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NORTH CAROLINA REPORTS,

VOL. LXXX.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA,

JANUARY TERM, 1879.

REPORTED BY
THOMAS S. KENAN.
(VOL. 5.)

RALEIGH:
THE OBSERVER, STATE PRINTER AND BINDER,
1879.

JUSTICES OF THE SUPREME COURT,

January Term, 1879.

CHIEF JUSTICE:

WILLIAM N. H. SMITH.

ASSOCIATE JUSTICES:

THOMAS S. ASHE, JOHN H. DILLARD.

Elected August, 1878. Justice Ashe was absent a month of the Term on account of sickness.

CLERK OF THE SUPREME COURT:

WILLIAM H. BAGLEY.

ATTORNEY GENERAL:

THOMAS S. KENAN.

JUDGES OF THE SUPERIOR COURTS.

MILLS L. EURE,	1st Dist.	JOHN KERR,	5th Dist.
AUG. S. SEYMOUR,	2d "	DAVID SCHENCK,	6th "
ALLMAND A. McKOY,	3d "	*JESSE F. GRAVES,	7th "
RALPH P. BUXTON,	4th "	*ALPHONSO C. AVERY,	8th "

*JAMES C. L. GUDGER, 9th Dist.

*Elected August, 1878.

SOLICITORS:

CYRUS W. GRANDY,	1st Dist.	F. N. STRUDWICK,	5th Dist.
JOHN H. COLLINS,	2d "	W. J. MONTGOMERY,	6th "
SWIFT GALLOWAY,	3d "	JOSEPH DOBSON,	7th "
JAMES D. McIVER	4th "	JOSEPH S. ADAMS,	8th "

GARLAND S. FERGUSON, 9th Dist.

Elected August, 1878.

JUDGE OF THE CRIMINAL COURT.

OLIVER P. MEARES Wilmington.

SOLICITOR.

BENJAMIN R. MOORE, Wilmington.

LICENSED ATTORNEYS,

JANUARY TERM, 1879.

William W. Barber,
Jacob T. Barron,
George S. Bradshaw,
George W. Britt,
William F. Carter,
Parish A. Cummings,
James A. Davis,
John H. Dobson,
Theophilus B. Eldridge,
Swift M. Empie,
Samuel J. Ervin,
Benjamin S. Gay,
John S. Gibson,
Eugene E. Gray,
James M. Gray,
Fernando G. James,
James B. Martin,
Thomas H. McKoy,
Robert H. McKoy,
Zachariah B. Newton,
Benjamin Posey,
Addison G. Ricaud,
Bernard P. Ryan,
George A. Shuford,
Foster A. Soudley,
John P. Thomas,
Thomas D. Turner,
David M. Vance,
George H. White,
William R. Whitson,
Robert C. Williamson,

CASES REPORTED.

CASES REMANDED, &c.

CASES CITED.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

JANUARY TERM, 1879.

PATRICK H. JOHNSON v. JOHN J. ROWLAND.

Practice—Pleading—Judge's Discretion.

1. Where it appeared that a defendant made no defence to the action, but suffered judgment to be entered against him in a justices' court in March, 1874, and appealed to the superior court, but failed to answer or ask for leave to do so until the trial in December, 1877, and the court refused to allow a plea of counter-claim then to be set up; *Held*, not to be error.
2. In such case, the reception or rejection of the plea is a matter addressed to the discretion of the judge, and is not reviewable.

(*Hinton* v. *Deans*, 75 N. C., 18, cited and approved.)

CIVIL ACTION tried at December special term, 1877, of BEAUFORT superior court, before *Schenck, J.*

The case is sufficiently stated by Mr. Justice DILLARD in

delivering the opinion of this Court. Judgment for plaintiff. Appeal by defendant.

Mr. J. E. Shepherd, for plaintiff.
Mr. G. H. Brown, Jr., for defendant.

DILLARD, J. This action was begun in a justice's court on a note with endorsed credits, and went to judgment on the 21st of March, 1874, and the defendant by agent was present at the trial, and interposed no defence by way of plea or answer, written or oral, but allowed judgment by default to pass against him. Defendant appealed to spring term, 1874, of Beaufort superior court, in which court the cause was several times continued, and no pleas were put in by defendant, or application made for leave so to do. At the trial before Judge Schenck at the special term in December, 1877, the defendant offered to prove other payments than those endorsed on the note, and on objection by plaintiff the court excluded the proof, and the defendant excepted. The defendant thereupon moved the court to be allowed to make oath in support of his motion, that he was sick and unable to be personally present at the justice's trial, and did not then know of the defence, and His Honor refused to allow the plea to be put in, on the ground that defendant might and ought to have moved in the matter earlier, and to this ruling the defendant excepted.

According to the case of appeal, the action was well constituted in the justice's court, and the defendant had a day in court, and was present by agent, and could or ought to have made a statement of his defence, if he had any, which the rules prescribed by statute for the conduct of proceedings in justice's courts, allowed him to make; but he failed to make any answer, oral or written, and contented himself with an appeal to the superior court. The object of the rules prescribed is to make an issue of law or fact in a

justice's court, or in any other, to the end that the controverted matter may be developed and made certain; and the defendant having failed to put in his defence, at the trial of the cause at December special term, 1877, there was no issue under which the proof of payment other than those endorsed on the note was competent and admissible, and there was no error therefore in the refusal of the court to allow the proof.

As to the exception to the refusal of the judge to allow the plea of set-off or counter-claim to be interposed at the trial: The reception of the plea was a matter addressed to the discretion of the court, and not a matter of absolute right in the defendant. Defendant having failed to make his defence in the justice's court, he could afterwards do so only at the discretion of the judge in the appellate court, and in order to an exercise of that discretion favorably to him, he should have been diligent to obtain leave to add the proper pleas in a reasonable time after appeal taken; but he neglected to apply for such leave from spring term, 1874, until the trial was on hand at December term, 1877, and under the circumstances the reception or rejection of the plea was altogether a matter in the discretion of the judge, which we cannot review and do not undertake to review. *Hinton* v. *Deans*, 75 N. C., 18.

No error. Affirmed.

J. W. THOMAS v. ELIZABETH SIMPSON and others.

Practice—Contract—Implied Warranty.

1. It is competent for the superior court, on the trial of an appeal from a justice of the peace, to allow the defendant to set up a counter-claim not made on the trial before the justice.
2. One who manufactures articles for the use of another, to be applied to a particular purpose, warrants their adaptability to that purpose, and cannot recover their value where they have been received and partially paid for in ignorance of their unfitness.

CIVIL ACTION tried at fall term, 1878, of GUILFORD superior court, before *Kerr, J.*

The case is sufficiently stated by Mr. Justice ASHE in delivering the opinion. Verdict and judgment for the defendants. Appeal by plaintiff.

Mr. J. N. Staples, for plaintiff.
Messrs. Scott & Caldwell, for defendants.

ASHE, J. This is an action commenced before a justice of the peace in the county of Guilford and brought by successive appeals to this court.

The action is for work and labor done by plaintiff and another in making shingles for the defendants. His Honor allowed the defendants to plead a counter claim for board of plaintiff and his hireling while making the shingles. The testimony in the case was conflicting. The plaintiff offered testimony to show that the shingles were good, and fit for the purpose for which they were got, to-wit: to re-cover the house of the defendants, and that there was no contract as to the length and size of the shingles; that they were examined and not objected to, and defendant paid him eighteen

dollars, fifteen of which were paid after the shingles were made.

The defendants on the other hand introduced testimony to show that the shingles were made for the purpose of re-covering their house and the plaintiff knew it; that they were not fit for such a purpose, but were utterly worthless; that they were to be eighteen inches long and four inches wide; that they boarded the plaintiff and his hireling twenty-three and a half days; that the board of each was worth fifty cents per day; that the shingles were made and stacked in the yard of the defendants, who were females living by themselves, and neither of them had ever seen shingles made before, and did not know what constituted a good shingle; that after paying the eighteen dollars they refused to pay the plaintiff anything more upon learning from a carpenter who examined them with the view of putting them on the house, that they were worthless and totally unfit for the purpose.

The case was considered by His Honor and the counsel, as if it was an action on a contract for the purchase of shingles, when according to the meagre pleadings in the case it was an action for work and labor done in making shingles. But it makes no material difference, as the principle of law involved is equally applicable to either aspect of the case.

The plaintiff excepted because His Honor allowed the defendant to plead a counter-claim in the superior court, remarking it was by no means certain but what the defendant had plead it before the justice, when one of the defendants had sworn that she had not plead it. It is immaterial whether she had plead it before or not. His Honor clearly had the right to allow them to do so.

The defendant then prayed His Honor to give the following instructions to the jury:—

1. "If the jury believed from the evidence that the de-

fendants having a fair opportunity to examine the shingles and did so, and then received them, they cannot now be heard to object, and the plaintiff is entitled to recover."

2. "If the jury believe that the defendants did object to the shingles while they were being made, but afterwards received them, making no objection thereto but actually paid one-third of the amount claimed, the plaintiff is entitled to recover."

His Honor declined to give the instruction as prayed for, but in response to the first he charged: "That if it came to the knowledge of the defendants that the shingles were utterly worthless and they took them, they cannot now object, and the plaintiff is entitled to recover." And, in answer to the second, he charged: "That if what defendants did in receiving the shingles was done in ignorance of the quality of the shingles, the plaintiff cannot recover."

We think there was no error in the instruction given by His Honor, and that he properly refused to give the instructions as prayed for, because they were not entirely applicable to the state of facts in the case.

The plaintiff undertook to employ his skill and labor in making shingles for the defendants for the purpose of recovering their house, and there was an implied warranty arising out of the contract that they should be fit and proper for that purpose. But in this case it was in evidence that the shingles were unfit for the purpose for which they were wanted and their deficiency was not brought to the knowledge of the defendants, who were ignorant of what constituted good shingles, until after they had paid the plaintiff a part of the price of his labor. The payment under these circumstances did not amount to a waiver of their rights to object to them and defend against an action for the value of the work and labor in making them. Par-

son on Cont. 47. *Trustees of Monroe* v. *Female University* 30 Ga. 1.

No error. Affirmed.

M. J. SIMONTON v. R. SIMONTON, Executrix.

Practice—New Trial.

Where the judge who presided at a trial, goes out of office without making up a case of appeal, and the appellant is in no default, a new trial will be awarded.

(*Adams* v. *Reeves*, 74 N. C., 106; *Mason* v. *Osgood*, 72 N. C., 120; *Isler* v. *Haddock*, *ibid*, 119, cited and approved.)

CIVIL ACTION tried at fall term, 1877, of IREDELL superior court, before *Cloud, J.*

Mr. R. F. Armfield, for plaintiff.

Messrs. M. L. McCorkle and *G. N. Folk*, for defendant.

SMITH, C. J. The transcript of the record in this appeal was filed at January term, 1878, containing no concise statement of the case as prescribed in the Code, § 301. It appears by affidavit that the counsel of the parties were unable to agree upon a case and sent their respective statements to the judge, who presided at the trial, to settle it. This has not been done as appears from the return to the writ of certiorari issued by order of the court, and the judge has gone out of office. If this omission were the fault of the appellant, his appeal would be dismissed. *Adams* v. *Reeves*, 74 N. C., 106. But as it is not, in accordance with the practice in this court a new trial must be awarded. *Mason* v.

Osgood, 72 N. C., 120; *Isler* v. *Haddock*, *ibid*, 119. And it is so ordered.

PER CURIAM. Order accordingly

L. A. PASCHALL, Adm'r., v. L. H. BULLOCK.

Practice—Appeal.

Where there is no statement of the facts proved at the trial in the court below, and no error appears on the record, this court will, on appeal, affirm the judgment.

(*Utley* v. *Foy*, 70 N. C., 303; *Brumble* v. *Brown*, 71 N. C., 513; *State* v. *Powell*, 74 N. C., 270; *Green* v. *Castleberry*, 77 N. C., 164, cited and approved.)

APPEAL from an order made at spring term, 1878, of GRANVILLE superior court, by *Seymour, J.*

Messrs. J. B. Batchelor and *E. G. Haywood*, for plaintiff.
Messrs. Merrimon, Fuller & Ashe, for defendant.

SMITH, C. J. This is an appeal from a judgment of the superior court of Granville county, affirming the action of the clerk in giving leave to the plaintiff to sue out execution on his judgment which had become dormant. Due notice of the motion for such leave was given the defendant, and proof made before the clerk that no part of the debt had been paid. No statement of facts proved upon the trial of the cause before the judge and no assignment of errors appear in the record. We have repeatedly held that it is incumbent on the appellant to make out his case and show error. He has not done so, and nothing remains for this

court to do, but to affirm the judgment. *Utley* v. *Foy*, 70 N. C., 303; *Brumble* v. *Brown*, 71 N. C., 513: *State* v. *Powell*, 74 N. C., 270; *Green* v. *Castleberry*, 77 N. C., 164.

There is no error and the judgment is affirmed. This will be certified to the superior court of Granville, to the end that further proceeding be therein had according to law.

No error. Judgment affirmed.

BANK OF WASHINGTON v. THE CREDITORS OF SAID BANK.

Practice—Appeal—Rights of Creditors.

1. Where no error is assigned in the ruling of the court below, this court will, on appeal, affirm the judgment.
2. A creditor, *bona fide* ignorant of proceedings had for the distribution of a fund, will be allowed to come in and prove his claim against the estate, after the time fixed for presentation and proof of claims.

(*Meekins* v. *Tatem*, 79 N. C., 546, cited and approved.)

APPEAL from an order made at December special term, 1877, of BEAUFORT superior court, by *Schenck, J.*

This was a proceeding under the act of March the 12th, 1866, enabling the banks of the state to close their business, and at fall term, 1866, of the court of equity of Beaufort county, before *Barnes, J.*, a decree was obtained appointing John G. Blount a commissioner to receive the effects of the bank, sell its real estate and advertise for all creditors to establish their claims before the commissioner within twelve months. At fall term, 1867, before *Shipp, J.*, the commissioner was ordered to divide the fund reported to be in his hands upon the supposition that all who claimed to be creditors had proved their claims, and that the residue

be invested and held subject to the further order of the court. At spring term, 1868, before *Warren, J.*, a contested claim of certain parties was decided, and the commissioner ordered to settle the same upon their filing with him a certain amount in bills of the bank. It was subsequently ordered that the commissioner make report of the condition of the assets in his hands. And at the said term in December, 1877, His Honor ordered that Calvin J. Cowles, upon his application, be allowed to file his bills with the right to share in the *pro rata* distribution of all assets except those already distributed, and directed the commissioner to make a full report to the next term of the court. From this order the commissioner appealed.

No counsel for plaintiff.
Mr. G. H. Brown, for defendant.

DILLARD, J. The plaintiff bank surrendered its charter and filed a bill in the court of equity to close its business under an act of the General Assembly, passed on the 12th of March, 1866; and in the course of the cause, John G. Blount by a decree of the court was appointed a commissioner to collect and apply the assets of the bank to the creditors and bill holders as he might be ordered. From time to time, orders of distribution were made, and at the special term of the court in December, 1877, on motion, Calvin J. Cowles was allowed to file certain bills belonging to him, so as to participate in the assets thereafter to come under the control of the court, and John G. Blount appealed from this order.

There is no statement of the case signed by the parties or by the judge who made the order appealed from, no errors are pointed out, and we are unable to pass on the correctness of the order allowing Cowles to file his bills. We know that in distributing a fund, courts of equity will allow a

creditor to come in subsequently to the time fixed for presentation and proof of claims against the estate, if he was *bona fide* ignorant of the proceedings previously had; but under what circumstances Cowles was allowed to file his bills does in no manner appear, and we cannot therefore review the order. In such case, the settled practice of this court is to affirm the order appealed from. *Meekins* v. *Tatem*, 79 N. C., 546.

No error. Affirmed.

MARION BROOKS v. ANDREW HEADEN and others.

Appeal—Practice in Supreme Court.

Where the case of appeal fails to disclose the errors assigned below, the rule is to affirm the judgment; but if it appear from the record that other parties are necessary to a final determination of the matters involved, the rule will be relaxed and the cause remanded that they may be brought in by *legal process*.

CIVIL ACTION heard upon exceptions to referee's report at fall term, 1878, of CHATHAM superior court, before *Kerr, J.*

The plaintiff executed a deed in trust in 1856 to the testator of the defendants to secure the creditors therein mentioned and any others he might owe, whether mentioned or not. The trustee by consent of all parties interested, within twelve months and before the day of default mentioned in the deed, sold the personal property at $250, or thereabouts, at six months, and took notes with surety from the purchasers, which notes he held up to his death in December, 1858. After his death they came to the hands of defendants, the executors of the trustee, and remained in their hands

at the institution of this suit, uncollected and unapplied to the trust creditors.

This suit of the plaintiff is brought to have an account of the trusteeship of A. D. Headen, and of the trust funds which came or ought to have come to the hands of A. D. Headen, or into the hands of the defendants as executors of the trustee since his death, and from the decree of the court adjudging against the defendants the amount of the trust funds and fixing them with assets of their testator to pay the same, an appeal is taken to this Court.

Messrs. John Manniny and *J. W. Graham*, for plaintiff.
Mr. J. H. Headen, for defendants.

DILLARD, J. (After stating the case.) The case of appeal brought up to this Court contains the final decree aforesaid and in it is a recital that one exception on behalf of the plaintiff to the report of referees of the assets of A. D. Headen for failure to charge $3,000 against the defendants for negroes distributed, is sustained; and one exception on the part of the defendants for failure to allow them interest for their advances in excess of the assets, is overruled. The appeal to this court is intended to have a review of the judge below as to his rulings on the said exceptions, and yet neither the case of appeal nor the record proper contains the report excepted to, nor the exceptions themselves, nor the evidence on which the said exceptions are to be supported or defeated; and therefore it is that we cannot say whether the judge erred or not in his ruling on the exceptions. We cannot see from anything before us, whether the negroes distributed ought to have been charged to the executors or not; nor whether the defendants have cause of complaint in the failure of the referees to credit them by interest on their advances out of their individual estates in excess of the assets. It is obvious that

there must have been some proof by which the referees were governed.

Defendants claim also that there are creditors in the deed of trust not paid, and they demand that the $377.31 decreed against them shall not be diverted to the plaintiff until an account is taken ascertaining the amount still due under the trust and a provision made for their payment out of any funds which they may be liable for. The plaintiff in his complaint admits that all the creditors have not been paid, and though he claims to have notified them to come in and make themselves parties, yet the notice given was a mere private notice and not obliging them to appear or concluding them as to the application of the trust fund. Under the circumstances, as we have to remand the papers in the cause as hereinafter stated, the plaintiff may make the creditors parties and have an account taken if need be of the unpaid balance due them if any.

It is the duty of the appellant to see that his case of appeal and the record accompanying shall be properly made out, so as to contain whatsoever shall be material to a review of the Judge below upon the errors assigned; otherwise the rule is to affirm the judgment appealed from, and this course would be pursued in this case but for the necessity of bringing the creditors in as parties.

The creditors when called in may be willing to have their debts ascertained and to accept and confirm the reports of the trust funds and assets of defendants' testator and the decrees made thereon; and in case they should, then the defendants may bring up their appeal to this court for review on the assignment of errors as they now exist; or, if the creditors when called in shall elect to repudiate the account taken and the decrees rendered thereon, then it will be necessary in the court below to set aside all the reports and decrees made, and have the same taken over with opportu-

nity to the new parties to be represented and to have a voice in all the ulterior proceedings.

Let this cause be remanded to the court below for new parties to be called in and other proceedings therein had as in this opinion indicated.

PER CURIAM. Cause remanded.

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*E. F. SKINNER, Exr., v. M. G. BADHAM, Admx., and others.

Practice—Certiorari—Appeal.

Where a certiorari returned to this court shows an imperfect record and no statement of the case, a new writ of certiorari will not be granted; but the appeal will be dismissed.

MOTION for a certiorari heard at January term, 1878, of the SUPREME COURT.

Messrs. Gilliam & Gatling, for plaintiff.
Messrs. Batchelor and *Mullen & Moore,* for defendants.

DILLARD, J. The defendants appealed from Chowan superior court to the June term, 1878, of this court, and on their motion, a writ of *certiorari* was issued to bring up the record. In answer to the writ, a transcript is certified and filed during the present term, and thereupon the plaintiff moves to dismiss the appeal, because it does not appear to have been taken and perfected according to law, and the defendants move for a new writ of *certiorari.*

From the transcript it does not appear that any appeal

*Smith, C. J., having been of counsel, did not sit on the hearing of this case.

was taken. There is no entry of appeal taken of record, no notice of appeal, no appeal bond, and no statement of a case of appeal; and there being no proof by affidavit or otherwise, that any appeal was ever taken, or if taken, no suggestion made why it does not appear in the transcript already sent to this court, the motion of defendants for another writ of *certiorari* is refused.

The motion of plaintiff to dismiss the appeal is sustained.

PER CURIAM. Appeal dismissed.

ALEXANDER OLDHAM v. W. M. SNEED.

Practice—Appeal—Excusable Neglect.

Upon an appeal from an order refusing to vacate a judgment under C. C. P., § 133, it is the duty of the judge to find the facts, so that this court may decide whether in law they amount to mistake, inadvertence, or excusable neglect.

MOTION to vacate a judgment heard at spring term, 1878, of NEW HANOVER superior court, before *Eure, J.*

No statement of the case is necessary to an understanding of the opinion.

Mr. J. D. Bellamy, for plaintiff.
Messrs. A. T. & J. London, for defendant.

DILLARD, J. This was an application in the court below by the defendant to vacate a judgment against him under C. C. P., § 133, on the grounds therein mentioned, and from the denial of the motion an appeal is taken to this court.

The case of appeal, as made out by the judge, states the judgment of the court merely, and shows no facts on which he acts, but directs the affidavits used before him and the record of the cause in which the judgment complained of was obtained, to be sent up. From the exercise of his discretion no appeal lies, but from his mistakes of the law in ascertaining the facts, or upon the question whether the facts in law amount to mistake, inadvertence, or excusable neglect, an appeal may be taken, and the judge below reviewed. In the absence of any facts found, we can only see from the case sent up that His Honor refused to vacate the judgment, but why he did so, or whether with or without any mistake, or misapplication of the law, cannot be seen.

Let this be certified to the end that defendant may renew his motion if so advised and have the court to find the facts, and thereon, the judgment of the court.

PER CURIAM. Order accordingly.

J. C. HALYBURTON and others v. JOHN CARSON, Executor.

Practice—Judgment—Power to vacate.

A Court may vacate or modify its judgment during the term.

(*Faircloth* v. *Isler*, 76 N. C., 49; *Dick* v. *Dickson*, 63 N. C., 488; *Sneed* v. *Leigh*, 3 Dev., 364, cited and approved.)

APPEAL from an order made at spring term, 1878, of McDOWELL superior court, by *Cloud, J.*

Upon complaint and answer and the report of a referee filed in the cause, His Honor on motion of plaintiffs' attorney, gave judgment against defendant. And on a subse-

quent day of the same term, on motion of defendant's attorney, His Honor ordered that said judgment be vacated on the ground that the court erred in granting it, and from this the plaintiffs appealed.

No counsel in this court for plaintiffs.

Messrs. Gilliam & Gatling and *J. G. Bynum*, for defendant.

ASHE, J. The only question presented for the consideration and decision of this court in this voluminous record of seventy-two pages is, whether a judge of a superior court has the power to vacate a judgment rendered by him during the same term.

It is familiar learning that all the proceedings of a court of record are *in fieri*—under the absolute control of the judge, subject to be amended, modified or annulled at any time before the expiration of the term in which they are had or done.

Faircloth v. *Isler*, 76 N. C. 49; *Dick* v. *Dickson*, 63 N. C. 488; *Sneed* v. *Leigh*, 3 Dev. 364; Coke upon Littleton 1st Am. Ed. 260 (a.)

No error. Affirmed.

M. L. EURE and others v. W. C. PAXTON and others.

Practice—Impeaching final decree.

A final decree rendered by a court of competent jurisdiction can be impeached only in a direct proceeding for that purpose.

(The court intimate that causes will be remanded at the cost of the appellant where the appeal is not perfected as required by C. C. P. § 301.)

(*Covington* v. *Ingram*, 64 N. C. 123; *Thaxton* v. *Williamson*, 72 N. C. 125; *Spruill* v. *Sanderson*, 79 N. C. 466, cited and approved.)

CIVIL ACTION tried at Spring Term, 1878, of CHOWAN Superior Court, before *Furches, J.*

This action was brought for the sale of a tract of land known as "Locust Grove," and for the application of the proceeds of sale to the discharge of certain liens attaching thereon. The land had been mortgaged to secure a debt due the testator, Richard Paxton, and was after his death sold and purchased by his executrix and widow, E. B. Paxton, for the benefit of his estate, and paid for out of the secured debt. Subsequently to this purchase, the legatees and executrix instituted certain proceedings in the superior court of Chowan, which terminated in a final decree at spring term, 1876. The judgment among other things provided for an exchange of the interest of some of the parties in the land so purchased and another devised tract, and, for equality of partition, declared that the petitioners, J. C. Warren and wife Elizabeth, and Thomas C. Badham and wife Sallie, were each entitled to the sum of $187.50 with interest thereon from March 6th, 1876, and the infant petitioner, Claudia Paxton, to the sum of $1,125 with like interest, and that these sums were and should be liens upon the Locust Grove tract. The judgment also declared that the said Claudia was indebted to one C. M. Wood, executrix, in the sum of $300 with interest from July, 1874, and to T. C. Badham and wife in the sum of $180 with interest from May 22d, 1873, which are charged upon the moneys due to her. Assignments have been made to others, parties to the action, which need not be specifically set out.

The prayer is for a sale of Locust Grove and the application of the proceeds thereof to the satisfaction of the respective liens. There was a judgment for sale and an appeal by the defendant, Claudia.

Mr. J. B. Batchelor, for plaintiffs.
Messrs. Gilliam & Gatling, for defendants.

SMITH, C. J. (After stating the case as above.) The only defence made in this court is that the sums declared to be due from Claudia, are in excess of her income and largely encroach upon her principal estate. The objection interposed at this time and in this mode is entirely untenable. The judgment having been rendered by a court of competent jurisdiction and in a cause properly constituted between the parties, until reversed or modified by some proceeding directly impeaching it, remains in full vigor, and its liens cannot be successfully resisted. While it stands, all inquiry into its merits is shut off. This is fully settled upon authority and well understood principles of legal and equitable procedure. *Covington* v. *Ingram*, 64 N. C. 123; *Thaxton* v. *Williamson*, 72 N. C. 125; *Spruill* v. *Anderson*, 79 N. C. 466. We therefore affirm the judgment.

The case made out for this court contains a statement of some facts, and refers us to voluminous pleadings to ascertain the other facts therein alleged and admitted. This is not in accordance with the requirements of C. C. P. § 301, and but for the fact that the controversy is narrowed down to a single point, not difficult of determination, we should have felt constrained to remand the cause at the cost of the appellant.

No error. Affirmed.

W. J. SUTTON and wife v. JAMES T. SCHONWALD and others.

Appeal—Order of Reference—Practice.

1. No appeal lies to this court from an interlocutory order made to ascertain controverted facts, and without prejudice to the parties litigant.
2. Where in an action by a guardian to impeach a former decree, it appeared that alleged expenditures for the benefit of the ward should be ascertained before final judgment, *it was held*, not to be error in the court to direct a mistrial and order a reference, without prejudice, to take an account. C. C. P., § 245 (2).

(*Wallington* v. *Montgomery*, 74 N. C., 372; *Mitchell* v. *Kilburn*, *Ibid.* 483; *Crawley* v. *Woodfin*, 78 N. C., 4; *McBride* v. *Patterson*, *Ibid.* 412; *Com'rs of Wake* v. *Magnin*, *Ibid.* 181, *Childs* v. *Martin*, 68 N. C., 307, cited and approved.)

CIVIL ACTION tried at Fall Term, 1878, of NEW HANOVER Superior Court, before *McKoy, J.*

David Smith died intestate in the year 1862, seized and possessed of certain land in the city of Wilmington which descended to his two infant children, David and Catharine. On the 9th day of May 1862, the defendant, J. T. Schonwald, became guardian to David, and under the impression that he had been appointed guardian to both, filed a petition in their names in the court of equity for the sale of the land. The land was sold under a decretal order, report thereof made and confirmed, and under a decree of the court after payment of the purchase money, the land conveyed by the clerk and master to Charles E. Thornburn, the purchaser, and one of the defendants, who had no notice of any irregularity in the proceedings. By successive subsequent deeds, the land has been conveyed to others of the defendants. In the year 1866, Schonwald, discovering his error, applied to the proper court and was appointed guardian also to Catherine Smith. The present action is instituted to impeach,

annul and make void so much of the orders and decrees made in the proceedings for the sale of the land, as affects the estate and interest of the feme plaintiff therein. The defendant, Schonwald, to whom the proceeds of sale were paid, alleges in his answer that they have all been appropriated and expended in the necessary support and maintenance of the infants.

Issues were made up and submitted to the jury and among them one to which the plaintiffs except, as to the intestate's title to the land. During the trial the court being of opinion that the alleged expenditures of the fund for the benefit of the infants were material and should be ascertained before final judgment, directed a mistrial and reference, without prejudice, of said matters of account. Thereupon the plaintiffs appealed.

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

Messrs. A. T. & J. London, for defendants.

SMITH, C. J. (After stating the case as above.) There is no particular error alleged in the ruling of the court, and we only know from the argument here of what the plaintiffs complain. It is insisted that the order of reference was unauthorized, not because the matter was not a proper subject of reference within the provisions of the Code, but for the reason that it was wholly immaterial to the controversy. The court may without consent of parties, on application of either, or of its own motion, make an order of reference, where the taking of an account shall be *necessary for the information of the Court.* C. C. P. § 245 (2.)

The only question to be considered by us is this, does an appeal lie from this interlocutory order, made to ascertain certain controverted facts and without prejudice, and can this court

be called on to declare them immaterial at this preliminary stage of the proceedings and before trial?

In our opinion the appeal was improvidently taken and is not warranted by C. C. P. § 299 or by the adjudications of this court.

The section of the Code referred to authorizes an appeal "from every judicial order or determination of a judge of a superior court involving a matter of law or legal inference, which *affects a substantial* right, claimed in any action or proceeding." We are unable to see how any "substantial right" of the plaintiffs can be affected by an enquiry to ascertain the facts of the alleged expenditures of the proceeds of sale received by the guardian and relied on as an equity in the answer. If they are immaterial, no prejudice to the plaintiffs can result from an enquiry, by which the immateriality will be ascertained and determined, unless in the delay and costs of the reference, and these follow equally an order of continuance. If an issue involving the same subject matter had been directed to be submitted to the jury, it is quite plain that an appeal would not lie for the obvious reason that no substantial right would be affected, and this and every order made at and during the progress of the trial can be reviewed on appeal after verdict and judgment. The order in this case simply substitutes in place of an issue for the jury, another mode of presenting the facts before the court, and it is when these facts enter as elements in the judgment controlling or modifying it, that any rights of the plaintiffs are involved. It is not the policy of the law or the intent of the present system of procedure to have causes brought up for revision in fragmentary parts when the same ends can be attained without injury to parties by a presentation of them in their entirety, and the litigation be concluded. And hence it is that interlocutory appeals are allowed when a decision is made affecting substantial rights, which without such appeals would be beyond cor-

rection afterwards. Thus it has been held that an appeal does not lie upon a refusal of the judge to pass upon the competency and materiality of evidence before trial. *Wallington* v. *Montgomery*, 74 N. C., 372. Nor for his refusal to grant a motion to dismiss the proceeding. *Mitchell* v. *Kilburn*, 74 N. C., 483; *Crawley v. Woodfin*, 78 N. C., 4; *McBryde* v. *Patterson*, *Ibid.* 412.

The principle which governs in appeals is thus stated by RODMAN, J., delivering the opinion of the court in *Childs* v. *Martin*, 68 N. C., 307: "The C. C. P. is liberal in giving the right to appeal. But it is of the nature of an appeal that it must be from some determination which *affects in whole or in part the legal or actual merits of the controversy.*"

In the recent case of *Commissioners of Wake* v. *Magnin*, 78 N. C., 181, an appeal was taken from a judgment overruling a demurrer, which was sustained upon authority, and the court say: "We have over and again entertained appeals from such orders, and although it may admit of doubt whether the Code would not bear a different construction, yet it is a matter of practice which experience can best test, and if found to be inconvenient, it can be easily altered by legislation or possibly by a rule of this court."

We shall not undertake in this indirect method to pass upon questions involving the competency and materiality of evidence before it can be known what it is, nor upon its force and effect upon the claims of the plaintiffs, or in adjusting the equities which may arise among the defendants themselves. Interruptions in the preparation of cases for trial by appeal are not to be favored, nor allowed unless the appeal comes within the provisions of the Code, and the more especially since it is now a matter of right and not subject to the control of the court.

The appeal must be dismissed, that the cause may proceed in the court below.

PER CURIAM. Appeal dismissed.

F. W. KERCHNER v. HENRY FAIRLEY and others.

Practice—Receiver—Foreclosure of Mortgage.

Plaintiff mortgagee was administrator of one of two mortgagors, whose heirs and the other mortgagor were defendants in an action to foreclose a mortgage; the property conveyed was inadequate to pay the debt, and the mortgagor in possession insolvent; plaintiff denied an alleged payment of the debt and the existence of assets in his hands applicable thereto; *Held*, that in such case it was not error in the court on application of the plaintiff to appoint a receiver to secure the rents and profits pending the litigation.

(*TenBroeck* v. *Orchard*, 74 N. C., 409; *Rollins* v. *Henry*, 77 N. C., 467, cited and approved.)

APPEAL from an Order made at Spring Term, 1878, of RICHMOND Superior Court, by *Moore, J.*

Pending the action and on application of the plaintiff, the court below made an order for the appointment of a receiver, upon the facts which are sufficiently set out by Mr. Justice DILLARD in delivering the opinion. From this order the defendants appealed.

Messrs. Hinsdale & Devereux and *Dowd & Walker*, for plaintiff.

Mr. J. D. Shaw, for defendants.

DILLARD, J. The plaintiff is a mortgagee of the lands in the two deeds mentioned in the pleadings, conveyed to him as a security of three several promissory notes amounting in the aggregate to the sum of $8,801.34, with interest at eight per cent; for all of which the deed of John Fairley and wife is a security, and for one of which only, the deed of Robert N. Fairley and wife is an additional security. The plaintiff brings his action for a foreclosure of said mortgages. John Fairley is dead, and the plaintiff is his administrator with

the will annexed, and his widow, heirs at law, and devisees are made parties defendant, as interested in the one mortgage, and Robert N. Fairley and wife are made parties defendant, as interested in the other. Pending the suit, the plaintiff on notice moved for the appointment of a receiver on the allegation that the property was an inadequate security, and that Robert N. Fairley was in the pernancy of the profits and was insolvent, whereby he was in danger of irreparable loss as to the rents and profits. The motion was heard on affidavits, and His Honor finding the facts made an order appointing a receiver, and defendants being dissatisfied therewith appealed to this court.

A mortgagee, after day of default, is entitled to enter into the possession of the mortgaged premises, and take and apply the rents and profits in liquidation of his debt, and his right to do so is incident to his legal estate and is part of his security; but he will do so with liability to account for the same on a bill to foreclose by a sale, or on a bill by the mortgagor to redeem. Adams Eq. 118. In this action brought to foreclose the mortgages, the defence is made that the notes secured have been paid in whole or in part; and defendants particularly insist that the plaintiff, as administrator of John Fairley, who was bound for all three of the notes as principal, had or ought to have assets in hand sufficient to pay off the entire debt, and the plaintiff denying the alleged payment and existence of assets in his hands, an issue is made fit to be tried before a decree of foreclosure is made in the cause. Pending the litigation, the rents and profits ought to be secured as a fund to be applied at the final hearing to plaintiff's debt, if need be, in aid of the proceeds of sale of land, otherwise to be turned over to the defendants. Considerable delay may occur in settling the administration account of the plaintiff under the defence made by the defendants, and during such time the defendant, Robert N. Fairley, now in the perception of the

profits being insolvent, and the lands conveyed in the mortgages inadequate to pay the debt, as found to be the facts by the court below, the plaintiff as to the rents and profits in the meantime, included within his security as aforesaid, will obviously be at the hazard of their total loss. In such case it is his right, and within the rightful authority of the court to secure the fund through the appointment of a receiver until the final hearing of the cause. C. C. P. § 215. *TenBroeck* v. *Orchard*, 74 N. C. 409; *Rollins* v. *Henry*, 77 N. C., 467. We are of opinion that the plaintiff was entitled to have a receiver appointed, and the order of His Honor appointing one must be affirmed.

No error. Affirmed.

T. G. WALTON, Commissioner, v. WM. M. WALTON and others.

Jurisdiction—Practice—Irregular Judgment.

1. The superior court is one of general common law jurisdiction over all actions *ex contractu*, when the principal sum demanded is more than two hundred dollars, and other causes which may be allotted to it by the general assembly within the limits of the constitution. Art. iv, § 12.
2. When there is no defect of jurisdiction, a judgment will not be set aside to let in a defence, however meritorious, which the party cast neglected to make in apt time.
3. A judgment by default where the defendant has accepted service of the summons, but fails to appear and answer the complaint, the suit being on an instrument for the payment of money only, is regular in all respects.
4. A stranger to an irregular judgment cannot be heard to move its vacation.

(*Branch* v. *Houston*, Busb. 85; *Smith* v. *Moore*, 79 N. C., 82; *Jacobs* v. *Burgwyn*, 63 N. C. 196; *Rollins* v. *Henry*, 78 N. C., 342, cited and approved.)

WALTON *v.* WALTON.

MOTION to set aside a judgment, heard at Spring Term, 1878, of BURKE Superior Court, before *Cloud, J.*

From the transcript of the record and the case agreed by the counsel in the court below, the facts are that the heirs of Thomas Walton, deceased, in 1859, filed their petition for the sale of their ancestor's land and a division of the proceeds of sale in the court of equity of Burke county. In the regular course of the suit, under decree of the court, a part of the land was sold by E. J. Erwin, clerk and master, and sales confirmed. In 1868 T. George Walton was appointed to make sale of the lands not sold by the clerk and master, and under this appointment, the said T. George Walton, as commissioner, sold to William M. Walton, one of the heirs of Thomas Walton, the brick corner lot in the town of Morganton at $2,950 and secured the payment of the purchase money by taking his bond, with John H. Murphy as surety, and this sale was confirmed by the court. In October, 1872, while the suit in equity aforesaid was still pending, T. George Walton, as commissioner, brought suit on said bond to the fall term of Burke superior court and William M. Walton acknowledged the service of the summons and at the term judgment by default for want of an answer was taken against William M. Walton alone. Upon the rendition of the judgment an execution was issued and returned by the sheriff, indulged by the plaintiff. William M. Walton paid on the judgment $500 and no other execution was issued until the 5th of January, 1878, and it is agreed, that was issued by leave of the court on regular proceedings to relieve against dormancy.

In the meantime, in the year 1877, Moore, Jenkins & Co., Watrous, Sims & Co., E. S. Jeffreys & Co., Dunsmore & Kyle, Hurst, Purnell & Co., and others obtained judgments against W. M. Walton, and had the same docketed in Burke superior court, and executions were issued and in the hands of the sheriff at the same time with the one issued in favor

of T. George Walton, all returnable to spring term 1878, and under these executions the sheriff put up and sold all the lands of the debtor, and some difficulty being suspected as to the title, the purchaser refused to pay his bid, and thereupon the executions were returned, no sale.

The sale having failed, the said judgment creditors, Moore, Jenkins & Co., and others, at the return term of these executions moved the court for leave to intervene in the suit in which T. George Walton had recovered his judgment against W. M. Walton, and on leave given, they filed their petition, wherein besides the facts above set forth, they represented that W. M. Walton was entitled to a credit on his purchase to one-sixth and one-fourth of one-sixth of the proceeds of sale of all the lands of Thomas Walton, deceased, besides the $500 paid on the judgment, and that the plaintiff, T. George Walton, had the title to the land retained as a security for the purchase money due from W. M. Walton; and they showed forth that the action against W. M. Walton by the plaintiff as commissioner was brought when remedy might be had in the pending suit in equity, and therefore insist that the judgment recovered was irregular and void, and the only relief they pray for is that the judgment in favor of the plaintiff, T. George Walton, and the execution issued thereon and levied on the lands of W. M. Walton be vacated and set aside. On the hearing of the motion His Honor adjudged that the action of T. George Walton against W. M. Walton was unnecessary, and that remedy might be had by motion in the equity cause for the sale of the land, still pending, and that the judgment was irregular and contrary to the course of the court, and he adjudged that the said judgment be vacated and set aside, and from this judgment the appeal is taken by the plaintiff.

Messrs. Folk and *Armfield*, for plaintiff.
Messrs. Hinsdale & Devereux, for defendants.

DILLARD, J. (After stating the case.) The question for our determination is, was the judgment in this action void absolutely from a defect of jurisdiction in the superior court to grant it, or voidable from some privilege or exemption of defendant, or other thing for which the jurisdiction might have been abated, or from being entered irregularly and contrary to the course and practice of the court. The superior court is a court of general common law jurisdiction, and its power extends to all actions founded on contract and otherwise, which has been or may be allotted to it by the general assembly not in conflict with the provisions of the constitution. Art. 4, § 12. And said courts having, under the apportionment of power as now conferred, jurisdiction extending to actions on contracts wherever the principal sum demanded is above two hundred dollars, there was no defect of jurisdiction to entertain the plaintiff's action and the judgment rendered was not void. *Branch* v. *Houston*, Busb, 85.

Is the judgment voidable? It might have been *prevented*, if W. M. Walton had appeared and set up, by plea or answer, (or perhaps on motion to dismiss) the pendency of the suit in equity in which remedy might be had, in abatement of this action, but failing to appear and make the defence, the judgment entered against him being in a court having jurisdiction over the subject matter, the door was closed as to him. *Branch* v. *Houston*, Busb., 85; *Smith* v. *Moore*, 79, N. C., 82.

Was the judgment taken, irregular and contrary to the course and practice of the court? and if so, on whose motion may it be vacated and set aside? The suit was begun by summons, the service was acknowledged in writing, and complaint filed; and defendant not appearing, judgment by default final was signed by the judge presiding, and the same constitutes a part of the judgment roll, and it thus appears that it was taken according to the regular course and practice of the court, and cannot now be set aside at

the instance of the defendant. It is settled that even if the judgment were irregular, a stranger could not intervene and be heard to move its vacation. *Jacobs* v. *Burgwyn*, 63 N. C., 196; *Rollins* v. *Henry*, 78 N. C., 342.

It was error therefore in the court below to vacate the judgment of the plaintiff, and the judgment of His Honor vacating the same is reversed with the costs of this court against Moore, Jenkins & Co., and others making the motion in the cause.

It may be that the junior creditors of W. M. Walton may have remedy to put the plaintiff's judgment primarily on the land for which it is the purchase money, so as to leave the other lands for payment of their judgments, or if the other lands shall be sold for plaintiff's debt, they may be entitled to be subrogated to the security of the plaintiff. But as to this matter this court will not undertake to advise.

Error. Reversed.

W. P. MATTHEWS v. W. S. COPELAND and WM. BARROW.

Practice—Judgment on Overruling Demurrer.

1. Where the plaintiff sues, in a form of action peculiar to a court of law under the old system, on a contract made prior to the ratification of C. C. P., judgment against the defendant upon overruling a demurrer is final.

2. The act (Bat. Rev. ch. 17, § 131,) which provides that after the decision of a demurrer interposed in good faith, the judge *shall* allow the party to plead over, has no application to actions on contracts entered into prior to the ratification of the C. C. P.

(*Teague* v. *James*, 63 N. C., 91; *Gaither* v. *Gibson*, *Ibid.* 93; *Vallentine* v. *Holloman*, *Ibid.* 475; *Merwin* v. *Ballard*, 65 N. C., 168, cited and approved.)

MATTHEWS *v.* COPELAND.

PETITION TO REHEAR filed by the defendants and heard at January Term, 1879, of THE SUPREME COURT.

See same case, 79 N. C., 493.

Messrs. R. B. Peebles and *Reade, Busbee & Busbee*, for plaintiff.

Messrs. W. C. Bowen and *Mullen & Moore*, for defendants.

SMITH, C. J. The record upon which this cause was heard at the last term is somewhat conflicting as to the action of the court at the time of trial when the appeal was taken. The transcript first sent up contains an entry of the judgment in these words: "The plaintiff has leave to amend by inserting the name of the state as an additional party plaintiff without costs. Upon such amendment being made the demurrer is overruled and judgment given for the plaintiff, or the defendant has leave to answer, as of spring term, 1878, on or before the first day of fall term."

An omitted part of the record which contains a formal judgment, is subsequently certified and sent up to be annexed to the transcript, made at the same term, as follows: "This cause coming on to be heard upon complaint and demurrer and the court being of opinion with the plaintiff, it is considered that the demurrer be overruled, and it is further considered, on motion of R. B. Peebles, counsel for the plaintiff, that the plaintiff recover of the defendants, W. S. Copeland and William Barrow, the sum of twenty thousand dollars, to be discharged upon the payment of the sum of three hundred and seventy-nine and four one hundredths dollars, with interest thereon at the rate of twelve per cent per annum from July 1st, 1855, till paid, and the costs of this action to be taxed by the clerk. Let the plaintiff have execution." Both these judgments were signed by the presiding judge and rendered at the same term. This discrepancy does not, however, affect the appeal, nor our review of the decision of the court on which it was taken.

At the last term, this court overruled the demurrer and final judgment was entered.

The petition to rehear assigns two errors only which we deem it proper to notice:

1. The judgment is in excess of the plaintiff's demand, and the recovery below, by the sum of twenty-three and seventy-five one-hundredths dollars.

2. The judgment should not have been final, but the cause ought to have been remanded in order that the defendants, if so advised, might put in their answer to the complaint.

The first objection is well founded and the plaintiff consents that the judgment may be corrected. The only remaining question is as to the judgment which ought to have been entered up on overruling the demurrer. Under the rules of pleading and practice, the judgment upon overruling a demurrer was final and conclusive in a court of law, while in a court of equity the defendant was allowed to answer over. The new system, in cases to which it is applicable, adopts the rule which prevails in a court of equity.

The present action is on the official bonds of a former clerk and master in equity executed, one of them in the year 1850, and the other, four years later, upon his re-appointment, against the defendants who are his sureties to both, to recover for an official default of their principal, and it is therefore a substitute for the old action of law and must be governed by the same general rules. The enactments contained in C. C. P. are declared applicable to "all civil actions commenced prior to the ratification of this act, or which shall be hereafter commenced, *founded on a contract made prior* to the ratification of this act, and not embraced in the ordinance above mentioned. But such actions shall be governed in respect to the practice and procedure therein, up to and including the judgment, by *the laws existing prior to the ratification of this act*, as near as may be, except as to

form, and the practice in such actions subsequent to judgment shall be governed by the enactment of this act."

In the construction of this section applied to actions pending at the time of the adoption of the Code, it has been held that a counter-claim was inadmissible. *Teague* v. *James*, 63 N. C., 91; *Gaither* v. *Gibson*, *Ibid.*, 93; nor could a defendant avail himself of an equitable set-off at the trial. *Valentine* v. *Holloman*, *Ibid.*, 475.

But the very point now before us was declared in *Merwin* v. *Ballard*, 65 N. C., 168. In that case the action was brought in the year 1870 for goods sold and delivered in the year 1860. The defendant demurred for want of parties, for that one Joyner was jointly liable with him. In delivering the opinion the court say: "We have thought proper to discuss the questions presented in the elaborate argument of counsel, but they do not govern the case before us, as the action is founded upon a *contract made prior to the ratification of the C. C. P. Such cases* are governed by the law existing before that date." C. C. P., § 8 (3, 4.) The opinion thus concludes: "The demurrer must be overruled, and as this case is governed by the old mode of pleading, *the plaintiff is entitled to final judgment in this court.*"

This is a direct adjudication of the question and decisive of the case unless a different result is produced by the act of February 9th, 1872, which substitutes the word "shall" in place of the words "may in his discretion," in § 131 of C. C. P. But we think no such operation can be allowed this amendatory statute. Its purpose and its affect are simply to modify a rule of pleading under the code in cases to which such pleading applies, but not to embrace those contracts specified in § 8 which previous to judgment are not controlled by its provisions. Since, as before, such contracts must be governed in the unchanged words of the section, "in respect to the practice and procedure therein, up to and including the judgment, *by the laws existing* prior

to the ratification of this act, as near as may be except as to form."

We must, therefore, declare that there is no error in the judgment we are called on to review in this respect, and it must be, with the modification suggested, affirmed.

No error. Affirmed.

MARTHA C. MEBANE v. MARIA A. MEBANE.

Practice—Mortgage—Decree—Parties—Excusable neglect.

1. A decree of sale in an action to foreclose a mortgage should, first, fix a reasonable time within which the mortgagor may redeem, and second, require the commissioner to report the bid made at the sale, which confers no right on the purchaser until confirmed by the court and an order for title made and executed. It is an interlocutory decree, and subject to the control of the court.
2. In an action to foreclose a mortgage executed by a *feme covert* and her husband upon her separate estate to secure a debt of the husband, the personal representative of the husband (he being deceased) is a necessary party.
3. Upon a motion under the Code, § 133, to vacate a judgment rendered in an action to foreclose a mortgage, where it appeared that defendant's counsel had not been informed of the nature of the defence on account of his absence and the illness of defendant, and that he had consented to the judgment, supposing the matter to be understood by defendant; that defendant afterwards learning that the debt was larger than she had been led to believe when mortgage was made (by herself and husband, now deceased, upon her separate estate,) employed other counsel to procure an injunction, &c., but stopped the proceedings on the assurance of plaintiff's counsel that no objection would be made to setting aside the judgment on payment of costs; that the land had been sold under the judgment and bought by the plaintiff; and that the defendant had a meritorious defence to the action; *It was held*, that the facts constituted excusable negligence on the part of defendant, and the judgment was properly vacated in the court below.

(*Capehart* v. *Biggs*, 77 N. C., 261; *Averett* v. *Ward*, Busb. Eq., 192; *Ashe* v. *Moore*, 2 Mur., 383; *Worth* v. *Gray*, 6 Jones Eq., 4; *Shinn* v. *Smith*, 79 N. C., 310; *Burke* v. *Stokely*, 65 N. C., 569; *Griel* v. *Vernon*, *Ibid.*, 76; *Bradford* v. *Coit*, 77 N. C., 72, cited, commented on and approved.)

MOTION to set aside a judgment heard at Fall Term, 1878, of NEW HANOVER Superior Court, before *McKoy*, *J.*

This action is brought for the foreclosure of a mortgage and the sale of the land conveyed, by summons returnable to April term, 1878, of the superior court of New Hanover county. The complaint was filed at that term and the defendant appeared by counsel, but no answer was put in and the cause was continued without further action. At June term following under an order of reference then made, the clerk reported the amount of mortgage debt and the judgment was entered up, from the order setting aside which in the court below the appeal is taken. The judgment was prepared by plaintiff's counsel, exhibited for examination to the defendant's counsel, and he making no objection, it was handed to the judge and signed by him. The judgment declares to be due the plaintiff the sum of $9,589.06 principal and accrued interest on the secured debt, and orders and decrees "that the defendant shall stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to, the said mortgaged premises," and directs the clerk to proceed to advertise and sell the land, the plaintiff being allowed to bid and become purchaser at the sale, and from its proceeds pay the debt and costs of suit.

Under this order the land was sold to the plaintiff for $3,000, and without report, confirmation, or other order, conveyed by the commissioner to her. At fall term, 1878, the defendant by her verified petition applied to the court and moved that the judgment rendered at June term be set aside and vacated and for leave to put in an answer. Upon

the hearing of the motion the following facts are found by the judge:

The defendant's counsel had no conference with her previous to the entering up the judgment and was not informed of the nature of her defence. He had called to see her on the subject but owing to her illness the interview did not take place. Between April and June terms the counsel was absent from the city (Wilmington) at different times, in all about three weeks, and during the interval the defendant made repeated but unsuccessful efforts to see him and advise him of her defence. The action is between parties whose husbands were brothers, and the counsel hearing that the defendant relied upon her legal incapacity while under coverture to make a valid conveyance of her separate estate to secure debts not her own but her husband's, which he deemed untenable, and inferring from the relationship subsisting between them that the subject matter was understood, made no opposition to the judgment. Conversations had occurred in presence of defendant calculated to mislead her into the belief that the debt secured was for $1000 only, and that without reading or hearing the deed read, she executed it under that belief. The defendant had frequently visited the plaintiff at her house, but neither by her nor her husband was she undeceived as to the true terms of the mortgage. After June term the defendant learned the real facts of the case and employed other counsel to seek relief by injunction, but refrained from suing out the writ, on the assurance of the plaintiff's counsel that no objection would be made to an order setting aside the judgment on defendant's paying the costs. The plaintiff, however, proceeded to have the land sold and became herself the purchaser. The judge finds further that the defendant has a meretorious defence to the action. Upon these facts the judgment was vacated with the proceedings consequent thereon, and from this order the plaintiff appealed.

Messrs. A. T. & J. London, for the plaintiff.
Mr. E. G. Haywood, for the defendant.

SMITH, C. J. (After stating the case as above.) The mortgage on its face shows the debt to be that of the husband alone, and for which the defendant was in no manner liable, and contains a clause vesting, on the debtor's default, a power of sale in the mortgagee. The aid of this court, while not necessary for the plaintiff's relief, is nevertheless invoked to give effect to this provision. In directing and controlling the exercise of the power, the court will be guided by those rules of equitable proceedings not inconsistent with the deed, which are observed in decrees of foreclosure and sale of property conveyed in mortgages without such power. The judgment in this case does not conform to those rules.

1. The foreclosure is absolute and no time is allowed the mortgagor to pay the debt and redeem: This is not in accordance with the established practice in courts of equity. "The usual course pursued on foreclosure," says an eminent writer on the law of mortgages, "is for the mortgagee to file his bill praying that an account may be taken of principal and interest, and that the defendant may be decreed to pay the same with costs by a short day to be appointed by the court, and in default thereof he may be foreclosed his equity of redemption," and this time is usually six calendar months. Coot's Law of Mortgages, 492.

In *Clark* v. *Reynolds*, 8 Wallace, 318, a bill for foreclosure was filed in the circuit court of the United States for the district of Kansas, and a decree was entered giving no time to pay and redeem, and making the foreclosure unconditional and absolute at once. In delivering the opinion in the supreme court, Mr. Justice SWAYNE says: "The settled English practice is for the decree to order the amount due to be ascertained and the costs to be taxed, and that upon the payment of both within six months the plaintiff shall

reconvey to the defendant, but in default of payment within the time limited, that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of and in said mortgaged premises. We have been unable to find any English case where in the absence of fraud, a time for redemption was not allowed." And he adds: "In the light of these authorities we are constrained to hold the decree in the case before us *fatally defective.*" The judgment under consideration is in almost identical words and falls under like condemnation. So in this state, PEARSON, C. J., says: "The decree of sale is always *after reasonable notice* of the decree, say three months, in order to give the mortgagor an opportunity to raise the money and prevent a sale." *Capehart* v. *Biggs*, 77 N. C., 261.

2. No report of the sale is required to be made to the court in order that it may be set aside or confirmed, and title ordered, but this is left to the uncontrolled discretion of the commissioner: This is entirely at variance with the nature of judicial sales. The commissioner acts as the agent of the court and must report to it all his doings in execution of its order. The bid is but a proposition to buy, and, until accepted and sanctioned by the court, confers no right whatever upon the purchaser. The sale is consummated when that sanction is given and an order for title made and executed. This power will not be delegated to the agent who exposes the property to public biddings. 2 Jones' Mort. §§ 1608, 1637; Rorer on Jud. Sales, 55, 58.

3. The debt being due from the defendant's husband alone, his personal representative would seem to be a proper if not necessary party. It is true it has been held in *Averett* v. *Ward*, Busb. Eq., 192, that the personal representative of the mortgagor and debtor is not a necessary party in a bill to foreclose, or for sale of the premises. But the court adds: "In this State the personal representative of the mortgagor may be made a party, but is not a necessary party." The

rule is somewhat differently stated by others. In Fisher on Mort., 84 Law Lib., 159, it is said: "The personal representative of a mortgagor is not a necessary party for *foreclosure simply, or redemption*; but if the object of the suit be to *obtain a sale* under the mortgage by way of *trust for sale*, or on the bill of an unpaid vendor of real estate or otherwise, * * the personal representatives of the mortgagor are necessary parties because they are interested in the proceeds of the sale or in the taking of the accounts." So it is declared that when a wife joins her husband in a mortgage of her own estate and the money is applied for the husband's benefit, the personal estate of the husband will be first applied in payment of the mortgage. 1 Greenl. Cruise, 648. It would seem to be peculiarly appropriate that the personal representative of the only person owing the debt and interested in reducing its amount should be before the court and be bound by its decree, and thus the measure of his liability to the plaintiff, whose property may be sold to pay it, be definitely ascertained and determined.

We have examined the judgment and pointed out some of its departures from the established usage and practice in courts where the relief here sought is afforded, as bearing upon the question of power and propriety of setting it aside. In form the judgment is self-executing and final, leaving nothing further to be done by the court. But if it had been drawn in the usual form, it would have been an interlocutory order which is always subject to revision and control. We see no reason why under such circumstances it may not be dealt with and corrected as if it were what it should have been. The power to modify, change, or vacate an interlocutory order made in the progress of a cause is well settled both upon principle and authority. Unlike a judgment at law, it may be moulded and shaped to meet the exigencies of each particular case. *Ashe* v. *Moore*, 2 Mur., 383; *Worth* v. *Gray*, 6 Jones' Eq., 4.

4. But a case not unlike ours was before the court at the last term, *Shinn* v. *Smith*, 79 N. C., 310. The facts so far as necessary to the elucidation of the point we are now considering are these: Smith being indebted, he and his wife united in the execution of a deed conveying lands belonging to her as well as to him to secure his indebtedness. Shinn, an outside creditor, brought his suit against the parties to the mortgage to compel a foreclosure, so that the surplus of the proceeds of sale might be applied to his claim. An order was obtained directing a sale, and that the wife's land should be sold first. The manifest effect and purpose of the order were to have the property of the wife, a surety only, applied in exoneration of the lands of the principal debtor, and that his might be subjected to the payment of Shinn's judgment. The wife on being advised of the nature of this order applied to the court and was made a co-defendant. The order of sale was then modified, but as Shinn alleged, still leaving her property in the front rank of responsibility for the debt due to King. On the proper construction of this modified order READE, J., delivering the opinion of the court, says: "If the modified order in unmistakable terms directed the sale of the wife's land to pay the plaintiff's debt for which neither she nor the land was bound, it would have been erroneous."

In the arguments before us the defendant's right to relief is made dependent on § 133, C. C. P., as construed and applied in the numerous adjudications to which our attention was called. It is difficult to deduce any distinct practical principle from them, or to run a well defined line separating those *neglects* that are, from those that are not excusable in the sense of the statute, and hence the facts relied on must be ranged on the one and on the other side of that line, in each case as they arise. The two cases approximating most nearly to the boundary, and on opposite sides of it, are *Burke* v. *Stokely*, 65 N. C., 569, and *Griel* v. *Vernon*,

Ibid., 76. In the former, it is held that where it appeared that the defendant had written to an attorney to appear for him and the attorney failing to do so, a judgment by default was recovered, and there was no evidence to show that the letter ever reached the attorney, the facts do not constitute excusable negligence. In the latter, an attorney was employed and failed to put in a defence, in consequence of which, judgment by default was entered, and the defendant did not examine the record to see if his defence had been entered. This was decided to be a case of excusable neglect. The distinction is recognised in the recent case of *Bradford* v. *Coit*, 77 N. C., 72, in which READE, J., delivering the opinion, says: "We have said that where a party employs counsel to enter his plea and the counsel neglects it, in consequence of which, judgment is given against the party, it is *excusable neglect* in the party and the judgment may be vacated,"—citing *Griel* v. *Vernon*. We think the present case with its attending circumstances falls within the rule there laid down. Indeed the defendant's equitable claim to have the barrier removed and to be allowed to make what the judge himself declares to be meritorious defence to the action, seems to be conceded in the consent of the plaintiff's counsel to the re-opening the matter upon the simple terms of payment of the costs. If the judgment is to remain and all enquiry into the merits of the controversy suppressed, a serious and irremediable injury may be done to the defendant; while on the contrary if it is vacated the parties will stand on equal terms, and without advantage to either. As was forcibly said in the opinion in *Shinn* v. *Smith*, in reference to the first order of sale: "Whether this was by design or accident, it only needed that the error and injustice should be subsequently called to the attention of the court to induce the court to set aside the interlocutory order of sale, an interlocutory order being always under the control of the court during the pending of the action."

We therefore declare there is no error, and the judgment is affirmed. This will be certified to the court below in order that further proceedings be therein had according to law.

No error. Affirmed.

ELIZABETH G. HAYWOOD, Ex'rx, v. E. BURKE HAYWOOD, Ex'r.

Practice—Sale of Land for Assets—Decree.

1. In entering a decree for the sale of land of a deceased person for the payment of debts, the court should make inquiry (either by reference or the examination of witnesses) as to the proper manner, terms and conditions of sale; and a refusal to do so, on motion, is error.
2. A presentation of an order of sale in such case to the court, containing a clause of reference to inquire and report as to the manner and terms on which the sale should be made, which was stricken out by the court, is equivalent to a motion that the necessary proof be taken and a denial of the same.

CIVIL ACTION in the nature of a creditor's bill heard at Fall Term, 1878, of WAKE Superior Court, before *Seymour, J.*

Upon the decision in same case, reported in 79 N. C., 42, being certified to the court below, the following order was made: That defendant be restrained from further action in selling the real estate of his testatrix, under the proceedings instituted by him in the probate court asking for a license to sell the same for assets; that defendant be appointed as executor and commissioner to sell said land upon his entering into bond with two or more sureties in the penal sum of $15,000, to be approved, after justification of said sureties, by the clerk of the court, and conditioned as required by law for the bonds of executors licensed to sell real estate of

their testators for assets and filed in this court; that a reference be made to ——— to take an account of amount due plaintiff and all other creditors of defendant's testatrix, and the order in which said creditors are to be paid, &c., and to give notice by advertisement for creditors to come in and prove their debts, otherwise to be excluded from the benefits of this decree; that said referee do take an account of the personal estate of said testatrix which came into, or ought to have come into the hands of defendant executor, or to any other person by his order, and also the proceeds of the land when the same shall have been sold, which shall be applied to discharge the debts of the estate, and make report to the court.

The plaintiff appealed from so much of said decree as refused the motion to incorporate in the same an order for a reference to inquire and report upon what terms and in what parcels the real estate described in the pleadings ought to be sold, so as to secure the largest price and best promote the interest of creditors, and also, from so much thereof as authorizes the defendant executor to sell the same without specifying the size of lots, place of sale, terms of credit, and security for payment of purchase money, whereby he shall be limited and governed in making said sale.

Messrs. E. G. Haywood, A. W. Tourgee, J. B. Batchelor and *Merrimon, Fuller & Ashe*, for plaintiff.

Messrs. Reade, Busbee & Busbee, D. G. Fowle, Battle & Mordecai, A. W. Haywood and *Gilliam & Gatling*, for defendant.

SMITH, C. J. At spring term, 1878, an interlocutory decree was passed, among the provisions of which were the following:

"It is ordered that E. Burke Haywood be appointed commissioner to sell said lands upon his entering into bond, payable to the State of North Carolina, with two or more

sufficient sureties, in the penal sum of fifteen thousand dollars, to be approved after justification of said sureties by the clerk of the court, and conditioned as required by law for the bonds of executors licensed to sell real estate of their testators for assets and filed in this court."

This order as drawn and presented to the judge for his signature, contains a clause of reference "to enquire and report upon what terms and in what parts the real estate mentioned and described in the pleadings ought to be sold," which was stricken out, His Honor, as we understand the record, refusing to institute any enquiry and declining to hear evidence upon the point. The act which authorizes a license for the sale of the lands of deceased persons for payment of debts declares that "the court may decree a sale of the whole or any specific parcel of the premises in such a manner as to size of lots, place of sale, terms of credit, and security for the payment of the purchase money, as may be most advantageous to the estate." Bat. Rev., ch. 45, § 68. The act, whether the words are or are not mandatory, manifestly contemplates the exercise of the judgment of the court granting the license as to the manner, terms and conditions of sale, and the embodying of the instructions in the order of sale, and not that they should be left to the uncontrolled discretion of the representative or commissioner appointed and authorized to make the sale. To this end the court should have sought for information, either by means of a reference according to the usual practice in equity, or by the examination of witnesses. Without this knowledge the court could not act intelligently and so frame its decree as to make the execution of it "most advantageous" to those interested in the estate.

We have in *Mebane* v. *Mebane, ante*, 34, pointed out the manner in which judicial sales are conducted by commissioners as a mere agency of the court, and that they are consummated only when approved and confirmed by the court. It

is therefore eminently proper that the particulars of the sale should be prescribed beforehand, and the statute in this case recognizes the practice.

It was contended in the argument that the judge was not called on to settle the details at or before the passing the decree; nor was any evidence tendered to enlighten and guide his judgment, and hence the appellant has no just cause of complaint for his failure to act.

The argument is not warranted by the construction we put on the case appearing in the record. The preparation and presentation of the proposed order for the judge to sign, was a suggestion and prayer to him to take the necessary proof, and his answer of that part was a direct and unequivocal refusal. This is equivalent to a motion to this effect made and denied, and the appellant was not required to do more.

We do not wish to be understood as holding that all the particulars specified in the statute must be settled in the decree in order to the validity of the sale under it, but that it is the duty of the judge to inform himself of the facts, so far as to enable him to exercise his discretion in regulating the terms of the sale and directing the commissioner in conducting it. Had this been done, we are not prepared to say that even this general order would be irregular. But it is error to decline to hear any evidence or suggestion on the subject.

The interlocutory order must therefore be reversed and this will be certified.

Error. Reversed.

M. P. PURNELL v. VAUGHAN, BARNES & CO.

Practice—Non-suit—Counter-claim.

1. A non-suit is not permitted under the present practice, when a counter-claim is set up by the defendant, who thus in turn prosecutes his counter-claim against the plaintiff for its recovery.
2. Where the plaintiff, alleging usury, &c., asked the cancellation of a certain mortgage executed by him to defendants and enjoined the defendants from selling certain land under the mortgage until the controversy between them as to the amount due should be settled; and an account was stated by which the amount of principal money due from plaintiff to defendant was ascertained, neither party excepting; *It was held*, that the plaintiff was not entitled at that stage of the proceedings to dismiss his action against the will of the defendants.

(*McKesson* v. *Mendenhall*, 64 N. C., 502; *Pescud* v. *Hawkins*, 71 N. C., 299; *Tate* v. *Phillips*, 77 N. C., 126, cited and approved.)

MOTION for an injunction heard at Spring Term, 1878, of NORTHAMPTON Superior Court, before *Seymour, J.*

The plaintiff being indebted to the defendants in the sum of $1,504.91, to secure the same and to provide for supplies in money and articles needed to carry on his farming operations, to be furnished by the defendants, and in the aggregate not to exceed $4,000, for which sum he gave them his promissory note payable on the 1st of December, 1876, on the 27th of January preceding, executed to them a mortgage giving a lien on the crops to be made, under the statute and conveying a large and valuable farm known as Marsh-land, with condition to be void if the debt and advances were paid at or before the said month of December, and with power of sale in case of default. During the year, advances and supplies were furnished by the defendants and several lots of cotton were sent to them by the plaintiff, which were sold and the proceeds of sale placed to his credit. But default being made in payment of the balance claimed to be

due on the account, the defendants undertook to dispose of the crops, but the moneys received therefor by the sheriff were arrested in his hands and are still in litigation.

The defendants then under the power contained in the mortgage, advertised the sale of the land, when this suit was instituted to enjoin them from making the sale, and a restraining order asked for and obtained and a day appointed to hear the application for the injunction. The plaintiff in his complaint alleges usury and other matters of defence; and demands the cancellation of the mortgage and that the defendants be prohibited from selling under the mortgage "until the termination of this suit or the further order of the court."

In his amended complaint the prayer is also for a restraining order "until the controversy between affiant and the said parties, as to the amount due from the former to the latter" (supplying the omitted concluding words) is settled.

The disputed account was referred to the clerk and he made his report of the principal money due from the plaintiff to the defendants, which both parties admit to be correct, and from which all usurious charges are excluded.

On hearing the motion for an injunction, the court expressed the opinion that the plaintiff could not maintain his action without submitting to pay what he owed with lawful interest thereon, and thereupon the plaintiff declining further to prosecute his suit, asked to be permitted to take a non-suit, which was objected to by the defendants, but allowed by the court and the action dismissed. From this order the defendants appealed. (See same case, 77 N. C., 268.)

Messrs. R. B. Peebles, Walter Clark and *J. B. Batchelor*, for plaintiff.

Messrs. Mullen & Moore, Gilliam & Gatling, R. O. Burton, and *Reade, Busbee & Busbee*, for defendant.

SMITH, C. J. (After stating the case). The only question presented in the record and which we are called on to consider is this: Can the plaintiff after prosecuting his suit thus far, against the will of the defendants, dismiss his action, or in the language of a court of law, take a non suit? We think it too late to do so.

The scope of the plaintiff's equity to ask the intervention of the court embraces the taking an account of their mutual dealings in order to ascertain the amount due and the postponement of the proposed sale until this can be done; and then the allowance of a reasonable time to redeem; and it involves his correlative duty to pay and to submit to a decree of sale, if he fails to make the payment. This should be provided in the decree of sale as we have said in *Mebane* v. *Mebane, ante,* 34.

The whole matter in controversy and the enforcement of the rights of each party under the mortgage are by the plaintiff's own election taken from the mortgagee's control and as an essential condition of relief placed under the exclusive jurisdiction of the court and to be retained until a full and final settlement can be made. The jurisdiction thus invoked has been exercised for the benefit of the plaintiff and the sale deferred until a full and unexceptional account is stated, showing what is due and owing to the defendants, and the cause is ready for a decree of sale; and it would now be most unjust to deny to the defendants all accruing benefit of the proceeding. He who comes into a court of equity seeking its assistance must himself do equity, and the plaintiff cannot be allowed after taking the advantages derived from his action, by putting an end to it, deprive the defendants of the advantages to which they are entitled.

The right to take a non-suit in a court of law was left to the uncontrolled discretion of the plaintiff to be exercised at any time before the rendering of the verdict. It is more

limited under the present system and is not permitted when a counter-claim is set up by the defendant who thus in turn prosecutes his counter-action against the plaintiff for its recovery. As the account consists of a series of claims of each against the other, the case may come under the operation of the principle applicable to a non-suit. *McKesson* v. *Mendenhall*, 64 N. C., 502; *Pescud* v. *Hawkins*, 71 N. C., 299; *Tate* v. *Phillips*, 77 N. C., 126.

The present action is however but a substitute for a bill in equity, by which the relief sought could alone be obtained, and we must look to the practice prevailing in that court for the rule to govern us in this case.

The principle is thus laid down by an eminent writer on the practice in the courts of chancery: "After a decree, however, the court will not suffer a plaintiff to dismiss his own bill, unless upon consent, for all parties are interested in a decree and any party may take such steps as he may be advised to have the effect of it." 2 Danl. Ch. Pr., 930. And in this he is sustained by authority.

"After an order to account and report made, the plaintiff cannot dismiss on payment of costs." Cases cited in note at foot of page.

Chancellor WALWORTH in *Watt* v. *Crawford*, 11 Paige, ch. 470, announces the rule in these words: "Before any decree or decretal order has been made in a suit in chancery by which a defendant therein has acquired rights, the complainant is at liberty to dismiss his bill upon payment of costs. But after a decree has been made by which a defendant has acquired rights, either as against the complainant or as against a co-defendant in the suit, the complainant's bill cannot be dismissed without destroying those rights. The complainant cannot in such case dismiss without the consent of all the parties interested in the decree."

In the case before us the court has acted, suspended the sale by the mortgagee, ordered meanwhile a reference of

the contested matters of account, the report has been made and its correctness conceded by both parties, and the cause in condition to be finally disposed of. Certainly it would not be equitable now to let the plaintiff put an end to the action and turn the defendants out of court.

There is error in allowing the plaintiff to dismiss his action and this will be certified.

Error. Reversed.

J. L. PETTILLO, EX PARTE.

Practice—Default of Purchaser—Re-sale of Land—Surety and Principal.

1. Where a purchaser fails to pay the note for the purchase money of land sold under a decree, the court will, upon notice, order a resale and charge him with the deficiency, in case the price obtained is not enough to pay what is due on the note. And this, without the concurrence of the delinquent purchaser. *Ex parte Yates*, 6 Jones Eq., 212, modified.

2. A surety upon a note for the purchase money of land sold under a decree of court, has the right, on default of his principal, to require a re-sale in exoneration of his liability.

(*Egerton* v. *Alley*, 6 Ire. Eq., 188; *Ferrer* v. *Barrett*, 4 Jones Eq., 455; *Walke* v. *Moody*, 65 N. C., 599, cited and approved, and *Ex parte Yates*, 6 Jones Eq., 212, modified.

APPEAL from an Order made at Fall Term, 1878, of HENDERSON Superior Court, by *Avery, J.*

Under a decretal order of the late court of equity made in the year 1859, the lands mentioned in the petition were exposed to sale and purchased by the petitioners John L., Samuel and M. W. Pettillo, at the price of $3,549, and accord-

ing to the conditions of sale they executed their notes for moieties thereof with one Nathan Drake, surety, payable at one and two years with interest from date. The sale was reported and confirmed at the next term, and the purchasers entered into possession. At fall term, 1876, of the superior court to which the cause had been transferred, notice was directed to issue to the purchasers and the surety to appear at the succeeding term and show cause why the residue of the purchase money should not be paid, or a resale ordered. The notice was served on the two living purchasers and the heirs at law of the deceased purchaser. From a report of a referee to the court at spring term, 1878, it appeared that after deducting a payment made in 1863 there was still due for the land the sum of $4,699.20. The purchasers failing to pay this residue or to provide therefor, or to show cause to the contrary, the court ordered a resale on a similar credit of one and two years with interest, and from this order the purchasers appealed.

Messrs. J. H. Merriman and *C. M. McLoud*, for petitioners.

SMITH, C. J. (After stating the case.) The only question in the case is this: The surety being dead, and the purchasers after a default of sixteen years, when called on, still failing to pay the residue of the purchase money, can the court direct a re-sale and charge them with the deficiency in case the price obtained is not enough to pay what is due?

It is the usual practice in making judicial sales, not only to require personal security, but to retain the title until full payment of the purchase money. This double security may by proper orders in the cause, be made available to the parties entitled to the fund, and the land itself as the property of the principal debtor, be advanced to the front rank of liability at the instance of and for the exoneration of the

surety. In case the principal has become insolvent, the surety has an equity to require a re-sale, for his reimbursement if he has paid the debt, and for his protection if he has not; and the equity extends to cases where there are reasonable grounds for apprehending the insolvency and consequent loss to the surety. *Egerton* v. *Alley*, 6 Ire. Eq., 188; *Ferrer* v. *Barrett*, 4 Jones Eq., 455.

No good reason can be assigned why the court, under such circumstances as would entitle the surety to require a resale, may not make the order without coercion alike for the benefit of those to whom the fund belongs and for the relief of the surety himself. Why may not the manifest right of the surety, upon the facts of this case, be acknowledged and acted upon by the court, as well without as by his direct interposition and prompting, and the equities among the parties be fully administered?

The question has been before the courts in this country and in England and is not free from difficulty. We will advert to some of the adjudications on the subject:—

In *Harding* v. *Harding*, 4 Mylne & Craig, 514, in the plaintiff's application for a resale of a part of the land bid off by a defendant who failed to pay the purchase money at the appointed time, Vice Chancellor Shadwell passed an order directing a resale and discharging the purchaser from his contract. The order coming before the Lord Chancellor Cottenham for review, he approved so much of it as directed the sale and remarked: "I think that the order should have been to hold the purchaser to his contract and order the resale in the meantime." Subsequently, after consultation with the other judges, he made the following order: "His Lordship doth order that so much of the order dated the 6th of August, 1838, as directs the defendant, Thomas Haughton Harding, to be discharged from his purchase, in said order mentioned, be discharged, and it is ordered that the rest of the said order be affirmed."

In *Miller* v. *Colyn*, 36 Barb. (N. Y.) 250, the court say: "The remedy against a purchaser who refuses to complete a purchase under a decree or judgment of a court of equity is by an application to the court to compel him to complete it, *or to resell the property and hold him liable for the loss and the additional expenses.* Such an application will be disposed of upon equitable principles, and no doubt facts would be considered which would not be allowed to influence the decision of a suit at law." Then referring to the doubt expressed by Lord ELDON, and to several cases in which the exercise of the power has been maintained, the court proceeds to say: "These cases do not proceed strictly upon the ground of contract, but upon the ground that when a person becomes a purchaser under a decree he submits himself to the jurisdiction of the court, as to all matters connected with the sale or with him in the character of purchaser. *Regina* v. *Rea*, 2 Paige, 399. He may as well be compelled to complete as to relinquish his purchase, and the court by whose order the sale is made must decide in the original suit whether either is equitable and right."

In *Walke* v. *Moody*, 65 N. C., 599, some of the purchase money remaining unpaid, and application being made to subject the land thereto, the court declared "that the plaintiffs have a lien upon the feme plaintiff's share of the land mentioned in the complaint, for the payment of the residue of the purchase money and to *a decree directing a resale* of the feme plaintiff's interest in said land, and the payment of the said debt out of the proceeds thereof, unless the said John M. Moody, or some one on his behalf will come in and pay by a day certain the principal and interest due," &c.

But our attention is called to the ruling in the matter of *Yates*, 6 Jones Eq., 212, in which PEARSON, C. J., defining the remedies where a purchaser at a judicial sale fails to comply with the terms of the bidding, points out one of them in these words: "By an order, without absolutely re-

leasing them from their bid and rescinding the contract, that the land be sold over again, they undertaking as a condition precedent to this order of resale which is made for *their* benefit and on the basis of their liability to a decree for specific performance, &c." This seems to imply the concurrence of the purchasers as necessary to the order for a resale, and if so intended is not in harmony with the authorities cited. The decision is undoubtedly correct in reversing the interlocutory order to resell, made in the court below for the sufficient reason that the first sale had not been confirmed; and until this was done, the bid was nothing more than an unaccepted proposition to buy, imposing no obligation on the bidder. It is properly held that until the contract is consummated by the action of the court, there is no ground on which the bidder can be charged with the expenses and loss attendant upon a second sale. The order which attempted to do this was consequently declared to be erroneous and set aside. In the unreported case, *Harding* v. *Yarborough*, referred to in the opinion and then depending in the court, a notice was directed to be issued to certain persons who had bid for lands, and after confirmation of the sale, failed to comply with the conditions thereof. The notice, assuming the form of a rule, requires them to complete their purchase or appear at the time specified and show cause why the prayer of the plaintiff should not be granted.

The prayer recited in the notice is, that if the terms of sale are not complied with or good cause shown to the contrary, then the "commissioner may be directed forthwith to resell the hotel and premises, and that all the costs, charges, and incidental expenses attending the last sale and incidental thereto and occasioned by the default" of the purchasers, "*together with any loss or deficiency in price* and interest arising by such second sale may be ascertained by the clerk of this court and the same paid into the office of this court" by said purchasers "for the benefit of the parties interested

in the premises according to their several interests." It appears from the records that the purchasers completed their contract and no further action was had under the rule.

This was an adversary proceeding against delinquent purchasers instituted and conducted, not with their concurrence nor for their benefit, but in the interest of those to whom the fund belonged. It sustains our view of the subject and of the proper practice in such cases. We are therefore of opinion that there is no error in the order directing the resale, but it should be reformed so as to give time for the payment of what remains due on the original sale before the commissioners proceed to sell, according to the practice in the foreclosure of mortgages which we approve in *Mebane* v. *Mebane, ante,* 34.

No error. Affirmed.

J. R. H. CARMER v. E. B. EVERS and others and THE CITY OF RALEIGH.

Practice—Recordari—Attachment—Liability of Garnishee.

1. A writ of *recordari*, although in terms addressed to the sheriff, is legally as sufficient as if formally addressed to the justice who rendered the judgment, after he has yielded obedience thereto and recorded and sent up his proceedings.
2. It is no objection to the docketing of a case upon the return to a writ of *recordari*, that the justice's fees have not been paid; such objection can be urged only by the justice.
3. A failure to give bond on a petition for a *recordari* is remediable, in the discretion of the court, after a return to the writ is made, by the execution of a bond *nunc pro tunc*.
4. A warrant of attachment served upon a debtor of the defendant,

either with or without a certificate given of the amount of indebtedness, is merely a security for such sum as the plaintiff may recover in his action; it does not subject the garnishee to have judgment taken against him in the pending cause, but only to a separate action for its recovery.

5. On the hearing below, it appeared that a garnishee in an attachment proceeding, appeared before a justice's court upon notice, on November 13th, and denied any indebtedness to defendant; that on December 10th, without further notice, judgment was rendered against the garnishee, of which he had no knowledge until December 27th, when he sought to arrange for relief with plaintiff's attorney, and thought he had done so; that on January 3d, he was notified that no arrangement could be made, and on January 7th, he applied to the justice to vacate the judgment, which being denied, he applied on January 10th, for a writ of *recordari; Held*, that the right of appeal was lost without default on his part, and as he had merits, the writ of *recordari* was properly granted.

(*Swann* v. *Smith*, 65 N. C., 211, cited and approved.)

MOTION to docket the case upon the return to a writ of *Recordari*, heard before *Seymour, J.*, at Spring Term, 1878, of WAKE Superior Court.

The facts necessary to an understanding of the case are as follows, viz.: On August 27th, 1877, the plaintiff sued out an attachment against E. B. Evers, one of the defendants, and service was made by publication; afterwards M. A. McDonald and the Virginia and North Carolina gas-light company (composed of Evers and McDonald) were made parties to the action by publication. On August 29th the city of Raleigh was garnisheed upon a debt alleged to be due the Virginia and North Carolina gas-light company by notice served upon the mayor, auditor and treasurer of the city, who notified the officer serving the notice that the city was not indebted to the defendants. On November 10th an order was served upon the above-named officers of the city to appear before the justice for examination concerning the alleged indebtedness of the city to the defendants. The said officers appeared before the justice and

testified that the city was not indebted as alleged, but had a release from any and all indebtedness.

On December 10th the justice, without further notice to the city, gave judgment in favor of the plaintiff against the city. The city had no notice of this judgment until December 27th, when the city attorney immediately applied to the attorney for the plaintiff for a correction of the judgment rendered against the city, and thought that the matter was arranged to the satisfaction of both parties. On January 3d he was notified by the plaintiff's attorney that the proposed arrangement could not be consummated, whereupon, on January 7th, he applied to the justice to vacate the judgment against the city, which motion the justice denied. On January 10th the city applied for a writ of *recordari*, which was granted; the writ was directed to the sheriff who served it on the justice and the justice made due return of the proceedings in the case to the superior court.

At spring term, 1878, of the superior court the case was argued upon a motion on behalf of the city to docket the case. The plaintiff resisted the motion upon the following grounds: (1.) Because the writ was not issued to the justice of the peace who tried the case, and plaintiff denied that there was any record before the court. (2.) Because the petitioner did not aver that the justice's fees had been paid. (3.) Because the petitioner did not give the bond required by law. (4.) Because the petition disclosed no merits and the petitioner had not complied with the law.

After hearing the petition, affidavits, &c., the court decided that the objection to the form of the writ was not fatal after the justice had made a regular return, as in this case, and that the objection as to the fees not being paid could not be taken by the plaintiff, it not appearing that the justice required it. The court allowed the bond to be given by the city *nunc pro tunc* and granted the motion, ordering the case

to be placed upon the trial docket of the court. Plaintiff appealed.

Mr. Armistead Jones, for plaintiff.
Messrs. Reade, Busbee & Busbee, for defendant.

DILLARD, J. On the return of the justice of the peace in answer to the writ of *recordari*, His Honor ordered the cause to be entered on the docket, and from that order the plaintiff appeals and assigns the following errors: 1. Because the writ was not issued to the justice who tried the cause, and there was no record before the court. 2. Because there was no averment in petition of payment of justice's fees. 3. Because the petitioner did not give the bond required by law. 4. Because the petition disclosed no merits and had not complied with the law.

We think there was no error in His Honor's ruling as to these several grounds of error. The writ of *recordari* although not in terms addressed to the justice of the peace was served on him by the sheriff, and the justice having yielded obedience to the writ and recorded and sent up his proceedings, it is legally as sufficient as if formally addressed to him by name or in his official capacity.

There was nothing in the objection of the non-payment of the justice's fee; and the justice, and he alone, had the right to urge and act on it. The failure to give bond as required by law was remediable by the allowance of the court in the exercise of its discretion; and the court having allowed it *nunc pro tunc*, the plaintiff is not injured and has no right to complain.

The warrant of attachment issued in the cause, served by a copy delivered to the city, imposed the duty on the city to give a certificate of its indebtedness to Evers, or either or any of the defendants to the suit; and failing to do so, the legal proceeding was to have up the officers representing

the corporation before the justice of the peace and to examine them on that subject, and in legal effect such examination operated a lien on anything owing by the city to the defendants in the suit, as of the day when the copy of the warrant of attachment was delivered; and thereby prevented any alteration of the state of accounts between the defendants and the city.

A warrant of attachment under our law served on a debtor to the defendant in the suit, either with or without a certificate given of the amount, is merely a security for such sum as the plaintiff may recover. It does not subject such person to have judgment taken against him in the pending cause, but only to a separate action for its recovery in the name of the sheriff or in that of the defendant, subject to the direction of the court, Bat. Rev., ch. 17, § 204, with liberty to the plaintiff to prosecute actions himself, or under his directions, on indemnity given to the sheriff, as provided in section 210 of same chapter. It is manifest from these provisions of the statute that it was never designed that a stranger to the action should be proceeded against otherwise than by a suit in the ordinary way, commenced by summons. Therefore the judgment rendered against the city on the examination of its officers was unauthorized and erroneous.

On the examination had and concluded on the 13th of November, the city left court liable only to be impleaded in a separate action; and not being otherwise connected with the pending cause, its failure to appeal from the judgment rendered on the 10th of December, of which it had no notice actual or constructive, cannot be imputed to it as laches. The statement is that the city had no knowledge of the judgment entered against it until about the 27th of December, when it sought to arrange for relief against it with the plaintiffs, and thought it had done so. But being notified of the rejection of its overtures on the 3rd of January, the

city then moved to vacate the judgment in the justice's court, and that being refused, immediately had recourse to the petition for writ of *recordari* to bring up the case to the superior court. The city had merits, and having lost its right of appeal without any default on its part, the writ of *recordari* was properly granted. The record being sent up, it was the right course to state the case on the docket for a hearing, as on a writ of false judgment. *Swann* v. *Smith*, 65 N. C., 211.

There is no error. Judgment of the court below is affirmed. This will be certified that the cause may be proceeded in as the parties may be advised.

No error. Affirmed.

W. H. RUNNION and others v. M. J. RAMSAY and others.

Practice—Petition to Rehear—Parol Trust.

1. Equity suits pending at the adoption of the Code and transferred to the superior court docket, should be tried and conducted up to final judgment, according to the old rules of equity procedure.
2. Under the old system, a petition to rehear was the proper mode of assailing a preliminary decree for irregularity.
3. The parties plaintiff to the decree attacked, alleged that their ancestor and the ancestor of the defendants had made a parol agreement to purchase jointly a tract of land and share the expenses of improving the same; and that defendants' ancestor had taken title to himself alone, although payments and improvements on the land had been made by both parties; the defendants denied the agreement for a joint purchase and the payments and improvements by the plaintiffs' ancestor; *Held*, that a decree directing an account to be taken of the payments and improvements, and, *at the same time*, declaring a trust in favor of the plaintiffs, is irregular and improper, and will be vacated on a petition to rehear.

MOTION to vacate an Order heard at November Special Term, 1878, of MADISON Superior Court, before *Avery, J.*

This litigation was begun by a bill in equity, under our old system, to fall term, 1867, of the superior court of law and equity of Madison county, and from the pleadings the case was, that William Ramsay and A. J. Ramsay, his son, about 1856, agreed by parol to buy the tract of land, described in the bill, at clerk and master's sale and pay for the same equally, and make improvements thereon at their equal expense and be equal owners thereof. It is alleged that each party made payments toward the purchase money and in the erection of a saw mill on the premises. Both of them died—A. J. Ramsay in 1858, leaving the defendants, his widow and heirs at law, and William Ramsay in 1859, leaving the plaintiffs and the defendants, except M. J. Ramsay, his heirs at law. At the time of their deaths the purchase money had not all been paid and no title executed for the land. Since then the defendants, the widow and heirs at law of A. J. Ramsay, have paid the balance due of the purchase money and taken the legal title in their names, and they claim to be solely entitled to the land.

The prayer of the bill is to have an account taken of the payments towards the original purchase money and expenses in making improvements on the land by each of the parties, for a declaration of trust of the legal title for their benefit in one half of the land, less the share in said half of the defendants as representing A. J. Ramsay, and for a decree of sale of the whole tract and a division of the proceeds according to the respective rights of the parties. The defendants resisted the claim of the plaintiffs upon the allegation that their ancestor, A. J. Ramsay, purchased the land for himself alone, and made all the payments thereon except what defendants have paid since his death; and made the improvements at his own expense, except those the defendants say they have made. The defendants

deny all interest of William Ramsay in the land and all payments claimed to have been made by him, or if any shall have been made by him, they say it was done by William Ramsay in the way of advancement in life of their father, and with no intent to have or claim any joint ownership of the land with A. J. Ramsay. To fortify them in such, their position, they aver that A. J. Ramsay took and held sole possession to his death, and his widow and children have held possession and paid up the balance of the purchase money since his death.

The heirs at law of A. J. Ramsay were all infants at the institution of this suit, and defence was made in their names and for them by S. V. Pickens as their guardian up to fall term, 1872, of the court, when it appearing that Pickens was not the guardian, M. J. Ramsay, the mother of the infants, who by this time had become their guardian, was allowed to file an answer for herself and the infants. Thereupon proofs were taken, and at fall term, 1876, the cause was heard and a decree therein made; and afterwards at fall term, 1878, the defendants, all of them by this time having arrived at full age, except one, presented a petition to rehear and vacate the decree made at fall term, 1876, and on the rehearing His Honor set aside the said decree and let in the defendants to make defence in their proper persons, and from this order of the judge setting aside the decree at fall term, 1876, the appeal is taken.

Messrs. T. F. Davidson and *Gilliam & Gatling*, for plantiffs.
Messrs. J. H. Merrimon and *C. M. McLoud*, for defendants.

DILLARD, J. (After stating the case.) The appeal presents for our determination two questions—first, was it competent to the judge, on a petition to rehear, to set aside the decree made at the fall term, 1876, and if so, then second, was

it error to set it aside on the declarations therein contained and the other facts appearing in the record.

1. This being a suit pending at the adoption of the code, it was directed to be transferred to the docket of the superior court. C. C. P. § 400. And being so transferred, it was provided it should be tried under the existing laws and rules applicable thereto up to final judgment. C. C. P. § 403. The existing law and rules of practice in this state, referred to in said section of the code, for the review or rehearing of decrees in the court of equity, were the same as in the English chancery; and according to that system, it was by bill of review after final decree enrolled, and on petition to rehear in case of any interlocutory or other decree defined to be preliminary; and therefore by authority of C. C. P. § 403, it was admissible for the judge on the petition to rehear, to reverse or modify the decree of fall term, 1876, in this case, if the same was other than final.

A final decree, called a decree on further direction, is one which ultimately disposes of a suit; and a decree preliminary is one which provides for the investigation of matter material either in determining on subsequent steps in the cause, or in deciding the real issue between the parties. Adams' Eq., 375. A scrutiny of the decree sought to be reversed and put out of the way will show, in the light of this definition, that the same, although in terms larger, is in legal effect at most only a preliminary decree, and therefore reviewable on a petition to rehear.

The prayer of the bill is for a decree holding defendants as affected with a trust of the legal title in favor of the plaintiffs to the extent of a moiety of the land in the bill mentioned, or if not so far, then *pro tanto* any payments William Ramsay paid towards the purchase money. The defendants having denied a joint purchase and any payments made at all by the father, or if any, having averred that he made them in advancement of A. J. Ramsay in life,

it was material as preliminary to the raising of a trust by construction of a court of equity, and as fixing the extent of such trust, in the first place, to know whether the purchase was made by the son in his name with a right in the father to pay one-half and thereby to become the owner of one-half, and if so, then how much he paid, and whether paid as a loan or an advancement of the son.

Clearly a court of equity regarding assistance to a son by a father as within his parental duty, would not imply and by its decree enforce any trust in favor of the heirs of William Ramsay in this suit, if the proof showed in rebuttal thereof that he made payments merely to assist his son, A. J. Ramsay, and with the expectation and design that he or his heirs should take and keep the title. Adams' Eq., 101, 102. Therefore it was obviously material, if not indispensable, to the decision of the real issue between the parties, to know what, if anything, was paid, and with what intent paid, before there could be any decree declaring the trust and determining the extent thereof. On examining the decree of fall term, 1876, it will appear that His Honor in his decree adjudged a tenancy in common to exist, and ordered a sale of the land for division, in the same decree, in which he ordered an account of the payments made; and thus in effect, he concluded the defendants in respect of their title to one-half of the land, and adjudged a sale of the other half without their consent, when upon the results of an inquiry into the payments made and the purpose thereof, it might turn out that in law no trust ought to be declared. Suppose, on taking the account, it was disclosed as a fact that Wm. Ramsay had paid nothing on the land, or if he had, he paid it as an advancement; then, after the sale of the land and an adjudication that plaintiffs were owners in common, how could he decree half the money to plaintiffs whose ancestor paid nothing towards the land, or if he did, it was done with the intention of a gift to the son. Thus it

is seen that the decree as entered is entitled to be considered as erroneous in law, and of no greater effect than merely an order of account.

2. It having been seen that the decree was preliminary merely, and therefore within the competency of the court on a petition to rehear to set it aside, it remains to inquire as to the legal propriety of the decree His Honor Judge Avery made, and in doing so it is proper to have regard to the facts set out in his decree and all others in the record.

It is settled law that if A. J. Ramsay agreed, even by parol, to buy and did buy the land for himself and his father, and they both made payments thereon and incurred expenditures in its improvement with intention to be joint owners, and after their deaths the heirs of A. J. Ramsay made the last payment and took the title for the whole, equity will, by construction, hold defendants trustees *pro tanto* the payments and expenditures made by Wm. Ramsay in favor of the plaintiffs; but if the purchase were by A. J. Ramsay for himself alone, and he and his heirs paid all the money, or if made for himself and his father, and the father paid none, or paid what he did with the intention to help his son in life and not take title, then in neither of the cases last supposed, would any declaration of trust be made against the heirs of the son in favor of heirs general of the father.

As the case was under the decree of 1878, the title is adjudged and a sale ordered for division; and this, before it is found what the father paid, and if anything, with what intent—whether as a gift, or loan, or otherwise—and in such situation the defendants stood concluded. But that decree being put out of the way, it is open to the parties as it ought to be, to have it settled, as to the alleged joint purchase, and then as to the payments if any made by the father, and the intention with which they were made. These essential facts being established either by declaration of the court or on issues to a jury in aid of the court as the judge in his dis-

cretion may direct, the cause will then be in a condition to adjudge upon the title and determine the extent thereof in the rival claimants. And then will be the time to decide whether a division is to be had, and if so, whether in kind or by a sale and division of the proceeds.

After a careful consideration of the points argued before us in connection with the facts in the record, we are of the opinion that it was competent to the judge on the petition to rehear, to set aside the decree of 1876, and that he was warranted in so doing, in order to a final determination of the cause upon the points involved.

No error. Affirmed.

JEMIMA MASON v. JEREMIAH J. PELLETIER.

Practice—Petition to Rehear—When Granted.

A petition to rehear will be granted when it clearly appears that a former decision of this court resulted from overlooking material admissions in the pleadings of the prevailing party.

PETITION TO REHEAR filed by plaintiff on the 12th of February, 1878, and heard at January Term, 1879, of THE SUPREME COURT.

Messrs. Gilliam & Gatling, for plaintiff.
No counsel for defendant.

DILLARD, J. This is an application to rehear a judgment of this court at June term, 1877, reported in 77 N. C., 52, and in order to understand the grounds of the application it is necessary to recite the following facts:

Edward Hill many years ago sued Matthew Mason for a tract of land, and from the verdict and judgment in the cause, an appeal was taken to the supreme court, and in the supreme court the litigation was ended by a decision in favor of Mason, whereby the land in dispute was decided to belong to him and not to Hill. *Hill* v. *Mason*, 7 Jones, 551. Mason died in 1861, and by will devised the land in controversy between him and Hill to the plaintiff, his widow. Hill sold and conveyed in his life time a large tract of land to the defendant, of which the land in litigation in the said suit was claimed to be a part, but excepted the same in the deed, stipulating to convey it, if he established his title thereto, and agreeing to pay defendant five dollars per acre therefor in case he failed to establish his title.

The plaintiff conveyed to defendant a part of the lands devised to her and which had been the subject of litigation in the said suit of Hill against her husband, and the defendant conveyed to plaintiff a part of the same tract called the "Marsh lands," and the plaintiff alleges that the transaction was induced and brought about by a false and fraudulent representation of defendant, that the suit of *Hill* v. *Mason* had been decided in favor of Hill, in which she confided and believed to be true at the time of executing the deed aforesaid to the defendant; and plaintiff, on finding out the deception and fraud practiced on her in relation to the result of the said suit, brought her action against the defendant for the rescission of the deed she had made to him and for a reconveyance of the land to herself. This action of the plaintiff was tried at fall term, 1876, of Carteret superior court, and judgment given for the plaintiff, and on appeal to the supreme court the cause was heard at the June term, 1877, and the judgment of the court below was reversed for error set forth in the opinion of the court, and a certificate thereof directed to issue to the court below to govern its further action. The error in the judgment of

this court is assigned to be, in that, this court declared that there was no evidence that the fraudulent representations found by the jury to have been made by defendant were false, whereas in point of fact the decision of the suit of *Hill* v. *Mason*, 7 Jones, 551, and the recovery therein by Mason was distinctly averred in the first and second articles of the complaint and expressly admitted in the answer.

On looking into the record of the cause and the case of appeal accompanying the same, it is seen that plaintiff in the first and second articles of her complaint, alleges a suit by Hill against Mason, in Carteret county, and a recovery therein by the defendant, and an appeal to the supreme court and an affirmation of the judgment below, as reported in 7 Jones, 551. The subject matter of that suit is alleged to be a tract of land described in a plat annexed to the record of said case, and the same plat is referred to as descriptive of the land in controversy, in this action. The defendant in his answer expressly admits the first and second paragraphs of the complaint, and thereby in effect admits the existence of the suit referred to, its scope and the result as set forth in the plaintiff's complaint. It was stated in the case of appeal in this action, that on the trial the plaintiff's counsel in his argument to the jury read to the jury a portion of the case of *Hill* v. *Mason*, reported in 7th Jones, when the presiding judge stopped him; and it was thence understood by His Honor delivering the opinion of this court, at June term, 1877, from a hasty perusal of the pleadings, that there was no evidence by which the falsity of the alleged fraudulent representations of defendant could be found, whereas, in truth, on the pleadings, the falsity of the representations, if any were made, was admitted, and not, therefore, an open question. Certainly if on the trial of the issues submitted to the jury it was proved that defendant represented to plaintiff that *Hill* v. *Mason* had been decided in favor of Hill, no evidence was

needed or even pertinent to show the falsity thereof, as it was already admitted in defendant's answer that the decision had been in favor of Mason.

It is the opinion of this court, and we so decide, that the judgment of this court in the case reported in 77 N. C., 52, is erroneous and the same is set aside, and the cause will stand for hearing as on the appeal *de novo*.

Let this be certified to the court below to the end that it may know of the reversal of the judgment at June term, 1877, and of the reinstatement of the appeal on the docket of this court for a hearing to be hereafter had.

PER CURIAM. Reversed.

D. J. & L. TWITTY v. G. W. LOGAN and others.

Practice—Appointment of Receiver.

An order appointing a receiver will not be made when the party applying for the same has not established an apparent right to the property in litigation, and where it is neither alleged nor shown that there is danger of waste or injury to the property, or loss of the rents and profits by reason of the insolvency of the adverse party in possession.

CIVIL ACTION heard upon a motion for the appointment of a Receiver, at Fall Term, 1878, of RUTHERFORD Superior Court, before *Schenck, J.*

The opinion contains facts sufficient to an understanding of the point decided. His Honor allowed the motion, and the defendant, Logan, appealed.

Messrs. Hoke & Son, Bailey and *Hinsdale & Devereux*, for plaintiffs.

Messrs. Reade, Busbee & Busbee, for defendant.

SMITH, C. J. The purpose of this action, as appears from the complaint, is to enforce an alleged lien on the land in possession of the defendant, Logan, for the sum of $529.47 and interest thereon from September 26th, 1860, claimed to be due to the plaintiffs. The defendant, Logan, in his answer denies the lien, and sets up title in himself under a sale made by the sheriff by virtue of an execution against the property of Samuel Wilkins.

The land in controversy has been sold several times, and at the last trustee's sale brought the sum of $5,400, and it is not intimated that it is not amply sufficient to meet the plaintiff's demand. M. O. Dickinson, the only other defendant who answers, asserts title to the land as assignee in bankruptcy of the said Samuel Wilkins.

The pleadings do not disclose the date of the adjudication in bankruptcy nor the time of rendering the judgment, except that in the recitals contained in the order, it is said the adjudication was prior to the execution sale. Nor is there any suggestion of Logan's insolvency or his inability to meet any just demands for the use and occupation of the premises, or that he is committing any waste or injury to the property. Both defendants derive their title under Wilkins. At the instance of the plaintiffs and the defendant, Dickinson, the latter on motion was appointed receiver and the property placed in his possession, and from this order the defendant, Logan, appeals.

The matter of the appointment of a receiver to take charge of property in litigation pending the suit is regulated by statute. A receiver may be appointed before judgment on the application of either party when he establishes *an apparent right to property* which is the subject of the action, and which is in possession of an adverse party, and the *property or its rents and profits are in danger of being lost or materially injured or impaired*, except in cases where judgment upon

failure to answer may be had on application to the court. C. C. P., § 218.

It will be seen that the order appointing a receiver upon the facts of this case, is not within the contemplation of this section of the code, nor warranted by it.

1. No such apparent right to property as the act prescribes is shown.

2. There is no allegation or proof of waste or mismanagement, from which detriment may come to the land, or injury threatened, calling for the intervention of the court and the displacement of the defendant in possession.

3. There is no suggestion of the insolvency or inability of Logan to answer out of his own estate any claim which may be established for rents or profits, or that it is in danger of being lost.

4. The pleadings do not show which of the conflicting claims to the land is of prior right—that vesting in the assignee, or that derived from the sheriff's sale, with the lien relating back to the rendition and docketing of the judgment.

It is true the plaintiffs in their complaint aver that Wilkins never had such estate or interest in the land as by law was liable to sale under execution, but as the sole object of their action is to establish a lien for the security of their debt upon the land itself in whomsoever the title may be, the issue is an immaterial one to them and does not affect the equity set up in their complaint. It is not denied in the answer of Dickinson, the only real contesting claimant, that Wilkins once had such an estate as was liable to execution, but he insists it had been before divested and transferred to himself as his assignee in bankruptcy.

These controversies are not before us, and we refer to them only to show the present condition of the case as not authorizing the summary order displacing one of the claim-

ants and putting the other in possession of the premises. There is error in the ruling of the court.

Error. Reversed.

MARK P. JONES and NANNIE JONES v. J. WILLIAMS THORNE and others.

Practice—Vexatious Litigation—Right of Appeal.

1. A party ought not to be harassed by successive motions for an order made in the progress of a cause, when the motion, after full investigation has once been refused, unless upon facts thereafter transpiring, which make an essentially new and different case.
2. The granting or refusing an order for an injunction or for the appointment of a receiver, is not a mere matter of discretion in the judge, and either party dissatisfied with his ruling may have it reviewed.

(*Bank* v. *Jenkins*, 64 N. C., 719, cited and approved.)

MOTION by plaintiffs for the appointment of a Receiver, heard at Chambers in Tarboro, on the 25th day of October, 1878, before *Seymour J.*

The action in which this motion was made was brought to recover a tract of land in Warren county. The plaintiffs alleged that on the 10th of August, 1869, the defendant, Thorne, bought the land of one Albert Johnson, and to secure a balance of the purchase money executed notes and a deed in trust to Johnson, who thereafter assigned the same to J. M. Heck; that Thorne made default and Heck, after advertisement, sold the land in pursuance of a power contained in the deed, when the feme plaintiff became the purchaser at $11,000, which she paid to Heck, who thereupon made her a deed; that Thorne agreed to pay $20,900 for the land, and

the cash payment reduced the debt secured by the deed to $15,900.

The defendant alleged, among other things, that Johnson assigned several of said notes to Heck, and retained the balance, upon which he had made various payments, and that if all just credits were allowed he believes the amount now due would not exceed $4,000, and asks for a settlement of accounts between the parties in order to an ascertainment of the balance due.

His Honor granted the motion upon the affidavits which are substantially set out in the opinion of this court, and the defendants appealed.

Messrs. Merrimon, Fuller & Ashe, for plaintiffs.

Messrs. Reade, Busbee & Busbee and *Batchelor,* for defendants.

SMITH, C. J. This action was commenced on the 9th of May, 1878, and the complaint, with its accompanying exhibits, the mortgage deed, the assignment to Heck, and the latter's deed to the feme plaintiff, was verified on the 9th of June following; and on the 19th of this month, after notice, application was made before *Cox, J.,* at chambers, for an injunction and the appointment of a receiver to take charge of the land in dispute; and in support of the application, in addition to the complaint, the plaintiff, Mark P. Jones, filed an affidavit in which he alleges:—

1. That the defendants are insolvent, and if the rents and profits are received by them they will be lost to the plaintiffs.

2. That there was a crop of wheat growing on the land, almost fit to be harvested, and fruit trees with fruit nearly ripe for gathering.

3. That a steam saw mill was in operation on the prem-

ises, near to an uninsured cotton gin and granary, exposing them to peril.

4. That defendants, or some of them, were cutting down the trees on the land and sawing them into lumber for sale.

5. That defendants had no title.

To this the principal defendant, Thorne, put in a counter affidavit denying some of the charges and explaining others.

On the hearing, the court declared "that the legal title not being in the plaintiffs, or at all events, it is a controversy concerning land, the motion is refused." And upon appeal the judgment was affirmed, READE J., delivering the opinion, as follows: "Without intending to intimate an opinion upon the final rights of the parties, *we fully concur with His Honor, that the complaint and answer present no case for an injunction or a receiver.*"

Notice was again given by the plaintiffs of a similar application to be made to the judge of the district on the 25th of October, at Tarboro. On this second hearing many additional affidavits were read to show the insolvency of the defendants and the waste committed in felling trees for the saw mill, and counter-affidavits in explanation and denial. The motion rests substantially upon the same grounds and is supported by the same facts, though upon further and fuller evidence, as the motion made and refused. The judge granted the motion and appointed a receiver to collect the rents and profits, and in order thereto, as we understand, to take possession of the land itself. From this interlocutory order the defendants appeal.

The facts are essentially the same now as those presented on the former appeal, when this court held that a receiver ought not to be appointed, and the same considerations that brought us to that conclusion then, must govern and control our decision of the same question now. That is more than a precedent and authority; it is a determination of the very point presented again. Precisely the same motion

has been made and denied upon the ground of a want of title in the plaintiffs, or of an existing controversy in reference thereto, and this court has affirmed the ruling and declared its full concurrence therein; and no reason is assigned for reversing that judgment, and no error in rendering it has been pointed out. The matter has thus passed into and become *res adjudicata.* A party ought not to be harassed by successive motions for an order made in the progress of a cause, when the object of the motion, after full investigation, has been refused, unless upon facts thereafter transpiring which make essentially a new and different case. *Nemo pro una et eadem causa, bis vexare debet.*

The doctrine is thus stated by Mr. High: "It is proper on denying a motion for a receiver to give leave to the moving party to renew his motion upon additional proof, if it appear that he may by obtaining new proof present a strong case for the relief sought. And it is competent for the plaintiff to ask and for the court to appoint a receiver after a hearing, and even a rehearing, and refusal, when an altered state of facts is presented, showing an appropriate case for relief." High on Receivers, § 91. The granting or refusing an order for an injunction or for the appointment of a receiver is not a mere matter of discretion in the judge, and either party dissatisfied with his ruling may have it reviewed. The court in this case has assumed and exercised jurisdiction to pass upon the refusal to appoint a receiver; and the *Bank* v. *Jenkins*, 64 N. C., 719, is an authority in case an injunction is refused.

We are therefore of opinion that the order appointing a receiver is erroneous, not only because it is repugnant to a previous adjudication, but for the further reason that the grounds of that adjudication remain unchanged and in undimished force. We express no opinion upon the question of title or the legal sufficiency of the assignment of Johnson to authorize the sale and conveyance under which the plain-

tiffs claim. These are not properly before us in the appeal upon this collateral matter, and will be decided only when directly presented. There is error, and the interlocutory order must be reversed.

Error. Reversed.

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*CHARLES H. WILLIAMS v. PAUL GREEN and others.

Practice—Executions Against Personal Representatives.

A docketed judgment, rendered against an administrator in his representative capacity, where administration was granted before July 1st, 1869, creates no lien upon his land. To have that effect, the plaintiff must issue execution *de bonis testatoris*, and, upon the return of *nulla bona* thereto, give notice to the defendant to show cause why execution *be bonis propriis* should not be awarded.

(*McDowell* v. *Asbury*, 66 N. C., 444, cited and approved.)

APPLICATION of the Sheriff for advice and direction in the distribution of certain moneys in his hands by virtue of sundry executions, heard at Fall Term, 1878, of PERSON Superior Court; before *Kerr, J.*

The facts are sufficiently stated by Mr. Justice ASHE in delivering the opinion. See *Williams* v. *Williams*, 79 N. C., 411.

Messrs. Merrimon, Fuller & Ashe, for plaintiff.
Messrs. Graham and *Ruffin*, for defendants.

ASHE, J. The sheriff of Person county having several executions in his hands in favor of different plaintiffs, issued

*Smith, C. J., having been of counsel, did not sit on the hearing of this case.

upon judgments docketed at different times, and having money in his possession raised by sale of the land of one Alexander Williams, a defendant in the several executions, was at a loss how to apply the fund so raised, and prayed the court for instructions in that particular.

His Honor directed him to apply the money according to the priority of the dates of docketing the several judgments upon which they were respectively issued, except as to that of Charles H. Williams; and as to that, he held and so advised, directed and ordered, that his lien began on the first Monday of June, 1878, the date of the teste of the execution, from which ruling the plaintiff appealed to this court.

By reference to the record of the case in which the judgment in favor of the plaintiff rendered in this court at June term, 1878, (*Williams* v. *Williams*, 79 N. C., 411,) and on which the execution was issued, the letters of administration on the estate of Haywood Williams, were granted to Alexander Williams and Green Williams, prior to the 1st of July, 1869; in which case, the estate was to be administered, closed up and settled according to the law as it existed just prior to that date. Acts 1871–'72, chap. 213, § 29. A judgment rendered against an administrator in his representative character previous to that time, created no lien upon his land. And before that could be effected, the plaintiff had to issue his execution upon the judgment to be levied on the goods and chattels of the intestate, which had come to his hands to be administered, and upon the return of *nulla bona*, on motion, give notice to the defendant to show cause why execution should not be issued *de bonis propriis*. *McDowell* v. *Asbury*, 66 N. C., 444.

The 96th section of chapter 45 of Battle's Revisal has no application to judgments rendered against administrators appointed before July 1st, 1869. It has reference only to administrations granted since that date.

It not appearing that the plaintiff has, in his case, taken

the steps to subject the individual property of Alexander Williams to his judgment, it has no lien upon his land, and he by virtue of his execution has no interest in the fund in the hands of the sheriff.

We think the judge below was correct in his conclusions, and there was no error in his directions as to the application of the fund.

No error. Affirmed.

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*JOSEPH H. ETHERIDGE and others v. MILFORD VERNOY.

Practice—Judicial Sale—Purchaser.

A purchaser at a judicial sale, knowing of an adverse claim to the property, the strength of which he cannot determine until the same has been judicially ascertained, may buy in the rival claim and deduct for it, or, if the money has been paid into court, demand the return of a proportional part of it.

(*Ex Parte Yates*, 6 Jones Eq., 212, cited and approved.)

PETITION in the Cause filed by a purchaser for relief against a defective title to land, heard at January Term, 1879, of THE SUPREME COURT.

This was an action brought to foreclose a mortgage, and on appeal to this court, the balance due of the debt secured, was ascertained and a decree pronounced in this court to sell the lands incumbered for its payment. [See same case, 70—713; 71—184; 74—800.]

The sale was made and reported to court, and upon an advance bid of ten per cent put in, a resale was ordered, when D. M. Carter became the purchaser of the tract in

*Smith, C. J., did not sit on the hearing of this case.

Bertie county at $5,200, and on report of that sale to court, the same was accepted and duly confirmed by a decretal order in the cause.

Pending these proceedings, D. M. Carter transferred his bid to Dennis Simmons, who paid in the cash installment and gave bond for the deferred payments, and at maturity paid them fully, and thereupon the said tract of land was conveyed to him, and he sold and conveyed the same to E. R. Outlaw.

While the money, paid into the clerk's office of this court, was still in the hands of the clerk, an adverse claim having been made to a part of the land sold and confirmed as aforesaid to D. M. Carter, under a mortgage executed by the defendant to secure a debt to Todd, Schenck & Co., by agreement entered on the records of this court at June term, 1876, the sum of $500, part of the purchase money paid in by Dennis Simmons was retained to indemnify said Simmons against the threatened defect of title to a part of the lands he had paid for; and now at this term of the court, Simmons, by petition in the cause, showeth that Todd, Schenck & Co. made recovery on their said adverse claim for one hundred and twenty-four acres of said tract, as reported in *Todd* v. *Outlaw*, 79 N. C., 235; that he had bought and paid $500 for their title in order to perfect the title he had made to Outlaw, and asks that the $500 retained for his indemnity may be adjudged to be paid over to him by the clerk, by way of abatement for the defect of title in that part of the tract recovered by Todd, Schenck & Co.

The prayer of the petitioner, Dennis Simmons, is resisted on the ground that D. M. Carter under whom he claims, knew of the adverse claim before the sale was confirmed, and the order of confirmation being made with his sanction and assent, it is objected that he and those claiming under him are estopped to ask any abatement from the money paid into the clerk's office.

No counsel for plaintiffs.

Messrs. Gilliam & Gatling and *Batchelor*, for defendant.

DILLARD, J. (After stating the case.) We do not concur in the objection. A sale confirmed is a bargain complete between the purchaser and the parties to the suit whose title has been sold; and the same is enforceable in specie through orders in the cause in the same manner and to the same extent as a vendee under articles and the vendor may enforce specific performance against each other. Rorer on Jud. Sales, § 124; *Ex Parte Yates*, 6 Jones' Eq., 212. As between private persons, if the title be deficient in a material and substantial part of the land, the vendee may insist on rescission of the contract, or elect to take the title as far as it can be made with a proportionate abatement of the purchase money. Just so in the case of a purchaser at judicial sale; he may ask to be discharged or to have abatement in the price, or, if the money is still within the control of the court, a return of a part thereof, after confirmation of the sale; for he is in no position to make such questions until confirmation is had.

But it is urged that Carter knew of the adverse claim of Todd, Schenck & Co. before confirmation, and that with that knowledge he had the sale confirmed. Therefore it is said, he and those claiming under him are not to be heard to stir the question of abatement or reimbursement. If a private purchaser, knowing of an adverse claim the strength of which he cannot know until judicially litigated, shall come to know the extent of the defect by decision of a competent court before he parts with his money, may he not buy in the rival claim and deduct for it, or insist on an abatement from the price? Certainly he could. And equally certain it is, that a purchaser under decree of court may in such case ask abatement, or, if he has paid in the money, ask a return of a proportional part of it.

We conclude therefore that Dennis Simmons, assignee of D. M. Carter, has the right to have repaid to him the sum of money retained to await the decision of the suit of *Todd* v. *Outlaw, supra,* it being admitted in the argument before us that the plaintiffs prevailed in that suit to the extent of one hundred and twenty-five acres of the land, and that the $500 is not more than the value of the land in proportion to the whole tract. A decree may be drawn in conformity to this opinion.

PER CURIAM. Decree accordingly

RUFUS EDNEY, Adm'r., v. THOMAS A. EDNEY and others.

Practice—Judicial Sale.

One who, as commissioner of the court, sells the real estate of a decedent for assets, is understood to offer an absolute and indefeasible title; and the purchaser will not be compelled to pay his money and take a title substantially defective, unless the sale be made of an estate or interest short of the entire title, and so mentioned in the decree, or clearly implied from the nature of the sale.

(*Ex Parte Yates*, 6 Jones Eq., 306; *Shields* v. *Allen*, 77 N. C., 375, cited and approved.)

PETITION filed before the clerk and tried, upon issues joined, at Fall Term, 1878, of HENDERSON Superior Court, before *Avery, J.*

This was a petition filed by Rufus Edney, administrator of B. M. Edney, for a license to sell the real estate of his intestate, including a tract called the "Myers farm," and was begun by summons returnable in the office of the clerk of the superior court of Henderson county, and after all the heirs at law of the intestate were regularly made parties

and issues of fact joined in the pleadings, the cause was transferred to the docket of the superior court for trial of the issues at term.

At fall term, 1871, of the superior court of Henderson, by consent of all parties, it was referred to R. B. Vance to state and report to court an account of the administration of the estate by the plaintiff, and the account was taken and reported to court as ordered. It appearing from the said account that there was a necessity to sell the real estate of the intestate, it was decreed at fall term, 1875, that the plaintiff have license to sell the same, and amongst the sales made he reported to the court a sale of the Myers farm in four parcels—two to W. G. Rice at $1,920, and two to O. H. Moss at $1,375, of which sums twenty per cent. was paid down in money on the day of sale, and the residue secured by the bonds of the purchasers respectively, with good surety, payable at twelve months, and on report of sales filed, an order of confirmation was regularly made by consent of all parties.

At the maturity of the bonds given by W. G. Rice and O. H. Moss, as above set forth, the plaintiff, as commissioner, put the same in a course of collection by instituting actions thereon, and after the pleadings were filed and issues joined by consent of parties the two actions were incorporated into the cause in which the license to sell was obtained, upon the agreement that they were to be taken and treated as motions in that cause, and the result of the motion in one to be accepted as the result in the other. On the hearing of the motion, the purchasers resisted judgment against them on the ground of a defect of title in the heirs of B. M. Edney, and on the further ground of false representations by the plaintiff as to the quantity of interest in the Myers farm owned by his intestate, made at the time of the sale, and inducing them to become bidders.

It was admitted at the hearing of the motion that B.

M. Edney, the intestate, owned at his death only one-fifteenth of the land in question, in fee, three out of five life estates therein, and there being a conflict of evidence touching the alleged false representations made by the plaintiff at the time of the sale, His Honor made and submitted certain issues to a jury as to that matter, who found that the plaintiff represented at the sale that his intestate owned, and he was then selling two undivided thirds of the Myers farm; and on this response of the jury His Honor adjudged that the order of confirmation theretofore made be vacated, and the sales to Rice and Moss be set aside and the bonds sued on be cancelled and returned to the purchasers. He further adjudged that plaintiff pay back to said Rice and Moss the amounts paid by them as a cash payment on the day of sale, with interest thereon, and from this judgment the appeal is taken.

Mr. J. H. Merrimon, for plaintiff.
Mr. M. E. Carter, for defendants.

DILLARD, J. (After stating the case.) We concur in the judgment of His Honor. In sales under a decree of the court, a sale made by a commissioner appointed for that purpose ascertains a proposer merely on the terms specified in the decree, and on compliance with the terms of sale he acquires the right to be reported to court on his proposal, and when the report is made and a confirmation is adjudged by the court the bargain is struck and each party then occupies the status, to be entitled to have a specific execution of the contract as against the other, that is to say, the vendors, or holders of the title, making the sale through the agency of the court, by the order of confirmation have the right to call on the purchasers to pay the money and take the title, and the purchaser has the reciprocal right to call on the vendors to accept the money and execute title to him. *Ex-*

parte Yates, 6 Jones Eq., 306; Rorer on Judicial Sales, 60, §§ 152, 1853.

On confirmation of the sale the orderly proceeding in equity was a rule on the purchaser to show cause against specific performance of the contract, and under our present system it is a motion in the cause for judgment on the bonds for the purchase money. Under either system the purchaser is thus brought in and connected with the cause and has an opportunity to show cause, if any he have, against an order for specific performance under the equity system, or against the rendition of judgment on his bond for the purchase money under our North Carolina system. In accordance with this practice, the two suits irregularly brought against W. G. Rice and O. H. Moss, after being put at issue, were by consent to be treated as motions in the cause still pending, in which the decree for the sale of the lands had been made. The purchasers being thus for the first time brought into court, and having opportunity to show cause against the confirmation of the sale and its specific enforcement, had the liberty to defeat the motions for judgment by any matter or facts which on a regular bill in equity would induce a chancellor, in the exercise of a legal discretion, to decline to decree specific performance against a vendee. Being brought into court in defence of the motion for judgment, the purchasers were found by the jury, on an issue submitted to them, to have purchased the Myers farm upon the representation by the plaintiff, the administrator of B. M. Edney, and the instrument of the court, that his intestate was the owner of two undivided thirds of that farm. This fact, with the admission before the judge that the intestate in truth and reality owned but one-fifteenth in fee, and three shares out of five for life in the land, constituted the cause shown against the rendition of judgment. And the question is, how ought His Honor to have held on these facts?

A court of equity will not enforce specific performance of a contract where mutuality of performance can not be had. Adams' Eq., 80. And here, whilst the purchasers are proceeded against as able to pay for two-thirds of the Myers farm, it is admitted that the heirs of B. M. Edney own only one-fifteenth, in fee, and three shares out of five for life, and therefore they cannot be compelled to perform on their part. Again, specific performance will not be decreed if there has been wilful misrepresentations by a party interested and conducting the sale, reasonably relied on by the purchaser and constituting a material inducement to the contract. Adams' Eq., 117; Rorer on Jud'l Sales, § 421. And here we have a false representation made by the plaintiff who, from his access to the papers of his intestate, may be taken to know the extent of his title, and who, therefore, may be reasonably relied on by the purchaser when he represents the quantity of interest to be two-thirds, and, under this state of things, it would be against good conscience to hold the purchaser to pay for the land.

Besides these grounds influencing the discretion of a chancellor against a decree for the specific performance of the contract, it is settled in this state, that in judicial sales, a good title is to be deemed as offered, and the purchaser will not be compelled to pay his money and take a title substantially defective, unless the sale be made of an estate or interest short of the entire title, and so expressly mentioned on the face of a decree, or clearly implied from the nature of the sale. *Shields* v. *Allen*, 77 N. C., 375. To this rule we fully assent as material to establish a confidence in sales made by authority of the court, and as conducing to beget fair competition of bidders. And we agree that the doctrine of *caveat emptor* should not apply to such sales, unless there be something on the face of the decree indicating a sale of some estate or interest defective, or less than a whole title, and thereby putting the purchaser on his guard and at his

own risk. Tested by these principles, in this case it will appear that in the petition and decree a description is given of the land to be sold in language broad enough to impress the purchasers if they were notified thereof, that the sale was of the whole title and not a fragment, and thereby they would be drawn in to bid upon the confidence that a court of equity would not take their money unless the thing bought could be effectually conveyed.

We conclude therefore that upon the general doctrines of a court of equity above enunciated and upon the authority of the case of *Shields* v. *Allen*, the purchasers should have been released from their contract and put *in statu quo* as was decreed by His Honor, and that the lands should be sold again on terms indicating the situation and extent of the title proposed to be sold.

There is no error. Judgment of the court below affirmed. Let this opinion be certified that such further proceedings may be had in this case as the parties may be advised.

No error. Affirmed.

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*GRIFFIN PRITCHARD v. JOHN O. ASKEW.

Practice—Judicial Sale—Re-sale of Land.

On a motion by plaintiff to set aside a sale of land, sold under decree of this court, where it appeared that the sale was advertised for January 4th, and afterwards changed to the 6th, and that plaintiff (the owner of the land and against whom the decree of sale was made) had arranged with one H to attend and buy the land and allow him to have it on re-imbursing him, and that both H and plaintiff had been pre-

*Smith, C. J., having been of counsel, did not sit on the hearing of this case.

vented from attending the sale on account of the inclemency of the weather, and it also appeared that plaintiff had advanced the bid at which the land was sold ten per cent. and secured the payment of the same; *It was held*, that the sale should be set aside, the proceedings thereunder cancelled, and a re-sale had, opening the biddings at the advanced bid of plaintiff.

(*Wood* v. *Parker*, 63 N. C., 379; *Ex parte Bost*, 3 Jones Eq., 482; *Ashbee* v. *Cowell*, Busb. Eq., 158, cited and approved.)

MOTION by plaintiff to open biddings and resell land, heard at January Term, 1879, of THE SUPREME COURT.

Mr. J. B. Batchelor, for plaintiff.
Messrs. Gilliam & Gatling, for defendant.

DILLARD, J. At the June term, 1878, of this court, it was decreed that $2,573.84, with interest from the 3rd day of June, 1878, on $2,000 part thereof, was due and owing by plaintiff to the defendant John O. Askew, executor of Wm. J. Perry, for a balance of purchase money for the tract of land in the bill mentioned, and it was adjudged in said decree that the said land be sold at public auction for cash on the 1st of November next thereafter at Winton, by Wm. H. Bagley, appointed a commissioner for that purpose, after advertising the time and place of sale according to law, unless on or before said day the plaintiff or some one for him should pay to the commissioner, or to John O. Askew, the principal and interest aforesaid, together with the costs of the action, and said commissioner was directed to report to the present term of this court.

In pursuance of said decretal order, the commissioner reports that he exposed the said land to sale at public auction as commanded, on the 6th of January, 1879, when Wm. P. Shaw and J. O. Askew, administrators of said John O. Askew, became the purchasers at the price of $2,815, for which sum they deposited with him their release for the

sum of $2,573.84 in full of amount adjudged against the plaintiff for purchase money, and paid to him in cash the sum of $170.16, making the amount of their bid, to-wit: $2,815, and said commissioner recommends a confirmation of the sale.

At this term of the court the plaintiff moves to be allowed to put in an advance bid of ten per cent. upon the price at which the purchasers bought the land, and offers to secure the same with his bond and approved security, and in case the biddings are opened by this court, he agrees at the resale to start the biddings at the advance now offered, and at the same time, the said purchasers oppose the motion to open the biddings and move on their part for a confirmation of the sale which has been had.

The parties support their respective motions by affidavits, and it now becomes our duty to consider the matter submitted to our decision, and thereon to decide, as we may be authorized in view of justice to the parties interested, and in accordance with the rules observed in our courts in the case of judicial sales.

In sales of the character of the one under consideration, the bidder is never considered a purchaser until the sale is reported and confirmed. He is to be taken as becoming the best bidder, subject to the understanding in all cases that the court may confirm the sale or set it aside and order a resale, as in the exercise of a sound discretion it may determine to be right and proper. *Wood* v. *Parker*, 63 N. C., 379; *Ex parte Bost*, 3 Jones Eq., 482; *Ashbee* v. *Cowell*, Busb. Eq., 158.

The court has the power to set aside sales made in pursuance of its authority, either for the owner, or at the instance of the purchaser, but as a matter of policy it is slow to do so and is careful not to open the biddings unless there be some special circumstances, such as unfairness in the conduct of the sale, want of proper notice of the time and

place of sale, fraud in the purchaser, and palpable inadequacy of price, and similar grounds. Rorer on Judicial Sales, ch. 10, § 394 to 441.

In this case it appears that the sale was advertised for the 4th of January, and afterwards changed to the 6th, and that plaintiff had arranged with Mr. Hinton to attend and buy the land, and allow him to have it on reimbursing him, but the inclemency of the weather was very great, and so much ice in the roads and streams as to prevent the attendance of said Hinton and disable the plaintiff to reach the place of sale although he endeavored to do so. From the facts and circumstances we think it may fairly be presumed that the sale came off without a fair attendance of bidders, and certainly without the presence of Hinton in person, or the plaintiff as his agent, who was prepared to give, and is yet willing to give ten per cent. advance, and perhaps more, on the bid of the purchasers that day, and hath secured the payment in case a resale is ordered.

We recognize it as good policy in the courts to maintain judicial sales, and to that end, not to open the biddings unless for some cause palpably sufficient; but in this case, the purchaser ought to be content to get the debt he represents and to allow the plaintiff the benefit of any excess the land may bring at another sale more favorable to a better competition of bidders. Justice should not be sacrificed to policy.

There is no intimation of anything unfair at the sale by the purchaser or any other person, but the plaintiff had the purpose to be present with a friend, and to buy in the property at a sum in excess of that at which the property was struck off. And he attempted to be present and failed without default imputable to him, and it being reasonably to be inferred from the extreme severety of the weather that others were thereby hindered from attending the sale, it is ordered that the sale reported to this term be set aside, and the release of the judgment executed by the purchaser and

the money paid in by him be returned, and that the clerk do resell the land on the terms prescribed in the original decree, opening the biddings at the advance bid of the plaintiff, and that he report to the next term of this court.

PER CURIAM. Resale ordered.

P. T. CAPEL and others v. JOHN T. PEEBLES and others.

Practice—Appeal—Purchase at Judicial Sale.

1. No appeal lies to this court from the refusal of the court below to order the cancellation of a bond given by the purchaser of land sold under decree of court, and to dismiss the proceedings in the cause on account of alleged defects in the pleadings and parties which would prevent the purchaser from obtaining a perfect title, such refusal being based on the ground that the papers in the cause were not in a condition to make such order, and that all parties in interest were not before the court.
2. In such case the refusal of the court below to dismiss the proceedings and order a cancellation of the bond without giving reasonable time to perfect the pleadings and bring in necessary parties, was not an error of which the purchaser can justly complain under C. C. P., § 297.

(*Maxwell* v. *Caldwell*, 72 N. C., 450; *Childs* v. *Martin*, 68 N. C., 307; *Ex parte Yates*, 6 Jones Eq., 306; *Chambers* v. *Penland*, 78 N. C., 53, cited and approved.)

CIVIL ACTION, heard, on motion of the parties, at Spring Term, 1878, of NORTHAMPTON Superior Court, before *Seymour, J.*

On a sale of land on the 3rd of June, 1861, by a clerk and master of the court of equity of Northampton county on an *ex parte* petition, the defendant, John T. Peebles, becoming the purchaser at $112 gave bond to secure the same with defendant Isaac Peele as his surety, and on motion in the

cause in the superior court at fall term, 1874, judgment was entered on said bond for the purchase money.

At spring term, 1875, the defendants moved to set aside the judgment on the ground of excusable neglect, and it was done; and at the same term a written answer was filed, showing for cause against the motion for judgment, that the bond was given on a sale of land made by the clerk and master, made as they supposed under a valid authority; but they claim that the sale was made under a decree entered on the records of the court at spring term, 1861, without any petition then, or at any time since, on which the decree of sale was based; and for further cause, they say that the wife of P. T. Capel has died, leaving several minor children who are interested, and are not made parties. The defendants say that a good title cannot be made to them, and they pray that the record may be amended so as to show that no petition was ever filed, and that their bond be cancelled and surrenderd to them.

In opposition to the cause, shown by defendants, the plaintiffs filed a written reply, wherein they deny that the decree of sale was unaccompanied by a petition for that purpose, and offer to supply the place of the missing petition by filing another *nunc pro tunc*, or do whatever might be material in that behalf; and at the same time they filed a petition, *nunc pro tunc*, praying a sale of the land, intended to be in lieu of the one originally filed.

The motions of the parties, that of the plaintiffs for judgment on the bond, and that of the defendants for the dismission of the proceedings and cancellation and surrender of their bond, were continued from term to term until spring term, 1878, when the same were heard before *Seymour, J.*

At the hearing of the motions His Honor gave no judgment for either of the parties. He refused to dismiss the proceedings and order a cancellation and surrender of the bond to defendants; and he refused, on plaintiffs' motion,

to enter judgment against defendants for the purchase money, on the ground that the papers in the cause were not in condition to make such an order, with a suggestion that all parties in interest were not before the court in the original cause. The defendants appealed from the judgment refusing the relief demanded by them.

Mr. W. C. Bowen, for plaintiffs.
Mr. R. B. Peebles, for defendants.

DILLARD, J. (After stating the case.) One question for our consideration is—could any appeal be properly taken from the refusal to give the judgment prayed for? An appeal lies only "from an order or determination of a judge upon or involving a matter of law or legal inference, which affects a substantial right claimed in any action or proceeding, or which in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action, or grants or refuses a new trial." C. C. P., § 299. There was here no order or determination at all. The defendants had no right to be discharged from payment of the purchase money, except in case of inability of the petitioners to make a good title, and they had no right to have the court to act on their motion, until the parties in interest were all before the court, and the refusal to give the judgment prayed for in legal effect left the case to stand in the same condition in which it was before the motions were heard, and no more affected any right of the defendants than a mere continuance of the cause against their will would have done. In this case, therefore, we think upon the words of the Code and the decisions of this court in construction thereof, there was no right of appeal to the defendants, and their appeal should be dismissed. *Maxwell* v. *Caldwell*, 72 N. C., 450; *Childs* v. *Martin*, 68 N. C., 307.

But let us consider the case as applicable within section

297 of the Code, as it has been argued before us in that aspect, and then the question is, was the refusal of the judge to dismiss the proceedings and order the bond of the purchaser to be surrendered an error in law of which the purchaser, John T. Peebles, had just cause of complaint?

We learn from the written defence of the purchaser, filed in court in 1875, to the motion for judgment on his bond, that he purchased in 1861, at clerk and master's sale, under the authority of a decree on the records of the court; that the sale was reported and confirmed by another decree; that nothing further was done until about 1873, when a decree in the cause was entered in the superior court before *Albertson, J.*, confirming the sale again, and ordering collection, and title on the payment of the money. The purchaser says, in his said written defence, that he took possession and kept it for several years, and when the name of P. T. Capel, husband of one of the parties interested, for the first time appeared in the record, and he learned his wife was dead, leaving minor children not made parties, and heard that no petition ever was filed, he took the advice of counsel, and being advised no title could be made, he abandoned the possession.

The court had possession of the purchaser's bond, and the order of confirmation of sale was in legal effect a contract complete, and put the petitioners and the purchaser reciprocally in the position each to have the right to demand specific performance of the other, and to enforce it by orders in the cause. *Ex Parte Yates*, 6 Jones' Eq., 306. This being so, the motion for judgment and the defence against it, with the written allegations of each side in support of their positions, may be regarded as the rule of the petitioners for specific performance on the one side, and the rule of the purchaser for discharge from his contract and surrender of his bond on the other side; and so viewing the controversy, His Honor, in the light of these respective averments in

connection with the record of the *ex parte* petition to sell the land, did nothing of which either party can complain as erroneous. The petitioners cannot complain that he denied them judgment as matters then stood, there being parties in interest not connected with the cause, and all they could ask was to have action on the motions delayed with opportunity to perfect the pending action so that a good title would pass to the purchaser. And the purchaser having purchased and had possession for a number of years ought in conscience to be willing to pay the money and let judgment go against him therefor, if assured of a perfect title. The refusal of the judge to give the judgment discharging him at once without reasonable time to the petitioners to perfect the papers and bring in necessary parties, was in accordance with the ordinary course of proceedings in courts of equity.

It has been decided in this court that a purchaser complaining of a defect in the proceedings under which he became purchaser, or of a defect of parties, may through the court call upon those before the court to bring in the omitted parties, and the whole of them, to confirm or repudiate the sale; and he should do so before asking to have the contract annulled and himself freed from its obligation. *Chambers* v. *Penland*, 78 N. C., 53. His Honor's action on the respective motions of the parties was in exact conformity to the ruling in the cited case and was legally correct. The defendants have no right to complain. Appeal dismissed. Let this be certified, &c.

PER CURIAM. Appeal dismissed.

A. H. BOYDEN, Ex'r., v. JOSEPH WILLIAMS.

Practice—Vacating Judgment.

Where a defendant withdraws a counter-claim to an action and refers it to arbitration, leaving judgment to go against him in the action, he cannot afterwards have the judgment set aside under C. C. P., § 133, on the ground that the plaintiff is fraudulently obstructing the execution of the reference and does not intend to carry it into effect.

MOTION to set aside a judgment under C. C. P., § 133, heard at Chambers in Charlotte, on the 12th of October, 1878, before *Schenck, J.*

The opinion contains the facts. His Honor refused the motion and the defendant appealed.

Messrs. J. S. Henderson and *W. J. Montgomery*, for plaintiff.
Messrs. J. M. Clement and *J. M. McCorkle*, for defendant.

SMITH, C. J. This is a motion made and refused to set aside a judgment rendered at spring term, 1878, of Cabarrus superior court under C. C. P., § 133.

No statement of facts accompanies the record, and unless the matter set out in the defendant's affidavit and on which his application rests, taken as true, discloses a case entitling him to relief, we should be compelled to remand the cause in order that the facts deducible from the evidence might be determined, the law arising on which is alone subject to review in this court. Our attention will therefore be directed to the defendant's own statement of the ground of his application.

It appears from the affidavit that in the action pending between the parties, the defendant, Williams, set up a counter-claim and the controversy was confined to that defence. It was then agreed that judgment be rendered for

the amount of the plaintiff's demand and the counter-claim withdrawn, and, with certain admissions relating to it, submitted to arbitrators to be selected by the parties, to determine its validity as an obligation binding the testator's estate; and that whatever sum should be allowed should be applied in payment of a debt due defendant from his co-defendant and in exoneration of the former as surety for the latter, principal in certain outstanding notes.

Judgment was entered with full knowledge and consent of the defendant and in conformity to the agreement. The affidavit charges fraudulent conduct on the part of the plaintiff in obstructing the execution of the reference, and avers a belief that he does not intend to carry it into effect, and for these reasons the court is asked to set aside the judgment.

The Code of Civil Procedure, § 133, declares that "the judge may also in his discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him, though *his* mistake, inadvertence, surprise, or excusable neglect." See the numerous cases on the construction of the act in Tourgee's edition of the Code, with notes.

The defendant's allegations do not bring his case within the meaning and scope of the enactment. The judgment was not taken "through any mistake, inadvertence, surprise, or excusable neglect of his." It was entered up as he intended and agreed it should be done, and with his full knowledge and approbation. The subsequent alleged fraudulent conduct of the plaintiff may, and if true, does entitle him to a remedy, but not to the relief he is now seeking. We therefore sustain the ruling of the court in denying the motion upon the defendant's own showing, and affirm the judgment.

No error. Affirmed.

*R. W. GLENN and others v. THE FARMER'S BANK.

Practice—Laches.

In pursuance of a decree to distribute the assets of an insolvent bank, advertisement was made for creditors to prove their claims by a certain day, on pain of being thereafter barred; *Held* that a creditor who had no information of the advertisement, and who was not guilty of *laches* in presenting his claim, was entitled to prove after the day named.

(*Green* v. *N. C. R. R. Co.*, 73 N. C., 524; *Wordsworth* v. *Davis*, 75 N. C., 159, cited and approved.)

PETITION in the cause, heard at Fall Term, 1878, of GUILFORD Superior Court, before *Kerr, J.*

This is a creditor's suit which seeks to have the property of the defendant, The Farmer's bank, applied to its debts, and to have its stockholders assessed according to their respective liabilities under the charter, as such, to meet the deficiency. It has been twice before the court, and is reported in 70 N. C., 191, and 72 N. C., 626.

In the progress of the cause, and in order to ascertain the names of the creditors and the amount of the indebtedness of the bank, the court at spring term, 1876, appointed two commissioners to take proof of the debts, with authority to limit the time within which such proof could be made. The commissioners accordingly advertised in the *Greensboro Patriot* for more than six weeks for the creditors of the bank to come in and prove their claims at a certain place in Greensboro on or before the 6th of August, 1876, or they would be debarred from participating in the distribution of the fund. The report of the commissioners was made to spring term, 1877, and confirmed; and it was declared and adjudged by the court that all such creditors as had made the required

*Dillard, J., having been of counsel, did not sit on the hearing of this case.

proof should share in the assets of the bank, and those failing to do so be excluded therefrom.

The appellant through his counsel on the 24th of May, 1876, deposited certain bills of the bank held by him with the clerk, and caused the following memorandum to be then entered on the docket opposite the cause: "Calvin J. Cowles made party plaintiff by T. B. Keogh," of that date.

A formal and verified petition was presented to the court at December term, 1877, by the appellant praying to be allowed to become a co-plaintiff and to prove his claim alleging therein that he knew of the pending suit and "intended when opportunity offered to make himself party plaintiff, but that the advertisement, if any, escaped his attention and this too, though a constant reader of the newspapers, and on the lookout for notice of this suit."

The appellant subsequently at December term, 1878, made another similar application by a petition not verified, stating in substance the same facts, for leave to prove a larger indebtedness due him.

The applications were both refused, the latter upon the ground as stated in the judgment, that the appellant failed to "prove his claims before the expiration of the time" fixed in the published notice and "that the matter had already been adjudicated."

No apportionment has yet been made of the funds in the hands of the receiver and they are not in a condition to admit of present distribution. Motion refused and Cowles, the petitioner, appealed. (See *Bank, &c.*, v. *Creditors, ante* 9.)

Messrs. A. W. Tourgee and *J. N. Staples*, for petitioner.
Messrs. W. P. Caldwell and *T. Ruffin*, for defendants.

SMITH, C. J. (After stating the case.) The correctness of the ruling of the court by which the appellant was excluded from sharing in the assets is the only point presented for our

consideration upon the appeal. Had the appellant a right upon his statement of the facts and according to the practrice governing in such case, to be admitted among the suing creditors and afforded an opportunity to show that he had and held valid claims against the bank ?

If the appellant had no information of the advertisement limiting the time for proofs and is not chargeable with negligence in bringing forward his claims, his application should have been granted, and it was the duty of the judge to ascertain and determine these precedent facts before giving a peremptory refusal. This enquiry he does not seem to have made, and puts his decision on the simple ground of the appellant's omission to make proof within the restricted time, and that (referring as we suppose to the first petition) the matter was already adjudged.

It was objected in the argument here that the bills held by the appellant are barred by the statute of limitations, and he is not, therefore, entitled to be admitted among the creditors. The objection is not tenable for two sufficient reasons:

1. It is not apparent upon the face of the complaint, and if it was, it must be taken by answer. *Green* v. *N. C. Railroad Co.*, 73 N. C., 524.

2. The appellant only asks an *opportunity* to prove his debt, and if allowed, this or other sufficient legal defence may be set up, when the proof is offered by the other creditors or any one of them. *Wordsworth* v. *Davis*, 75 N. C., 159.

The rules prevailing in the courts of chancery applicable to cases like the present one are well established and understood.

In *Gillespie* v. *Alexander*, 3 Eng. Ch. Rep., 326, Lord ELDON thus states the practice: "Although the language of the decree, when an account of debts is directed, is that those who do not come in shall be excluded from the benefit of

that decree, yet the course is to permit a creditor, he paying the costs of the proceedings, to *prove his debt as long as there happens to be a residuary fund in court or in the hands of an executor, and to pay him out of that residue.* If a creditor does not come in till after the executor has paid away the residue, he is not without remedy though he is barred the benefit of that decree."

So in *Lashley* v. *Hogg*, 11 Ves. Ch. Rep. 601, the same eminent judge declared that "though the time" (for proving the debt) "had elapsed, yet the court will let in creditors at any time while the fund is in court."

An application on behalf of a creditor for permission to prove his debt after the money had been apportioned among the creditors, and transferred to an officer to be paid to them, was allowed by Vice Chancellor PLUMER, who remarked: "The creditor must pay the costs of this application, and the expense incident to the same in recasting the apportionment of the property amongst the creditors." *Angel* v. *Hadden*, 1 and 2, Mad. Ch. Rep., 285.

The same principle is laid down in Story Eq. Pl., § 106, and in Adams' Eq., 262, and is recognized and acted on in *Williams* v. *Gibbs*, 17 How., 239, and other cases cited in the brief of the appellant's counsel.

We think, therefore, the judge erred in summarily rejecting the application without inquiring into the facts, and if the appellant, in the language used by the court in the last mentioned case, "was not guilty of wilful laches or unreasonable neglect" he ought not to be concluded by the decree from the assertion of his right, as a creditor, to share in the common fund.

Error. Reversed.

ALANSON CAPEHART v. WILLIAM STEWART.

Practice—Challenging Jurors.

While it is a subject for just animadversion that the presiding judge requested the sheriff, in the course of making up a jury, to summons a talesman of a particular color, such a request, though acted upon by the sheriff, is not assignable for error where it does not appear that the party cast has exhausted his challenges.

(*State* v. *Arthur*, 2 Dev., 217; *State* v. *Smith*, 2 Ire., 402; *State* v. *Cockman*, 2 Winst., 95, cited and approved.)

CLAIM AND DELIVERY tried at Spring Term, 1876, of NORTHAMPTON Superior Court, before *Henry, J.*

This action was instituted by the plaintiff, a white man, against the defendant, a colored man, to recover possession of a horse. When the case was called for trial, there was a full jury of the original panel in the box, of whom one only was colored. The plaintiff's counsel challenged this juror peremptorily, remarking at the time, that he did not know his name. Thereupon the regular panel being exhausted, the judge requested the sheriff to summon from the by-standers a colored tales juror in his place, and to this the plaintiff excepted. The colored juror thus summoned and tendered was also challenged for cause by the plaintiff who failed to show his disqualification. The plaintiff's counsel then peremptorily challenged one of the white jurors, and another colored tales juror was summoned in his stead, whom the plaintiff also challenged for cause, and failed to sustain his challenge. It does not appear that the plaintiff made any other peremptory challenges. The jury being impannelled on hearing the evidence found a verdict for defendant. Judgment, appeal by plaintiff.

Mr. R. B. Peebles, for plaintiff.
Mr. W. C. Bowen, for defendant.

SMITH, C. J. (After stating the case.) The only exception apparent on the record is that taken to the remark of the judge to the sheriff requesting him to summon a colored tales juror in place of the one removed, and in our opinion it is entirely untenable.

A fair and impartial jury was obtained obnoxious to no just objection and acceptable to the plaintiff himself, since he still retained the right to strike two more jurors from the list and failed to exercise it. He has therefore no just cause of complaint.

"The right to challenge is given to prisoners," says TOOMER, J., in *State* v. *Arthur*, 2 Dev., 217, "not that a particular individual may be put on the jury, but that the prisoner may have a jury free from all objection." And in a separate opinion in the same case, HENDERSON, C. J., remarks: "The rule is not that the prisoner shall be tried by a jury of his own choice or selection, but by one against which after having exhausted his peremptory challenges he can offer no just exception."

So in *State* v. *Smith*, 2 Ire., 402, GASTON, J., says: "The right of challenge is a right *to reject*, not a right to select jurors."

To same effect is *State* v. *Cockman*, 2 Winst., 95, and *United States* v. *Merchant*, 12 Wheat, 480.

While we hold the verdict not to be vitiated by what transpired at the trial, we must express our disapprobation of unnecessary interference with the officers of the court in the discharge of their appropriate duties by suggestions such as were made in this case. The law knows no distinction among the people of the state in their civil and political rights and correspondent obligations, and none such should be recognized by those who are charged with its administration.

If an officer while executing an order of the court should act oppressively or under the influence of partiality or prej-

udice towards one of the parties to the pending suit, the judge ought at once to interpose and correct the improper conduct. But when no such improper disposition is manifest, or, as in the present case, when the officer is about to perform the required service, a suggestion conveying an apparent rebuke to counsel for making the challenge, is uncalled for and without excuse. The right to except to a limited number of jurors without assigning any cause is given by law to suitors, and for its exercise they are responsible to no one.

In like manner the selection from the by-standers of competent tales jurors to complete the panel rests in the sound discretion of the officer who is called on to summon, and under a just sense of official responsibility.

If the judge may direct, (and a request under the circumstances is in effect tantamount to a direction) the summoning of a colored juror in place of one removed, he may with equal propriety direct the summoning of a white juror, and thus class distinctions, which the recent amendments to the constitution of the United States and our own constitution conforming thereto are intended to abolish, would be introduced in the practical operations of our judical system, and in trials by jury, its most vital and valuable part. We forbear further comment. The plaintiff has had a fair and impartial trial and must abide the verdict.

No error. Affirmed.

JAMES E. O'HARA v. W. H. POWELL and others, county canvassers.

Practice—Mandamus—Contested Election.

1. In a proceeding to compel by *mandamus* a re-assembling of a board of county canvassers and a recount of the votes cast in the county for candidates for the house of representatives, where, since the institution

of the action, the board of state canvassers has acted upon the returns transmitted to them, and issued a commission to the person elected on the face of the returns; *Held*, that judicial action in the premises would be wholly unavailing, as the matter has passed beyond the jurisdiction of the court, and the proceeding must be dismissed.

2. In such case no judicial order can change or affect the result; the only remedy open to the plaintiff is by a contest before the house of representatives.

3. If the exercise of the judicial power invoked could have been rendered and made available to secure the transmission of full and corrected returns to the board of state canvassers in time to be acted upon before its final adjournment, the plaintiff's right to the aid of the court would seem to be clear and indisputable; but on account of the delays incident to judicial proceedings, the remedy by *mandamus* is practically useless.

(*Moore* v. *Jones*, 76 N. C., 182; *Brown* v. *Turner*, 70 N. C., 93, cited and commented on.)

APPLICATION for a *Mandamus* heard at Chambers in Rocky Mount, in Edgecombe county, on the 9th of December, 1878, before *Seymour, J.*

The facts necessary to an understanding of the decision of this court are stated in its opinion. The order for *mandamus* was granted and the defendants appealed.

Messrs. George Howard and *Gilliam & Gatling* for plaintiff.

Messrs. Battle & Mordecai, D. G. Fowle and *Busbee & Busbee*, for defendants.

SMITH, C. J. At the election held in the several counties constituting the second congressional district on the 5th day of November last, the plaintiff, who was a candidate for representative therefrom in the next congress of the United States, received a large number of votes in the county of Edgecombe. Returns from the various places of voting were made to the board of county canvassers, at their meeting on the second day after the election, at which time and place they are required by law "to open and canvass the

returns and make abstracts stating the number of votes cast in each precinct for each office, the name of each person voted for, and the number of votes given to each person for each different office, and sign the same." Acts 1876–'77, ch. 275, § 25.

Section 26 directs the abstract for representatives in congress to be made on a separate and distinct sheet. Three such abstracts for representatives in congress and state officers must be prepared and signed by the board of county canvassers, of which one is delivered to the sheriff, another filed in the register's office for registration, and the third forwarded in a registered letter to the secretary of state, at Raleigh. § 27.

When the canvass is concluded the original returns are deposited with the clerk of the superior court for safe keeping, and the abstracts recorded in a book kept in the office for the purpose. He is then required to transmit duplicates of the abstracts, mentioned in section 27, to the secretary of state.

The canvassing board must proclaim the result of their canvass and comparison of the polls, when completed, at the court house door. Section 53 establishes a board of state canvassers, consisting of the governor, secretary of state, attorney general and two members of the state senate of different political parties to be appointed by the governor. This board shall open the abstracts in the office of the secretary of state "on the Thursday following the third Monday after the day of election and examine the returns if they shall have been received from all the counties; and if all are not received, they may adjourn not exceeding twenty days for the purpose of obtaining the returns from all the counties, and when these are received, *shall proceed with the canvass;* such canvass shall be conducted publicly in the hall of the house of representatives, § 55.

Sections 56, 57, 58 and 59 prescribe in detail the duties of

this board which are very similar to those imposed upon the county board as to county officers, and the abstracts prepared by them must ascertain and state what persons are elected to the respective offices.

The next section (60) is in these words: "Representatives in congress, justices of the supreme court, judges of the superior court and solicitors shall be commissioned by the governor." Such are the general provisions of the act regulating elections and defining the duties of canvassing boards, constituting the machinery by which the popular will is ascertained and made effective in the choice of public agents and representatives.

The county canvassers of Edgecombe, as the pleadings in the case show, rejected many of the precinct returns of votes made to them, for alleged irregularities and canvassed and counted the other precinct returns, only the abstracts of which were disposed of as the law directs, and by adjournment after completing their work dissolved their organization. To compel the persons composing the board of county canvassers of Edgecombe to reassemble and make a new and full recount, including the omitted votes and the required abstract therefrom, is the object of the present proceeding by mandamus, which on the hearing before the judge on the 9th day of December last, he ordered to issue against the defendants, and from whose judgment they appeal.

The state canvassing board under the law can extend their session for twenty days when necessary to procure absent county returns, and it would expire by limitation on the 17th day of the month, allowing the relator eight days only to derive any advantage from the award of the writ. It must be assumed that the state canvassers have acted upon the abstracts transmitted from the several counties to the department of state, including those from Edgecombe charged in the complaint to be partial and imperfect, and declared the

result; and that the commissions mentioned in section 60 have been issued to those who upon the count are ascertained to have been elected. It is not suggested that this board did not in every respect act legally in canvassing the returns and determining the election upon the evidence before them, or that the governor, himself a member of the body, ought not to have issued, as we must presume he did issue in obedience to the law, commissions to the persons having upon the count the highest number of votes. The case has, therefore, proceeded so far that no judicial order in this action can change or affect the result.

If returns corrected under the mandate addressed to the defendants and substituted for those now in the clerk's and register's offices are sent to the secretary of state, they would remain inert and lifeless papers in his office and of no benefit to the relator. If, however, he should be disposed further to prosecute his suit and seek another writ to compel the members of the state board to reconvene and recanvass (and no wrong or official neglect is imputed to them) it could only end, if the majorities are thereby reversed, in making two inconsistent determinations, and perhaps a third mandamus become necessary to compel the issuing of a second commission for the same office. The result would be that two persons would possess the same evidence of his title to an office which one only can fill, and the controversy between rival claimants be left unsettled as before. The law provides in the process of *quo warranto*, a simple and direct mode of trying the title to office and recovering possession when it is wrongfully withheld, in which the merits may be investigated and the remedy is full and complete. For this the writ of mandamus is a very insufficient substitute.

Let us suppose the contest to be about one of the offices of the state into which the person declared elected by the canvassers is inducted through the regular forms of law, can his title be impeached and he superseded or affected by

a proceeding which exhausts itself in the correction of errors in the returns from a single county? And this, too, when the constitution provides a tribunal for the trial of the contested election? Art. III., § 3.

In the election of a member of the general assembly, or a representative in congress, contesting claims to a seat must be tried before the body to which the certificate of election or commission accredits the person holding it, and the decision there made is final and irreversible. If Kitchin, to whom we must assume the commission has been given in accordance with the count and determination of the board, should take his seat as a member of the house of representatives, can he be disturbed or the relator assisted in his efforts to displace him by any action which the court is competent to take? The power to do this resides exclusively in the house, and in our opinion not less so after the case has passed beyond further control of the state and its officers by the issuing of the commission.

We concede the propriety and usefulness of the judicial power, the exercise of which in this case is invoked for the relator, to enforce upon a returning board of canvassers the proper performance of their official duties, while the political machinery is in motion and the result undetermined. If the service demanded could have been rendered and made available, by the transmission of full and corrected returns to the state board in time to be acted on before the final adjournment, the relator's right to the aid of the court would seem to be clear and indisputable; and yet with the delays incident to the mode of judicial procedure, the trial of issues and the right of appeal, the remedy by mandamus is practically useless. The complaining party is not however without redress. He may assert his right to an office and recover its possession by the appropriate writ of *quo warranto* or by a contest before the representative body or other special tribunal appointed by law.

The enquiry naturally meets the relator at this stage of his proceeding,—what benefit will he derive from the successful prosecution of his suit? How will it assist him in the assertion of his claim before the house, in which full and exclusive jurisdiction is vested?

In the controversy about the mayoralty of the city of Raleigh, the incumbent's term expired before the cause could be heard, and as no practical advantage would be secured by the determination of the conflicting claims to the office, this court refused to take further cognizance of the cause.

We do not find it necessary to consider and decide the question of the nature of the functions of the canvassing board who are directed to "open and canvass the returns" as distinguished from those of the board of county commissioners who, under the former law are merely "to add the number of votes returned," and who in *Moore* v. *Jones*, 76 N. C., 182, are declared to be a mere ministerial agency. Nor do we propose to enquire whether the board of county canvassers having once attempted to perform the service imposed on them, and adjourned, can be compelled to meet again and revise and correct their errors and omissions, upon which there are numerous and conflicting decisions to be found. We put our decision upon the ground that judicial action would be wholly unavailing, as the matter has passed beyond the jurisdiction of the court.

The writ of mandamus, originally a prerogative writ, now as declared by BYNUM J., in *Brown* v. *Turner*, 70 N. C., 93, "an ordinary process in cases to which it is applicable" can be used only when there is no other remedy and this remedy may be made effective. We are content to quote a few extracts from that valuable work, Tapping on Mandamus, to show under what circumstances it will be granted:

"It will not be granted if, when granted, it would be nugatory," page 15.

"The court will refuse it, if it be manifest that it must be vain or fruitless or cannot have a beneficial effect."

"The court will refuse it, if it see that it must ultimately fail."

"Nor will the court grant it, if sought merely in order to *obtain the opinion of the court* on *a point of law*," page 16.

"The court will refuse to grant the writ of mandamus, if it appear that the applicant has a remedy by information in the nature of a *quo warranto*," page 26.

"A rule for a mandamus to admit a recorder was refused, because it appeared that there was a recorder *de facto*, and therefore the applicant had such a remedy. For the consequence of granting a rule in such a case would be that a second person would be admitted to an office already filled by another, both claiming to be duly elected." *Ibid.*

In the discussion before us, the relator's counsel not disputing the uselessness of the proceeding as a practical remedy, insisted nevertheless that this court should pass upon the legal right of the returning board to reject any of the precinct returns, and define their duties and powers as a guide in future elections, and a declaration of the law upon matters that may become the subject of investigation by the body of which the relator claims to be a duly elected and rightful member. This we do not propose to do for any such purpose. Courts are established to decide causes properly constituted before them, and when their decisions can be enforced and made effectual. They will not indulge in the expression of speculative opinions not called for in the decision of the cause depending before them for use in some contemplated future proceeding.

We were struck with the forcible and just remarks of the court in *The People* v. *Tremain*, 29 Barb., 96, upon this point: "We do not sit," says EMOTT, J., "to decide abstract questions, or to promulgate our opinions in authoritative form for some future, it may be indirect, use or reference

Our duty is to administer the remedies which the law and the constitution afford to suitors, according to the rules which the law and the constitution prescribe."

The action must be dismissed, but without costs.

PER CURIAM. Dismissed.

SAMUEL P. SWAIN v. JAMES D. MCRAE and others, county canvassers.

Practice—Mandamus—Public Office—Election, Validity of Registration.

1. An action does not lie against a board of county canvassers and a person declared by them to have been elected superior court clerk, by one claiming to have been elected, to compel by *mandamus* a re-assembling of the board and a recount of the votes. The proper remedy is by *quo warranto*.
2. Where a new registration of the voters of a township was ordered, but was not had for the reason that the order was made within less than thirty days of the time required by law for opening books of registration; and forty-five days intervened between the date of the order of registration and the day of election; *Held*, that the county board of canvassers erred in rejecting the vote of the township because there had been no new registration as ordered.

(*Moore* v. *Jones*, 76 N. C. 182, cited and commented on.)

APPLICATION for a *Mandamus*, heard at Fall Term, 1878, of BRUNSWICK Superior Court, before *Buxton, J.*

The plaintiff alleged he had been re-elected clerk of the said court on the first Thursday in August, 1878, and demanded that the defendants, board of county canvassers, be ordered to reassemble and count the votes of Town Creek township as returned by the judges of election, and add them to the votes of the other townships in the county, and

proclaim the result of the election for clerk of the superior court. Defendants demurred to the complaint and the court sustained the demurrer. The plaintiff was then allowed to amend the process and pleadings by making M. C. Guthrie, the rival candidate for the office, a party defendant. In his amended complaint, the plaintiff asked for an order restraining defendant, Guthrie, from qualifying and being inducted into office. The defendants answering alleged that there was no legal election held in said township on account of certain irregularities in providing for a new registration of the voters, and that M. C. Guthrie received a majority of the legal votes cast at said election, and was properly declared elected clerk of said court at the regular meeting of the board of canvassers, and that said board are now *functi officio*. The irregularities appearing from the pleadings are in brief as follows: A new registration of the voters of said township among others was ordered, but not taken by reason of the fact that the order was made within less than thirty days of the time required by law for opening the books of registration; but between the time the order was made and the day of election there intervened forty-five days, and the registrar failed to open the books as ordered. At the meeting of the board of canvassers and it appearing that no new registration had been taken as aforesaid, they refused to count the votes polled at Town Creek township, and declared the defendant, Guthrie, elected.

His Honor held that the remedy for *mandamus* was inapplicable, the said board was not a continuing body, and refused to grant the order for an injunction. From this ruling the plaintiff appealed.

Mr. D. L. Russell, for plaintiff.

Messrs. J. D. Bellamy, Jr., and *W. S. & D. J. Devane* for defendants.

SMITH, C. J. The object of this suit, commenced on the 16th day of August last, against the members of the board of county canvassers, is to compel them to re-assemble and make a recount of the vote cast for superior court clerk in Brunswick county, including the rejected return from Town Creek township. The process, originally returnable before the judge of the district at Fayetteville, in Cumberland county, on exception to the jurisdiction taken and sustained, was amended by making M. C. Guthrie a co-defendant, and the summons returnable before the superior court of Brunswick in term time, and was heard and decided at the regular fall term of the court upon complaint and answer. His Honor refused the writs of injunction and mandamus, and declined to inquire into the merits of the case on the ground that the writ of mandamus is not an appropriate remedy, and for the further reason that in the opinion of the court the board of county canvassers created by law for a single specific purpose, which has been accomplished, has ceased to exist as an organic body, and its members are no longer competent to do an official act. The appeal brings up the correctness of this ruling for review.

As the cause is now constituted, the contestants become adversary parties to the suit, each asserting his claim to the office in dispute, and the coercive power of the court is asked to enforce such action on the other defendants as will determine the controversy and secure the place to the plaintiff. It presents the anomalous case of an incumbent holding over after the expiration of his term, and claiming to have received a majority of the popular vote in opposition to the declared official count, seeking to restrain his opponent from qualifying and accepting the office until, by a recount made under the direction of the court, his own title thereto can be established. If this mode of procedure to decide a contested election is allowed, it will obstruct the operation of those laws through which the popular will is

collected and expressed, and deprive the public of the services of those persons legally declared to be elected during the pendency of the dispute as to who is rightfully entitled. It is important that all public offices should be filled by the party having a *prima facie* right thereto, until a better title is shown in some one else. For this reason it is that by a proceeding in the nature of a *quo warranto* one entitled to an office in possession of another may recover possession, and by a subsequent action compensation in damages for the time it has been wrongfully withheld. C. C. P., § 373.

It is the duty of the county canvassing board, after concluding their count, to declare the person having the greatest number of votes to be elected and to make proclamation "at the court house of the voting in their county for all the persons voted for, and the number of votes cast for each." Act of 1876–'77, chapter 275. §§ 30, 31. This we must assume to have been done on the second day after the election, the time prescribed by law for their meeting. It was then the duty of the county commissioners to qualify and induct into office those whose election the county canvassers have ascertained and announced. Bat. Rev., ch. 27, § 8, (31.)

The present proceeding aims to obstruct the execution of the law, and if allowed, would leave the office unfilled but for the fact that the plaintiff is the former incumbent and retains possession. The office of the writ of mandamus is simply to impose upon an officer the execution of a neglected duty affecting the interest or rights of the person applying for it. It cannot be extended to reach conflicting claims to an office and thus usurp the place of that special and ample remedy which the law prescribes for adjusting and determining them. We refrain from saying more on this subject as it is fully discussed in *O'Hara* v. *Powell*, *ante* 103.

It is unnecessary to examine the other ground upon which the judge rests his decision, to-wit: that the board

is *functus officio*, and incapable of further acting. There are conflicting authorities on this point, and his ruling is supported by several able decisions in the courts of New York and elsewhere, which are cited in the brief of defendant's counsel. Nor do we propose to enquire whether the functions of the newly created canvassing board are purely ministerial as those exercised under the former law by the county commissioners, their predecessor in this service, are decided to be in the case of *Moore* v. *Jones*, 76 N. C., 182; and, therefore, under the mandatory power of the court, or whether they are discretionary and in some of their features *quasi* judicial and beyond that control. There is a very marked difference in the phraseology which prescribes and defines the duty of these respective bodies. The *commissioners* are directed simply "to *add* the number of *votes* returned," while the *canvassers* are required "to open and *canvass the returns*." Acts 1876–'77, ch. 275, § 25. But we forbear the expression of any opinion on the point as it is not necessary to the decision of the case.

We sustain the ruling of the court in holding that the plaintiff misconceives his remedy and in denying the relief sought in this action.

While it is not necessary to the decision of the case, yet as it may facilitate the settlement of the matter in controversy and avoid the delay and expense of future litigation, we deem it proper to express the opinion we have formed that the county canvassers for any reasons assigned, erred in rejecting the vote of Town Creek township, and that it ought to have been added and counted in ascertaining the result of the election.

No error. Affirmed

R. M. DEAVER v. COMMISSIONERS OF BUNCOMBE.

Costs—Witness tickets—Payment of—Evidence.

Costs and charges of state's witnesses upon acquittal of a defendant were ordered to be paid by the county; and in an action against the commissioners to recover the amount of tickets issued to such witnesses: *It was held,*

(1) That the statute makes the tickets presumptive evidence of the facts set forth therein—attendance, miles traveled, &c.

(2) This evidence, together with the order of the court, imposes a duty upon defendants to provide for their payment.

APPEAL from a Justice's Court tried at Chambers by consent of parties on the 28th of January, 1879, before *Gudger, J.*

The facts sufficiently appear in the opinion.

Mr. C. M. McLoud, for plaintiff.
Mr. J. H. Merrimon, for defendants.

DILLARD, J. The plaintiff as assignee and owner for value of two witness tickets amounting to $17.40 brought suit against the defendants in a justice's court and from the judgment against them they appealed to the superior court and thence to this court.

It appears from the facts found by the judge below that the two witnesses to whom were issued the tickets sued upon, attended under summons at fall term, 1878, of Buncombe superior court as witnesses for the state on an indictment against James R. Deaver for murder, who was tried and acquitted at that term; and the fact is also found that the judge (Avery) who tried the case made an order in the cause that the county of Buncombe pay the costs of the officers of the court and the charges of the state's witnesses.

The defendants insist that no duty arose to them to pay

the said tickets, because the judge should have passed on the right of the witnesses to prove in the suit, for how long, whether for whole or half fees, whether they had attended under subpœna for the number of days proved for, and that the order of the judge should have included the names of all witnesses who should be permitted to prove against the state.

The statute makes the tickets issued to the witnesses presumptive evidence of the facts set forth therein, that is to say, of their attendance, for whom, how long, for how much, and the miles travelled. Bat. Rev., ch. 105, § 33. And the judge having at the conclusion of the trial made an order that the county of Buncombe pay the charges of the state's witnesses, all was done that ought to be required of him, or that was needed to enable the defendants to protect the county. The defendants, although in a strict sense not parties to the action, were interested and may be regarded as *quasi* parties in respect of their probable liability to pay the costs, and by having reference to the record of the cause, of easy access to them, they could easily find out the names of those holding tickets and therefore embraced in the judge's order. Thus it was convenient to them to exercise their duty to pay the tickets upon the presumed truth of the facts set forth therein, or if any valid objection existed thereto, then to avail of such objection by a proper proceeding—perhaps by a motion to retax the costs.

It is the opinion of the court that the tickets issued and now in suit made presumptive evidence of the facts in them recited, together with the order of the judge, made it the duty of the defendants to provide for their payment, and that upon the facts found by His Honor the judgment pronounced was authorized in law.

No error. Affirmed.

GEORGE W. DIXON v. COMMISSIONERS OF BEAUFORT.

County Commissioners—Sheriff's Bond—Penalty of.

1. To entitle a sheriff to be inducted into office, it is essentially necessary that three several bonds must be executed by him and approved by the county commissioners according to the requirements of the statute. Bat. Rev., ch. 106, § 8, and ch. 27, § 8, (31.)
2. The county commissioners have the power to require that the penal sums in such bonds shall exceed $10,000, when necessary for the public interests. (Acts of Dec. 9, 1862, and 1868-'69, ch. 1 and 245. *Sykes* v. *Com'rs of Bladen*, 72—34, modified.)
3. Such bonds extend over the entire term of two years, and embrace all taxes collected after their execution. The renewed bonds are additional securities for the fidelity of the sheriff.

(*Slade* v. *Governor*, 3 Dev., 365; *Coffield* v. *McNeill*, 74 N. C., 535; *Vann* v. *Pipkin*, 77 N. C., 408, approved, and *Sykes* v. *Com'rs of Bladen*, 72 N. C., 34, modified.)

CASE AGREED heard at Fall Term, 1878, of BEAUFORT Superior Court, before *Eure, J.*

The plaintiff who had been elected sheriff of Beaufort county appeared before the defendant commissioners at their meeting on the first Monday in December following, and tendered the process bond in form and with sufficient sureties as required by law, but refused to give the prescribed bonds for the collection of state and county taxes. He proposed and insisted upon a right to be inducted into the office of sheriff, exempt from any obligation or duty in respect to the public taxes. The board denied the application and demanded his execution of all the bonds as a condition of his admission to office. His Honor being of opinion with defendants gave judgment accordingly, and the plaintiff appealed.

Mr. Geo. H. Brown, Jr., for plaintiff.
No counsel for defendants.

SMITH, C. J. (After stating the case as above.) The cor-

rectness of this ruling of the board of commissioners is the only point for the consideration of the court. It is made the duty of one elected to the office of sheriff to "*execute three several bonds* payable to the state of North Carolina and conditioned as follows, one conditioned for the collection, payment and settlement of the county, poor, school, and special taxes;" another, "for the collection, payment and settlement of the public taxes;" and a third, for the due execution and return of process, and the payment over of all moneys which may come into his hands by virtue of such process, and the due execution of all other duties appertaining to the office of sheriff. Bat. Rev., ch. 106, § 8. The board of commissioners have power and it is their duty "to qualify and induct into office after an election" sheriffs and other county officers, and "*to take and approve their official bonds;*" Ibid. ch. 27, § 8, (31), and this, under an amendatory act, is to be done at their meeting on the first Monday in December. Acts 1874–'75, ch. 227, § 3.

The duty thus enjoined by provisions of positive law includes as well the tax bonds which the plaintiff refused to give, as that for the due execution of process, and the board had no more authority to dispense with the former, or either of them, than with the other. The direction is that all three must be given as an indispensable qualification for the office. It is true the functions of the proper office of sheriff and of tax collector, though united and imposed by law upon the same person, are in themselves essentially distinct, and may under some circumstances become dissociated. This occurs when a sheriff goes out of office at the expiration of his term with an uncollected tax list in his hands, or which ought to have been in his hands, though it may have been delivered afterwards. *Slade* v. *Governor*, 3 Dev., 365. So too, upon the death of a sheriff the sureties to his official bond are permitted to proceed with the collection, (Acts 1876–'77, ch. 153, § 45,) and such

severance may take place in other cases. Still, the powers, duties and responsibilities incident to the collection of taxes are by virtue of his office devolved upon the sheriff, and he cannot escape them by a refusal to give the necessary and prescribed bonds; nor will he be permitted to enter upon his office until they have been tendered and accepted.

The plaintiff's counsel, in the argument before us, insists that as the plaintiff is not bound to take the tax lists from his predecessor and no new tax list can come into his hands until the time when a new bond is required, he will meanwhile have no collection of taxes to make, and no bonds to secure them are necessary. If this was so, it would furnish no excuse for a plain and palpable disregard of the law. It is not true, however, that no taxes to be protected by the proposed bonds can come into the plaintiff's hands. The bonds required when the sheriff enters upon his office extend over the entire term of two years, and embrace all the taxes which may be thereafter collected. The subsequent or renewed bonds are but additional and cumulative securities for his fidelity. Moreover, there are large sums paid at various times, as privilege or license taxes, and enumerated in schedule B of the revenue law, which are not contained in the annual lists which are to be made out and delivered on or before the first Monday of September. Those taxes received before that date, and those contained in the first tax list, would be without any security except that afforded by the bonds executed at the beginning of the term of office. *Coffield* v. *McNeil*, 74 N. C., 535; *Vann* v. *Pipkin*, 77 N. C., 408. It is sufficient to say that the mandate of the law is imperative, and the plaintiff has no right to the possession of the office until he complies with all its preliminary requirements. There is no error in the ruling of the court below.

It would seem from the record that the defendants, guided by what is declared in the opinion in *Sykes* v. *Com-*

missioners of Bladen, 72 N. C., 34, considered themselves restricted to bonds whose penalties do not exceed $10,000. This is an error which we deem it our duty, at the earliest moment, to correct. There are statutes authorizing a larger penalty when necessary for the public interests, which were probably not called to the attention of the court when that case was decided. See acts of Dec. 9, 1862, and 1868–'69, ch. 1 and 245.

No error. Affirmed.

GEORGE E. BUCKMAN v. COMMISSIONERS OF BEAUFORT.

County Commissioners—Official Bond—Mandamus.

1. Where a clerk of the superior court tendered his official bond to the county commissioners at the time prescribed by law, which they refused to accept on account of insufficiency, and thereupon granted him further time—until their next regular meeting—to file his bond and qualify, and communicated their action to the judge of the district who made no order in relation thereto; and at said next meeting they refused to receive the bond tendered, on the ground that their power to do so ceased at the first meeting; *It was held*,

   (1) That the commissioners at their second meeting were not *functi officio*, but had the power to act in the premises.

   (2) That there had not been such a failure to give bond on the part of the clerk as worked a forfeiture of the office.

   (3) Such failure must be ascertained and declared by the commissioners before the judge is authorized to declare a vacancy. Bat. Rev., ch. 17, §§ 137, 140.

2. *Held further*, that the plaintiff, clerk, is not entitled to a peremptory mandamus commanding defendant, commissioners, to receive *the bond tendered* and induct him into office. The court cannot control or interfere in the exercise of their discretion.

(*Grady* v. *Com'rs of Lenoir*, 74 N. C., 101, cited and approved.)

CONTROVERSY submitted without action under C. C. P., §

315, at Fall Term, 1878, of BEAUFORT Superior Court, before *Eure, J.*

The plaintiff was elected clerk of the superior court at the election held in August last, and was so declared by the board of county canvassers as required by law. At the meeting of the county commissioners held on the first Monday of September following, he appeared and tendered his official bond with sureties which were unsatisfactory to the defendants and they refused to accept it. The session of the commissioners was prolonged to a late hour on Tuesday afternoon, when, without finishing the public business, they adjourned to the first Monday in October in consequence of the inability of two of them, who had other important public duties to perform, to remain longer with their associates. Previous to the adjournment and pending the plaintiff's application to be allowed to qualify, the commissioners passed the following resolution: "Whereas, George E. Buckman has failed to give bond and qualify as clerk of the superior court, it is therefore ordered that he have until the first Monday of October next to give bond and qualify according to law, provided that if at the October meeting the board is satisfied that they have no power to make such extension of time, the board will not then induct said Buckman into office." This action of the commissioners was communicated by the chairman to the judge of the district and he took no action and made no order in relation thereto. But for the early termination of the session, the plaintiff would have tendered a bond with other and sufficient sureties on the next day. At the adjourned session in October the plaintiff did tender such bond to the board in the penal sum of $14,000, with sureties justifying to that amount, and asked to be admitted to his office. The board adjudging that their power to accept an official bond ceased at their former meeting, refused to consider or receive it and denied the application.

His Honor ordered the board to consider the bond tendered by the plaintiff, or such bond as he shall tender at the time fixed by them, and if said bond be satisfactory, that they induct the plaintiff into office, from which ruling the defendants appealed.

Messrs. Reade, Busbee & Busbee, for plaintiff.
Mr. G. H. Brown, Jr., for defendants.

SMITH, C. J. (After stating the case as above.) Upon these facts the only question presented for our determination is: Had the commissioners the power at their October session to act in the premises and induct the plaintiff into the office to which he has been elected?

It is obvious that no final disposition was intended to be made of the case at the time of the adjournment, when further time was allowed the plaintiff to comply with the requirements of the law. As he could not know in advance whether the sureties offered and deemed by himself sufficient would be satisfactory to the commissioners, it was reasonable and proper, when they were rejected, that he should have some opportunity offered him to find and offer others in their place. A single day would have answered his purpose, but as the session could not be protracted owing to the necessary absence afterwards of two of the commissioners, he was permitted to prepare and offer his bond at their next regular session in October. The proviso attached to the resolution intimates or implies a doubt as to their right thus to defer further action, but the power is nevertheless exercised, and at that time and no other can the plaintiff comply with this prerequisite condition of admission to office. There was on his part no such delay as can work a forfeiture of office, and nothing but an absolute want of power can be permitted to produce that result.

Let us examine and see what are the statutory provisions

on the subject: It is the duty of one elected or appointed clerk to deliver to the commissioners a bond with sufficient sureties to be approved by them at their *first meeting* after the election or appointment. Bat. Rev., ch. 17, § 137. If he *fail* to give bond and qualify as directed, the presiding officer of the board must immediately inform the judge of the judicial district in which the county lies, who shall thereupon declare a vacancy and fill it, and his appointee shall also give bond and qualify as before directed. Ibid., § 140. In the argument it was properly conceded that but for the peremptory words used in the section last referred to, commanding *immediate information of the failure* to be conveyed to the judge, the statute must be construed as directory only, and the delay in giving effect to its provisions not allowed to invalidate the plaintiff's title to his office and thus practically reverse the result of the election. It may be conceded that the statute contemplates an early and prompt admission to office, and that but for the postponing action of the commissioners the plaintiff would be restricted in giving his bond and taking the oath to the first session of the board. Had a reasonable time been given after the rejection of the first bond for his preparing and tendering another, the commissioners would have been justified in declaring the failure and finally determining the application. Then upon certifying the fact to the judge it would have become his duty to make an appointment to supply the vacancy. This, however, was not done, and though the judge was informed that no bond had been given, he was also informed that the matter was still pending and further time had been allowed the plaintiff to execute another and sufficient bond. It is to be observed that *immediate* notice must be given of the *failure* of the person elected or appointed to give the bond, and this *failure* must be ascertained and declared by the commissioners before it can be given. That fact had not been finally ascertained.

The application for admission was pending, still under consideration when the adjournment took place, and further action suspended and deferred; and until the matter before the commissioners was finally disposed of, the contingency had not arrived which calls into exercise the appointing power of the judge. It is unnecessary to cite authorities bearing upon the question of materiality of time in the performance of statutory duties. They are cited and the subject discussed in Sedgwick on Stat. and Const. Law, 368, *et seq.*, to which, in the argument, our attention was called. We will refer to a single case in our own reports as illustrative of the point—*Grady* v. *Commissioners of Lenoir*, 74 N. C., 101. The general assembly by the act of February 26, 1875—acts of 1874-'75, ch. 105—formed a new township out of that portion of Kinston township lying south of Neuse river, and provided for an election of officers on the third Monday of March following. No election was held at the prescribed time in consequence of a judicial order based upon the alleged unconstitutionality of the act. READE, J., delivering the opinion of the court and maintaining the validity of the act, says: "But they (the commissioners) will *now* be met with the difficulty that the time named in the act for holding the election has passed. Can they order an election at some time to be fixed by them? This is not directly before us and may never be, as the township may prefer to wait until the next regular election. But we have considered it and incline to the opinion that as time was not *essential* and the failure to observe it was *unavoidable*, and as the public good may require the offices to be immediately filled, the commissioners may order an election upon reasonable notice." The principle thus announced comprehends the case before us.

It may be observed further that no inconvenience to the public can arise from the delay in inducting the plaintiff into office, because the incumbent under a constitutional

provision holds over until his successor is qualified, and there is no interval during which there is no officer to discharge the duties. Const., Art. IV, § 25. We therefore declare that the commissioners were not at their second meeting *functi officio,* but were competent to take and ought to have passed upon the bond then tendered.

The plaintiff's counsel asks for a peremptory mandamus commanding the defendants to receive the bond tendered and induct the plaintiff into office. To this form of the writ he is not entitled. Upon the comm ssioners alone devolves the obligation, and upon them rests the responsibility of deciding upon the sufficiency of the bond, under the penalty of incurring a personal liability as surety for taking a bond known or believed to be insufficient. We can compel them to proceed and act, but we cannot control or interfere with the honest exercise of their judgment and discretion. It is needless to cite authorities upon the point. They may be found in Moses on Mandamus, 23; High on Ex. Leg. Rem., §§ 234, 257; Tapping on Mandamus, 14.

But aside from this, in the case before us it is expressly agreed if in the opinion of the court the defendants have power to act in the premises, the judgment shall be that the defendants "proceed to consider the bond at once." There is no error. This will be certified, to the end that the writ of mandamus issue as declared in the opinion of this court, and such further proceedings be had thereon as are agreeable to law.

No error. Affirmed.

State on relation of JOHN G. JONES v. MANLY B. JONES.

County Commissioners—Powers of.

If from any cause the newly elected commissioners of a county fail to qualify at the time prescribed by law, the old board, as *de facto* officers, have the power to qualify a county treasurer elect and induct him into office; or upon his default in filing the required bond, they have the power to declare a vacancy and fill the same by appointment. (See *Buckman* v. *Com'rs*, *ante*, 121.)

(*Norfleet* v. *Staton*, 73 N. C., 546; *Cloud* v. *Wilson*, 72 N. C., 155, cited and approved.)

CIVIL ACTION in the nature of a *quo warranto*, tried at Spring Term, 1878, of GRANVILLE Superior Court, before *Seymour, J.*

The case is sufficiently stated by THE CHIEF JUSTICE. Judgment for the defendant, and the plaintiff appealed.

Messrs. Batchelor and *Edwards*, for plaintiff.
Messrs. Merrimon, Fuller & Ashe and *Venable*, for defendant.

SMITH, C. J. At the election held in Granville county on Tuesday next after the first Monday in November, 1876, for county officers, the defendant was duly elected county treasurer. On the 14th day of that month the board of county commissioners met and canvassed the vote of the county, excluding the vote cast at Henderson township. They ascertained and declared the defendant elected and he was notified ten days previously to appear before the commissioners at their meeting on the first Monday in December, to give his bond and be inducted into office. The defendant appeared before the commissioners at that meeting, declared his inability to give the required bond, and asked for further time. This request was granted and he was allowed until the 21st day of the month to prepare and tender it. At that

date the commissioners met at the court house and the defendant failing to appear, declared a vacancy and proceeded to fill it by appointing the relator county treasurer, who thereupon gave bond, took the prescribed oaths and entered upon his official duties. Three of the commissioners on the first Monday in January, 1877, at the common jail in which they were imprisoned by order of the superior court judge for contempt in refusing to recount the county vote and include therein the vote cast at Henderson, as they had been commanded to do, undertook a second time to declare the vacancy by default of the defendant, and reappointed the relator, who again qualified and remained in office, performing its duties until ousted therefrom by the defendant. On the second of May the commissioners made the recount and their successors ascertained to be elected at once qualified, recanvassed the county vote and declared the defendant upon the full vote to be elected. The defendant gave bond and took possession of the office on the fifth day of June following.

The only matter in controversy is as to the legal effect of the action of the two boards of commissioners upon the title of the office, which is claimed by the respective parties to the action. Had the old board the right at their adjourned meeting in December, on default of the defendant, to declare and fill the vacancy by the appointment of the relator? Or was their action illegal and void so that the new board upon a recanvass of the full vote in May, and also ascertaining the same result, the election of the defendant, were authorized to admit him to office as if no appointment had been made? Two questions are thus presented for us to consider and decide :

1. Had the former commissioners the right to make the appointment?

2. If so, could they extend the time for preparing and

tendering the defendant's bond, and act upon his default at the adjourned meeting in December?

In arriving at a satisfactory solution of these enquiries, an examination of the statutory provisions on the subject becomes necessary. "The commissioners elect shall be qualified before the clerk of the superior court by taking the several oaths of office, and shall thereupon organize by electing one of their number chairman and proceed to qualify the other officers elected in the county and take the several bonds prescribed by law." Bat. Rev. ch. 52, § 23.

The commissioners have power "to qualify and induct into office, at the annual meeting on the first Monday in September" (since changed to December) "after a general election, or at any time when a vacancy in any of the county offices shall be filled, the clerk of the superior court, the sheriff, the county treasurer, * * * and to take and approve the official bonds of the said county officers," &c. Bat. Rev. ch. 27, § 8. "Every vacancy occurring in any of the offices provided for in art. VII. of the constitution of North Carolina shall be filled, unless otherwise provided, by a majority of the board of county commissioners of the county in which such vacancy may occur." Bat. Rev., ch. 27, § 29.

In the year 1874 an act was passed directing the elections for county commissioners and county officers to be held on Tuesday next after the first Monday in November, and the newly elected officers for that year to meet and qualify on the first Monday in December thereafter, and by section 6 declares "that all officers whose terms of office would expire did the election occur on the first Thursday in August, 1876, are hereby authorized and directed to hold over in the same until their successors in office are elected and qualified under this act." Acts of 1874-'75, ch. 237. While the act expressly directs the new commissioners just admitted to office to proceed to induct the other county officers into their

several offices, to which they shall be found to have been elected, it does not follow that if from any cause the new commissioners themselves fail to qualify there is no competent authority left in the old board to qualify those other county officers, and they are to be deprived of the benefits of the election and the public of their services. The command to the new commissioners presupposes their accession to the office and the retirement of the old, and attaches to the office itself, whoever may be the incumbents for the time being, constituting the body corporate, and it was equally the right and duty of those holding over under the statute until their successors took their places to exercise to the fullest extent for the public good all the appropriate functions of office. The law does not intend an *inter regnum*, or interval, when those functions are in abeyance. The powers and duties of the board of county commissioners are large and varied, involving county government itself, and their suspension would produce the most serious consequences. Let us suppose, not an uncommon occurrence, a controversy between contesting claimants, passing into judicial litigation and protracted by delays incident to judicial procedure, over a long period of time before a final determination is reached. During this time, in a personal controversy as to the rights of rival claimants, are no county taxes to be levied, no lists made out for the collection of state and county taxes, no county officers to act and thus county government become itself paralyzed because a new board has not been organized to ascertain the result of the election and accept the official bonds of such as are elected? A doctrine leading to such consequences cannot be sound, and hence it has long been settled that the acts of *de facto* officers have the same validity in reference to third persons whether rightfully or wrongfully in possession of office. It is only necessary to refer to a single case in our own reports, where the

whole subject is fully examined and discussed. *Norfleet* v. *Staton*, 73 N. C., 546.

Under an act of the general assembly (afterwards declared unconstitutional in *Cloud* v. *Wilson*, 72 N. C., 155,) Hillard was elected judge of the second judicial district for the residue of an unexpired term to which Moore had been previously appointed by the governor, and proceeded to hold the several superior courts therein. While thus acting in his official capacity he appointed the defendant clerk of the superior court of Edgecombe. After the decision was made, Moore resumed possession of his office from which he had been temporarily displaced, and disregarding the appointment of Staton, appointed the relator as clerk. It was held that the defendant was rightfully in office, and there was no vacancy to be filled. We are unable to discover any facts in the present case to distinguish it from the one then before the court, and it is in our opinion decisive.

The second enquiry is, had the board at the instance of the defendant a right to postpone final action until the 21st day of December, in passing upon his qualification, and upon his failure *then to tender* a satisfactory bond, to declare the vacancy and fill it? We have decided at the present term, in *Buckman* v. *Com'rs of Beaufort*, *ante*, 121, that the board had the power for sufficient reasons to extend the time for giving an official bond, and then to accept it and induct the person elect into office. If they could do this, they have equal capacity upon his failure to appoint and put another in his place. Public policy requires as well as the law that all persons elected or appointed to office should be qualified as soon as they reasonably can be, but this duty neglected or deferred beyond a prescribed time, does not for this delay cease to be of binding obligation and take from the commissioners all legal ability to perform it afterwards. The time was not so unreasonable as to work a forfeiture of the office, and take from the commissioners all further

power of action. Certainly the defendant cannot complain of what was done upon his own application and for his exclusive personal benefit.

We have not considered the proceedings of the three imprisoned commissioners at the public jail, because they do not in our view affect the point in controversy and the conclusions at which we have arrived. But the term of office has expired and while the judgment here cannot restore to the relator that to which he was entitled, but which has ceased to exist, it may lay the foundation for damages in another action. C. C. P., § 373.

Error. Reversed.

State on relation of R. G. SNEED v. B. F. BULLOCK.

County Commissioners—Sheriff—Election of.

S was appointed sheriff in 1875, to fill a vacancy, and held the office until May, 1877; in the meantime—Nov., 1876—an election was held, and upon the result of certain legal proceedings in May, 1877, M was declared to be elected sheriff, who failed to give bond, and the county commissioners declared a vacancy and appointed B to fill the same; *Held*, that S had no right to hold over until the next *popular* election, but that B was entitled to the office, being elected by the *commissioners*.

(*Battle* v. *McIver*, 68 N. C., 467, cited and approved.)

CIVIL ACTION in the nature of a *quo warranto*, tried at Spring Term, 1878, of GRANVILLE Superior Court, before *Seymour, J.*

The case states: One James I. Moore was elected sheriff of Granville in August, 1874, for two years, and was inducted into office on the first Monday in September follow-

ing. In September, 1875, he failed to exhibit his tax receipts and renew his bond, and the commissioners declared the office vacant and appointed the plaintiff, Richard G. Sneed, to fill the same, who gave bond and was inducted into office. In September, 1876, Sneed renewed his bond and continued to act as sheriff until the 3d of May, 1877, when he ceased to act by reason of the circumstances hereinafter stated, to-wit: In November, 1876, the said Moore was elected sheriff and certain persons were elected commissioners. Upon the returns coming in, the county commissioners made an illegal canvass, refusing to count the votes of Henderson township, (*Moore* v. *Jones*, 76 N. C., 182, 8, 9) and proclaiming one Crews to have been elected sheriff, but upon the result of certain legal proceedings Moore was declared to be sheriff and on the 3d of May, 1877, the newly elected board of commissioners notified him to file his bond, which he failed to do. Thereupon a vacancy was declared and the defendant, Bullock, was appointed to fill the same, who qualified and gave bond, and continues to act as sheriff under said appointment. And on said 3d of May Sneed ceased to act and commenced this action.

It was contended for the plaintiff, that Sneed, being in office at the time Moore was declared elected, under the proceedings as aforesaid, but failed to give bond and qualify, had a right in law to continue to hold the office until his successor was elected and qualified, and his successor having failed to qualify, there was no such vacancy as the board could fill; while the defendant contended that upon such failure the board had the right to declare the office vacant, which had been done and Bullock appointed to fill the same. Thereupon His Honor adjudged that defendant, Bullock, was entitled to the said office of sheriff, and the plaintiff appealed.

Messrs. Batchelor and *Edwards*, for plaintiff.
Messrs. Merrimon, Fuller & Ashe and *Venable*, for defendant.

SMITH, C. J. The relator derives his title to the office of sheriff under an appointment made by the commissioners in September, 1875, to fill the residue of the term of J. I. Moore, which had become vacant by reason of his failure to exhibit the proper tax receipts required by Bat. Rev., ch. 106, § 5. The term which would have expired on the first Monday in September, 1876, was protracted, in the act changing the election from August to November, until the first Monday in December. Section 6 is in these words: "All officers whose terms of office would expire, did the election occur on the first Thursday in August, 1876, are hereby authorized and directed to hold over in the same until their *successors in office are elected and qualified under this act.*" Acts 1874–'75, ch. 237.

The commissioners in November canvassed the county vote, illegally rejecting that cast at Henderson, and declared James B. Crews to have received a majority of the votes, and to be elected sheriff. Under coercive orders of the judge of the superior court of Granville, in the month of May, a recount of the county vote was made inclusive of that cast at Henderson, by which it appeared that other commissioners had been elected, and that Moore, the former sheriff, had been re-elected to the office. He was thereupon notified to appear before the new board and qualify according to the requirements of law. He failed to do so, and the defendant was appointed by the commissioners in his place and admitted to the office, and Crews retired.

The case is not like that of *Jones* v. *Jones, ante*, 127, though many of the facts are common to both. There, the rejected vote did not change the result, and the treasurer elect was allowed ample time to prepare and tender his bond. The objection was directed not against the validity of the act of

appointment itself, but against the legal capacity of the board then holding over to make the appointment. It is decided that the commissioners being officers *de facto*, were competent to perform all official acts, so far as they affected third persons, as if they were officers *de jure*, and that their right to hold office could not in that proceeding be called in question. Here, the act is unlawful, whether done by the retiring or incoming board, and the contingency calling into exercise the power to supply a vacancy does not arise until after a full and legal count, and the failure of the sheriff elect then to qualify.

The relator's claim however must be, and by his counsel is, put upon other grounds and cannot prevail unless good against both Crews and the defendant. It is his title to the office that is now in controversy, and not that of the two appointees as between themselves. The relator contends that the force and affect of the act of 1874, § 6, is to prolong the term and continue him in office until the next popular election, and for this relies upon *Battle* v. *McIver*, 68 N. C., 467.

In that case, upon the resignation of S. S. Ashley, superintendent of public instruction, the governor appointed the relator to fill the residue of his term, expiring on the first day of January, 1873, as he was authorized to do by the constitution. Art. III., § 13. At the election held in August, 1872, after the appointment, James Reed was elected to the office for the ensuing term and died before its commencement. In January, 1873, the relator was appointed to fill the term. The court decided that, as the defendant substituted in place of his predecessor and invested with all his rights, was to hold the office until "his successor be elected and qualified," there was no vacancy to be filled and the appointment of the relator was void.

The decision does not, however, dispose of the present case. The purpose and scope of section 6, most obviously,

is to extend the term only, and make its terminal point coincident with the beginning of the deferred succeeding term. It does not undertake to annul the existing law which authorizes and directs the commissioners upon the ascertained inability of a sheriff elect to give bond, or his failure while in office when required to renew it, to exhibit proper evidence of his having accounted for the public taxes, to appoint or elect another in his place. Upon no fair and reasonable rules of construction can the act be allowed to have such effect. The word used, though usually applied to the result of a popular vote, is not inappropriate to express the action of the commissioners as well. The five commissioners who form a county board vote and elect when they exercise the power to designate the person to fill a vacant office. An election is defined by Webster to be, "the act of choosing a person to fill an office or employment by any manifestation of preference, as by ballot, uplifted hand or *viva voce.*" Plainly in this sense the word is used in the act and cannot by verbal criticism be so restricted as to produce the results contended for by the counsel of the relator.

No error. Affirmed.

JOHN M. RHODES v. JOHN G. LEWIS.

Register of Deeds—Election.

The constitution and laws in force on the first Thursday in August, 1878, required that polls should be opened on that day for the election of registers of deeds as well as other county officers.

(*State* v. *Bell*, 3 Ire., 506; *State* v. *Melton*, Busb., 49, cited and approved.)

CASE AGREED heard at Chambers in Lincolnton, on the 9th of January, 1879, before *Schenck, J.*

The question presented was,—whether the election of plaintiff as register of deeds on the first Thursday in August, 1878, was regular and legal. His Honor held that it was, and ordered the defendant to surrender the office to the plaintiff. Appeal by defendant.

Messrs. J. I. Scales and *C. M. Cooke*, for plaintiff.
Messrs. Platt D. Walker and *W. R. Cox*, for defendant.

DILLARD, J. His Honor on consideration of the question submitted adjudged that the plaintiff was duly elected register of deeds of Gaston county, and as such was entitled to have possession of the office and books and papers pertaining thereto, and adjudged that defendant surrender the same to him, and that plaintiff recover his costs to be taxed by the clerk, and from this judgment the defendant appealed.

The controversy grew up thus: The constitution, art. VII, § 1, provides that "in each county there shall be elected biennially by the qualified voters thereof, as provided for the election of members of the general assembly, the following officers,—a treasurer, register of deeds, surveyor, and five commissioners," and under the act of 1873–'74, ch. 122, the time for electing said officers was fixed to be the first Thursday in August and every two years thereafter on the same day.

By the act of 1874–'75, ch. 237, the time for holding the election of members of the general assembly and the county officers provided for in said article and section of the constitution was changed from the first Thursday in August and every two years thereafter, to Tuesday after the first Monday in November, 1876, without provision for elections thereafter, and in said act were retained the rules and regulations for elections as prescribed in Bat. Rev., ch. 52, entitled "general assembly," and in chapter 132, laws of 1873–'74,

with an amendment of said chapters merely in so far as to make the same conformable to the altered time of holding said elections. The act aforesaid of 1874–'75 changed the time to Tuesday after the first Monday in November, 1876, and omitted to enact anything in respect to any elections *thereafter* to be had, as the constitution was expected soon thereafter to be amended and go into effect. And therefore it was that no provision was made for any elections subsequent to the one authorized as aforesaid for 1876, and that was purposely left for future legislation in conformity to what might be the requirements of the forthcoming constitution.

By the amended constitution, the election of the county officers by the qualified voters of each county, "*as provided for the election of members of the general assembly,*" is reproduced in precisely the same words heretofore quoted, as were used in art. VII, § 1, of the constitution of 1868, and in order to provide the legislation suited to carry this clause of the constitution into effect, the general assembly at the session of 1876–'77, ch. 141, § 2, by an act entitled "an act to establish county governments," enacted in the words of the constitution that in each county the county officers therein specified should be biennially elected by the qualified voters "as provided for members of the general assembly," without providing any rules and regulations in said act to be observed in the elections.

The legislature, recognizing the necessity of machinery to carry into effect the clause of the constitution under consideration, besides the chapter 141 aforesaid, passed an act at the same session of 1876–'77, ch. 275, entitled "an act to regulate elections," wherein it is enacted that state officers, congressmen and members of the general assembly and county officers, naming the register of deeds, shall be elected on Tuesday after the first Monday in November in 1880, and every two years thereafter, and rules and regulations

are prescribed for such elections, both before and after 1880, minutely directing, amongst other things, that the state officers shall be voted for on one ballot, members of the general assembly on one ballot, and county officers—clerk, treasurer, register of deeds, surveyor—on one ballot. After providing for the declaration of the result, the act in the 77th section fixes the time of the next general election of officers, state and county, to be on the first Thursday in August, 1878, and in the recital of the officers then to be elected, omits to mention the register of deeds.

His Honor's judgment was that the election of plaintiff as register of deeds upon the facts agreed was authorized by law, notwithstanding the omission of his name in the recitals of the aforesaid section, and we concur in opinion with him.

In construing statutes, it is the duty of courts to ascertain and carry out the legislative intent, so far as it can be done within the fair meaning of the words used by the law-makers, interpreted with reference to the subject matter and the policy of the enactment. To this end it is a settled rule to examine and compare the different parts of the same statute and with other statutes made *in pari materia*. *State* v. *Bell*, 3 Ire., 506; *State* v. *Melton*, Busb., 49. Now, if we take art. VII. § 1, of the constitution and consider the same as *in pari materia* with chapter 141 of acts of 1876, for the establishment of county governments, and chapter 275, passed at the same session, to regulate elections, there can be no reasonable doubt of the intention that the register of deeds was to be elected with the other county officers. No reason can be suggested why the election of the members of the general assembly and all the other county officers should be provided for and the register of deeds be intentionally omitted; and in our opinion upon a fair construction of the constitution and the statutes aforesaid, his election was

as well authorized by law as any other county officer at the election held on the first Thursday in August, 1878.

The constitution was mandatory to the legislature that the register and other county officers should be elected "*as provided for the election of members of the general assembly,*" and provision being made for the election of *members of the general assembly* and all sufficient rules and regulations prescribed for *their election* in chapter 275, acts 1876–'77, it cannot be doubted that thereby the election of the county officers was in law sufficiently authorized, at the time, places, and manner provided for the members of the general assembly, and there was no necessity that they should be named in the 77th section of said act. Manifestly the constitution having declared that the county officers were to be elected "*as provided for members of the general assembly,*" an act providing the machinery as to *their* election would have sufficed in legal effect as to the county officers, without any mention of their names in the act; and therefore, if in section 77 aforesaid, there had been no mention of *the time* of election of any others than the members of the general assembly, the county officers would have been elected at the same time, for the constitution had fixed it that they were to be elected "as *provided for members of the general assembly.*"

In our opinion section 77 of chapter 275 of the acts 1876–'77, was designed to fix the time of election in 1878, and the omission of the name of the register of deeds therein did not affect his election, as the same had been already otherwise sufficiently authorized.

We agree with His Honor that the election of the plaintiff as register of deeds was regular and legal, and concur in the judgment that defendant do surrender to him the office and the books and papers pertaining thereto.

There is no error. Let this opinion be certified that proper proceedings be had for the enforcement of the judgment in the court below.

No error. Affirmed

T. C. DAVIS v. H. C. MOSS.

Inferior Court Clerk—Tenure of Office.

Where the superior court clerk becomes *ex-officio* clerk of the inferior court, by reason of the justices of the county declining to elect a clerk of the latter court, and gives the bond required by law, he is entitled to the office for two years, notwithstanding the expiration of his term as superior court clerk within that period.

(*Perry* v. *Campbell*, 63 N. C., 257; *Coffield* v. *McNeil*, 74 N. C., 535, cited and approved.)

CONTROVERSY submitted without action under the Code, § 315, and heard at Fall Term, 1878, of WILSON Superior Court, before *McKoy, J.*

The case agreed states: "On the first Monday of September, 1877, the justices of the peace of Wilson county, in accordance with an act of the general assembly, ratified on the 3rd of March, 1877, entitled an act to establish courts inferior to the supreme court, to be styled 'the inferior court,' organized an inferior court by the election of three justices and an attorney, but declined to elect a clerk, it being entered of record that the clerk of the superior court be accepted as clerk *ex-officio* of the inferior court, who at the first term of said court gave bond in the penalty required by law, and thereafter performed the duties of clerk of such inferior court. H. C. Moss was then clerk of the superior court, and at the general election held on the first Thursday in August, 1878, he was re-elected clerk of the superior court. At a regular meeting of the justices of the peace of said county, a majority being present, held on the first Monday in August, 1878, T. C. Davis was elected clerk of the inferior court for said county, and gave bond and was duly qualified before said justices who accepted said bond.

It is agreed on this statement of facts, if His Honor shall

be of opinion that H. C. Moss, clerk of the superior court, is the clerk of the inferior court of Wilson county, then judgment shall be entered that he hold the same and be recognized as such. If the opinion of the court be otherwise then judgment shall be that H. C. Moss surrender the records, books and papers belonging to said office of inferior court clerk to the said T. C. Davis." His Honor held that plaintiff was entitled to the possession of the office, books, papers and other proprerty of the clerk of the inferior court, and that defendant surrender the same to the plaintiff. Judgment accordingly. Appeal by defendant.

Mr. H. F. Murray, for plaintiff.
Meesrs. Gilliam & Gatling, for defendant.

DILLARD, J. The parties without action presented the question in difference between them to the decision of His Honor on a case agreed in which the facts are substantially as follows: At the organization of the inferior court of the county of Wilson on the first Monday in September, 1877, the justices of the peace declined to elect a clerk, but accepted the defendant clerk of the superior court, as *ex-officio* clerk to the inferior court, took his bond with sureties conditioned for the due performance of his duties for two years, and inducted him into office. At the general election of county officers on the first Thursday in August, 1878, the defendant was re-elected clerk of the superior court and continued to act as clerk to the inferior court. At the regular meeting on the first Monday in August, 1878, a majority being present, the said justices elected the plaintiff clerk to said inferior court, and took bond of him and qualified him as such. Thereupon, on demand and refusal of the possession of the office, the controversy arose.

The determination of the question for our consideration rests upon the construction of the statute—acts 1876-'77,

ch. 154—and if we regard the language employed in reference to a clerk to the inferior court in connection with the intention of the legislature, as gathered from the whole statute, the solution of the question is not a difficult matter.

The act in section 13 provided that the justices of the peace might organize an inferior court or not, and in case of choosing to establish one, they might elect a clerk to the court for themselves; or in case of failing or declining to make the election, they should take the clerk of the superior court as *ex-officio* their clerk. The justices at the organization of the inferior court did not merely fail but solemnly declined to exercise the power of electing a clerk for themselves, and had entry thereof made on the record. Thereupon, as it was necessary to a court to have a clerk, the alternative arose to accept and qualify the defendant, who was then clerk of the superior court. This they did, and accordingly the defendant has ever since performed and now performs the duties of clerk to the inferior court.

The defendant being qualified as clerk to the inferior court, as aforesaid, and admitted to the discharge of its duties, was he removable or liable to be superseded by the justices of the peace at their pleasure? And if not, how long could he hold? To the expiration of his then term of office as superior court clerk, which was less than a year, or to the end of two years from the time of his qualification as clerk of the inferior court. The statute gave the power of electing a clerk to the justices, and, they having declined, the office was otherwise filled; and having neglected their opportunity, the right to elect for that time was gone, and they could not remove or supersede the appointee of the law during his term, whatever it was. § 13.

But how long did the appointee of the law hold? The plaintiff says, only until the expiration of his term as clerk of the superior court, which would occur on the day he was elected by the justices; while the defendant contends that

the duration of his position as clerk to the inferior court was not limited to his then unexpired term as clerk of the superior court, but extended for full two years from his qualification in the inferior court. The same section (13) of the statute, in case the superior court clerk should become the clerk to the inferior court, provided, that he should give like bond, be subject to the same duties, and be liable in the same manner, and to the same extent, as if he had been elected by the justices of the peace. The legislature must have designed that the appointee of the law should hold for two years, otherwise a bond for the performance of duty for two years would not have been required of him. If it had been intended that he should only hold until the appointment of one by the justices, or until the expiration of his office, it could and would have been so expressed, and a bond taken accordingly. It is hardly respectful to the legislature to suppose that a bond for two years was required, when manifestly the office of defendant as superior court clerk would expire in a year at most, and might be but for a short period of time, as the counties might be prompt or slow in establishing inferior courts.

This case in our view is analogous to the case of a sheriff having entered on his office and received tax lists for collection. He is entitled by virtue of his office to have the collection of the taxes, and his authority is not an incident to the office of sheriff in such sense as to terminate with it, or depend on its continuance. His obligation and duty to collect would still exist, if his office expired by efflux of time or by resignation. *Perry* v. *Campbell*, 63 N. C., 257; *Coffield* v. *McNeill*, 74 N. C., 535. So we think the right and duty of the defendant to discharge the duties of clerk to the inferior court, having begun as incident to the office of superior court clerk, did not depend on its continuance nor terminate with it. There is error. The judgment of the court below is reversed, and this will be certified to the end

that judgment be entered for defendant, and that he may be possessed of the office, books and papers belonging thereto if necessary.

Error. Reversed.

B. P. CLIFTON, County Treasurer, v. JAMES C. WYNNE and others.

Taxation—Duties and Liabilities of Collectors—Suits on Collector's Bond.

1. The provisions of the constitution, Art. V, §§ 1, 6, prescribing the equation of taxes between property and the poll, and limiting the county taxes to double the state tax, apply only to such as are levied for ordinary county purposes, and not to such as may be necessary to pay a debt contracted before the adoption of the constitution.
2. A tax list in the hands of the sheriff is an execution, which the law will presume to have been regularly and rightfully issued, until the contrary shall be made to appear.
3. A county tax, more than double that of the state, or one which unsettles the equation between property and the poll, is not *prima facie* invalid on that account, since there are exceptional cases where such a tax would be authorized; and the court will presume, in the absence of rebutting evidence, that such a case has arisen, under the maxim, "*omnia præsumuntur rite esse acta.*"
4. Where the illegal portion of a tax is clearly severable from the rest, it is the duty of the collector to proceed with the collection of so much as is lawful.
5. A tax, though illegal and avoidable by the tax payer, when collected under process and by color of office, cannot be retained by the collector, but must be accounted for to the proper party; and a failure to so account will subject the collector's official bond.
6. The county treasurer is the proper relator in a suit on the sheriff's official bond to recover the taxes collected for school purposes.
7. The fact that the state and county taxes have been accidentally blended and confused on the tax list does not exonerate the collector

from the duty of paying each tax to the party entitled. The amount due the state can readily be discriminated from the rest by reference to the statute imposing the tax.

(*Haughton* v. *Com'rs of Jones*, 70 N. C., 466; *Street* v. *Com'rs of Craven*, *Ibid.*, 644; *Brothers* v. *Com'rs of Currituck*, *Ibid.*, 726; *Trull* v. *Com'rs of Madison*, 72 N. C., 388; *French* v. *Com'rs of New Hanover*, 74 N. C., 692; *State* v. *McIntosh* 7 Ire., 68; *Cody* v. *Quinn*, 6 Ire., 191; *Gore* v. *Mastin*, 66 N. C., 371; *Hewlett* v. *Nutt*, 79 N. C., 263; *Com'rs of Wake* v. *Magnin*, 78 N. C., 181, cited and approved.)

CIVIL ACTION upon a Sheriff's Bond, tried at Fall Term, 1878, of FRANKLIN Superior Court, before *Kerr, J.*

The exceptions constituting the basis of the decision of this court are embodied in its opinion. Both parties appealed from the judgment of the court below.

Messrs. C. M. Cooke and *A. W. Tourgee*, for plaintiff.

Messrs. Reade, Busbee & Busbee and *A. M. Lewis*, for defendants.

SMITH, C. J. While numerous exceptions are shown in the record to have been taken by both parties during the progress of the cause, all such as have been contested in the argument before us are contained in three propositions of the defendants' counsel:

1. The taxes levied for state and county purposes were eighty-eight cents on property of the value of one hundred dollars, and two dollars and sixty-four cents on the poll; preserving the equation, but in excess of the constitutional limit by twenty-one and one-third cents in the first, and sixty-four cents in the latter; and by reason thereof the entire assessment is illegal and void, at least as to the county levy, and the defendant's official bond is not liable therefor.

2. The school tax should be sued for on the relation of the board of education of Franklin and cannot be claimed in this action.

3. The county tax being divided in the list, the one-half part unaccounted for, which is blended with the state tax, in the column appropriated to the latter, cannot be recovered by the relator, of the sureties to the bond.

The court ruled against the last two propositions and in favor of the first, and gave judgment against all the defendants for the sum of $1,505.37 collected under schedule B of the revenue act, and against the defendant Wynne alone for the sum of $7,655.42, the residue of the county taxes collected and not paid over. From the judgment both parties appeal to this court.

There is error in the ruling of the court that the official bond is not liable for the whole amount due.

1. The tax list made out by the board of county commissioners is not upon its face illegal and void, because the assessment is in excess of the limits prescribed in the constitution. The restraint there imposed upon the taxing power applies to *taxes levied to meet the ordinary expenses* of county government, but does not extend to such as may be necessary for the payment of obligations incurred before its adoption. In such case the equation of the property and poll tax may be disregarded, and the limits exceeded. This is expressly decided in *Haughton* v. *Com'rs of Jones*, 70 N. C., 466; *Street* v. *Com'rs of Craven*, *Ibid.*, 644; *Brothers* v. *Com'rs of Currituck*, *Ibid.*, 726; *Trull* v. *Com'rs of Madison*, 72 N. C., 388; *French* v. *Com'rs of New Hanover*, 74 N. C., 692.

In the first case cited, READE, J., says: "It is true as contended for the plaintiff that as a general rule the county commissioners cannot levy for county purposes a tax more than double the state tax. Const. Art. V., § 7. But that provision was not intended to apply to taxes laid to pay debts existing at the time of the adoption of the constitution, and if it had so intended, it would have been in conflict with the constitution of the United States as impairing the obligation of contracts."

In *Street* v. *Com'rs of Craven*, a tax of a half cent was put upon the poll and two dollars upon the one hundred dollars valuation of property to provide for debts contracted before the year 1868, and the court declared it to be "within the power of the board of commissioners to levy it," and that their discretion could not be controlled.

If then the commissioners had authority to prepare and deliver such a tax list to the sheriff for collection upon the maxim "*omnia præsumunter rite esse acta*," he may assume the existence of such necessary facts as give the jurisdiction and render process emanating from it regular and proper. *State* v. *McIntosh*, 7 Ire., 68. The form of the tax list does not disclose the particular use to which the moneys assessed for county purposes are to be applied, and hence it does not appear that the taxes levied fall within the restrictive clause of the constitution. The process is void only, conferring no power and imposing no duty, when the illegality is patent, or it issues from incompetent authority. The county commissioners are invested with full and exclusive jurisdiction under the restraints of law to levy such county taxes as the public interest may require, and their action in making an assessment and delivering the tax list to the collector, has been assimilated to and substantially is an exercise of judicial power and governed by the same rules. It is so declared in *Cody* v. *Quinn*, 6 Ire., 191, and in *Gore* v. *Mastin*, 66 N. C., 371. In the last, BOYDEN, J., referring to the tax list, uses this language: "This list thus prepared and furnished the sheriff constituted the authority of the sheriff for the collection of the taxes and was of the same *force and effect as an execution* issuing from the county court upon a judgment therein rendered in the matter of which the same court had jurisdiction. It was no part of the duty of the sheriff to enquire whether these taxes were properly laid or not." The principle has been incorporated in the revenue law, and it is declared "the clerk shall endorse on the copies

of the tax lists given to the sheriff an order to collect the taxes therein mentioned, and such order shall have *the force and effect of a judgment and execution* against the property of the person charged in such list." Acts 1876–'77, ch. 155, § 22, and the form of the order is therein prescribed.

2. The taxes contained in the list being apportioned *per capita* and upon the *ad valorem* principle on property and the excess easily severable from the authorized amount, the lawful tax may be collected and the assessment is not wholly void.

This proposition seems so manifest as scarcely to require citation of authority in its support. We will refer to a single case. In *Moore* v. *Alleghany City*, 18 Penn., St. Rep., 55, this question came up for consideration, and the court say: "It may be that in a contest between the assessors and tax payer, an illegal tax, so incorporated with a regular assessment as to be undistinguishable, may vitiate the whole. But from the manner in which assessments are usually made and returned on different species of property, this is hardly possible, and it is not to be doubted that if part of assessment be legal and part illegal, the former, if it can be separated, may be enforced irrespective of the latter." In our case no difficulty whatever is met in discarding the excess and collecting the admitted lawful part of the tax. We should be reluctant to hold that the incorporation of a small *ad valorem* tax illegal only because of its excess, in a revenue act, should arrest the machinery put in motion for its collection, and obstruct the administration of the government for want of means to carry it on. The consequences of such a doctrine must be its answer and refutation. In *Trull* v. *Commissioners of Madison*, 72 N. C., 388, the court restrained the collection of the excess only, it being easily ascertained.

3. The tax, though part of it be illegal and avoidable by the tax payer, when collected under process and by color

of office, cannot be retained by the collector, but must be accounted for to the proper party. The sheriff who has used the tax list and made the collection under its authority will not be permitted to say that he made the collection illegally and will not pay what he has received. The authorities are full and decisive upon this point.

"If the collector receives the money to the use of the public," says COOLEY, J., "he should account for it, and it is immaterial that those who have paid it might successfully have resisted the collection from them." Cooley Taxation, 497, 498. "Even an *unconstitutional tax once collected*, the collector has no right to retain, but should account as in other cases." *Ibid.*, 498.

So Judge BURROUGHS, in his work on taxation, says: "The collector is liable to the state for the amount of taxes on his roll, when it is a valid one, and even on an invalid one to the extent of the moneys collected." § 264.

The general doctrine of the liability of the official bond of the collector for taxes illegally assessed but collected from the tax payer is stated and supported by numerous references in Brandt on Suretyship, § 447. We will refer to some of them.

In *McGuin* v. *Bry*, 3 Rob. (La.), 196, the illegality of the appointment of the collector and of the assessment was relied on to defeat a recovery on his official bond, and the court say: "By accepting the tax roll and giving bond, Williams and his sureties recognized the authority of the police jury, and it is too late now to contest the validity of these ordinances, after having acted under them and *received the money* taken from the pockets of the people in compliance with their authority."

In *Mississippi County* v. *Jackson*, 51 Mo., 23, BLISS, J., who delivers the opinion, says: "Defendants further contend that the county court had no right to make the assessment, called the jail tax, and therefore all that was collected upon it was

a voluntary gift, and the collector is not holden on his official bond for not paying over the same. To this it may be replied, the collector is estopped from setting up the fact even if it were true. Armed with his tax list and demanding payment according to such list, the payments he receives are made to him in his official character, and he will not be permitted to say that he acted illegally and is not therefore responsible for money collected." The same doctrine is held in Maine and Massachusetts.

In *Fort* v. *Clough*, 8 Greenl., (Me.), the court say in an action on a collector's bond for not paying moneys collected, the sureties cannot "controvert the legality of the meeting at which the collector was chosen, nor *the legality* of the assessment of taxes antecedent to their commitment to him." And again in *Johnson* v. *Goodrich*, 15 Maine, 29, the same court declare that the official bond is responsible for taxes voluntarily paid to him, although he has received no collector's warrant and the *tax bills are imperfect and illegal.*" These decisions are cited and approved by APPLETON, J., in *Inhabitants of Drono* v. *Widgewood*, 44 Maine, 49, and the principle applied in that case.

In *Sandwich* v. *Fish*, 2 Gray, (Mass.), 298, SHAW, C. J., uses this language: "Defects in the warrant or tax list might be a good excuse for not executing the warrant. But to say that a collector who has collected the money without objection by the tax payers, is not liable to account therefor, would be as contrary to the rules of law as to justice." In consonance with these decisions is the recent case of *Hewlett* v. *Nutt*, 79 N. C., 263. The defendant was sued as surety on the clerk's bond for the non-payment by his principal of moneys taxed in certain civil suits and paid into his office. The defence was set up that these taxes were unauthorized by law. The court held that they were lawful; and READE, J., says: "This is answered by what we have said that the statute authorizing the tax is in full force. But if it were

not, the court would not patiently hear the defendant controvert the authority of a statute which he assumed to be in force and under which he received money for the public and refused to pay it over."

4. The exception to the right of the relator to prosecute the action for the default in not paying over that part of the county tax levied for public schools, has not been pressed in the able and exhaustive argument in behalf of the defendants, and we will briefly dispose of it.

The county commissioners constitute the board of education for their respective counties, and the county treasurer, as such, receives and disburses all public school funds. Bat. Rev., ch. 68, §§ 32, 34. The school tax is a county tax for a specified object, and must be collected by the sheriff in money, and he shall be subject to the same liabilities for the collection and accounting for said tax, as he is or may be by law in regard to other county taxes. § 50. *Com'rs of Wake* v. *Magnin*, 78 N. C., 181. The fund, therefore, when collected, will pass into the hands of the relator, and he may maintain the action for this breach of the bond.

5. The last point remaining to be considered is the effect of the association of half of the county tax with the state tax upon the right of the county to that part of the fund.

It is quite clear that unless this money can be recovered for the use of the county, it cannot be recovered at all. The state tax is determined and fixed by statute, and when the amount thus assessed has been paid to the public treasurer, the sheriff's duty in that regard is fully discharged. It would be an answer to any action on the part of the state to show that the entire tax levied for the state had been duly paid into the treasury. Nor in our opinion, however improper was this intermixing of funds, due different political bodies, on the list according to which they were to be collected, has the county thereby lost its right to claim and recover what was in fact assessed for county purposes. The

officer was aware that half the county tax had been placed in the wrong column, and the reasons for so doing, and this information, easily arrived at also by a single numerical calculation, enables him to discriminate between the sums due to the state and to his county. The sum actually collected for county purposes and upon a county assessment, must be paid to the county authorities for the use and benefit of the tax payers and others therein. To deny the relator's right of action is to affirm the right of the collector, after receiving by virtue of his office a large sum from the tax payers, to retain and appropriate one-half to his own use without accountability to any one, a doctrine alike repugnant in the words of SHAW, C. J., "to the rules of law and to justice."

The numerous decisions cited by defendant's counsel and the analogies deduced from them are not in our opinion in conflict with the views we have expressed or the conclusions to which they lead. There is here no want of competent authority to issue the tax list, nor any defect rendering it illegal, apparent upon its face. The alleged irregularity lies behind the process and arises out of facts with notice of which a ministerial officer is not chargeable, and in such cases the warrant should be obeyed, and it affords protection to those who act under it.

There is error, in that the judgment is not against the sureties as well as against the principal for the whole amount of taxes collected and unaccounted for. The action is upon the bond and the liability of the obligors is one and the same. The judgment must be rendered against all the de-defendants.

PER CURIAM. Error.

NOTE—SMITH, C. J. The appeal by defendants and the exceptions therein are disposed of in the plaintiff's appeal. No error.

E. F. MOORE v. THE MAYOR AND COMMISSIONERS OF FAYETTEVILLE.

Constitutional Law—Tax on National Bank Stock.

1. The maxim that taxation and representation should go together has no application to individuals, but to political communities as such; *therefore*, a statute empowering the authorities of a town to impose the same taxes, for municipal purposes, upon non-residents pursuing their ordinary avocations within the corporate limits as upon the inhabitants, with a *proviso* that non-residents so taxed shall have the right to vote at municipal elections, is not abrogated by a change in the state constitution which deprives the non-resident tax payer of his vote.
2. Such a statute authorizes a tax upon the shares in a national bank, located in the town, and held by one who conducts his ordinary business therein, but whose residence is in the county, outside the corporate limits.
3. A tax to pay an existing debt, incurred in the past, is a tax "for municipal purposes" within the meaning of the statute.

(*Buie* v *Com'rs*, 79 N. C., 267, cited and approved.)

MOTION for an Injunction, heard at Chambers, on the 16th of December, 1878, before *Buxton, J.*

The plaintiff resides near to and outside the corporate limits of the town of Fayetteville, but conducts and carries on his business as a merchant within the town. He is president of the People's National Bank, also located in the town, and owns two hundred and five shares of its capital stock, on which the corporate authorities have levied and are attempting to collect an *ad valorem* tax, such as is assessed upon similar property possessed by resident owners. This action involves the legality of the assessment, and the plaintiff's liability to pay the tax on his stock. His Honor refused the motion to enjoin defendants and the plaintiff appealed.

Mr. B. Fuller, for plaintiff.
Mr. N. W. Ray, for defendants.

SMITH, C. J. (After stating the case.) By an act of the general assembly amendatory of the act of incorporation, and ratified May 20th, 1864, § 4, it is declared that the mayor and commissioners of Fayetteville are hereby empowered to impose the same taxes, for municipal purposes, upon all persons whose *ordinary avocations are pursued within the corporate limits* of the town, although *resident beyond the corporate limits*, in like manner and to the same extent, as upon persons resident within the corporate limits; *provided*, that non-residents thus taxed shall have the right to vote at municipal elections.

In *Buie* v. *Commissioners of Fayetteville*, 79 N. C., 267, it is decided that shares of stock in national banks, held by persons residing in the state, are subject to taxation in the county of the owner's residence, as part of his personal estate, and not elsewhere, for state and county purposes. The present case presents the question whether such stock, owned by one whose residence is just outside but whose business is within the corporate limits, may be taxed for municipal purposes in like manner as if his residence was also in the town. As the place and manner as well as extent of taxation of its citizens are regulated by the laws of the state, the solution of the question must be found in the proper interpretation to be put upon the clause of the amended charter, and, in our opinion, is free from all reasonable doubt. The words are direct and positive, that such property as is held by the plaintiff shall be subject to the burden of municipal taxation. The intention and the effect of the act are to make such a person for purposes of taxation an actual resident of the town. We have said in the case referred to, that resident stockholders in national banks might be taxed where the legislature directed, and they are here subjected to municipal assessment in the town. In this respect the plaintiff is made to share in the burdens, as

he does in the advantages of a town residence, and we see no reason why he should not.

It is contended, however, that the proviso conferring the right to vote and participate in the management of municipal affairs, has been superseded and annulled by the constitution of 1868, and that this political privilege is so associated with the liability that the repeal of the one is the extinguishment of the other. We do not so construe the section. The electoral right is conferred on such as may constitutionally exercise it, but is not an inseparable condition of taxation. Persons under age, and women in the situation of the plaintiff, may be assessed and yet they cannot vote. If further restrictions are imposed by the organic law upon the electoral franchise, reducing it within narrower bounds or withdrawing it altogether, if such be the effect of the constitution, from the class to which the plaintiff belongs, this does not annul the authority to impose the tax. There is no such necessary connection between the liability created in the body of the section, and the privilege conferred in the attached proviso, that the former may not remain without the latter. If the constitution denies to the plaintiff the right to vote for officers of the town government for want of actual residence within its boundaries, he shares in other municipal privileges and is not exempt from the common burden by which these privileges are secured to himself and others.

It was suggested in the argument that the tax is levied as well to pay the corporate debt as to provide for the current expenses of the town government, and the first are not "for municipal purposes" within the meaning of the act. It is quite as much the duty of the authorities, in exercising the power of taxation, to provide for an existing legal obligation as for the expenses of governing the town and managing its affairs, and both are "for municipal purposes." The words are broad and comprehensive, looking to every

legitimate use to which the moneys levied can be properly applied. The maxim invoked in aid of the argument that taxation and representation go together, has no application to individuals, but to political communities as such. Otherwise non-residents would escape all taxes whatever.

No error. Affirmed.

MARY A. BANKS v. JOSEPH PARKER and others.

Equities Between Mortgagee and Purchaser—Injunction.

1. A person in the quiet possession of real estate as owner, may obtain an injunction to restrain others from dispossessing him by means of process growing out of litigation to which he is not a party.
2. A mortgaged to B 940 acres of land, and thereafter conveyed to C his right of redemption in 220 acres. Subsequently, A made to B another mortgage on the unsold portion of the land and considerable other property, to secure a large additional indebtedness and a small balance on the first debt. B sold the entire tract of 940 acres under both mortgages at the same time, brought ejectment and recovered judgment against the widow of C in possession of the 220 acres; *Held*, that the heirs of C, also in possession, were entitled to an injunction against the enforcement of such judgment until the equities between all the parties could be declared.

(Smith, C. J., dissenting.)

(*Kornegay* v. *Spicer*, 76 N. C., 95; *Capehart* v. *Biggs*, 77 N. C., 261, cited and approved.)

MOTION for an Injunction, heard at Fall Term, 1878, of PERQUIMANS Superior Court, before *Eure, J.*

See *Parker* v. *Banks*, 79 N. C., 480. Mary Banks, the plaintiff, is the widow of Thaddeus F. Banks, and the other plaintiffs are his children and heirs at law. In 1868, David Parker sold and conveyed to C. C. Pool nine hundred and forty acres of land, lying in the county of Perquimans, for

$3,600, payable in installments, and took from Pool a mortgage on the same to secure the purchase money, $1,600 of which was paid by Pool. In the same year Pool sold two hundred and twenty acres of the same tract to said T. F. Banks for $2,000, which he paid in full.

In June, 1872, David Parker took another mortgage from Pool to secure a large indebtedness, including some small balance, as plaintiffs allege, remaining due on the debt secured by the first mortgage, and conveyed a large amount of property, real and personal, but only seven hundred and twenty acres of the tract conveyed in the first mortgage, leaving out the two hundred and twenty acres that had been sold to Banks. After the death of Banks, which occurred in 1873, David Parker, the mortgagee, advertised the sale of the whole nine hundred and forty acres, under both mortgages, and sold the same in mass, and no other property conveyed in the second mortgage besides the nine hundred and forty acre tract was sold at that time. And at this sale, Joseph, James and John Parker, sons of David Parker, became the last and highest bidders, who it is alleged by plaintiffs paid nothing for the land, and answer equivocally on that point. David Parker, the mortgagee, died before making a deed to his sons, and they, after his death, had a trustee appointed in his stead who executed to them a deed for the entire tract of nine hundred and forty acres. The three Parkers after receiving the deed contracted to convey the land to T. R. Askew and wife, and they have entered into a contract to convey to W. C. Lowery. There is no allegation that any money was paid by any of these parties for the land upon their contracts. They are all parties to this action and had full knowledge, as is alleged, of the plaintiffs' right, and it is not denied by them.

The Parkers have brought an action of ejectment against Mary Banks, the widow, and have obtained judgment against her and are about to turn her out of possession by a writ of

habere facias possessionem. Her children, the other plaintiffs, who are those really in interest, were not made parties to the action of ejectment, and are also about to be ejected from the premises.

At fall term, 1878, of said court an application on motion of plaintiffs was made to the judge then presiding at chambers for an injunction restraining the defendants who were plaintiffs in the said action of ejectment, from suing out and executing the writ of possession. The motion was refused and the plaintiffs appealed.

Mr. J. W. Albertson, for plaintiffs.
Messrs. Gilliam & Gatling, for defendants.

ASHE, J. (After stating the case.) We are not informed upon what ground the restraining order was refused. If it was denied on the ground that the children of T. F. Banks who were not parties to the action of ejectment had no right to interpose in that suit and ask that the writ of possession should be restrained, we think it was error; for they are the equitable owners of the land, the very persons whose rights are to be most affected by the execution of the writ of possession. They have the right to interpose and ask the court for its aid in protecting them from a gross act of injustice. A person in the quiet possession of real estate as owner may obtain an injunction to restrain others from dispossessing him by means of process growing out of litigation to which he was not a party. High on Injunctions, § 259; 28 Ill., 81. If it was refused on the ground that there was a want of equity on the part of the plaintiffs, we think it was equally erroneous; for the plaintiffs have a clear equity to call upon the court for its protection. There is enough alleged in the complaint and not denied, and confessed in the answer, to entitle them to the injunction.

They have been unfairly dealt with in this transaction.

It is probable if the seven hundred and twenty acre tract had been sold by itself as it ought to have been, it would have brought enough to have disincumbered the two hundred and twenty acre tract. All the facts in this case seem to us to disclose a purpose on the part of David Parker and his sons to take advantage of the plaintiffs. He waits until after the death of T. F. Banks before he undertakes to sell the land, and then he sells in mass under both mortgages—a mode of sale that was calculated to prevent competition and stifle bidding. It was bid in by his sons who it is more than probable never paid anything for it, for though they say they accounted with David Parker for the amount of their bid, they state facts in that connection which are calculated to raise a doubt. They say David Parker was sick at the time of the sale and died soon after, and that was the reason why he did not make them a deed. If he was too ill to make a deed, he was hardly well enough to come to an account and settlement. We must believe, since the two hundred and twenty acre tract brought $2,000, that the remaining seven hundred and twenty acres would have sold for more than enough, with the $1,600 paid, to have satisfied the residue of the debt secured by the first mortgage, if the sale had been fairly conducted.

Mortgages with power of sale are regarded with great jealousy, and when there is any unfairness or any suggestion of oppression, the mortgagee will be enjoined until the balance due is ascertained, and all equities between the parties declared. *Kornegay* v. *Spicer*, 76 N. C., 95; *Capehart* v. *Biggs*, 77 N. C., 261.

We are of opinion the injunction should have been granted until the hearing. There is error. Let this be certified to the end that the injunction may be granted and further proceedings had in conformity to this opinion.

Error. Reversed.

EDWIN G. CHEATHAM v. WILLIAM J. HAWKINS and others.

Mortgage of Merchandise—Fraud.

1. A mortgage on a stock of goods which contains a provision that the mortgagor is to remain in possession for at least nine months, and a further stipulation that "in case of removal or attempt to remove the same (the goods) from the town of H. and an unreasonable depreciation in value, *or if from any other cause the security should become inadequate*," the mortgagee may take possession, affords the most cogent intrinsic evidence of fraud.
2. The presumption of fraud thus arising is almost irresistibly strengthened by evidence *aliunde* that the mortgagor was insolvent at the time of the conveyance, and all his other property under mortgage, and that afterwards he continued in possession, made additions to the stock, and applied the proceeds of his sales to his family and personal expenses and the payment of his other debts.
3. If the law adjudges the effect of a transaction to be to delay, hinder, or defraud creditors, it is to be regarded as fraudulent, although this may not have been the actual intention of the parties.

(*Cheatham* v. *Hawkins*, 76 N. C., 335; *Holmes* v. *Marshall*, 78 N. C., 262, cited and approved.)

CIVIL ACTION tried at Spring Term, 1876, of GRANVILLE Superior Court, before *Seymour, J.*

The statement in same case, 76 N. C., 335, and the facts set out by THE CHIEF JUSTICE in delivering the opinion of this court are deemed sufficient to an understanding of the points decided. Judgment for plaintiff, appeal by defendants.

Mr. W. H. Young, for plaintiff.

Messrs. Merrimon, Fuller & Ashe and *Batchelor*, for defendants.

SMITH, C. J. When this case was before the court upon the former appeal, 76 N. C., 335, BYNUM, J., delivering the opinion of the court, thus comments on the mortgage deed:

"To secure a debt the bargainor conveys in mortgage an entire stock of miscellaneous merchandise and at the same time in the deed 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 encumbrance on 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."

It may be added to what is so forcibly said by the court that the intention that Harris in retaining possession might use and dispose of the goods, after the making the mortgage as before, seems to be implied if not directly sanctioned by the following clause inserted in it: "But in case of removal or attempt to remove the same (the goods) from the town of Henderson, and an unreasonable depreciation in value, or if *from any other cause the security shall become inadequate*, the said Hawkins & Co. may take the said property or any part thereof into their own possession." For, it may be asked, how otherwise than by the means specified or by a reduction of the stock itself could the security be rendered precarious, until which time or until the note matured Harris was to remain in undisturbed possession of the goods.

The court in the former opinion also declared "that the mortgage affords the strongest possible example of pre-

sumptive fraud, and one which can scarcely be rebutted by any existing facts outside of the deed."

The case is now before us with the evidence offered on the one side to rebut, and on the other to strengthen and sustain the presumption. The judge who tried the cause and by consent of parties passed upon the facts held that it was not rebutted. We will examine the proof of the "facts outside of the deed" and see what is its force and effect.

When Harris executed his mortgage he was in hopeless insolvency, all of his other property also under mortgage, and his debts estimated to amount to fifteen thousand dollars. He continued in the same manner after as before his conveyance to the defendants to sell and dispose of the goods, furnishing his own family therefrom, and appropriating the fund to the improvement of his land and to the payment of other debts. During the time he bought and made fresh additions to the stock, which were intermingled with the goods on hand, and sold indiscriminately with them. The defendant's agent, Andrews, who negotiated the sale of the bacon and took the mortgage from Harris, testified that he expected when the transfer took place that Harris would go on as before.

The rebutting testimony proceeds from the mortgagor, the agent, and the acting member of the mortgagee firm, each of whom swears that in making and accepting the deed, he did not intend thereby to hinder, delay or defraud other creditors of Harris, or to secure any benefit to him or his family. The only rebutting evidence adduced against the fraudulent purpose inferred from the provisions of the deed itself and their obvious and necessary effect upon the rights of creditors, is found in the declaration of the several parties to the transaction, that an intent to favor the mortgagor, or to delay or defraud his creditors, was not in their minds at the time. This cannot be allowed to remove the legal presumption arising from the facts. Acts fraudulent

in view of the law because of their necessary tendency to delay or obstruct the creditor in pursuit of his legal remedy, do not cease to be such because the fraud as an independent fact was not then in mind. If a person does and intends to do that which from its consequences the law pronounces fraudulent, he is held to intend the fraud inseparable from the act. To lease a stock of goods after they have been conveyed by mortgage in the debtor's possession and subject to his exclusive control and disposition as if they were his own while they are at the same time placed beyond the reach of execution, is itself a fraud; because it does secure ease and exemption to the debtor and obstructs the creditor's remedial process for the enforcement of his debt against the property. As this effect follows from the form of the mortgage and the uses to which the property conveyed by it could be and has been put, it must be considered as within the contemplation of the parties to the mortgage, and cannot be met and removed by their misapprehension of what constitutes fraud, and declaration that none was intended. There are conveyances, regular and fair upon their face, yet rendered fraudulent and void because of the intent accompanying their execution and the unlawful purposes they are made to subserve. The taint is communicated by the accompanying illegal intent. Our attention has been called, in the carefully prepared and forcible argument of the plaintiff's counsel, to many cases in this and other states where the same question has been discussed and decided, to some few of which only will we refer.

In *Collins* v. *Myers*, 16 Ohio, 547, a stock of goods was conveyed by mortgage of which the mortgagor was to remain in possession. The court say: "to hold that such a mortgage was valid, would furnish a complete shelter under which a man could carry on trade for his own benefit completely protected against the payment of his debts and placed wholly beyond the reach of creditors." In *Griswold* v. *Shel-*

don, 4 Coms., (N. Y.) 581, BRONSON, C. J., says: "There would be no hope of maintaining honesty and fair dealing if the courts should allow a mortgagee or vendee to succeed to a claim to personal property against creditors and purchasers after he had not only left the property in the possession of the debtor, but had allowed him to deal with and dispose of it as his own."

In *Tennessee Nat. Bank* v. *Elbert*, 9 Heisk., (Tenn.) 154, a very similar conveyance of groceries was made, and the court say: "Admitting that there was no specific intent to defraud any particular creditor, or no actual fraud in fact, yet here are such facilities for fraud contracted for on the face of the deed, that it must be held as wanting in legal good faith on the plain principle that every reasonable man is presumed to intend the probable consequences of his own acts. And besides, there is clearly a benefit contracted for to the grantors on the face of the deed and a prejudice to the rights of other creditors."

In *Babcock* v. *Eckler*, 24 N. Y., 623, this strong and forcible language is used by one of the judges: "If the necessary consequence of a conceded transaction was a defrauding of another, then as a party must be presumed to have foreseen and intended the necessary consequence of his own act, the transaction itself is conclusive evidence of a fraudulent intent; for a party cannot be permitted to say that he did not intend the necessary consequence of his own voluntary act. Intent or intention is an emotion or operation of the mind, and can usually be shown by acts or declarations, and as acts speak louder than words, if a party does an act which must defraud another is weighed down by the evidences of his own act."

We may add to the numerous cases cited in the opinion of BYNUM, J., the opinion of the same judge in the more recent case of *Holmes* v. *Marshall*, 78 N. C., 262, in its main features very similar to this before us, wherein he says:

"The presumption of fraud here is not affected by the ignorance of the plaintiff of the insolvency of the trustors at the the time of the execution of the deed; but the presumption is raised by the *fact* of their insolvency, and the further fact that the plaintiff is a party to a deed of trust which secures a benefit to the makers and which conflicts with the right of creditors."

If the motive to be ascertained, not from the act itself and its results but from the subsequent declarations of the parties to the transaction, is to be the test of the validity of conveyances, they would depend not upon the clear and well settled principles of law but upon the capricious and uncertain temper of individual persons. Hence the reasonableness and utility of the rule which has been established.

The surrounding facts of this case and the uses made of the goods, the possibility of which brought the mortgage to the very verge of condemnation, as fraudulent upon its face, but strengthen instead of impairing the force of the presumption which it is said to be almost impossible successfully to repel.

We see no error in the ruling of the court, and the judgment must be affirmed.

No error. Affirmed.

A. P. NEWHART v. H. B. PETERS and others.

Husband and Wife—Mortgage—Demurrer.

1. In an action of foreclosure, it was alleged that a note was made by the wife for money borrowed by her, and to secure its payment the husband and wife joined in a mortgage deed of her land; a third party claiming an interest therein, was made a defendant and demurred to

the complaint, for that, it did not state a cause of action against the *feme* defendant so as to subject her land to sale, the note not having been made with the written consent of her husband, and the court sustained the demurrer; *Held*, to be error.

2. A mortgage deed of husband and wife conveying the wife's land to secure payment of a debt, is binding upon the wife.

(*Purvis* v. *Carstaphan*, 73 N. C., 575; *Shinn* v. *Smith*, 79 N. C., 310; *Jeffrees* v. *Green*, *Ibid.*, 330, cited and approved.)

CIVIL ACTION tried at Spring Term, 1878, of MECKLENBURG Superior Court, before *Cox*, *J.*

This action was brought for the foreclosure of a mortgage and heard upon demurrer, which His Honor sustained and dismissed the case, and the plaintiff appealed. The facts are set out by THE CHIEF JUSTICE.

Messrs. J. E. Brown and *Shipp & Bailey*, for plaintiff.
Mr. R. Barringer, for defendants.

SMITH, C. J. The plaintiff alleges, in his complaint, that the feme defendant, becoming indebted to him for borrowed money, on the 31st day of December, 1871, executed her bond therefor, payable at nine months and with interest from date, and that no part of the debt has been paid. That at the time of giving the bond the defendant, H. B. Peters and wife, in order to secure its payment, executed a deed of mortgage conveying to him a certain lot in Charlotte, belonging to the wife, which has been duly proved and registered. The prayer is for judgment on the bond and a foreclosure and sale of the land to pay the debt. No answer has been put in. At spring term, 1877, next after that to which the suit was brought, the First National Bank of Charlotte was also made a party defendant with leave to answer or demur to the complaint, and at fall term following filed a demurrer. The cause of demurrer assigned is, that the complaint does not state facts sufficient to con-

stitute a cause of action against the feme defendant, so as to subject said realty for sale as prayed for, and thus dispossess the said corporation, in that it does not appear on the face of the complaint that the contract specified as being entered into by the wife, was made with the written consent of her husband, or for purposes necessary under the law to make it a binding obligation on her. The court below sustained the demurrer and from the judgment thereon the plaintiff appealed. There is error and the demurrer must be overruled:

1. The demurrer admits the facts to be as stated in the complaint and the defence rests upon their *insufficiency* to constitute a cause of action. No other facts can be introduced or considered by the court. There is no averment found in the complaint showing or from which an inference can be drawn, that the bank has any interest in the subject matter, or can be affected by the result of the suit. So far as appears, it intervenes in a dispute to which it is an entire stranger.

2. The validity of the bond and the legal capacity of the feme defendant to execute either it or the mortgage, are questions personal to her and to such others only as may have derived from her some claim or right to the property conveyed. It is for these only and not for others to set up the defence and resist the action.

3. Though it may be unnecessary to the decision, as our opinion is clear on the point discussed by the counsel of appellee, we fully concur in the adjudications heretofore made, that the husband and wife can by deed of mortgage, executed, proved and registered as prescribed by law, make an effectual conveyance of her lands and subject them to the payment of debts or other liabilities. *Purvis* v. *Carstaphan*, 73 N. C., 575; *Shinn* v. *Smith*, 79 N. C., 310; *Jeffrees* v. *Green*, *Ibid.*, 330.

The doctrine that a feme covert can make an absolute

deed for her land, but cannot mortgage them, involves the absurdity of allowing her to deprive herself of her property altogether, and disabling her from reserving an equity of redemption for her own benefit.

Error. Reversed.

R. W. WHARTON, Adm'r., v. ELIZABETH LEGGETT and others.

Homestead— Widow.

Under Art. X, § 5 of the constitution, a widow is not entitled to a homestead in the lands of her husband if he die leaving children—minors or adults.

(*Watts* v. *Leggett*, 66 N. C., 197; *Hager* v. *Nixon*, 69 N. C., 108, cited and approved.)

SPECIAL PROCEEDING heard on appeal at December Special Term, 1877, of BEAUFORT Superior Court, before *Schenck, J.*

Upon the facts which are set out by Mr. Justice ASHE in delivering the opinion, His Honor held that the defendant, widow, was not entitled to a homestead, and from that ruling she appealed.

Mr. J. E. Shepherd, for plaintiff.
Mr. Geo. H. Brown, Jr., for defendant.

ASHE, J. This is a special proceeding commenced before the clerk of the superior court of Beaufort county, by the plaintiff as administrator of John A. Leggett, against Elizabeth Leggett, his widow, and the heirs at law of his intestate who are defendants, to sell the lands descended from him, to make assets for the payment of his debts.

The intestate, John A. Leggett, owned no other land than that described in the petition, which is worth less than one thousand dollars. He left children but they had attained their majority. His widow, Elizabeth Leggett, who had no homestead of her own, resisted the application of the administrator and claimed her homstead in the land.

The question is, has she a right to a homestead? By Art. X, § 2, of the constitution a homestead is provided for every resident of the state who owns land, not exceeding the value of $1,000, by exempting it from execution, &c. By section 3 the homestead after the death of the owner thereof shall be exempt from the payment of any debt during the minority of his children or any one of them; and by section 5 it is provided, "if the owner of a homestead die leaving a widow but *no children*, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall enure to her benefit during her widowhood, unless she be the owner of a homestead in her own right."

The plain and literal construction of these sections is that they were meant, first, to secure a homestead to every resident of the state who owned land and was in debt, by exempting his land, not exceeding in value $1,000, from sale for his debts; second, if he die in debt and in possession of a homestead, it should descend to his minor children until the youngest attain the age of twenty-one years; and, third, if he die in debt and in possession of a homestead, leaving a widow and *no children*, it would go to her.

There would have been no question about this construction, if it had not been for the act of 1868, ch. 137, the tenth section of which provides that "if any person entitled to a homestead and personal property exemption die without having the same set apart, his widow, if he leave one, then his child and children under the age of twenty-one years, if he leave such, may proceed to have said homestead and personal property exemption laid off to her, him or them,

according to the provisions of sections seven and eight of this chapter."

A doubt arose in the minds of some whether it was not the purpose of the legislature by the enactment of this section, to extend the homestead rights of the widow, and it is contended in her behalf in this case, that it "really gives her a homestead whether there be children or not;" but this court has given quite a different construction to the section. It has held that the purpose was to prevent the widow or children from being prejudiced by the omission of one entitled to a homestead to have it laid off in his lifetime, and to provide the mode of laying it off for them, to-wit: according to the provisions of sections seven and eight of the same act which prescribed the course of proceeding for setting it apart for residents of this state, as guaranteed by Art. X of the constitution. *Watts* v. *Leggett*, 66 N. C., 197. PEARSON, C. J., in delivering the opinion of the court in that case said: "It is hard to understand how a provision to prevent the widow and children from being prejudiced by an omission to have the assignment in the lifetime of the party entitled, can be strained so as to have the effect of giving them greater advantage than if the omission had not occurred on the part of one under whom the widow and children derive their title. The constitution makes the 'relief of the debtor' its primary purpose, and the benefit to the widow and minor children comes in merely as an incident. It cannot be supposed that the effect of the statute is to go beyond the constitution, for its professed purpose is to carry into effect the provisions of the constitution, and to secure the homestead and personal property exemption as guaranteed by Art. X of the constitution." This we think settles the construction of section ten.

But it is also insisted on the part of the widow defendant in this case, that the words in section five, Art. X, "but no children," should be construed to mean *minor children*. We

do not concur in this construction. It cannot be made without discarding the plain and unequivocal language of the constitution—"leaving a widow but no children." We think it means *no children*, neither minors nor adults. And this was the opinion expressed by RODMAN, J., in the case of *Hager* v. *Nixon*, 69 N. C., 108. The widow in this case is not entitled to a homestead.

No error. Affirmed.

W. B. RICHARDSON v. J. J. WICKER, Sheriff.

Amercement of Sheriff—Homestead.

1. A sheriff is not liable to amercement for failure to have in court the amount of an execution issued upon a judgment for a debt contracted prior to 1868, when the judgment debtor has no property, real or personal, in excess of his exemptions under article X of the constitution.
2. The provisions of the exemption laws (constitution, art. X, and the statutes passed in pursuance thereof,) so modify chap. 106, § 15, Bat. Rev., as not to authorize the infliction of the penalty therein imposed for obedience to said exemption laws.

(*Badham* v. *Jones*, 64 N. C., 655, cited and approved.)

MOTION to amerce the defendant sheriff heard at Fall Term, 1878, of MOORE Superior Court, before *Buxton, J.*

The facts appear in the opinion. His Honor refused the motion and the plaintiff appealed.

Messrs. Hinsdale & Devereux, for plaintiff.

Messrs. John Manning, Neill McKay and *Merrimon, Fuller & Ashe*, for defendant.

DILLARD, J. This was a *sci. fa.* to show cause against a

judgment *nisi* for $100 against the defendant as sheriff of Moore county for failing to have in court at fall term, 1878, the amount of an execution issued in the case of the plaintiff against Alex'r McNeill, Arch'd D. Blue and W. C. Thaggard for the collection of a debt contracted before the war. The defendant sheriff showed for cause against the making of the judgment absolute, that the defendants had no property, real or personal, in excess of the exemptions allowed them by the laws of the state and the decisions of the courts, and that he had acted with the execution which came to his hands in the manner and upon the reasons stated in his return endorsed thereon, which was in the following words: "The defendants file no petition for homestead and personal property exemptions to be laid off; plaintiff neither pays nor tenders fees to lay off same, and therefore no action; and further, no action taken because of the penalties and prohibitions set forth in Bat. Rev., ch. 55."

1. Taking the facts above recited to be true, as by law we are required to do, there being no replication to them or other denial, the question is, do they in law constitute a sufficient cause against judgment absolute?

The execution issued to the sheriff was a command of the law to make the money therein specified out of the personal property of the defendants, if sufficient; and if not, then out of the lands owned by them at the date of the judgment, or since; and to have the money together with the writ in court at the return day, then and there to be rendered to the plaintiff. In case of failure to do these things, the sheriff was liable to an amercement of one hundred dollars with privilege at the next term of the court to show cause against it. Bat. Rev., ch. 106, § 15. Under this statute which is a copy of Rev. Code, ch. 105, § 17, the penalty is imposed upon the delinquency of the sheriff in failing to return the execution at all, or returning it without the money. And it is given to the plaintiff in the execution upon the theory that

he is aggrieved., but chiefly as a punishment of the officer, and to stimulate him to active obedience.

Since this statute was passed and the penalty given for the two things—non-return of the process and failure to have the money—the constitution of 1868, article ten, and the laws passed in pursuance thereof, exempted from execution lands not exceeding a thousand dollars in value, and personal property not exceeding five hundred dollars in value, and required of the sheriff before levy and sale to set apart a homestead in land and personal property exemptions, under pain of indictment for a misdemeanor in case of his failure to do so; and has forbidden the sale of a reversionary interest of any land included in a homestead on pain of indictment for failure to do this also. Bat. Rev., ch. 55, §§ 17, 26 and 27.

This new law upon the subject of exemptions, taken in connection with the statute imposing the penalty of one hundred dollars, required the sheriff in executing the writ to leave off the exemptions in land and personal property as aforesaid, and restricted his liability to an amercement to the non-return of the execution, and to a failure to have the money in court by a levy and sale of the property *outside* of the exemptions. It being admitted in this case that the execution debtors had nothing beyond their exemptions, there was therefore no liability to amercement on the part of the sheriff, and the cause shown by him in his return was legally sufficient to prevent the judgment *nisi* from being made absolute.

It has been held in *Edwards* v. *Kearzey*, decided at the October term, 1877, of the supreme court of the United States, that the exemptions in land, provided for by the constitution of 1868, were not allowable against debts previously contracted. And it may be that consistently with that decision the plaintiff in our case had the right to have his debt made (the same being contracted in 1860) out of the

real and personal property of the execution debtors, or either of them, without any exemptions whatever, except perhaps an exemption in personalty, under the legislation in existence at the time of the contract. And it may be that it was the duty of the sheriff to know the effect of said decision and to have proceeded with the plaintiff's execution to make the money. But his failure so to do gave to the plaintiff a right, by action on the case against the sheriff alone, or by a suit on his official bond, to recover such damages as he could prove he sustained; and there is no doubt he could have maintained such actions. But it is not the necessary effect of the decision in *Edwards* v. *Kearzey* to give the plaintiff in addition to a full remedy for his debt, the benefit of a penalty of one hundred dollars imposed by the statute on the sheriff, simply as a punishment for official neglect.

The imposition of a penalty for a want of official diligence is a matter of state regulation, and it would be no impairment of the plaintiff's right to collect his debt if the legislature should repeal the amercement law altogether. Therefore we cannot see how it is that the plaintiff has any right to complain, because at the time his execution went into the hands of the sheriff it should be held, as was the law, that there was no penalty to be imposed on the sheriff in relation to his execution until after first setting apart the exemptions as provided by the constitution and statute laws of the state. To impose a penalty under such circumstances is to do so without legislation to authorize it.

It cannot be, that obedience to the existing law of the state by a ministerial officer can be regarded as official neglect, and subject him to pains and penalties as provided by section 15, chapter 106, of Battle's Revisal, which by the recent legislation is narrowed to the imposition of penalties upon sheriffs for failure to sell after exemptions are assigned, and to this extent is repealed.

2. In support of the conclusion to which we have arrived, we have a strong analogy in the case of *Badham* v. *Jones*, 64 N. C., 655, which was an action on the bond of a clerk for failing to issue an execution within six weeks after spring term, 1867, as enjoined on him by Rev. Code, ch. 45, § 29.

The convention on the 23rd of June, 1866, provided that execution should not issue to or from spring term, 1867, of the superior courts, the effect of which was to make them run from fall term to fall term,—one execution in a year instead of two, as always before; and this was part of the legislation to hinder and stay creditors. And it was held that the effect of the ordinance was to repeal or so to modify the old act, ch. 45, § 29, Rev. Code, that the clerk was not liable for his omission to issue the execution within six weeks.

Precisely so in this case. The constitution and statutes allowed exemptions in land and personal property, and forbade the sheriff to levy and sell under execution until he had first appraised and set apart the exemptions, and made him indictable for failing so to do; and the effect in our opinion was so far inconsistent with the statute of amercements as to amount to a repeal of it or such a modification as not to authorize the infliction of the penalty of one hundred dollars for obedience to said exemption laws.

No error. Affirmed.

NOTE—The same ruling was made in a similar case between the same parties at this term.

EARLE & CO. v. R. W. HARDIE, sheriff.

Homestead and Personal Property Exemption—Debt contracted prior to 1868.

1. The homestead act of 1867 (ch. 61, act 1866–'67) is in full force as against all debts contracted after its ratification and prior to the adoption of the constitution of 1868.
2. To entitle a judgment debtor to the homestead provided in the act of 1867, against a debt contracted after its ratification, and prior to the adoption of the constitution of 1868, such homestead must have been allotted to him under the provisions of the act prior to the contracting of the debt.
3. As against such debt, the judgment debtor is entitled to the personal property exemption of five hundred dollars under art. X, § 1, of the constitution, more property not being thereby exempted than was exempt under existing law (ch. 61, acts 1866–'67) when the debt was contracted.

APPLICATION for a Mandamus to compel defendant sheriff to levy on and sell property of judgment debtors, heard at Spring Term, 1877, of CUMBERLAND Superior Court, before *McKoy, J.*

The complaint states that at November term, 1869, of said court, the plaintiffs recovered a judgment against William Warden and Daniel McKinnon for the sum of $336.17, with interest from the 15th of November, 1869, and costs, on three promissory notes for one hundred dollars each, dated November 26th, 1867, and payable respectively, six, seven and eight months after date; that the judgment was regularly docketed in the county of Cumberland, and an execution issued on the same to the sheriff against Warden and McKinnon, which came into his hands on the 16th day of April, 1870; and thereupon, on the 20th of said month, he caused the homestead and personal property exemption of each of the defendants in the execution to be laid off and assigned, and made return on the execution, "nothing to be

found over the homestead exemption." On the 2d day of December, 1871, an *alias* execution was issued against them to the defendant, Robert W. Hardie, as sheriff of Cumberland county, with request by plaintiffs that he would levy on the property of defendants which had been set apart for them under the homestead and personal property exemption laws of the state; and the sheriff made return on the execution, "no property to be found in my county in excess of the homestead," dated December 30th, 1871. Then, on the 15th of May, 1873, a *pluries* execution on the judgment was issued to the defendant, Hardie, as sheriff aforesaid, who made return thereon, "nothing to be found in excess of homestead. I decline to levy on the homestead under the existing laws of North Carolina." Afterwards, on the 21st of May, 1877, upon leave obtained from the superior court, another *pluries* execution was issued to defendant sheriff with the request from plaintiffs, through their attorney, that he would levy the execution on the property of the defendants in the execution, but he declined to do so.

The defendants, Warden and McKinnon, own some personal property and the land that was assigned to them as homesteads, and have no property in excess of the amount exempted from execution by the homestead and personal property exemptions provided for in the first and second sections of article ten of the constitution of 1868, and that no part of the judgment has been paid except the sum of $114.21, on the 17th day of July, 1869. Defendant demurred to the complaint, for that, the plaintiffs asked and required of defendant to do acts that were forbidden by law, to-wit, to levy upon and sell property exempt from the execution of plaintiffs' judgment. The demurrer was sustained and the plaintiffs appealed.

Messrs. Hinsdale & Devereux, for plaintiffs.
Messrs. N. W. Ray and *B. Fuller*, for defendant.

ASHE, J. (After stating the case.) We think the plaintiffs are entitled to the writ of mandamus as prayed for; but before the writ is issued, it is proper as a guide to the sheriff that it should be ascertained whether the defendants in the judgment are entitled to homesteads and personal property exemptions, and if so, to what amount and under what law. In considering these questions we will first inquire whether they are entitled to homesteads, and then, whether they can claim personal property exemptions against the execution of plaintiffs.

It has been decided by the supreme court of the United States at the October term, 1877, of said court, in the case of *Edwards* v. *Kearzey*, carried from this court by writ of error, that the second section of article ten of the constitution of 1868, which exempts from execution real property of a resident debtor not exceeding in value one thousand dollars, is void as against pre-existing debts, being in contravention of the constitution of the United States, which inhibits a state from passing a law impairing the obligation of contracts. Art. I, § 10. And the federal constitution being the supreme law of the land, and the supreme court of the United States its ultimate and authoritative expounder, we must refer to the judgments of that tribunal for the obligatory rule to control our decisions upon all constitutional questions arising under that instrument.

The second section of article ten of our constitution of 1868, having been declared void as against debts previously contracted, the act of the legislature passed on the 7th of April, 1869, Bat. Rev., ch. 55, to carry its provisions into effect, is also void as against the same debts. The act being void against pre existing debts, its clause repealing all laws coming in conflict with its provisions leaves the act of 1866–'67, ratified on the 25th of February, 1867, in full force as against all debts contracted after the date of its ratifica-

tion and before the time of the adoption of the constitution of 1868. No act can be in conflict with a void act.

The act of 1867, in the first section, provides: "That it shall be lawful for any citizen of the state who is possessed of a freehold of lands within the same, to file his petition in the court of pleas and quarter sessions of the county where the land lies, praying for the allotment of a homestead therefrom not exceeding one hundred acres if in the country, or one acre if in a city or town, which allotment may include a single dwelling and the necessary outhouses; and thereupon it shall be the duty of the court to appoint five freeholders to lay off and allot to the petitioner said homestead by metes and bounds according to their discretion, make a descriptive account of the same under their hands and seals, and return it to the court at its next session." This act having been in force when the plaintiffs' debt was contracted, the defendants in the judgment have the right to hold the homestead therein provided for against any execution that may be issued on the plaintiffs' judgment, provided they have complied with the requirements of the act.

We will next inquire whether the defendants in the judgment can hold the exemption of five hundred dollars in value of personal property as guaranteed in the first section of article ten of the constitution of 1868. We see no reason why they cannot. That section was not brought under the consideration of the supreme court of the United States in the case of *Edwards* v. *Kearzey*, and its operation upon pre-existing debts contracted after the ratification of the act of 1867, is an open question. Without doubt the act of 1867 was in force until the adoption of the constitution of 1868, and by the seventh section thereof there was exempt from execution after its ratification, "all necessary farming and mechanical tools, one work horse, one yoke of oxen, one cart or wagon, one milk cow and calf, fifteen head of hogs, five hundred pounds of pork or bacon, fifty bushels of corn,

twenty bushels of wheat or rice, household and kitchen furniture not to exceed in value two hundred dollars, the libraries of licensed attorneys at law, practising physicians and ministers of the gospel, and the instruments of surgeons and dentists, used in their professions;" the value of which exclusive of the libraries of attorneys, physicians, and ministers, and the instruments of surgeons and dentists, may amount to much more than five hundred dollars.

Laws which subsist at the time and place of making a contract, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. *Van Hoffman* v. *Quincy*, 4 Wallace, 552. They are in contemplation of both parties to a contract. The debtor knows how much of his property he can hold in exoneration from his liabilities, and the creditor knows how much of the estate of his debtor he has the right to look to for the satisfaction of his debt.

At the time then when the plaintiffs' debt was contracted, to-wit, on the 26th of November, 1867, the exemption act of February 25th, 1867, was in full force, and the debt was contracted in reference to its provisions, by which there was property exempted from execution considerably in excess of five hundred dollars in value. The act was prospective in its operation and the defendants in the judgment had the right to hold the property therein enumerated discharged from liability to the plaintiffs' debt. But after the date of plaintiffs' debt, the constitution of 1868 was adopted, and the question here recurs, whether the first section of article ten of that instrument is void against this debt. We think it is not.

The ground on which homesteads and exemptions are pronounced unconstitutional as impairing contracts, is, because they withdraw from liability to pre-existing contracts property which at the date of the contracts was liable to their satisfaction. "One of the tests that a contract has been

impaired is that its value has by legislation been diminished." *Van Hoffman* v. *Quincy*, *supra*, cited in *Edwards* v. *Kearzey*. Hence it follows that an exemption law which does not diminish the value of a contract, or withdraw from liability more property in value than was exempted at the time the contract was made, is not unconstitutional. *Lessly* v. *Phipps*, 49 Miss., 790; *Larence* v. *Evans*, 50 Ga., 216; *Whittington* v. *Colbert*, *Ibid.*, 584. Therefore the first section of article ten of the constitution of 1868 is not void as against the debt of plaintiffs, because it does not exempt from liability more property than was exempt by the existing law when the debt was contracted. We do not think the framers of the constitution of 1868 contemplated giving the personal property exemptions therein provided for, in addition to those given in the act of 1867, for that would have made it obnoxious to the reasoning and conclusion in the *Edwards-Kearzey* case; but intended it should be a substitute for them against all debts incurred or contracts made after the 25th of February, 1867, the day of the ratification of the act of that date, and prior to the adoption of the constitution on the 24th of April, 1868.

There is error. The judgment below is reversed and the demurrer overruled. This must be certified to the superior court of Cumberland in order that a writ of mandamus may be issued to the defendant, Robert W. Hardie, as sheriff of the county, commanding him to proceed forthwith under the execution now in his hands, or that may hereafter come into his hands, issued upon the said judgment in favor of the plaintiffs against William Warden and Daniel McKinnon, to levy upon and make sale of the personal property of each of the said defendants in excess of five hundred dollars, if to be found; and if not, to levy upon and sell the lands of each of the defendants owned by them at the date of the docketing of the judgment, or acquired by them since, or so much thereof as will satisfy the said judgment, except-

ing any homestead either of them may have had allotted to him under the provisions of the act of 1867, prior to the contracting of the debt.

Error. Reversed.

State on relation of B. F. GAMBLE v. H. T. RHYNE, Adm'r, and A. W. DAVENPORT.

Homestead and Personal Property Exemption—Debts contracted prior to 1868*—Attachment—Sheriff's Bond.*

1. Property seized under attachment is only a legal deposit in the hands of the sheriff to abide the event of the action, and after judgment against the defendant, he is entitled to the same exemptions in the property attached as he would have been had there been no attachment.

2. In an action upon a sheriff's bond, where the breach alleged was the failure to sell certain personal property under execution, which was in the possession of the sheriff, having been attached by him in the action in which judgment was rendered, such judgment being founded upon a debt contracted prior to 1868; *It was held*, to be error to exclude evidence tending to show that the judgment debtor was entitled to the property attached as his personal property exemption.

3. A judgment debtor is entitled to exemptions under Const., Art. X, § 1, against a debt contracted between February 25th, 1867, and the adoption of the constitution of 1868. *Quære*, as to exemptions in personalty against a debt contracted prior to February 25th, 1867.

(*Com'rs of Montgomery* v. *Riley*, 75 N. C., 144; *Duvall* v. *Rollins*, 71 N. C., 218, cited and approved.)

CIVIL ACTION tried at Spring Term, 1878, of GASTON Superior Court, before *Cox, J.*

This action was brought on the official bond of R. D. Rhyne, sheriff of Gaston county, the intestate of defendant, H. T. Rhyne, alleging a breach of the bond for the causes

set out in the opinion. Verdict for plaintiff. Judgment, appeal by defendant.

Messrs. Wilson & Son, for plaintiff.

Messrs. Jones & Johnston and *Hinsdale & Devereux*, for defendants.

DILLARD, J. The relator of the plaintiff, on the 25th of October, 1873, sued Albert Davis, in a justices' court, for $35 on a note executed before the constitution of 1868, and in the course of the action he procured a warrant of attachment to be issued, which came into the hands of R. D. Rhyne, sheriff, defendant's intestate, and under it he seized various articles of personal property, not exceeding $75 in value. Relator recovered judgment in the justice's court and Davis appealed to the superior court, and in that court also the relator had judgment.

After judgment the relator sued out an ordinary execution and it went to the sheriff's hands, and on it the sheriff returned, "no property of defendant liable to execution to be found in my county." Thereupon the action was brought on the official bond of the sheriff.

The relator assigns as a breach of the bond that the sheriff failed to sell and apply to his debt the property seized under the attachment. The defendants rest their defence on the position that the property seized was not of more value than $75, and that the judgment debtor had not as much personal property in all as the law exempted from execution.

On the trial in the court below the defendants, in support of the issue on their part, offered to make proof of these several facts, to-wit, that the judgment debtor was a housekeeper with a family; that the property seized and all he had was less than the sum exempt from execution by law; that he demanded the same at the seizure under the attachment, at the motion to vacate in the justice's court, and

again under the execution issued upon the judgment obtained in the superior court; and the case of appeal states that His Honor excluded the offered proof on these several points.

In the argument at the bar of this court, it was insisted for the relator that the property seized under the warrant of attachment went to the sheriff's hands, and thereby he owed the duty to take care of and was liable for the said property as a security for the satisfaction of any judgment he might recover, in the same manner, as if he had levied on the same under an execution. It was urged that the judgment debtor having moved to vacate the attachment in the justice's court and failed and allowed on appeal judgment to pass in the superior court for the debt, leaving the attachment still in force, he was concluded from claiming the said property as an exemption, and the sheriff in failing to sell the same and apply the proceeds to relator's debt, had broken the conditions of his bond and could not acquit himself of liability by setting up the debtor's right to it as an exemption.

We are of opinion that the position contended for by relator's counsel is not legally correct. Under our law the warrant of attachment is a provisional remedy, issued in the progress of a cause and as ancillary thereto, and is a command to the sheriff to seize the tangible property of the defendant and keep the same or its proceeds, if the same being perishable has been sold, until judgment in the action is obtained. Bat. Rev., ch. 17, §§ 203 and 204.

The property seized is a legal deposit in the hands of the sheriff to abide the event of the suit, the lien of the attaching creditor having priority over any subsequent attachment or execution which may come to his hands; and on the rendition of judgment againt the defendant and when execution is issued and comes to the sheriff's hands, then his powers as sheriff under the attachment to hold merely are merged into the larger powers acquired by him under the

execution. Bat. Rev., ch. 17, § 209, (2); 1 Whit. Practice, 515; *Schieb* v. *Baldwin*, 22 How., 278.

When the execution came to the hands of the sheriff, the debtor, being a resident of the state, had the same right of exemption, although there had been a warrant of attachment, as he would have had in case there had been no attachment. *Com'rs of Montgomery* v. *Riley*, 75 N. C., 144.

The debtor's right of exemption was by the paramount authority of the constitution and needed no action of the sheriff to vest the right in him; and the right was not forfeited by a failure of the debtor to have the property discharged by an order of the court. *Duvall* v. *Rollins*, 71 N. C., 218; *Com'rs of Montgomery* v. *Riley, supra.* We are, therefore, of opinion that the refusal of the motion to vacate the attachment in the justice's court did not in law conclude the debtor from claiming his exemption as against the execution when it came into the sheriff's hands. His Honor on the trial in the court below should have allowed the sheriff in support of his defence of "no breach," to make proof that the property attached was covered by the exemption to which the execution debtor was entitled, and that he had delivered it to him.

It was next insisted in the argument here, and His Honor so charged the law to be in the court below, that no personal property exemption whatever could be allowed the debtors as against the relator's debt, the same having been contracted prior to the adoption of the constitution of 1868, and in that view of the law the sheriff should have sold the property seized under the execution that was issued to him on the judgment in the superior court.

His Honor holding the law as excluding all right of exemption as against any debt contracted before the constitution of 1868, held that the offered proof on the part of the defendants as to residence in the state of the debtor, and the character and value of his personal property was immaterial

and excluded it, and therein, as we think, he committed an error.

His Honor's ruling went to the extent of denying all exemption to any debt contracted before the constitution of 1868, and we think, and have so decided at this term in the case of *Earle* v. *Hardie*, that there is an exemption in favor of a debt contracted in the interval between the act of 25th of February, 1867, and the adoption of the constitution of 1868; and it may possibly be, if the debt was contracted prior to the act of 1866–'67, there was an exemption in personalty existing to it, but as to this we express no opinion. It is our opinion, therefore, the proof should have been received and thereupon His Honor should have declared the law as to the existence or non-existence of the right of exemption of the debtor against the particular debt of the relator as material to the question of the alleged breach of the sheriff's bond.

There is error. Let this opinion be certified to the end that a new trial may be had.

Error. *Venire de novo.*

WARREN GHEEN and others v. R. R. SUMMEY.

Homestead—Allotment—Estoppel.

1. The laws enacted for carrying out the provisions of the constitution, Art. X, § 1, (Bat. Rev., ch. 55,) are void against debts contracted prior to the adoption of the constitution, April 24th, 1868.
2. Where a homestead was allotted to a judgment debtor in 1870, against a debt contracted prior to 1868, and on appeal of the judgment creditor to the township board of trustees, the homestead was again allotted to the judgment debtor; *It was held*, that the judgment creditor was not thereby *estopped* from proceeding now to collect his debt by a levy upon and sale of said homestead.

3. The action of a sheriff in assigning a homestead by metes and bounds is not needed to any extent to *vest the right*, but merely as finding the *quantum* so as to enable him to ascertain the excess, if any.

(*Littlejohn* v. *Egerton*, 77 N. C., 379; *Lambert* v. *Kinnery*, 74 N. C., 348; *Spoon* v. *Reid*, 78 N. C., 244, cited, distinguished and approved.)

MOTION for an Injunction heard at Chambers on the 6th of January, 1879, before *Schenck, J.*

The record shows that the plaintiffs obtained several judgments against the defendant on debts contracted prior to 1868, and executions were issued thereon and placed in the hands of J. H. King, sheriff of Lincoln county; that on the 19th of October, 1870, the said sheriff proceeded to summon appraisers to lay off and assign to the defendant his homestead and personal property exemptions; that the appraisers laid off and allotted them to him and made due return of their proceedings, and the defendant appealed to the township board of trustees, who again laid off and assigned to him his homestead and personal property exemptions; that the sheriff then proceeded to levy upon and sell by virtue of said executions all the real estate of the defendant in excess of the homestead so laid off and assigned to him; from all of which actings and doings there was no appeal taken by the plaintiffs or either of them; that recently other executions have been issued on said judgments and are now in the hands of the sheriff, and he has levied upon the land covered by the homestead, so laid off and set apart to the defendant, and has advertised the same for sale. Upon this state of facts set forth in the defendant's affidavit and not controverted, His Honor granted the injunction restraining the sheriff from selling the defendant's homestead, from which ruling the plaintiffs appealed.

Messrs. Wilson & Son and *W. H. Bailey*, for plaintiffs.
Messrs. Gray & Stamps, for defendant.

ASHE, J. (After stating the facts.) The inquiry for us to make is, was there error in granting the injunction? and this involves the question, whether the homestead was liable to be sold under the executions?

It has been recently decided by the supreme court of the United States in the case of *Edwards* v. *Kearzey*, at the October term, 1877, carried by writ of error from this court, that the second section of article ten of the constitution, so far as it relates to pre-existing debts, is in violation of the constitution of the United States, Art. I, § 10, forbidding the states from passing any law impairing the obligation of contracts. The act then of the 7th of April, 1869, Bat. Rev., ch. 55, which was enacted for the purpose of carrying out the provisions of that section of the state constitution, must also be void, as against the same class of debts. A legislative act may be entirely valid as to some classes of cases, and clearly void as to others. Cooley Const. Lim., 218. The act of 1869, so far then as it provides the machinery for laying off and allotting the homestead against debts contracted prior to the 24th of April, 1868, the date of the adoption of the constitution, is void; but perfectly valid as to all contracts entered into subsequent to that date. *Earle* v. *Hardie*, *ante*, 177.

The court below held that the proceedings had by the appraisers and the township board of trustees in regard to the homestead of the defendant were *res adjudicata*, and worked an estoppel of record against the plaintiffs; and in support of the position relied upon the case of *Spoon* v. *Reid*, 78 N. C., 244. But on looking into that case, it is not made to appear when the debt sought to be enforced was contracted—whether before or after the adoption of the constitution—and upon the maxim "*omnia præsumuntur esse rite acta*," we must take it for granted that the debt which was the subject of action in that case was contracted subsequent to the

24th of April, 1868; otherwise the decision would be erroneous.

The act of April 7th, 1869, being void as to debts contracted prior to the 24th of April, 1868, then all the provisions of that act with regard to the machinery for carrying out the provisions of the constitution, are void as to the same class of debts. Therefore, neither the appraisers authorized by that act, nor the township board of trustees on appeal, have any jurisdiction in regard to such debts, and their acts are absolutely void. They had no more authority to decide the matter than any other body of citizens who might choose to exercise the power. In order to be conclusive, the judgment relied on as *res adjudicata* must have been one of a legally constituted court. Bigelow on Estoppel, 13; *Rogers* v. *Wood*, B. & A., 224. And in Freeman on Judgments, 252, it is laid down that a judgment to constitute an estoppel must proceed from a court of competent jurisdiction. Then neither the appraisers nor the township board of trustees having authority to lay off and allot to the defendant his homestead against the debt of the plaintiffs, there is no estoppel of record against them. Nor is there any estoppel *in pais*. And this conclusion of the non-existence of an estoppel, as it seems to us, results from and is in harmony with the estate of a debtor as it existed under our constitution and the exposition thereof by the decisions of this court.

It is settled by the construction of this court that the homestead right is a quality annexed to land, whereby an estate is exempted from sale under execution for a debt, and it has its force and vigor, in and by the constitution, and is in no wise dependent on the assent or action of the creditor. And, therefore, it results, as has been expressly held, that the action of the sheriff in assigning the same by metes and bounds is not needed to any extent to vest the right, but merely as finding the *quantum*, so as to enable him to ascer-

tain the excess, if any, and to levy on and sell it. *Littlejohn* v. *Egerton*, 77 N. C., 379; *Lambert* v. *Kinnery*, 74 N. C., 348.

By force of such existence of the homestead right, and the estate of the debtor therein, the creditor, as it is seen, has no agency in its existence or assignment; but it is simply an impediment thrown in his way by the constitution; and having been declared invalid by the decision in the case of *Edwards* v. *Kearzey*, as against pre-existing debts, the suspension of the remedy of such creditors no longer exists, and there is no obstacle to the levy and sale under their executions, by the constitution, or any act or conduct of the creditors, as an estoppel on them as against their debts, unless the debtor be entitled to a homestead under some statute previously enacted and in force when the debts were contracted.

It is to be regretted that the homestead question has not been permitted to remain in the repose it had assumed before the decision in *Edwards* v. *Kearzey*, but we must administer the law as we find it. There is error. The order of injunction is reversed and the injunction dissolved.

Error. Reversed.

GEORGE W. KITCHEN and others v. GEORGE W. WILSON and others.

Action to Recover Land—Practice—Answer—Lappage—Possession— tatute of Limitation—Evidence.

1. An action, wherein plaintiffs claim title in fee to certain land, allege an unlawful entry by defendants and a withholding of the same, and demand restoration of possession and damages, has all the elements of the old superseded action of ejectment and must be governed by the same rules.

2. Where in such case, the defendants in their answer, "disclaiming personal knowledge, say on information and belief that neither the plaintiff nor any one under whom he claims has ever had such possession or title to such tract as to give actual or constructive possession, nor had possession of or title to any portion included in the boundaries now in possession of any of defendants or that was in possession of any of them at the beginning of the action;" *Held*, to constitute a direct and explicit denial of plaintiff's averment of possession.

3. In cases of lapping or interfering conveyances of land, where neither claimant is in actual possession of the interference, the law adjudges the possession to follow the title.

4. The operation of the statute as to the presumption of a grant arising from possession of land is suspended by the issuing of a grant to another, covering the *locus in quo*.

5. The act suspending the statute of limitations from May 20th, 1861, to January 1st, 1870, applies to the presumption of title from adverse possession of land for seven years under color.

6. It is not error to refuse to admit cumulative testimony to prove an undisputed fact.

7. Evidence offered to aid a defective description in a deed or to vary the mathematical lines defined therein is inadmissible for such purpose.

8. In an action to recover land, the conduct and admissions of the deceased ancestor of defendant are not admissible for the purpose of showing the possession of the person under whom plaintiff claims.

(*Baker* v. *McDonald*, 2 Jones, 244; *McAlister* v. *Devane*, 76 N. C., 57; *Williams* v. *Wallace*, 78 N. C., 354; *McLean* v. *Murchison*, 8 Jones, 38; *Brown* v. *Potter*, Busb., 461; *Howell* v. *Buie*, 64 N. C., 446; *Melvin* v. *Waddell*, 75 N. C., 361; *Benbow* v. *Robbins*, 71 N. C., 338, cited and approved.)

CIVIL ACTION to recover Possession of Land tried at Fall Term, 1878, of TRANSYLVANIA Superior Court, before *Avery, J.*

The opinion contains the facts. Judgment for defendants, appeal by plaintiffs.

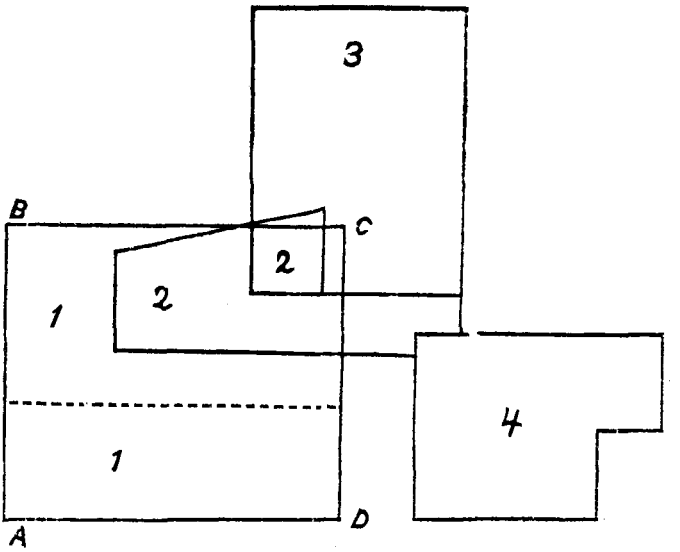
Messrs. J. H. Merrimon and *C. M. McLoud*, for plaintiffs.

Messrs. T. F. Davidson and *Reade, Busbee & Busbee* for defendants.

SMITH, C. J. The plaintiffs claim title to the land in dis-

pute under a deed from Beverly Daniel, marshal of the United States, to George C. Neil, dated December 6th, 1811, and a deed from the latter to George Clayton, ancestor of the plaintiffs dated March 10th, 1823, operating as color of title and possession thereunder. In both deeds the land is described as being in the county of Buncombe, "beginning on a small black oak and pointer, on the top of a ridge and runs 225 poles north to a stake, thence east 256 poles to a stake, thence 225 poles south to a stake in James and William Davidson's line, thence with their line 174 poles west, passing their pine corner 82 poles to the beginning, containing 200 acres more or less."

The defendants derive their title under grants from the state to John Clayton, their ancestor, one dated December



1. Beverly Daniel, Dec. 6th, 1811, A B C D.
2. John Clayton, 100 acre grant, including *locus in quo*.
3. John Clayton, 150 acre grant.
4. John Clayton, home tract.

4th, 1815, on an entry of October 29th, 1814, conveying one

hundred acres, the other dated December 5th, 1818, on an entry of January 3rd, 1816, conveying one hundred acres. The jury rendered a special verdict in which they find the following facts:

The boundaries given in the deeds from Daniel to Neil and from Neil to George Clayton are correctly laid down in the plat A, B, C, D, and as appears therefrom, include the land in dispute. The plaintiffs and those under whom they claim have been in possession since the year 1820, of so much of the tract as lies south of the dotted line, marked thereon and embracing the larger part of it. The grants to John Clayton and his home tract are also properly located on the map, and the *locus in quo* lies in the boundaries of one or both of the two grants from the state. The defendants and John Clayton have been in actual possession of the lands defined in the grants, but outside of the plaintiffs' boundaries since the year 1824, and of a portion of their land lying within those boundaries, since the year 1869. The plaintiffs and George Clayton have never been in actual possession of the lappage or part covered by the conflicting claims, until the year 1856, since which time some of it has been occupied by the plaintiffs. Upon the verdict, judgment was entered for the defendants.

The plaintiffs' exceptions relate to the exclusion of evidence offered by them on the trial, and to the insufficiency of the findings of the jury to warrant the judgment that was rendered. The latter will be first considered.

1. The action is trespass for breaking and entering the plaintiffs' close and a constructive possession is in law sufficient to sustain it. By reference to the complaint it will be seen that the plaintiffs claim title in fee to the land described in the deed from Neil to Clayton, allege an unlawful entry thereon by the defendants, in December, 1869, and a withholding of the same to the time of bringing suit, and demand the restoration of possession and damages for de-

taining their property. The case made in the complaint has, therefore, all the elements of the old superseded action of ejectment and must be governed by the same rules. But proof of property in the plaintiffs is necessary to their recovery of the land, whether the action be in one or the other form, since the title, if not changed and vested in them by their possession, remains in the defendants under the grants.

2. The allegation of possession of the disputed territory since, and for nine years preceding the year 1823, is not denied in the answer, and the fact is thereby admitted. This objection rests upon a misapprehension of what is contained in the answer of defendants Wilson and others who assert a right to the premises. In the 2nd paragraph of their answer, disclaiming personal knowledge, they say on information and belief, that neither the plaintiff nor any one under whom he claims has ever had such possession or title to such tract as to give actual or constructive possession, nor have they (plaintiff or Neil) or either of them had possession of or title to any portion included in the boundaries now in possession of any of these defendants, or that was in possession of any of them at the beginning of the action; or in which any of these defendants have entered or cut or converted trees or timber. It would be difficult to use words more directly and explicitly denying the plaintiffs' averment, and the issue thus made was very properly left to and disposed of by the jury.

3. The deed from John Clayton to the defendants was inoperative to convey lands then in the adverse occupancy of the plaintiffs. This point was not pressed in the argument for the two-fold reason: (1) The defendants as heirs at law of John Clayton would take by descent if not under his deed; (2) If such adverse possession existed it would have the effect to vest title in the plaintiffs, and their right to recover would be inaffected by the deed.

4. We are now brought to a consideration of the facts determined by the special verdict and their effect upon the conflicting claims of the parties to the land in contest between them. The plaintiffs insist that their actual occupancy for so long a time, below the dotted line, of the land defined in the deeds of Daniel and Neil was in law a constructive possession, co-extensive with the described boundaries, and there being no actual adverse possession above the line, conferred a valid title to the entire tract.

This is correct as to the lands of others embraced within the plaintiff's deeds, upon which they may have made an *actual entry* and thus become liable to the action of the rightful owner, and it is because the owner fails to bring his action and assert his title when he could do so, that after a time his entry is barred, and the possession transfers the title. But the proposition is not correct when applied to lands within the boundaries of the deed, not actually entered upon so as to give a right of action to the owner. As to lands thus situated a different rule prevails and it is held that the title draws possession to it and restricts *pro tanto* the constructive possession under the deed. The numerous cases cited and commented on by the plaintiffs' counsel will be found on examination to be in harmony with the doctrine stated, that in case of lapping or interfering conveyances where neither claimant is in possession of the interference, the law adjudges the possession to follow the title.

In *Baker* v. *McDonald*, 2 Jones, 244, NASH, C. J., concludes the opinion in these words: "The plaintiff having title to the land covered by the grant of 1767 that title drew to it the possession until the defendant by taking actual possession of the lappage gave him a right to bring this action."

In *McAlister* v. *Devane*, 76 N. C., 57, the court approve the following instruction given to the jury: "If both grantees are in possession under their grants, but neither is

seated on the lappage, the law adjudges the possession in the lappage in the older grantee; if the younger grantee is in actual possession of the lappage then the constructive possession of the older grantee is ousted." The principle is briefly stated in the opinion in the recent case of *Williams* v. *Wallace*, 78 N. C., 354, thus: "When there is no actual occupation shown, the law carries the possession to the real title." And in *McLean* v. *Murchison*, 8 Jones, 38, it is extended so far as to protect a stranger not connecting himself with the superior title, who enters upon the lappage, against the action of the holder of the inferior title.

It was suggested in argument that the plaintiffs' ancestors being in possession under a deed purporting to convey the estate in the entire tract, the statute of limitations began to run from their entry against the state and its operation was not suspended by the successive grants to John Clayton. If the principle is correctly laid down it is not applicable to the facts of the case. The jury find that the plaintiffs' possession of the part below the dotted line commenced in the year 1820, and of the interference in 1856. The grants to John Clayton issued, the first, on the 4th day of December, 1815, and the other, on the 5th day of December, 1818. So no adverse occupancy of any part of the land had begun at the date of either grant and the rule does not apply.

But we do not admit the proposition itself to be well founded in law, and it is in direct opposition to the doctrine declared in *Brown's Heirs* v. *Potter's Heirs*, Busb., 461. In that case the defendants and those under whom they claim, for more than thirty years before the action was brought had been in possession of the upper part of a tract of land with known and visible boundaries and including the *locus in quo*, but of the lappage for a few years only. The plaintiffs derived title under a grant from the state which issued in 1834, after that possession commenced. The opinion of the court is so appropriate to the facts of our case, that we

are content to quote the language of the chief justice and give it without comment. "The court," says NASH, C. J., "instructed the jury that if the defendants had been in possession thirty years before the commencement of this suit, claiming and cultivating it, as deposed to, and claiming to the boundaries, they ought to presume a grant for the same; that the taking out the grant by Brown, there being no actual possession, would not prevent the operation of the presumption. In the *latter part of the proposition there is error;* for if it be true that the issuing of the grant to Brown in 1834 did not stop the running of the presumption as to the land not covered by it, still it certainly must have that effect as to all the land that was covered by it; for at that time the title to the land was in the state, no sufficient length of possession having elapsed to raise the presumption of a grant, and the case in that aspect, presented at the trial, the ordinary one of the lappage of two grants, neither party being in the actual possession of the lappage. The title to the *locus in quo* at the time the action was brought, was in the lessor of the plaintiff and drew to it the possession, which possession was not disturbed until the taking the small portion mentioned in the case."

5. The defendants further rely on their possession of the lappage for more than seven years after their entry in 1856, as having the effect to confer title, and that the act suspending the statute of limitations from May 20, 1861, to January 1, 1870, does not apply. If this interval is eliminated from the computation of time, less than seven years have elapsed up to April 18, 1870, when this action was begun. The construction and operation of this suspending act have been so often before the court that it is needless to say more than that we regard the question of its application to the present case as settled. *Howell* v. *Buie*, 64 N. C., 446; *Melvin* v. *Waddell*, 75 N. C., 361; *Benbow* v. *Robbins*, 71 N. C., 338, and cases therein cited. In the last case the suspending act is held to

apply to the presumption of an easement arising from an adverse user of twenty years.

The remaining exceptions necessary to be disposed of are to the exclusion of evidence. The plaintiffs proposed to prove, 1. That George and John Clayton caused a stone to be placed at C, the end of the second line of the deeds of Daniel and Neil to mark a corner of the tract. 2. A conversation with John Clayton and his recognition of the line from C to D. 3. The declaration of John Clayton pointing out the plaintiffs' line from B to C and from C to D. 4. The survey and running of the line from C to D with the knowledge and privity of John Clayton and his recognition of it as a separating boundary between the tracts, and to show possession in reference to the line.

The court refused to admit the testimony and in our opinion ruled properly in doing so. There was then and there is now no controversy as to the true location of the land comprised in the plaintiffs' deeds, and the lines are expressly found by the jury to be correctly laid down in the plot as contended by the plaintiffs. Cumulative evidence to prove an undisputed fact would have involved a needless consumption of time and the refusal of the court to hear it could do no possible harm to the plaintiffs. If it was offered to aid a defective description in the deeds or to vary the mathematical lines defined therein, it was inadmissible for that purpose and was rightfully rejected.

The evidence last offered of the conduct and declarations of John Clayton looks beyond the establishment of the plaintiffs' lines and proposes to show a recognized possession up to them. It does not appear that the plaintiffs proposed to prove any facts which in law would constitute possession, nor any continuous acts of ownership on the part of himself over the disputed land, from which possession can be legally inferred, but as we understand, conduct and admissions of John Clayton as evidence of George Clayton's possession,

For this purpose the testimony was incompetent. What constitutes a possession sufficient in law to give validity to a defective title is a question of law to be declared upon facts proved, and no such proof was offered.

We have not entered upon the enquiry whether the boundaries of the plaintiffs' land as defined in their deeds are "known and visible lines and boundaries" required under the former as well as under the existing law, to extend the actual possession of a part to the constructive possession of the whole tract, for the reason that it is not necessary to a decision of the cause. There is no error. The exceptions are overruled and the judgment affirmed.

No error. Affirmed.

FIRST NATIONAL BANK OF CHARLOTTE v. J. R. WILSON and Sample & Alexander.

Process—Service of Summons—Jurisdiction—Motion.

1. Personal service of a copy of the summons on a defendant, or his written admission thereof, is necessary to constitute a case in court. A copy left with defendant's wife is not a legal service, and proof of its delivery to him by her, or of his recognition of, or verbal assent thereto, will not make it sufficient. C. C. P., § 89.
2. The refusal of a judge to grant a motion for want of jurisdiction, is no bar to an entertainment of the motion by a judge having jurisdiction.

(*Middleton* v. *Duffy*, 73 N. C., 72; *Howes* v. *Mauney*, 66 N. C., 218, cited and approved.)

MOTION by defendant Wilson to set aside a judgment, heard at Spring Term, 1878, of MECKLENBURG Superior Court, before *Cox, J.*

The facts are embodied in the opinion delivered by Mr.

Justice DILLARD. The court below vacated the judgment as to Wilson, and the plaintiff appealed.

Messrs. R. Barringer and *Shipp & Bailey*, for plaintiff.
Messrs. Wilson & Son, for defendant.

DILLARD, J. This suit was brought to spring term, 1876, of Mecklenburg superior court and a summons issued to the sheriff of Cabarrus county for defendant, J. R. Wilson, was returned endorsed, "Executed 9th May, 1876, by leaving a copy of the summons with the wife of J. R. Wilson," and at the return term, no appearance being entered by the defendants, judgment by default was taken against all of them for the amount of the note declared on.

The defendant Wilson afterwards, to-wit, on the 23d of March, 1878, moved before His Honor, Judge *Schenck* to vacate the said judgment and His Honor refused the motion, and in his order suggested that Hon. William R. Cox, then holding the courts of the districts of which Mecklenburg formed a part, was the judge having jurisdiction, and accordingly a new notice was given of a motion before *Cox, J.*, and at spring term, 1878, the papers presented to Judge *Schenck*, were laid before Judge *Cox* with some additional affidavits.

His Honor, Judge *Cox*, on consideration of said motion found as facts that the service on J. R. Wilson was by leaving a copy of the summons with his wife, and that there was no personal service on said Wilson, and thereupon adjudged that the judgment by default be vacated and set aside as to J. R. Wilson, and from the judgment the plaintiff appeals to this court.

At the time of the institution of this suit there were three methods of bringing a party into court—one by service of summons by the sheriff, one by written admission of the party, and the other by publication of the summons. C. C.

P., § 89. In the case of a service by the sheriff, it was prescribed that the service should be by delivering a copy of the summons to the defendant personally, and leaving it with him. C. C. P., § 8 (4). This requirement of a delivery of a copy of the summons by the sheriff to the defendant was designed to give him an authentic and fair notice of the commencement of the action and the nature thereof, and to afford him an opportunity to concert and make his defence; and in order to avoid all mistake and surprise on the part of the defendant as to the time and place, when and where he was expected to appear, the statute definitely required that the copy be delivered to the defendant personally.

This is the only method, other than that by publication, of bringing a party into court against his will, and it is essential that it be strictly observed to constitute the case in court and bring the person of the defendant within the jurisdiction of the court, and nothing will supply the place of personal service except the voluntary appearance of the defendant to the action. C. C. P., § 90. From the provisions of the Code we are of opinion that the service of the summons by leaving a copy with the wife of J. R. Wilson was not legal service, and that the court did not thereby acquire jurisdiction to proceed to judgment against him, unless it be that the return of the sheriff may be helped out by proof of the delivery of the copy by the wife to him, and of his verbal recognition of and assent to the service.

Can proof of the delivery of the copy by the wife to J. R. Wilson and of his recognition and verbal assent, make the service sufficient? It is certainly not within the words of the section requiring a personal service by the sheriff, and from the express enactment that voluntary appearance of the party should be equivalent to personal service it manifestly excludes the delivery of the copy by the wife as sufficient, even if proved to have been delivered; and it is equally manifest that no verbal admission of service or

assent to the service as made, will be a service within the provision which excludes any admission of service except it be in writing. C. C. P., § 89, (3).

Under the New York Code, of which our Code in this respect is a copy, the delivery of a copy to a person other than the defendant is never regarded as equivalent to personal service, although the party receiving it may hand it to the person for whom it was intended, the defect being a question of jurisdiction and not of regularity. *Williams* v. *Vanvalkenburg*, 16 How., 144. And this ruling would seem to be correct, inasmuch as there is a provision of the Code in which it is enacted that from the service of a summons the court is deemed to have acquired jurisdiction. C. C. P., § 90. So we think under our Code even if the wife handed the copy left by the sheriff, to her husband, his knowledge therefrom of the action begun was not sufficient to constitute the case in court, nor was his verbal assent to recognize it as a service such an admission as is contemplated by the Code, § 89, (4).

In our state there has not been any decision upon the point of the sufficiency of merely verbal recognition of, and assent to, a copy left with a third person. But in the case of *Middleton* v. *Duffy*, 73 N. C., 72, the service was as in this case by leaving copies for defendants with their daughter, and on the motion to vacate, it was shown by affidavits that on same day the sheriff saw the parties near their house and offered to go and get the copies and deliver them, when the feme defendant said she would accept the service as sufficient; the court overruled the motion to vacate, and in their opinion put the decision on the ground that there had been an appearance in the cause and steps taken therein for several years. So we take the expression in this case, whilst it does not decide the point expressly, to be an authority against the sufficiency of the service on J. R. Wilson. We conclude, therefore, there was no service sufficient to constitute the

cause in court as to J. R. Wilson, according to the true intent and meaning of the Code, and we think the service required was designed to cut off the very state of things we have in this case. Here we have the sheriff making oath that Wilson assented to the service, and Wilson on his oath denying any such assent, and the Code in its requirement of personal service or admission in writing, made such service a prerequisite to any subsequent proceedings in the cause.

It is claimed by the plaintiff that the refusal of Judge *Schenck* to vacate the judgment was *res adjudicata*, and concluded the parties, and therefore it was error in Judge *Cox* to entertain the motion involving the same matter and to set aside the judgment as to Wilson. We think there is nothing in this, for it appears from the order of Judge *Schenck* refusing to vacate, that he so adjudged from a want of jurisdiction, as Judge *Cox* assigned to the district of which Mecklenburg was a part, was then in the district holding the courts, and such being the fact the refusal to vacate on that ground was no bar to an entertainment of the motion by Judge *Cox*. *Howes* v. *Mauney*, 66 N. C., 218; Acts 1876–'77, ch. 223.

We concur in the opinion of His Honor, Judge *Cox*, that the service as made on Wilson was not a legal service and therefore it was irregular and contrary to the course of the court to enter judgment by default; and we hold there was no necessity to find the facts touching the verbal assent of Wilson to the service, as the same if found would not have brought him within the jurisdiction of the court.

No error. Affirmed.

F. FLYNT, Adm'r of Daniel Speace, v. T. H. BODENHAMER.

Expert—Judge's Charge—Evidence.

1. A physician of thirty years experience in the practice of his profession is an expert.
2. Upon an issue involving the mental condition of a party to a contract, the court charged the jury in regard to the evidence of a physician of thirty years standing, "that the law attaches peculiar importance to the opinion of medical men who have the opportunity of observation upon a question of mental capacity, as by study and experience they become experts in the matter of bodily and mental ailments;" *Held*, to be no invasion of the province of the jury.

(*State* v. *Ellington*, 7 Ire., 61; *Nash's case*, 8 Ire., 35; *Nat's case*, 6 Jones, 114; *Owen's*, 72 N. C., 605, cited and approved.)

CIVIL ACTION tried at Spring Term, 1878, of FORSYTH Superior court, before *Buxton, J.*

The action was brought to recover the amount of a note executed by defendant to plaintiff's intestate. The plaintiff alleged that defendant had improperly obtained possession of the note from his intestate a few days before his death, when he was in such mental condition as incapacitated him for business. The defendant resisted a recovery on the ground that he had agreed to take care of plaintiff's intestate while he lived, and in consideration thereof the intestate surrendered the note. The opinion contains the facts touching the point decided in this court. Judgment for plaintiff, appeal by defendant.

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

SMITH, C. J. The merits of the case are involved in a single enquiry submitted to the jury: "Did the defendant by fraud or undue influence wrongfully obtain from the

plaintiff's intestate the note sued on? And to this the jury responded in the affirmative.

During the trial many witnesses were examined as to the mental condition and capacity of the intestate, two of whom were present when the alleged surrender was made, and testified that the intestate fully understood what he was doing. Doctor Beverly Jones, introduced by the plaintiff, testified that he was a regular practicing physician of thirty years standing and attended the deceased in his last illness. He explained the nature of his disease and its usual effect upon the brain and mental faculties, and expressed the opinion that he was incapacitated to understand or engage in any business transaction for a period preceding his death, during which the defendant obtained possession of his note.

Several instructions were asked by the defendant's counsel, all of which were given, and among them one in these words: "In determining the condition of Daniel Speace's mind, much weight should be attached to the actions and conduct of said Speace at the time of the alleged delivery of the note in controversy to the defendant," to which His Honor added, "the law likewise attaches peculiar importance to the opinion of medical men who have the opportunity of observation upon a question of mental capacity, as by study and experience in the practice of their profession they become experts in the matter of bodily and mental ailments." Two objections are offered to this part of the charge, in that:

1. It does not sufficiently appear that Dr. Jones possessed those qualifications required in an *expert* so as to give additional force to his opinion.

2. That the language conveys an *expression of opinion as to the weight of the evidence.*

We think the charge obnoxious to neither objection. An expert is defined by Worcester, following Burrill, as "a person having skill, experience or peculiar knowledge on cer-

tain subjects or in certain professions;" and by Bouvier, as "*one instructed by experience.*" The court must decide whether the witness has had the necessary experience to enable him to testify as an expert. But the value of his opinion when admissible must be determined by the jury alone, and depends upon the opportunities he has had for acquiring skill and knowledge, and the use he has made of those opportunities. If a regular and continuous practice in his profession for thirty years does not entitle the witness to be regarded as an expert, or *experienced physician*, it is difficult to conceive what would do so.

Nor do we consider the criticism upon the language of the judge as invading the province of the jury, well founded. Mere opinions predicated upon the testimony of others when they proceed from those who have special skill and experience in a profession or employment, are competent and proper to be heard by the jury and are often valuable aids in conducting them to a correct conclusion. There are, however, hypothetical opinions only, dependent upon the fullness and accuracy of the facts to which they apply for their value, and it is to this kind of evidence that the disparaging remarks quoted by the defendant's counsel from certain law writers are mainly directed. But the opinion of a well instructed and experienced medical man upon a matter within the scope of his profession, and based on personal observation and knowledge, is and ought to be carefully considered and weighed by the jury in rendering their verdict; and this substantially is the comment of the court.

A few cases will be referred to for the purpose of illustration: In *State* v. *Ellington*, 7 Ire., 61, the mother and sister of the prisoner had been examined on his behalf, and referring to their testimony the court told the jury, "that it was for them to say whether those witnesses had testified truly, notwithstanding their relation to the prisoner, or had yielded to that human infirmity, to which we are liable, and had

testified falsely in favor of their son and brother." Reviewing the charge, the court say: "His Honor did not express an opinion upon any fact in controversy, but merely applied a *rule of law* to an admitted fact." In *State* v. *Nash*, 8 Ire., 35, the court charged "that the law regarded with suspicion the testimony of near relations when testifying for each other, and that it was the province of the jury to consider and decide on the weight due to the testimony," and it was declared not to be error. So it was held in *State* v. *Nat*, 6 Jones, 114, not improper for the judge to say to the jury that "when near relations deposed for near relations their testimony was to be received and ought to be received with many grains of allowance," and to extend the rule to the testimony of fellow servants of the prisoner. In a more recent case—*State* v. *Owen*, 72 N. C., 605,—the charge contained these words: "It is true that the opinion of experts ought to have weight with the jury as they are familiar with these questions, but the jury are not concluded by their opinion; that if the evidence justified, they might find against such opinion, and that they must find the facts upon the whole evidence;" and it was decided that the instruction was unexceptionable.

It cannot admit of question that the opinion of the medical expert who attended the deceased during his last fatal illness and must have become familiar with his disease and its effects upon both body and mind, should have greater weight and possess a higher value in determining his mental as well as physical condition than the opinion of an unprofessional man. As this is the dictate of common reason it was not improper in the judge to say so. The charge manifestly refers to the *opinion itself* as *evidence* in the cause, and not to the credibility of the witness who gives the opinion. The credit due to the witness belongs to the jury to determine and with them it is left.

No error. Affirmed.

J. W. REEVES v. H. DAVIS, Adm'r.

Justices' Judgments—Evidence—Practice.

1. A justice's court is not a court of record, and it is customary and proper to admit its judgments in evidence upon proof of the handwriting of the justice, of his being in office at the time, and the rendition of the same within his county.
2. A justice is under no obligation to write out and sign his judgments with his own hand. He may have them written and his name signed thereto by another, in his presence and under his supervision, without becoming obnoxious to the charge of delegating his judicial powers.
3. Ordinarily, it is the duty of a justice of the peace to pronounce his judgment on the day of trial, but in cases of difficulty, he may reserve his decision until he can be properly advised, and afterwards enter judgment and give the parties notice of his action.

(*Ledbetter* v. *Osborne*, 66 N. C., 379; *Hamilton* v. *Wright*, 4 Hawks, 283; *Carroll* v. *McGee*, 3 Ire., 13, cited and approved.)

CIVIL ACTION on a former judgment tried at Fall Term, 1878, of MADISON Superior Court, before *Avery, J.*

The facts appear in the opinion. Judgment for the plaintiff. Appeal by defendant.

Mr. M. E. Carter, for plaintiff.
Messrs. T. F. Davidson and *J. L. Henry*, for defendant.

DILLARD, J. This action was commenced in a justice's court on the judgment of a justice, and from his court there was an appeal by the defendant to the superior court of Madison county and thence to this court.

On the trial in the superior court the original judgment for the recovery of which the action was brought was offered in evidence, and when proof was being offered by one Creaseman, a justice of the peace, that he gave the judgment and the same was drawn up and signed by him or under

his dictation, it was objected by the defendant that the judgment of a justice's court was not provable by law otherwise than by a duly certified transcript of the record from the justice's court, which objection was overruled and the defendant excepted.

The court of a justice of the peace is an inferior court of limited jurisdiction, and although he is required to keep a docket and enter his proceedings therein, it is not under our present system, and was not under our former system, a court of record. *Ledbetter* v. *Osborne*, 66 N. C., 379; *Hamilton* v. *Wright*, 4 Hawks, 283; *Carroll* v, *McGee*, 3 Ire. 13. Not being a court of record the rules of evidence established in relation to the authentication and proof of the judgments of courts of record are not applicable to it, and there being no legislative provision as to how their judgments are to be proved, there can be and is no better way than that which has obtained heretofore in the practice of our courts. The rule has been for many years to admit the judgments of justices' courts in evidence on proof of their handwriting, of their being in office at the time, and of the rendition of the same within their counties, and thereupon the same conclusiveness of effect was attributed to them as to the judgments of courts of record shown forth by transcript under the seal of the court. *Hamilton* v. *Wright*, and *Carroll* v. *McGee*, *supra*.

We see no reason to depart from the rule on this subject, which has been so long observed in our courts, and in consistency therewith, we hold there was no error in the court below in overruling the objection of the defendant.

From the case made and sent up for our consideration it appears that the justice of the peace, whose judgment is the subject matter of this action, did not himself write out the judgment and subscribe his name with his own hand, but had the same done by another at his dictation. And it is further agreed by the parties to the appeal that the judgment of the justice was not rendered at the sitting when the case

was heard, but he reserved his judgment until he could deliberate and seek information. Afterwards in the absence of the parties he entered his judgment as aforesaid and gave notice thereof to the parties. Upon these facts it is assigned for error in this court; 1st. that the judgment was not the judgment of the justice, but of another and therefore void, and 2ndly. that the judgment was not rendered at the sitting when the case was heard and therefore out of term and void.

As to these objections now taken in this court it may be said that the entry of the judgment by the hand of another and not at the justice's term, but at another day, and out of the presence of the parties, were matters affecting the judgment on which this action is grounded, and might have been insisted upon by appeal or *recordari*, or perhaps on motion in the justice's court for irregularity; but not being so availed of in the first action, it is questionable whether defendant can fall back and have the same considered in this action founded on a subsisting judgment in full force and unreversed. But as the points are made and we have an opinion on them, we have no objection to express it.

It is unquestionable that a justice of the peace cannot delegate to another to perform the judicial act to hear an action and to pronounce the sentence of the law on the facts found or admitted therein. It is generally the case that having no clerk of his court he enters his judgments with his own hand; but no reason is or can be assigned why the justice if he tries a case himself and makes and announces his own conclusion of law, may not have the same reduced to writing and his name signed thereto by another under his personal supervision and dictation. It appears from the facts sent up that the justice of the peace in this instance heard the case and pronounced his judgment, and had the entry in writing made and his name subscribed by another, but it was done under his dictation and personal supervision, and we hold the judgment was not vitiated thereby.

As to the rendition of the judgment at a day subsequent to the hearing of the case, the defendant, under the circumstances, has no cause of complaint. It is the duty of a justice of the peace to pronounce his judgment on the day of trial, and he generally does, so that the parties may supervise and know the result, and then and there take such other steps as their interest may require. But in cases of difficulty it is not unusual for the magistrate to reserve his judgment so as to deliberate or examine as to any matter of law involved, and afterwards to enter his judgment and give the parties notice of his action. And this being done each party has the same opportunity of appeal or other step in the case as if the judgment had been pronounced on the day of the trial. The delay of judgment for a reasonable time in such case is no ground of error. The case states that the rendition of judgment was made and notice thereof given to defendant, and thereby he was put without a just cause of complaint.

The judgment of the court below is affirmed. But the parties having agreed in writing on a sum for which judgment is to be entered in this court in the event of a decision in favor of the plaintiff, the clerk of this court will enter the judgment for the sum specified in said written agreement.

No error. Affirmed.

H. BRUNHILD & BRO. v. J. H. & W. E. FREEMAN.

Evidence—Record of Justice's Court.

The record of a former action in a justice's court between the same parties in respect of the same subject matter, is competent evidence upon the trial on appeal in the superior court.

BRUNHILD *v.* FREEMAN.

CIVIL ACTION tried at June Special Term, 1878, of NEW HANOVER Superior Court, before *Eure, J.*

The facts are fully stated in same case reported in 77 N. C., 128, and 78 N. C., 67, and those material to the point discussed and determined upon this appeal, are embodied in the opinion delivered by Mr. Justice DILLARD. Judgment for defendants, appeal by plaintiffs.

Messrs. A. T. & J. London, for plaintiffs.
Mr. D. L. Russell, for defendants.

DILLARD, J. The defendants executed to the plaintiffs four notes of $100 each and delivered them together, and on the same consideration, falling due at three, six, nine, and twelve months respectively. On the maturity of the first one, the same was put in suit and prosecuted to judgment, and when the other three notes became due, actions were severally brought on them in a justice's court, which were defended on the ground that they were never delivered and were obtained by fraud, and for an alleged failure or want of consideration; and from judgments rendered thereon, the defendants appealed to the superior court. At the trial, the three appeals were consolidated and brought on to be tried as one case, and the plaintiffs offered to show forth in evidence the record of the recovery in the action on the first note, with an averment that the same points and matters of defence had been urged and adjudged therein as were insisted on in the case then on trial, and on objection the evidence was rejected by the court, to which ruling plaintiffs excepted.

It is well settled law that a verdict and judgment, as to all the facts and matters of law found and adjudged therein, concludes parties and privies and is a bar to any denial or further litigation thereof on the same cause of action, so long as the judgment remains unreversed and in force.

And it is also a rule, that in any subsequent action between the same parties on a different part of the transaction litigated in the first action, the judgment in the prior action may be used as an estoppel, or as evidence, as to the matters and defences set up in the second action which were passed on and determined in the first action. Bigelow on Estoppel, 35, 43; 2 Wharton's Law of Ev., § 765; *Gardner* v. *Buckbee*, 3 Cowen, 120; *Cromwell* v. *County of Sac*, 4 Otto, 351.

Now the question for our determination is as to the error or freedom from error, of the ruling of the judge below in the matter of rejecting the proposed record evidence; and considered in the light of these principles and the authorities cited, it is not difficult to come to a conclusion in regard thereto. It appears that no reply of former judgment was put in by the plaintiffs as an estoppel, but the case in the superior court stood on the defences of non-delivery of the notes, fraud in obtaining them and failure of consideration, and the issues thereon made by statute; and in the course of the trial, issues were submitted to the jury as to the existence or non-existence of consideration for the notes in suit, and the plaintiffs in support of their allegation of consideration and in disproof of defendants' allegation of a failure of it, offered to read in evidence to the jury the record of their recovery against defendants on the first of the four $100 notes, which was rejected as before stated. If the proposed evidence had been received and such parol testimony admitted as might be necessary to show the identity of the matter relied on and contested therein with the defences insisted on in the case on trial, then in case such identity appeared, a question would have arisen as to the effect of the record evidence adduced, and it would have become the duty of the court to declare the operation thereof, and to say whether the same was conclusive and admitted of no proof to the contrary, or was only evidence as on an open question of fact to be weighed by the jury in connection with other testimony in the cause.

We do not mean to express any opinion as to the effect of the evidence, if the same had been received, but merely to decide that its rejection hindered the plaintiffs from developing their case, and disabled them to raise the question of the effect of the alleged adjudication in the first action on the points and matters of defence insisted on in this action.

In our opinion the record of the former action between the parties should have been admitted in evidence to the jury, and the rejection thereof by the judge was error.

Error. Reversed and *venire de novo.*

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* State on relation of L. DEAN and wife v. W. W. RAGSDALE and others.

Guardian and Ward—Evidence—Reference.

In an action on a guardian bond, the evidence was that a female ward more than a year after arriving at full age, in presence of her mother and under the advice of her attorney, received payment of the sureties—in discharge of their liability—of an amount agreed upon in a former suit on the same bond, and a judgment was rendered for the same and no unfairness imputed; *It was held*—

(1) That there was evidence to support the finding of the jury in favor of defendant sureties.

(2) That in such case it was error in the court to order a reference to take an account of the guardianship.

(*Smith* v. *Barringer*, 74 N. C., 665, cited and approved.)

CIVIL ACTION tried at Spring Term, 1878, of FORSYTH Superior Court, before *Buxton, J.*

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*Dillard, J., having been of counsel did not sit on the hearing of this case.

This action is against the sureties to the bonds given by one Henry J. Pegram, guardian to the *feme* relator, to recover her estate in his hands. He died in 1864, and she attained her majority in the early part of the year 1874. The defence set up in the answer was a full settlement and compromise of the matters in controversy in a former suit on the same bonds and against the same sureties, and the adjudication therein. The only issue submitted to the jury was in these words: Did the female relator and the defendants, before her marriage and before the commencement of this action, come to an account and settlement of the amount due her from her late guardian, Henry J. Pegram, under authority of the court as alleged in the answer? The court instructed the jury that there was no evidence offered authorizing them to find the issue in the affirmative, and the case states that the verdict was for the relator. The record, however, shows a different finding in opposition to the charge. Thereupon the court ordered a reference to the clerk to take an account of the guardianship, and report to the next term. The defendants except to the instruction given, and to the order of reference afterwards made. The testimony of the witnesses examined on the trial is embodied in the case, so much of which only will be noticed as is necessary to a proper understanding of the exception to the charge.

It was in evidence that the relator, early in the year 1875, brought suit against the defendants as sureties on the same bonds in the superior court of Guilford, to recover what was due from her late guardian. At the term to which the summons was returnable, the defendants came to the office of the relator's attorneys and stated their intention not to resist the recovery, and their willingness and readiness to have a settlement, and pay whatever sum they were liable for. On the 29th day of March following, the relator and her mother and the defendants met at the office for the pur-

pose of effecting a settlement. The estate of the relator consisted of two notes—one unsecured and the other, the larger note, having two sureties. The dispute was as to the liability of the bond for the loss of these notes. The relator's attorneys were of opinion and so stated that the relator was entitled to recover the amount of the smaller note on which there was then due in principal and interest three hundred dollars, but not the amount of the other if the sureties were solvent when it was taken, and if by due diligence it could not have been collected since the war, and he added that he had made inquiries and was satisfied the relator could not recover for this loss. A compromise was then entered into with the approval of the relator's attorneys, by which the sureties were to pay three hundred dollars in full settlement and discharge. A part of the money was then paid to the relator and an arrangement made for her to purchase some land, and the residue paid to the attorneys not long afterwards, when their receipt was taken in these words: "Received, this 19th day of June, 1875, of Wyatt W. Ragsdale, Arch. Wilson, and Robert M. Stafford, three hundred dollars in full of all claims and demands whatever against them as sureties upon the guardian bonds of Henry J. Pegram, late guardian of Jane L. Goulsby; of this sum $75 was paid by the purchase of land, and $75 was heretofore paid in cash by said Wyatt W. Ragsdale, and a different receipt given to him therefor." Signed, Jane L. Goulsby by her attorneys Dillard and Gilmer.

This money was also soon after paid to the relator. At December term, 1875, the following final judgment was rendered in the cause by *Kerr, J.* "This action having been compromised by the parties it is ordered that the action be dismissed at the costs of the defendants. No attorney's fee to be taxed." Judgment for plaintiffs, appeal by defendants.

Mr. J. M. McCorkle, for plaintiffs.
Messrs. Watson & Glenn, for defendants.

SMITH, C. J. (After stating the case.) We are unable to see how with these facts testified to, the judge could instruct the jury that there was *no evidence* upon which they were warranted in finding the affirmative of the issue. If believed by them, a full and final settlement had been made, and obtained judicial sanction in the final judgment disposing of the pending action. Nor is any fact developed in the testimony tending to impugn the fairness and correctness of the adjustment itself. It occurred more than a year after the relator arrived at full age—in the presence of her mother—on the advice of her own counsel after full examination of all the facts, and it was consummated in good faith by the sureties. The confirmation by the court still remains in force and unimpeached. If the verdict is to be considered as responding affirmatively to the question, it puts an end to the case; and if not, the issue should be again submitted and passed on by the jury before any order of reference.

When the defence set up meets the action *in limine* and if sustained would be a bar to an account, it ought to be passed on and determined before a reference, because the account might be wholly unnecessary. *Smith* v. *Barringer*, 74 N. C., 665. In either aspect of the case the ruling of the court is erroneous. If the verdict is for the defendants, it ends the action and they should have judgment. If for the relator, it should be set aside because of the erroneous instruction under which it was rendered.

Error. Reversed.

KERCHNER & CALDER BROS. v. ALEXANDER McRAE and JOHN L. McRAE, Executors.

Evidence—Comments of Counsel—Executors and Administrators.

1. The rule that parol testimony is inadmissible to add to, vary, or contradict a written contract, is restricted to cases where the parties express in the writing the entire stipulations agreed on; *Therefore*, where A executed a bond to B who transferred the same by endorsement, *it was held*, in an action by the endorsee against A for the amount of the bond, that parol testimony was admissible to establish an agreement between the maker and payee at the time of the execution of the bond that certain credits should be allowed thereon.
2. In the trial of civil actions, it is not erroneous for the court to direct the jury to decide issues submitted to them upon a preponderance of the evidence.
3. It is discretionary in the presiding judge to stop counsel when making improper remarks in an argument to the jury, either at the time they are made or in his charge to the jury.
4. An executor is responsible in his representative character on contracts originating in testator's lifetime. But in causes of action wholly occurring after testator's death, he is liable individually.

(*Twidy* v. *Saunderson*, 9 Ire. 5; *Manning* v. *Jones*, Busb. 368; *Hailey* v. *Wheeler*, 4 Jones, 159; *McKoy* v. *Royal*, 7 Jones, 426; *Beatty* v. *Gingles*, 8 Jones, 302; *Kessler* v. *Hall*, 64 N. C., 60; *Hall* v. *Craige*, 65 N. C. 51, cited and approved.)

CIVIL ACTION tried at Fall Term, 1877, of NEW HANOVER Superior Court, before *Moore, J.*

The contract sued on in this action is under seal and was executed by the defendants as executors of John McCallum, on the 14th of October, 1873, to Charles McRae for $3,532.32, for the amount of an account due and owing by their testator at the time of his death to Charles McRae and Henry McCallum, partners, trading under the name and style of Charles McRae.

Charles McRae transferred said bond to the plaintiffs by an endorsement thereon, in part payment of the indebted-

ness of himself and partner to them; and the plaintiffs on the trial in the court below admitted that they took and held said bond subject to any set-off or equitable defence the defendants might have against it.

The defendants in their answer take the position, (1) that they had executed the bond declared on, as executors, and that no judgment could be recovered against them individually, and (2) if they were liable individually, they claimed that it was agreed by and between them and Charles McRae at the execution of the bond and as a part of the transaction, that he would hold and keep the bond, and give defendants a credit thereon for the proceeds of a parcel of cotton of the value of $3,000, which their testator had deposited with the firm of Charles McRae and Henry McCallum, for sale on his account.

To this answer the plaintiffs filed a reply, and therein they deny the deposit of any cotton with said firm, and also deny the alleged agreement to give a credit on the bond in suit for the proceeds of said cotton.

On the trial the following issues were submitted to the jury: 1. Was the proceeds of sale of cotton referred to in the pleadings the property of John McCallum? 2. Did the defendants execute the note referred to, under the promise at the time of execution by Charles McRae, that he would hold said note and that it should be credited with the proceeds of the cotton aforesaid? To these issues the jury responded in the affirmative.

During the trial plaintiffs objected to the admission of parol testimony on the part of the defendants in support of the second issue, and the court overruled the objection and the plaintiffs excepted.

After rendition of the verdict the plaintiffs moved for a new trial on the following grounds, (1) for the admission of incompetent testimony, (2) because the court did not stop the counsel for defendants in his argument to the jury on

the point of the liability of defendants in their individual character, (3) for that His Honor charged the jury that they should decide the case upon the preponderance of evidence. The court overruled the motion for a new trial, and thereupon the plaintiffs moved for judgment for the balance of the bond, after deducting $3,000 for the cotton, and His Honor disallowed the motion, holding that the defendants are not liable individually on the bond sued on, and the plaintiffs appealed.

Messrs. Geo. Davis, W. F. French and *Walter Clark*, for plaintiffs.

Messrs. Stedman & Latimer and *D. L. Russell*, for defendants.

DILLARD, J. (After stating the case.) The objection to the admission of parol testimony in support of the second issue was properly overruled by the court below. The general rule is that parol testimony is inadmissible to add to, vary or contradict a written contract; but the rule is restricted to cases in which the parties express in writing the entire stipulations agreed on, and the extent of the rule is established by the writers on evidence and by various decisions of this court.

In *Twidy* v. *Saunderson*, 9 Ire. 5, the plaintiff hired a slave to the defendant, and he gave his bond for the hire; and at the time, it was agreed as a part of the contract that the slave was not to be risked on water or be carried out of the county of Tyrrell; but Saunderson hired the slave to another and he carried him to Martin county where he was killed. Twidy sued for the violation of the stipulation not to carry the slave out of the county, and it was objected that the bond contained a memorial of the whole agreement, and parol testimony was inadmissible. On appeal, the admission of the evidence

objected to was held proper, on the ground that the bond for the hire did not contain the entire agreement.

In *Manning* v. *Jones*, Busb. 368, a vendee of land conveyed the same by deed to the purchaser, agreeing at the time and as a part of the contract to make certain repairs, which he failed to make, and on being sued for such failure, it was objected that the deed contained no such stipulation, and that parol evidence of the promise to make repairs could not be admitted. On appeal, it was ruled in this court that the evidence was admissible. Besides these two cases there have been many others, all referring to and approving them; and, from the principle thus settled, we conclude that His Honor properly admitted parol testimony in support of the second issue.

Independently of the admissibility of the parol testimony on said issue upon the grounds above set forth, the issue involved an inquiry into the truth of the alleged agreement of Charles McRae at the time of the execution of the bond sued on, to give defendants a credit on their bond for the cotton, and no objection being made to the issue, it is not perceived how any evidence tending to prove the same could be held incompetent, whether it was parol or otherwise. The agreement aforesaid, if made, was a stipulation on the part of Charles McRae and was in no sense included in the bond sued on, and the defendants in case they should establish it, were entitled as for a counter-claim or set-off to have a credit for the cotton; and to prove their right to such credit, it was competent to establish the agreement on the part of Charles McRae by any relevant legal testimony within the defendants' power. We therefore hold that there was no error in admitting the testimony.

As to the grounds on which a new trial was asked, they did not, singly or altogether, authorize a grant of the motion. The first ground is already disposed of, and as to the complaint of the judge's failure to stop defendants' counsel

in his argument to the jury on the point of their liability in their individual character, it does not appear that the failure of the judge did or by possibility could have operated to the injury of the plaintiffs. The case of appeal states that the plaintiffs' counsel in his argument urged to the jury, that it would be no hardship on defendants if they were held liable, and in reply, the defendants' counsel urged that it would be a great hardship if they were held liable, and insisted that they never intended to bind themselves individually. It was discretionary in the judge to stop the counsel at the time if his remarks were improper, or not having done so then, he might correct the matter in his charge. And the case states that the judge in his charge informed the jury that the question of liability of defendants was a matter of law for the court after their verdict, and that they must disregard the remarks of defendants' counsel. It therefore appears to this court that the plaintiffs were not prejudiced by the failure of the judge to stop the counsel in the course of his argument.

As to the direction of the judge to the jury, to decide the issues submitted to them by a preponderance of the evidence, it is uniformly so laid down to juries in civil actions, and therein no error was committed.

The plaintiffs having failed to get a new trial awarded them, thereupon moved the court for judgment for the balance of the bond declared on after deducting $3,000 as of the date thereof for the cotton, and His Honor disallowed the motion, holding that defendants were not liable individually on the bond. In this refusal of judgment as prayed, His Honor was in error. It is ruled in *Hailey* v. *Wheeler*, 4 Jones, 159; *McKoy* v. *Royal*, 7 Jones, 426; *Beatty* v. *Gingles*, 8 Jones, 302, and in the more recent cases of *Kessler* v. *Hall*, 64 N. C., 61, and *Hall* v. *Craige*, 65 N. C., 51, that executors are responsible in their representative character on contracts originating in testator's lifetime, but in

causes of action wholly occurring after testator's death, the executors are liable individually. And in the last case above mentioned, it is held that if an executor confess a judgment as executor, the judgment will bind him individually, and the words "as executor" will be rejected as surplusage.

The judgment of the court below disallowing the motion of plaintiffs for judgment, is reversed, and judgment will be entered in this court in favor of the plaintiffs for the balance due on the bond of defendants after deducting $3,000 as of the date of the bond.

Error. Judgment accordingly.

CHARLES M. BONHAM and others v. THOMAS CRAIG and others.

Pleading—Evidence—Parol agreement to reconvey land.

1. Where an allegation in the complaint is not denied in the answer, it is admitted and is as effectual as if found by a jury.
2. The parol agreement of a grantee to reconvey land made at the time it was conveyed to him by a deed absolute on its face—no accident, fraud, mistake, or undue advantage being alleged—will not be enforced upon parol evidence. No such evidence is competent to set up and attach the agreement to the conveyance as a trust or otherwise.
3. If such parol agreement be alleged in the complaint but denied in the answer, it is not necessary for defendant to insist on the statute as a bar; or, if it be admitted in the answer and the statute is set up as a defence, the defendant is entitled to its benefit.

(*Streator* v. *Jones*, 1 Mur. 449; *Sowell* v. *Barrett*, Busb. Eq. 50; *Dickinson* v. *Dickinson*, 2 Mur. 279; *Campbell* v. *Campbell*, 2 Jones Eq. 364; *Lyon* v. *Crissman*, 2 Dev. & Bat. Eq. 268; *Dunn* v. *Moore*, 3 Ire. Eq. 364; *Sain* v. *Dulin*, 6 Jones Eq. 195, cited and approved.)

BONHAM *v.* CRAIG.

CIVIL ACTION tried at June Special Term, 1878, of NEW HANOVER Superior Court, before *Eure, J.*

It was admitted in the pleadings that in May, 1863, one Charles Craig was seized of certain lands which is the subject of the controversy, and executed a deed in fee for the same to his brother, the defendant Thomas Craig, on the 15th of May, 1863.

1. Plaintiffs allege that said Craig, then sixty years of age, was about to leave the state for Bermuda and Nassau; and being in doubt whether he would ever return, he executed the said deed upon the distinct and express agreement with his brother that upon his return the premises were to be reconveyed to him; that the deed was made without any valuable consideration, and the grantee was to have no beneficial interest therein unless the grantor should die before he should return to the state. Defendants denied this allegation and said the deed was made without any condition whatsoever, voluntarily and of the own free will and accord of the grantor.

2. Plaintiffs alleged that about the close of the war Charles Craig returned to the state and took possession of said premises without objection on the part of Thomas Craig or any other person, and continued in possession until March, 1877, when he was induced by defendants to leave and go elsewhere, under the fraudulent representations that if he remained in the state he would be subjected to the trial of an indictment then pending against him. This was denied by defendants, who alleged that Charles Craig discontinued blockade running in 1864 and lived with his brother and sister about three years, during which time he set up no claim to the land, but stated to several persons that it belonged to defendants; and they positively denied that they induced him to quit the possession as alleged.

3. It was admitted that defendant, Thomas, executed a deed for the premises to his sons, the co-defendants, Charles,

Jr., and John Craig, on the 6th of February, 1873, but the allegation that there was collusion between them was denied by defendants.

4. Subsequently—on the 11th of December, 1877—the said Charles Craig executed a deed in fee to the plaintiff who now seeks in this action to compel the defendants to execute a deed to him.

The plaintiff's counsel submitted the following issue: Was any consideration paid by Thomas to Charles Craig for the land? and stated that he expected to prove by parol that there was no valuable consideration. The defendants' counsel objected, for that Charles Craig and those claiming under him were estopped to deny the consideration named in the deed ($2,100) and that parol evidence could not be admitted to vary the terms thereof, there being no allegation of fraud or mistake. The court held with defendants and plaintiff excepted.

Plaintiff's counsel insisted that there was a parol declaration of trust by the grantor in his own favor, and it was competent to show it by parol evidence—that grantee would reconvey upon return of grantor. Defendant replied that it was simply a parol promise of grantee to reconvey upon grantor's return to the state, which was a condition, and there being no allegation that the condition was omitted from the deed by reason of fraud or mistake, parol evidence was inadmissible to set up a trust in favor of the grantor. The court sustained the objection and refused to admit the evidence, and thereupon the plaintiff submitted to a nonsuit and appealed.

Messrs. W. S. & D. J. Devane, for plaintiff.
Messrs. A. T. & J. London, for defendants.

SMITH, C. J. Two rulings of the court are brought up for review on the nonsuit and appeal:—

1. The refusal of the court to allow an issue as to the consideration of the deed from Charles Craig to Thomas Craig, his brother, to be submitted to the jury on the ground that its recital of payment was an estoppel, and that no parol evidence was admissible to contradict it: The issue was wholly unnecessary and immaterial. The complaint alleges that there was no money paid and the deed was the voluntary act of the grantor, and this allegation is not denied in the answer. The fact is therefore admitted, and the effect of the admission is as available to the plaintiff as if found by the jury.

2. The refusal to submit an issue as to the existence of the alleged parol trust under which the grantee, Thomas, was bound to reconvey the estate to the grantor, Charles, on his return from abroad: The court held that no parol evidence was competent to set up and attach such agreement to the conveyance as a trust or otherwise.

The action is not instituted to correct or reform the deed itself on the ground it assumed an absolute form by reason of accident, fraud, mistake or undue advantage, and thus fails to give effect to the intent of the parties. No such allegations are contained in the complaint and hence the case does not fall within the principle established in *Streater* v. *Jones*, 1 Murp., 449, and the numerous subsequent concurring adjudications, to one only of which we will refer,— *Sowell* v. *Barrett*, Busb. Eq., 50. There, a bill was filed to redeem a tract of land conveyed by a deed with no reservation of such right:

PEARSON, J., says: "Since the case of *Streater* v. *Jones*, there has been a uniform current of decisions by which these two principles are established in reference to bills which seek to convert a deed absolute on its face into a mortgage,—

1. It must be alleged and of course proved that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage.

2. The intention must be established not merely by proof of declarations, but by proof of facts and circumstances dehors the deed inconsistent with the idea of an absolute purchase. Otherwise title evidenced by solemn deeds would be at all times exposed to the slippery memory of the witnesses."

Nor will it avail the plaintiff to treat the alleged agreement as raising a trust which not being within our statute of frauds, may be enforced upon sufficient parol proof. The case made in the complaint on which relief is sought is the omission to insert in the deed a clause limiting the estate conveyed upon the grantee's undertaking to restore the property, and reconvey title when the grantor returned, and the equity arising out of his refusal to do so. This is not a trust within the scope of any of the numerous adjudications to which our attention was called in the elaborate argument of counsel. It involves the question of the admissibility of evidence outside of the deed to control its operation, and impose upon the grantee an obligation, on the contingency which has happened, to reconvey the land. Upon principle and authority we think this cannot be done. We will advert to a few cases as decisive of the point:—

In *Streater* v. *Jones*, *supra*, the bill sought to convert an absolute deed for land into a security for money borrowed, and alleged an agreement by parol to that effect which was not to be put in the deed, the court say: "The bill states a case of two men equally free and competent to contract having made an agreement as to the conveyance of a tract of land, part of which agreement they reduced to writing, and part thereof by mutual consent, still rested in parol, and this latter part in direct contradiction to the former. That part of the agreement which is in writing sets forth an absolute and unconditional sale of land; that part which by mutual consent was not reduced to writing sets forth that the sale was not absolute, but was conditional; and com-

plainant was entitled to have the land reconveyed to him upon his performing the condition;" and the court declare: "It would be a palpable violation of the rules of evidence to permit the complainant to set up a parol agreement contradictory of the written one."

So in *Dickinson* v. *Dickinson*, 2 Murp., 279, the complainant attempted to annex to an absolute deed conveying a slave, a parol trust for the benefit of the former owner under an agreement of the bargainee to reconvey to him or such person as he should direct:

TAYLOR, C. J., referred to the cases of *Smith* v. *Williams*, 1 Murp., 426, and *Streater* v. *Jones*, *Ibid.*, 449, and said: "This case is governed by them and consequently it is not *competent for the plaintiff to give parol evidence for either* of the purposes stated in the case."

But the more recent case, cited in defendants' brief—*Campbell* v. *Campbell*, 2 Jones Eq., 364—as the counsel properly remarked, is in its essential features that now before us. The plaintiff conveyed the land by an absolute deed to his son for the purpose of enabling him to pay the father's debts, upon an understanding and agreement that when they were paid, one-half of the land should be reconveyed to the plaintiff. The suit was brought to enforce the parol agreement which in the answer was denied. The bill was dismissed and the court say: "We cannot see any difference in principle between this case and the ordinary one of a bill for the specific performance of a parol contract for the purchase of land. The statute of frauds declares such a contract to be void because its policy was to prevent the title of land from depending on any other than evidence in writing. The plaintiff does not pretend in the present case that the deed was obtained from him by means of either fraud, accident, mistake, ignorance or undue advantage, but only that he yielded to the persuasions of the defendant. Having knowingly and intentionally transferred the whole

tract of land to his son, he is now endeavoring to get half of it back upon parol proof of an agreement of his son to reconvey it. This would expose the title of the defendant's land to the danger of perjured or mistaken testimony."

It is thus manifest that whether the plaintiff's claim is put on the ground of a parol trust growing out of the transaction, or of the positive undertaking of his brother to reconvey, it cannot be supported; and these cases are equally fatal to it.

But it was argued that as the statute was not specifically set up in the answer as a defence it is out of the way, on the authority of *Lyon* v. *Crissman*, 2 Dev. and Bat. Eq., 268. It is the rule in equity practice that an objection to the validity of an unwritten contract under the statute should be set up as a defence against its enforcement by plea or in the answer; and when this is not done, but a contract differing in terms is relied on, the court will proceed to ascertain what was the agreement between the parties and give relief under it. But an absolute denial of any contract whatever contained in the answer extends not only to its existence, but also to its legal validity when not put in writing, and objection may be taken to the competency of parol evidence when offered to prove it. This is so in an action at law, and the rule is equally applicable to proceedings in equity. The principle is well expressed by the chancellor who decided the case of the *Ontario Bank* v. *Root*, 3 Paige Ch. Rep., 478, following *Cozine* v. *Graham*, 2 *Ibid*, 181: "As the agreement was denied in the defendant's answer it was not necessary for him to insist on the statute as a bar. The complainant in such case must produce legal evidence of the agreement which cannot be established by parol proof merely." So if the answer admits the parol contract and sets up the statute as a defence, the defendant is entitled to its benefit. In harmony with the opinion of the chancellor

of New York are the cases of *Campbell* v. *Campbell, supra; Dunn* v. *Moore,* 3 Ire. Eq., 364; and *Sain* v. *Dulin,* 6 Jones Eq., 195.

No error. Affirmed.

J. W. REDMAN and N. BROWN v. STARK P. GRAHAM and wife.

Delivery of Deed—Estoppel—Evidence—Damages.

1. The execution of a deed includes delivery, and, therefore, the adjudication of a probate judge that the execution has been duly proved is a judicial determination of the fact of delivery, which cannot be collaterally impeached.
2. The grantors to an unregistered deed for land, who represent the one from whom the grantee seeks to borrow money on the credit of the property conveyed, that the grantee has an absolute and unincumbered title, are estopped to dispute the validity of a mortgage made by him on such property to secure the money so obtained.
3. The exhibition in evidence of such mortgage, in a suit by the mortgagee against the grantors of the mortgagor, to subject the land to the mortgage debt, affords no ground of complaint by the defendants.
4. Conversations between the mortgagor and his grantors, with reference to borrowing the money are admissible to show their complicity in obtaining the loan, and thus estop them from claiming the land.
5. *It seems* that in a case such as the above, the mortgagee would be entitled to recover damages for the use and occupation of the premises from the time of action brought, to be credited on the mortgage debt.

(*Devereux* v. *Burgwyn*, 5 Ire. Eq., 351; *Mason* v. *Williams*, 66 N. C., 564; *Sherrill* v. *Sherrill*, 73 N. C., 8; *Henderson* v. *Lemly*, 79 N. C., 165, cited and approved.)

CIVIL ACTION commenced in Iredell and removed to and tried at Fall Term, 1878, of CATAWBA Superior Court, before *Gudger, J.*

The case is stated by THE CHIEF JUSTICE in delivering the opinion. Verdict and judgment for plaintiffs, appeal by defendants.

Mr. R. F. Armfield, for plaintiffs.
Mr. M. L. McCorkle, for defendants.

SMITH, C. J. The plaintiff, Redman, contracted with the defendants, Stark and Milton Graham, for the purchase of a tract of land at the price of two thousand dollars, whereof he paid four hundred dollars in cash and agreed to pay one thousand dollars the next week and the residue in three months, and took from them a bond to make title when the entire purchase money was paid. Finding himself unable to meet the second payment, Redman communicated the fact to them and stated if the land was conveyed to him, he could obtain the money as a loan from the plaintiff, Brown. Thereupon a deed for the land was prepared and executed by the said defendants and their wives, the latter being privily examined, and duly proved before the judge of probate and left in his custody. The deed was afterwards taken from the office by Stark and shown to Redman, who after examining and approving returned it to Stark, saying to him, the deed is all right and we will now go to Brown's and get the money. The defendant, Milton, who was also present, by direction of his son, Stark, went with Redman, carrying the deed with him to the house of Brown, and there exhibited it to him. After some conversation, and upon Milton's assurance that the deed was perfectly good, the loan was effected, the money paid to Redman and a mortgage made by him to Brown to secure it. On the same day, Redman, Milton and Stark, with one Welborn met at a store in the neighborhood, the money was there produced, counted by Milton and handed to Stark. Stark gave the deed to Redman, the title bond was surrendered, and a note

of $600 executed by Redman to Stark for the unpaid purchase money. Upon the suggestion of Milton a written agreement was then entered into, that Welborn should keep the agreement and deed until the note was paid. This arrangement was unknown to Brown. When the note fell due in February following, Redman went to Welborn's house prepared to pay it, and finding neither present, proposed to Welborn to have the deed registered and this was then done.

The foregoing is a brief recapitulation of the evidence out of which the controversy grows. The exceptions of the defendants as they were taken during the trial before the jury will be noticed in their order:—

The first exception was to the introduction of the mortgage deed as evidence.

No reason is stated in the record for the rejection of the mortgage, and it is certainly material and pertinent to the issue as to the plaintiffs' title, as well as in connection with the facts attending its execution, relied on as an estoppel on the defendants to deny the title.

The second and third exceptions are to the admission of conversations between Redman and Stark and Milton in reference to getting the money from Brown, and afterwards with Stark as to the encumbrances on the land. The first conversation tends directly to implicate Stark in the transaction of procuring the loan through his own deed lacking only registration to complete it, and the latter, while perhaps immaterial, could not have worked any injury to the defendants.

Three instructions were asked to be given to the jury, one only of which, as having any pertinency to the issues, will be considered: Although the deed to Redman may have been delivered to him with the intent it should thereby take effect, yet the parties to it were competent to enter into an agreement before its registration, that it should be held by

a third person as an escrow, and not operate as such until certain conditions were performed, and if such agreement was made and the deed placed in the hands of Welborn, to be held until the note for the remaining purchase money was paid, the deed though afterwards registered in violation of the agreement would not be effectual to pass title to the land.

The court declined thus to instruct the jury and charged as follows: "If the deed was delivered by the defendants, the first issue should be found for the plaintiffs. The law has not prescribed any form in which a delivery must be made, but there must be some act of the parties showing an intent that the paper writing should become operative to pass title. If, however, the deed was placed in possession of Welborn as an escrow, under an agreement made since the mortgage, and by the concurrence and agency of Redman and the defendants, was exhibited to Brown and represented to him as an absolute and perfect conveyance of the land, and upon the faith thereof the money was obtained and the mortgage security given, the defendants would be estopped to deny its effect in conveying title to Brown, and the issue should be found in favor of the plaintiffs."

We see no error in refusing the defendants' prayer, or in the instructions given. The agreement entered into subsequent to the mortgage, whatever may be its binding force among the parties, cannot be allowed to impair or injuriously affect the rights of the mortgagee. The execution of the deed had been proved, and as signing, sealing and *delivery* are essential parts of the execution, the fact of delivery had been, by the act of the defendants, judicially determined in the probate court, and could not in this collateral mode be impeached or controverted by them. But if we are to interpret the agreement to mean that Graham's deed should be withheld from registration until the note was discharged, it would be unavailing as to Brown, and he is not debarred

from taking the benefits of a registration which, for his own protection and against the will of the others, he could have enforced.

But the alternative instruction is not less fatal to the defendants' case. If the evidence of the manner in which the money was procured and the security given is accepted by the jury as proof of the facts, it is a clear case of estoppel, resting not only on Redman but with equal force upon the defendants who co-operate with him and who received and appropriated the fruits of the transaction to their own use. It would be a fraud in them to dispute the effect of their own registered deed and the title conveyed under the mortgage. This is an instance of the beneficent operation of the doctrine of estoppel, in securing good faith and honest dealing among men. If the arrangement disregarding Brown's right had been carried out and the deed kept from registration, the estoppel would have been operative for the protection of the title of the mortgagee, and it must be still more so in defending it from attack when the chain of legal title is made complete by registration.

The principle is thus stated by PEARSON, J., in *Devereux* v. *Burgwyn*, 5 Ire. Eq., 351: "If one acts in such a manner as *intentionally* to make another believe that he has no right, or has abandoned it, and the other, trusting to that belief, does an act which he would otherwise not have done, the fraudulent party will be restrained from asserting his right unless it be such a case as will admit of compensation in damages."

So in *Mason* v. *Williams*, 66 N. C., 564, RODMAN, J., quotes with approval the doctrine as thus laid down by an eminent English judge: "The true rule is that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on the impression, he shall be afterwards estopped from

denying it." *Sherrill* v. *Sherrill*, 73 N. C., 8; *Henderson* v. *Lemly*, 79 N. C., 169.

The record does not disclose any exception to the claim for damages, and the issue in regard thereto, though it was strenuously contested in the argument here. It would seem to be reasonable that compensation should be made for the wrongful withholding and use of the premises by the defendants after the action was brought, and we do not see that any more than this was allowed by the jury. There are equities set up in the answer which do not seem to have entered into the controversy or to be embodied in the issues passed on by the jury. They will be briefly pointed out in order that if the parties so elect they may be adjusted and settled in the action. The damages recovered for the use and occupation of the premises should be paid to the mortgagee and credited on his debt, the remainder of which constitutes the first encumberance on the land. Subject thereto, the land will stand charged with the payment of what is due on Redman's note. Upon this basis the final judgment may be made to dispose of all the matters in controversy. There is no error. This will be certified to the court below for further proceedings therein.

No error. Affirmed.

JOSEPH H. RIGGAN and others v. SIMON T. GREEN and others.

Deed of one, non compos—when valid.

A deed executed by a lunatic is voidable only and not void; and equity will not interfere to set aside such deed, where the grantee cannot be put *in statu quo*, or where the benefit received by the grantor is actual and of a durable character; *Therefore*, in an action by the heirs to recover land upon the ground of incapacity of their ancestor to make

a deed, and it appeared that the purchaser paid full value, without advantage taken and without notice of such incapacity, that the deed was attested by a brother and two sons of the grantor, and the purchase money used for the benefit of himself and family; *It was held*, that they were not entitled to recover.

(*Hogan* v. *Strayhorn*, 65 N. C., 279; *Hare* v. *Jernigan*, 76 N. C., 471; *Carr* v. *Holliday*, 1 Dev. & Bat. Eq., 344, cited and approved.)

CIVIL ACTON heard upon exceptions to referee's report, at Spring Term, 1878, of FRANKLIN Superior Court, before *Seymour, J.*

The plaintiffs as heirs at law of Joseph H. Riggan, sued to recover a tract of land, and defendants claim the same land under a deed of plaintiffs' ancestor to James T. Brown and a deed from Brown to them. The plaintiffs' reply to the defence set up that the deed of Joseph H. Riggan to James T. Brown was executed at a time when the grantor was of unsound mind and not of capacity to execute a deed, and to this the defendants rejoin, that they and Brown under whom they claim purchased of Riggan for full value and without notice of any incapacity on his part to make the sale, and that the purchase money paid went to the benefit of the grantor and his family.

After the parties were at issue on pleadings filed as aforesaid, the cause was by consent referred to William H. Battle as referee, with power, sitting as a chancellor, to decide upon the facts and all matters of law and equity, and with liberty to the parties to except only to his legal conclusions.

The referee made report of the facts found and his conclusions of law thereon adverse to plaintiffs' right of recovery, and on exception to his conclusions of law, His Honor overruled the exception and gave judgment in conformity to the report, and the plaintiffs appealed.

Messrs. Batchelor & Edwards, for plaintiffs.
Messrs. J. J. Davis and *Gilliam & Gatling*, for defendants.

DILLARD, J. (After stating the case.) Under our present system the distinctive principles formerly applicable in the separate courts of law and equity are now to be recognized in the superior courts, and such a judgment and decree is to be pronounced, as the equitable rights of the parties may require. And in conformity to this idea, the order of reference in this case was drawn, giving the referee power to deal with the matters under investigation, as a chancellor under a bill to set aside the deed of a lunatic. Considered in this point of view, it becomes material to inquire what is the effect of the deed of a lunatic for land, and for what and under what circumstances will such a deed be set aside, and a recovery allowed of the property conveyed.

The doctrine as to the effect of the deed of a lunatic is thus laid down by Blackstone, vol. 2, p. 295: "Idiots and persons of non-sane memory, infants and persons under duress, are not totally disabled to convey or purchase, but *sub modo* only; for their conveyances and purchases are voidable and not actually void." In 2 Kent's Commentaries, 451, it is said, "that sanity is to be presumed until the contrary be proved, and therefore by the common law a deed made by a person *non compos mentis* is voidable only, and not void." By our statute law, a deed executed and *registered* passes a seisin, and by the decisions under said statute the registration of a deed of bargain and sale is equivalent to livery of seisin in a feoffment; Bat. Rev. ch. 35, § 1; *Hogan* v. *Strayhorn*, 65 N. C., 279; *Hare* v. *Jernigan*, 76 N. C., 471; and therefore we conclude that the deed of Joseph H. Riggan availed to pass an estate to James T. Brown, and the same was valid until by action of the grantor or his heirs the same is avoided.

Such being the operation of the deed, and this action

being brought in a court competent to recognize and administer the legal and equitable rights of the parties in the same suit, it remains to determine how the court ought to have dealt with the subject matter involved therein.

Courts of equity ever watch with a jealous care every contract made with persons *non compos mentis*, and always interfere to set aside their contracts however solemn, in all cases of fraud, or when the contract or act is not seen to be just in itself, or for the benefit of such persons; but when a purchase is made in good faith, without knowledge of the incapacity, and no advantage is taken, for a full consideration, and that consideration goes manifestly to the benefit of the lunatic, courts of equity will not interfere therewith. 1 Story Eq., §§ 227, 228; 1 Chitty on Contracts 191; *Molton* v. *Camroux*, 2 Exc. 487. If a court of equity in any case sets aside the deed of a *non compos*, it will ordinarily administer the equity of having him to pay back to the other party the money or other thing received of him. And when it appears that the consideration is full and the lunatic is not able to put the other party *in statu quo*, or, if the benefit received is actual and of a durable character, in either case, the courts of equity will not be inclined to set aside the conveyance. *Carr* v. *Holliday*, 1 Dev. & Bat. Eq., 344, and same case, 5 Ire. Eq., 167.

Now in the light of these principles what ought to have been the conclusions of law by the referee on the facts found and set forth in his report, and what should have been the judgment in the court below on the exceptions taken to referee's conclusions of law? It is expressly found as a fact that the $500 paid by Brown to Riggan was the full value of the thirty acres conveyed to him, and that the same went to extinguish an execution against the lunatic in the hands of an officer, and that by means thereof the said Joseph H. Riggan was enabled to keep and occupy, till his death, another piece of land designated as his homestead, which now

by descent, belongs to plaintiffs; that the deed to Brown was executed in the family of the grantor, and attested by a brother and two sons of the grantor, and that Brown and the defendants claiming under him, have ever since held and used the said land as their own, and made large improvements without objection or any interposition by the grantor or any other on his behalf; and it is further found as a fact, that the purchase of defendants was for full value and without notice of any incapacity in Joseph H. Riggan. From such a state of facts, it would be apparent to the chancellor, and he would so decide, that a rescission of the deed would produce no benefit to the plaintiffs if coupled with the duty and obligation to replace defendants *in statu quo*, whilst it would be a great inconvenience and injustice to the defendants, and thereupon the conclusion would be not to interfere to set aside the deed, but leave the same to be operative and valid. And it is therefore our opinion that the referee was correct in his conclusions of law, and no error was committed by the judge in the court below in overruling the plaintiffs' exception.

No error. Affirmed.

ISAAC H. SMITH v. A. & M. HAHN.

Excusable Neglect—Fraud—Findings of Fact.

1. A motion to set aside a judgment made within a year after its rendition may be allowed on the ground of excusable neglect; (C. C. P., § 133,) or, after the year has elapsed, relief may be had at a subsequent term under the equitable jurisdiction of the court, against a judgment obtained by fraud.

2. On such motion the court found "that defendant did not fail to em-

ploy counsel in consequence of any fraud of plaintiff;" *Held* to be defective, in that, no facts are found which do or do not as a matter of law amount to fraud.

(*Jarman* v. *Saunders*, 64 N. C., 367; *Powell* v. *Weith*, 66 N. C., 423; *Clegg* v. *S. S. Co.*, *Ibid.*, 391, cited and approved.)

PETITION filed by defendants on the 18th day of November, 1876, to set aside a judgment, and heard at Chambers, before *Seymour, J.*

The defendants in their motion presented in the form of a petition state that they were sued to spring term, 1876, of Craven superior court by the present plaintiff on a cause of action against which they had a good defence and that they had employed L. J. Moore, an attorney practicing in said court, to attend to their business and expected him to file their answer at the proper time; that no answer was filed at the return term, but within the time allowed for filing their answer in the case, the plaintiff proposed to defendants if they would discontinue their action against him in the county of Jones, he would discontinue his action against them in the county of Craven. And to this proposition they agreed, and relying on the promise not to prosecute the action, defendants say, that they did not file any answer until the fall term, 1876, when they filed it in the cause with the consent of L. J. Moore who had generally attended to defendants business, but was the plaintiff's attorney in this action; and on the call of the cause the plaintiff, through other attorneys retained by him, objected to the answer on file as not being filed in time, and the objection being sustained by the court, judgment by default was entered against them unjustly and in violation of the agreement. The defendants alleged that they had been deprived through the conduct of the plaintiff of their opportunity to make defence to the action, and they claimed in their motion before the judge below, to have said judgment by default set aside and to be allowed to plead to the merits of the action.

On the hearing of the motion on the affidavits and counter affidavits, His Honor found the following facts:

1. That the defendants employed no counsel in their action until the fall term, 1876.

2. That the defendants did not fail to employ counsel in consequence of any fraud practiced upon them by the plaintiff; and upon these facts His Honor denied the motion for vacation of the judgment aforesaid and for leave to answer to the merits of the original action, and the defendants appealed.

Messrs. Battle & Mordecai, for plaintiff.

Messrs. Stevenson and *Merrimon, Fuller & Ashe*, for defendants.

DILLARD, J. (After stating the case.) It was the right of the defendants to apply, and within the power of the court below, in its discretion and upon such terms as might be just at any time within a year, to set aside the judgment against them, as taken through mistake, inadvertence, surprise or excusable neglect. C. C. P., § 133. And it is settled that if the judgment were not relievable under the said section of the Code, and its enforcement became inequitable for any reason of which a court of equity would take notice, the superior court under our present system exercising the powers of a court of law and court of equity, can and will set aside a judgment by default at a subsequent term, and allow a defence to be made of which a party has been deprived by the fraud of the other party, taking care, however, to require the party so relieved to secure the other party in such sum as he may recover together with his costs. *Jarman* v. *Saunders*, 64 N. C., 367.

Now the defendants' motion being made within a year after judgment, it was competent to them to be relieved and allowed to defend the action under the section of the Code

aforesaid, or under the equitable jurisdiction of the superior court, if upon an investigation of the facts it should appear that the judgment was obtained within the provisions of C. C. P., § 133, or by the fraud of the plaintiff. As to the merits of the case we do not express any opinion, and are to be understood only as declaring the legal rights of the defendants on the basis of the truth of their allegation about which we know nothing.

On the hearing of the motion, the record sent up for our consideration shows that the judge below made but two findings, one of which was "that the defendants did not fail to employ counsel in their action in consequence of any fraud practiced on them by the plaintiff." This finding is defective, in that it does not ascertain and separately set forth the facts which, as a matter of law, amount to fraud on the part of the plaintiff, or do not; and through inadvertence on the part of His Honor, no finding is made as to the allegation that defendants filed their answer with the consent of Mr. Moore, plaintiff's attorney, and that plaintiff afterwards employed other counsel and through them had the answer on file excluded and took the judgment by default. His Honor not having found the facts we cannot declare the law nor decide for or against his conclusions of law. *Powell* v. *Weith*, 66 N. C., 423; *Clegg* v. *Soap Stone Co.*, *Ibid.*, 391.

There is error. Let this be certified to the end that the defendants may on their motion or petition have the court to find the facts and make its judgment thereon, from which if so advised they may appeal to this court.

PER CURIAM. Error.

A. R. MASON v. R. McCORMICK.

Witness—Under § 343.

A witness is incompetent, under § 343 of the Code, to testify concerning a transaction with a person deceased, if such witness *ever had an interest* in the event of the action.

(*Peebles* v. *Stanley*, 77 N. C., 243, cited and approved.)

CIVIL ACTION to recover Land tried at Fall Term, 1877, of BLADEN Superior Court, before *Moore, J.*

That part of the case applicable to the point decided is as follows: To establish the location of the land as claimed by plaintiff under certain grants, Foster Mason was allowed to testify what Duncan McCormick told him while owner of the land, and what were the corners as pointed out to him. Defendant objected to the evidence on the ground that McCormick was dead, and that defendant was his devisee of the land in dispute, and that the witness was interested in the event of the action because he had been one of the sureties to the original prosecution bond. Before the trial began, the plaintiff offered another prosecution bond, on which the name of Foster Mason did not appear, to be substituted for the original one, and for the purpose of enabling the plaintiff to use said Foster as a witness. The court allowed the bond to be filed, with permission to withdraw the original and cancel it, overruled the objection and received the testimony of the witness. Verdict for plaintiff, judgment, appeal by defendant.

Messrs. N. W. Ray and *T. H. Sutton*, for plaintiff.
Messrs. Guthrie & Carr and *N. McKay*, for defendant.

SMITH, C. J. When this cause was before the court at June term, 1876, it was decided that Alexander Mason, a

surety to the prosecution bond, was incompetent as a witness for the plaintiff to testify to a conversation with Duncan McCormick, under whom the present defendants claim title as his devisees. At the last trial, on motion of plaintiff's counsel, the prosecution bond was allowed to be withdrawn and cancelled and another substituted in its place. The interest of the witness, as surety, being thus removed, he was permitted after objection from defendant's counsel to give in evidence a conversation between himself and the testator, in his life time, and proved that Duncan McCormick, while in possession of the land in dispute, pointed out its corners to the witness. The only question raised by the exception is this: Does the removal of the interest of the witness remove also his disqualification to testify to the conversation, and render the evidence competent? The point is directly decided in *Peebles* v. *Stanley*, 77 N. C. 243, and a construction given to the act: RODMAN, J., delivering the opinion refers to and approves the ruling as to the incompetency of the witness in *Mason* v. *McCormick*, 75 N. C., 263, and says: "It seems to me from a comparison of the Code with all the decisions upon § 343, a general rule may be stated thus,—in all cases except where the proposed evidence is as to a transaction, &c., with a person deceased, &c., the common law disqualifications of being a party and of interest in the event of the action are removed. But as to such transactions, &c., the disqualifications are preserved with the added one not known to the common law, that if the witness *ever had an interest, upon the question of his competency, it is to be considered as existing at the trial.*"

There have been many cases, the facts in which required a construction to be put upon the section, and its great length and numerous involutions have greatly perplexed the court in the effort to give it a clear and consistent interpretation. As progress is made in this direction, and one and another of the obscurities of the law are removed, we

are not disposed to re-open controversies which these adjudications settle. It is of great importance that the law should be understood, and except in cases of obvious error, the decisions of this court made after full and careful examination and thought, remain undisturbed. We regard the two cases cited as disposing of the whole question. As this entitles the defendant to a trial before another jury, we do not undertake to pass upon the other exceptions appearing in the record. There is error and we award a *venire de novo*.

Error. *Venire de novo.*

LEWIS H. JONES v. SUSAN JONES.

Evidence—Examination of Witness.

1. The testimony of a witness, elicited on cross-examination, relative to some collateral fact, or some act of his tending to show his bias, partiality or prejudice towards one of the parties litigant, cannot be contradicted without giving the witness an opportunity to explain the discrediting circumstance.
2. Testimony relating directly to the subject of litigation may be met by evidence of inconsistent facts or contradictory statements previously made by the witness, without first calling his attention to such facts or statements.
3. Whenever the credibility of a witness is assailed, it may be supported by proof of previous statements made by him correspondent with his testimony on the trial, whether such previous statements were made *ante litem motam* or pending the controversy.

(*State* v. *Patterson*, 2 Ire., 346; *State* v. *McQueen*, 1 Jones, 177; *Clark* v. *Clark*, 65 N. C., 655; *State* v. *George*, 8 Ire., 324; *Hoke* v. *Flemming* 10 Ire., 263; *State* v. *Dove*, *Ibid.*, 469; *March* v. *Harrell*, 1 Jones, 329; *State* v. *Laxton*, 78 N. C., 564; *Parish's case*, 79 N. C., 610, cited and approved.)

JONES *v.* JONES.

CIVIL ACTION for Divorce *a vinculo matrimonii* tried at Fall Term, 1878, of WAKE Superior Court, before *Seymour, J.* The facts applicable to the point decided by this court are embodied in its opinion. Judgment for defendant, appeal by plaintiff.

Messrs. T. M. Argo and *Armistead Jones,* for plaintiff.
Messrs. Reade, Busbee & Busbee, for defendant.

SMITH, C. J. The only issue submitted to the jury was in these words: "Did the defendant commit adultery with one Wm. Delaware in May, 1877?"

To prove the affirmative the plaintiff introduced one John Jones who testified that he went to the plaintiff's house to live some time in May, 1877, a day or two after the 7th of the month, as well as he could remember. To contradict this statement the defendant offered an affidavit of the witness made in January, 1878, to be used on the hearing of a motion in the cause, wherein the witness swears that he went to live with the plaintiff some time about the first of March, 1877. The plaintiff objected to the admission of the affidavit without assigning the grounds of his objection, and it was received by the court. The exception to the ruling is sustained in the argument before us, for that, the attention of the witness was not called to the proposed impeaching evidence on his examination, nor the writing itself produced. The exception rests upon a misapprehension of the rule. The testimony with which the affidavit conflicts, is pertinent and material to the pending enquiry whether the alleged criminal act was committed in the month of May, 1877. In such case no preliminary examination is required and the contradicting statement may be made to confront the witness without previous intimation to him of its existence or nature. If the matter, the details of which are extracted in the cross-examination, is collateral merely,

the answer of the witness is conclusive and no proof to the contrary is allowed. When, however, the collateral matter consists in acts or declarations of the witness, indicating temper, bias, or prejudice, and affecting his credit, his answer may be disproved; and if it be intended to contradict him afterwards, it is necessary to remind him of the substance of the conversation, the time, place, and attending circumstances, as far as may be, in order to give him an opportunity to explain before the proof can be offered. These distinctions are recognized and settled in *State* v. *Patterson*, 2 Ire., 346; *State* v. *McQueen*, 1 Jones, 177; *Clark* v. *Clark*, 65 N. C., 655, and other cases.

Says GASTON, J., in *Patterson's case:* "With respect to the subject matter of the witness' evidence, he may be presumed to come prepared to testify with a freshened memory and carefully directed attention; but this presumption does not exist as to collateral matters remotely connected with that subject matter, and justice to the witness, and still more reverence for truth, requires that before he be subjected to the suspicion of perjury he shall have a chance of awakening such impressions in respect thereof as may then be dormant in his memory." So in *McQueen's case*, BATTLE, J., giving his approval to the opinion of Judge GASTON adds: "A witness is never, and ought never to be asked as to any previous statements he has made, directly and immediately material to the issue, when contradictory to what he swore on the trial. Such *statements are allowed to be proved at once* to discredit him. It is only when testimony is introduced to prove his declarations or acts tending to show his bias, feeling, or partiality towards the party introducing him, that the question must be first put to him in relation to such declarations or acts, before the impeaching testimony is allowed to be given."

We have said thus much, though not necessary to the determination of the cause, to correct an erroneous impres-

sion that seems to prevail, as to the extent of the rule that in certain cases requires the mind of the witness to be directed to the discrediting statements before they can be given in evidence.

The second exception is to the exclusion of affidavits of other witnesses taken when the first one was offered in corroboration of their testimony and to support their credit which had been impeached. The affidavits were rejected for the assigned reason that they were taken after the suit was instituted—"*post litem motam.*" But this is not a restriction upon the admission of evidence of this kind. It is a qualification of the doctrine of hearsay or repute which from necessity is received in certain matters of public and sometimes private interest, where otherwise there would be a defect of proof and when the reputation is shown to have existed before the controversy arose and there was no motive to misrepresent.

The admissibility of previous correspondent accounts of the same transaction to confirm the testimony of an assailed witness, delivered on the trial, rests upon the obvious principle that as *conflicting statements impair*, so *uniform and consistent statements sustain* and strengthen his credit before the jury. The limitation on the rule contended for in the argument of defendant's counsel, which confines the evidence to such declarations as were made before the witness came under any bias or influence calculated to warp his testimony, is not supported in the numerous adjudications of this court, nor in our opinion by sound reason. The relationship of the witness to the cause or to the party for whom he testifies is one among many sources of discredit, this kind of evidence is intended to remove; and its application to the case supposed is a striking illustration of the usefulness and value of the rule. But its competency is not restricted to such cases.

The evidence is admitted to repel *any imputations* upon the

credibility of the witness whether they spring out of such relationship or arise from proof of general bad character, or of different versions of the fact given by himself or result from the manner in which the cross-examination is conducted. In whatever way the credit of the witness may be impaired, it may be restored or strengthened by this or any other proper evidence tending to insure confidence in his veracity and in the truthfulness of his testimony.

Again, the accuracy of memory is supported by proof that at or near the time when the facts deposed to have transpired, and were fresh in the mind of the witness, he gave the same version of them that he testified to on the trial. Suppose they had been written down and not since seen by the witness, would not the production of the written memorandum greatly confirm one's confidence in the integrity of his testimony to the same facts before the jury? It must be observed, however, that this evidence is not received in proof of the facts themselves, but to sustain the credibility of the witness in what he swears to on the trial. These principles are settled in numerous cases, among which we will only cite the following: *State* v. *George*, 8 Ire., 324; *Hoke* v. *Fleming*, 10 Ire., 263; *State* v. *Dove*, *Ibid*, 469; *March* v. *Harrell*, 1 Jones, 329; *State* v. *Laxton*, 78 N. C., 564; *State* v. *Parish* 79 N. C., 610.

But whatever criticism the rule may be supposed to be obnoxious to, it has become the established law of the state which we would not feel at liberty to question or disturb. Our duty is to administer the law as we find it, approved and enforced by the eminent jurists who have presided in this court and whose labors and learning have illustrated our system of jurisprudence. There is error and there must be a *venire de novo*.

Error. *Venire de novo.*

*W. R. PEPPER v. N. B. BROUGHTON and others.

Evidence—Transaction With Person Deceased.

1. The propounders and caveators to a contested will are *parties* to the proceeding within the spirit and meaning of C. C. P., § 343, which excludes the testimony of parties in certain cases.
2. Where the caveator to an alleged will, in order to show the bias of the testator against one of the propounders, introduces a witness who testifies that the testator had said to him, referring to such propounder, "he has married one of my nearest kin, and won't speak to me;" it is not competent for the person so mentioned, being a party to the controversy and interested in the result, to testify that he never refused to speak.

(*McCanless* v. *Reynolds*, 74, N. C. 301, cited and approved.)

ISSUE of *Devisavit Vel Non* tried at Fall Term, 1878, of WAKE Superior Court, before *Seymour, J.*

Weston G. Lougee at his death left two paper writings purporting to be wills, one dated the 11th of July, 1876, in which he gave his property to the plaintiff, W. R. Pepper, and the other dated the 17th of July, 1876, wherein he gave his property to Carolina Broughton, wife of N. B. Broughton, a relative; and on the same being offered for probate a *caveat* was entered to the probate of each by the legatee in the other, and thereupon the cases were sent up from the probate court to the superior court, and all the next of kin and heirs at law were summoned, to see proceedings and take part in issues *devisavit vel non*, to be found.

In the superior court an issue *devisavit vel non* was framed as to each paper writing and by consent submitted to the same jury, no one of the next of kin or heirs at law of the supposed testator taking sides in the controversy. In the course of the evidence, Pepper made proof by one Harris as

*Smith, C. J., did not sit on the hearing of this case.

material to the issue under consideration, that on one occasion he and the decedent met N. B. Broughton on the streets of Raleigh, and he took no notice of the decedent, and decedent remarked "he married one of my nearest kin and won't speak to me." In answer to this proof of declarations of the supposed testator on the occasion referred to, Carolina Broughton, the propounder of the script bearing date the 17th of July, introduced N. B. Broughton, her husband and co-propounder, and by him proposed to show that "he never refused to speak to Lougee." This evidence was objected to but admitted by the court, and its admission is assigned as error. Verdict for defendants, judgment, appeal by plaintiff.

Messrs. Reade, Busbee & Busbee, Ryan, Snow and *Battle & Mordecai*, for plaintiffs.

Messrs. D. G. Fowle and *Gilliam & Gatling*, for defendants.

DILLARD, J. (After stating the case.) N. B. Broughton's wife, Carolina, was the sole legatee and devisee in the script dated the 17th of July, and Pepper in the one dated the 11th, of July. and he and his wife were propounders of the one and caveators to the other. The next of kin and heirs at law failing, on citation to see proceedings. to take sides, as they were at liberty to do, then the issues framed and submitted to the jury, although the probate is *in rem*, were between Pepper on the one side and Broughton and wife on the other, and they were parties, and as truly adversary parties, as they could be in any conceivable case, and were within the description of parties as mentioned in C. C. P. § 343. But the being a party to the cause did not disqualify him, nor did his having an interest *jure mariti* to establish the paper writing in which his wife was sole legatee and devisee, disqualify; nor both together. But he was notwithstanding a competent witness for or against his wife as to all purposes in

the cause, with the inhibition not to be received to testify in regard to a transaction or communication between himself and Lougee, since deceased, against one claiming derivatively under him as legatee, devisee, or otherwise, as recited in the statute. C. C. P. §§ 342, 343.

Now Lougee had said in speaking of the intercourse between himself and the witnesss, who had married one of his nearest relations, in substance that he, N. B. Broughton, refused to speak to him, and this, if credited by the jury, tended to show that the will in favor of Pepper, a mere personal friend, was made on account of the neglect of him by his relations, and the testimony of Broughton "that he never refused to speak to him," was a contradiction of the declaration of the supposed testator himself as deposed to by Harris, and if believed by the jury tended to establish the script dated the 17th of July in favor of Carolina Broughton.

The testimony received of Broughton in denial of a refusal to speak was on oath, and as against it and in opposition thereto there was not and could not be placed the oath of the decedent; and the wishes of the testator were thus exposed to be thwarted and turned in a wrong direction by the oath of Broughton, when it might be if Lougee himself could be heard on his oath, he would reiterate his declarations as testified to by Harris.

We consider the question of evidence presented in this case as settled by the decision in *McCanless* v. *Reynolds*, 74 N. C. 301. There, McCanless and Reynolds claimed under Cox as a common source of title, and McCanless made proof of conversations and declarations of Cox concerning the sale and conveyance of the land to Reynolds as tending to show *mala fides* in that transaction. And the defendant, Reynolds, introduced himself, as Cox's declarations had been received against him, to explain these declarations, and this court on appeal held that unless Cox could also be heard on oath as to the conversations and declarations proved, Reynolds, the

defendant, could not be heard. And they say in so many words that the exclusion rests not merely upon the ground "that the dead man cannot have a fair showing, but upon the broader and more practical ground that the other party to the action has no chance by the oath of the relevant witness to reply to the oath of the party to the action."

In this case Broughton is received to deny that he refused to speak to Lougee, and this was on his oath, and to this oath the other party to the action, Pepper, could oppose nothing except the statement in conversation of the supposed testator. It matters not whether the object of the testimony was to prove a speaking affirmatively or negatively; it was to prove something material between the witness and the deceased, about which the deceased could have testified if alive, and it was unjust to allow Broughton by his evidence as to this point to have any influence to establish one of the wills rather than the other, when Lougee could not be heard in reply.

There were other exceptions taken to the charge of His Honor, but as there has to be a new trial for the error in admitting evidence, it is unnecessary for us to consider and pass upon them. There is error. Judgment of the court below reversed and this will be certified to the end that a new trial of the issue be had.

Error. *Venire de novo.*

*MARY D. GREGG and ELIZABETH HARWOOD v. W. H. HILL.

Evidence—Transaction With Deceased Person.

In a controversy as to which of two parties was the grantee of a lost deed, the grantor when he stands indifferent between the litigants is competent to testify that he made the deed to one deceased at the time of trial.

(*McCanless* v. *Reynolds*, 74 N. C., 301, cited and approved.)

CIVIL ACTION tried at Fall Term, 1878, of GUILFORD Superior Court, before *Kerr, J.*

The plaintiffs allege that in the year 1853 Andrew Weatherly, then owning a lot of land in Greensboro, for the sum of $2,000 sold and conveyed the same by deed directly to the plaintiff, Mary D., then the wife of D. P. Gregg, or to the plaintiff, Elizabeth Harwood, his trustee for her separate use, and that payment therefor was made out of funds belonging to her separate estate, and that the deed, without having been registered, is lost. The object of the action is to set up the deed and recover possession of the land from the defendant, Hill.

The defendant denies these allegations and says the deed was made directly to D. P. Gregg, the deceased husband, for his own use, and that by successive conveyances the title has vested in himself; and he relies upon several other matters of defence contained in his answer. Thereupon the said Weatherly is made a co-defendant, and he files his answer admitting the sale and conveyance of the lot to the plaintiff, Elizabeth, for the use of the plaintiff, Mary D., and that the contract therefor and its consummation by deed, on payment of the purchase money were effected through the agency of the husband acting on behalf of the trustee.

*Dillard, J., having been of counsel did not sit on the hearing of this case.

He sets up no claim to the property and "submits to such orders and decrees of the court touching the title as the court may make." The jury found under the evidence that the deed alleged to be lost, was made by Weatherly to D. P. Gregg in his own right, and the court held that the legal estate was in the heirs of Weatherly, now deceased, and that defendant was entitled to have them declared trustees for his benefit, subject to whatever equities the plaintiffs may establish by reason of Gregg's purchase of the land with their money. Motion for a new trial refused, judgment for defendants, appeal by plaintiffs.

Messrs. Scott & Caldwell, for plaintiffs.
Messrs. Gilmer, Staples and *Thos. Ruffin*, for defendants.

SMITH, C. J. (After stating the case.) Several issues were prepared and submitted to the jury, all of which may be resolved into the simple inquiry—to whom was the deed made?

On the trial the depositions of the plaintiff, Elizabeth, and the defendant, Weatherly, were offered in evidence for the plaintiffs, and the rejection of portions of the testimony of the latter furnish the only exception we deem it necessary to notice. The excluded evidence is of the act of the witness himself in executing the deed, which His Honor deemed inadmissible as relating to a transaction between the witness and a deceased person under whom the defendant claims within the words of the proviso of C. C. P., § 343. The principle embodied in the proviso, as stated by PEARSON, C. J., in delivering the opinion in *McCanless* v. *Reynolds*, 74 N. C., 301, is, that "unless both parties to a transaction can be heard on oath, a party to an action is not a competent witness in regard to the transaction." It is not necessary, however, to inquire whether the fact proposed to be proved by Weatherly is a "transaction" within the meaning of the Code, as we put our decision upon a distinct and independ-

ent ground. The opposing parties in the action undertake not only to derive their conflicting claims to the land from the same source, but by virtue of one and the same act of conveyance.

The making the deed an essential element in the equity of each against the maker, must be and is conceded by both, and the controversy is solely as to the person to whom the deed was made.

In the determination of this issue the witness has no interest, and to him it is a matter of indifference to which of the contending parties the conveyance shall be made. He is ready and submits to obey the order of the court, and meanwhile as a naked trustee or depository holds the legal estate for the benefit of the successful litigant. In our view the witness does not sustain such relations towards the cause or the controversy that in the effective and concluding words of the proviso, his "examination or any judgment or determination in such action or proceeding can in any manner affect the interest of such witness, or the interest previously owned or represented by him," a condition upon which the incompetency depends.

The sole issue the jury were to pass on is as to the identity of the bargainee in the deed, and the witness has no present interest, nor had or represented any former interest, to be affected by its determination.

We are fully sensible of the difficulties from the long and involved sentences of the section, and the obscurity of its language in putting upon it a reasonable and consistent construction. But we must so interpret its words as to make them subservient to the main purposes for which the enactment was made. In doing this we hold that the witness is not disabled to testify as proposed. In ruling out the evidence there is error, and there must be a new trial.

Error. *Venire de novo.*

J. R. JONES v. WILSON BOYD.

Province of Supreme Court—Vendor and Purchaser—Provisional Remedy.

1. A motion for an injunction being an application for equitable relief, it is the right and duty of the supreme court, under the present constitution, (art. iv, § 8,) on an appeal from an order granting or refusing the injunction, to determine the questions of fact as well as of law upon which the propriety of the order depends.
2. Where a contract is made for the sale of land, the purchase money to be paid in annual installments, and the vendee is let into possession, the vendor cannot maintain an action for specific performance until the last payment is due; and an injunction or order for a receiver as ancillary to the action must be vacated when the principal remedy is prematurely sought.
3. Where, under such a contract, the purchaser makes default as to the first or any intermediate installment, the vendor may bring ejectment and *then* apply for any provisional remedy which may be necessary.

(*Heilig* v. *Stokes*, 63 N. C., 612; *Gillis* v. *Martin*, 2 Dev. Eq., 470; *Ellis* v. *Hussey*, 66 N. C., 501; *Harshaw* v. *McKesson*, *Ibid.*, 266; *Butner* v. *Chaffin*, Phil., 497; *Carson* v, *Baker*, 4 Dev., 220; *Love* v. *Edmonston*, 1 Ire., 153, cited and approved.)

MOTION for an Injunction and appointment of a Receiver, heard at Chambers in Asheville on the 10th of August, 1878, before *Henry, J.*

The facts appear in the opinion. His Honor granted the motion and the defendant appealed.

Mr. J. H. Merrimon, for plaintiff.

Messrs. M. E. Carter and *Reade, Busbee & Busbee*, for defendant.

SMITH, C. J. On the 11th of July, 1878, the plaintiff issued his summons demanding specific performance according to the complaint to be filed, and four days thereafter ap-

plied to the judge of the district for the appointment of a receiver and for a restraining order. In the affidavit on which the application is based, the plaintiff states that early in the year 1875 he contracted with the defendant to sell him a tract of land containing thirty acres, at the price of five hundred dollars, to be paid in five annual instalments, and to make title when all the purchase money was paid; and that in pursuance of said agreement the defendant executed his five several notes, payable at the end of the successive years thereafter, the last falling due on the 1st of January, 1880.

The plaintiff gave a title bond to the defendant, a copy of which is set out in the course of the subsequent proceedings, the concluding clause of which is in these words: "Now if J. J. R. Jones do make, or cause to be made, a good and sufficient title to the above-named piece of land, when the above-named Wilson Boyd makes his last payment which is to be made on the 1st day of January, 1880, then this obligation to be void and of no effect; otherwise to remain in full force of law."

No complaint has been filed disclosing the plaintiff's cause of action, but in the *summons*, in the plaintiff's *affidavit* and in the *statement of the case* on the appeal, it is described as *an action for specific performance*, and the relief asked is an order restraining the defendant from committing waste and spoil, and the appointment of a receiver to take possession of the land. What is transmitted as the case on appeal, is little else than a recapitulation of what is contained in the record, with copies of the conflicting affidavits read on the hearing of the motion, and the order of appointment. If in order to the reversion of an interlocutory decree made pending the suit and auxiliary and incidental only to its main object, it is necessary to eliminate and present the facts apart from the evidence upon which the decree is founded, the appeal could not be sustained. But such has not been the ruling

nor the practice in this court in such cases, as is shown by the decision in *Heilig* v. *Stokes*, 63 N. C. 612, and in numerous other cases, in which upon the pleadings and evidence the court has assumed and exercised jurisdiction and determined the appeal. But whatever doubt may have previously existed as to the soundness of the distinction drawn in the opinion of the court in *Heilig* v. *Stokes*, between "issues of fact" and "questions of fact," as affecting the appellate power of this court, when that case was decided, it is removed by the express words of the recent constitutional amendment, which enlarges and restores jurisdiction over both, as it was possessed and exercised before the adoption of the constitution of 1868. Without undertaking to define the limits to which our appellate power is carried by this change, it is sufficient to say it embraces the present appeal and requires us to re examine the evidence and to determine the facts as well as the law arising thereon, in revising the subject matter of the appeal.

Under the former system of procedure, this court was invested with authority to review the decrees, final or interlocutory, of the *courts of equity* and the evidence upon which they were rendered, and in case of reversal to exercise original jurisdiction itself. The case whether upon appeal or reversal was heard upon written and documentary proofs only, according to the well established practice in courts of equity, and consequently this court had before it all the means for arriving at a correct decision which the court below had. *Gillis* v. *Martin*, 2 Dev. Eq. 470. In courts of law it was otherwise, and on appeals from them, only errors of law were subject to correction. This distinction must be kept in view in giving effect to the language of the amended constitution.

The order is an exercise of equitable power, and this appeal must be governed as far as practicable by the rules applicable to an appeal from an interlocutory decree of a

court of equity, and disposed of upon the evidence heard in the court below. *Gillis* v. *Martin*, *supra*. But these matters are not necessarily involved in deciding the case.

The action for specific performance cannot be maintained by either party to the contract,—not by the plaintiff because two of his notes were not due when he commenced his action, nor by the defendant because until he has made full payment he is not in condition to demand a conveyance of the land.

The relation between vendor and vendee in an executory agreement for the sale and purchase of land, is substantially that subsisting between mortgagee and mortgagor and governed by the same general rules. In both cases the legal title to the land is held as a security for the debt, to be conveyed or reconveyed to the owner of the equitable title when the debt is paid. "A vendor," says RODMAN, J., in *Ellis* v. *Hussey*, 66 N. C., 501, "who contracts to convey on payment of the purchase money, may be considered as between the parties a mortgagee." Keeping the analogy in mind it would seem that the right of the legal owner to have possession and a foreclosure by sale after final default must be the same in both cases.

In *Harshaw* v. *McKesson*, 66 N. C., 266, the mortgage sought to be foreclosed fixed the time of payment of the secured debts in equal instalments at three, four and five years, and some of them had not become due. DICK, J., delivering the opinion in the case uses this language: "A court of equity will never decree a foreclosure until the period limited for payment of the money be passed, and the estate in consequence thereof forfeited to the mortgagee; for it cannot shorten the time given by express covenant and agreement between the parties, as that would be to alter the nature of the contract to the injury of the party affected. 3 Pow. Mort., 965."

"The plaintiffs if they had seen proper might have pro-

ceeded in an action at law to recover the instalments as they became due, but they could not have a foreclosure until the day of redemption was passed."

Plainly the plaintiff in like manner is precluded from demanding a premature sale of the land, because by the express words of his bond, the final default cannot occur before the first of January, 1880, after which the sale may be decreed.

We treat this as a proceeding for foreclosure and sale, and the restraining order and appointment of a receiver as subsidiary and incidental to the main relief, not themselves the object of the suit; since a specific performance of the contract to pay the purchase money, unless by the defendant's voluntary act, in the absence of other property liable to execution, can only be enforced by a sale of the land and applying the proceeds to the payment of the debt.

But it may be asked, is there no remedy in such a case? Undoubtedly there is a remedy, but it is not that which the plaintiff is now pursuing. The defendant so far as appears, is not in possession under any contract by which he may rightfully withhold the land from the plaintiff. He has the same remedies which are open to any one else who is wrongfully deprived of the possession of land, and while prosecuting his action to recover possession, may have the ancillary aid of an injunction or other appropriate order to protect the property from waste and injury by an insolvent defendant, pending the suit.

"The mortgagor," says Mr. Coot, "is liable to eviction by the mortgagee without any notice whatever, unless protected by the agreement for quiet possession until default." Coot on Mort. 332, 339.

To the same effect is *Butner* v. *Chaffin*, Phil. 497, wherein READE, J., says: "It must now be regarded as well settled in this state that when a person is let into the possession of a tract of land, under a contract of purchase, he is but a

mere occupant at the will of the vendor, until the purchase money is paid. The vendor may put an end to this occupancy at any moment by demanding the possession, under a reasonable notice to quit, and if it be not surrendered, he may then maintain an action of ejectment," citing in support of the proposition the cases of *Carson* v. *Baker*, 4 Dev. 220, and *Love* v. *Edmonston*, 1 Ire. 153.

As the plaintiff has and may assert his full ownership over the property, he has the same redress as any other owner of land against one who wrongfully withholds possession from him. There is error in the interlocutory order and it must be reversed.

Error. Reversed.

M. E. WALKER v. W. P. DICKS.

Surety and Principal—Counter-claim.

A surety before he has suffered from his suretyship, has the right to use his liabilities, as such, as an equitable counter-claim against a debt he owes his insolvent principal. This defence will avail him equally against an assignee of the note past due when assigned, or assigned with notice.

(*Williams* v. *Helme*, 1 Dev. Eq., 151; *Miller* v. *Cherry*, 4 Jones Eq., 197, cited and approved.)

CIVIL ACTION tried at Fall Term, 1878, of FORSYTH Superior Court, before *Graves, J.*

Case agreed: In 1865, the defendant became surety on a guardian bond of R. L. Walker, deceased husband of plaintiff, and in 1872 a judgment was obtained on the bond. Subsequently Walker died insolvent, the judgment remaining unpaid. Before Walker's death, the defendant being

indebted to him for the purchase of land, executed a note dated April 18, 1872, payable one day after date, which note was assigned to plaintiff, widow, as part of her year's allowance, and this action was brought for its recovery.

In 1873, the defendant paid $100 on said judgment, and before this action was begun (June 19, 1877,) he paid the further sum of $100, the amount then due by him on the judgment, which was afterwards re-opened on the ground of mistake, and a further recovery of $3,500 had against the sureties to the guardian bond,—defendant's ratable part being $332 less $320 already paid, leaving a balance of $12. The note sued on amounts to $303.03, principal and interest, and the sum paid by defendant as surety aforesaid exceeds the amount of the note.

Thereupon His Honor held that defendant was not entitled to set off the sum for which he was liable and had paid as surety aforesaid, against the note sued on, and gave judgment accordingly, and defendant appealed.

Mr. J. T. Morehead, for plaintiff.
Messrs. Watson & Glenn, for defendant.

ASHE, J. The only question presented by the facts in this case as agreed upon, is,—has the defendant the right to use his liabilities as surety for R. L. Walker, as an equitable set-off against the note sued on by the plaintiff, the widow of the said R. L. Walker?

At law, the defendant clearly would have no such right, but we think it is equally clear that such a defence will be sustained in equity. Our equity courts have been liberal in extending its aid to creditors, and although a surety is not a creditor before he pays his liabilities as such, yet the rights of a creditor have been accorded to him by the beneficent jurisdiction which the courts of equity in this state have assumed on this subject. The principle seems well established

by the current of authorities, that a surety before he has suffered from his suretyship, may use his liabilities as equitable sets-off against the debt he owes his insolvent principal, and this defence will avail him equally against an assignee, provided the note is over-due when assigned, or assigned with notice.

The surety's equity consists in his liabilities as such—his ability to meet them and the insolvency of his principal. When these incidents concur, he has the right to insist that his debt shall not be used so as to make him a loser thereby. *Williams* v. *Helme,* 1 Dev. Eq., 151; *Miller* v. *Cherry,* 4 Jones Eq., 197.

In our case this equitable defence arose in the lifetime of R. L. Walker, and attached to the note in controversy while he was the holder thereof. The note was past due, and according to the authorities above cited, if he had transferred it, the same equity would have followed it in the possession of the assignee; if so, we can see no reason why it should not follow it in the hands of the plaintiff who holds it under her husband, R. L. Walker, and must take it affected with the same equities to which it was subject in his hands.

Error. Reversed.

CITY OF WILMINGTON v. HENRY NUTT.

Liability of Sureties on Official Bond.

The decision in *Wilmington* v. *Nutt,* as reported in 78 N. C., 177, to the effect that "the sureties on the official bond of a clerk of the superior court of New Hanover county, conditioned according to the provisions of C. C. P., § 137, are liable to an action by the city of Wilmington to recover taxes collected by the clerk upon inspector's licenses under private acts 1870-'1, ch. 6, although the bond was executed prior to

the passage of the act," *accords with both principle and authority, and must stand as first delivered.*

(*State* v. *Bradshaw*, 10 Ire., 229; *Cameron* v. *Campbell*, 3 Hawks., 285; *Crumpler* v. *Governor*, 1 Dev., 52; *Governor* v. *Barr*, *Ibid.*, 65; *Governor* v. *Matlock*, *Ibid.*, 214; *Eaton* v. *Kelly*, 72 N. C., 110, cited and approved.)

CIVIL ACTION tried at December Special Term, 1878, of NEW HANOVER Superior Court, before *McKoy*, J.

This action was brought against defendant as surety on the official bond of one James C. Mann, a former clerk of said court, to recover certain moneys alleged to have been collected by said clerk from certain inspectors in Wilmington, under and by virtue of a private act of the legislature, ratified on the 21st of December, 1870, and was heard upon exceptions filed by defendant to the report of a referee. The exceptions were overruled, and the defendant's counsel moved in arrest of judgment on the ground that the complaint did not state facts sufficient to constitute a cause of action, in that, the failure of said Mann to pay over to plaintiff the taxes for inspectors' licenses received by him under a private local act of the legislature, passed after the execution of the official bond of said Mann, as clerk aforesaid, set forth in the complaint, was not in law any breach of the condition of said bond. Motion overruled, judgment, appeal by defendant. See same case 78 N. C. 177.

Mr. D. L. Russell, for plaintiff.
Mr. Geo. Davis, for defendant.

SMITH, C. J. This cause was before the court at January term, 1878, upon a demurrer to the complaint, and it was held that the moneys received by the clerk, J. C. Mann, for inspectors' licenses were covered by his official bond, and that the defendant, one of his sureties, was liable therefor. The cause now comes up on appeal from the final judgment,

and we are asked to revise and reverse the former decision. The question has been fully and ably re-argued by defendant's counsel, and we have carefully reconsidered the former judgment, with a view to discover and correct any error into which we may have fallen, and failing to do so, we proceed to state the grounds upon which our conclusions rest.

The general rule governing the annexation of new duties to an office for the proper discharge of which an official bond has been taken, is very clearly expressed in the opinion in the case of *United States* v. *Senger*, 15 Wall. 122, wherein the court say: "The official bond of parties undoubtedly cover not merely duties imposed by existing law, *but duties belonging to and naturally connected with their office or business, imposed by subsequent law.* But the new duties should have some relation to, or connection with such office or business, and not be disconnected from, or foreign to both."

The same principle has been declared in this state. In delivering the opinion in *State* v. *Bradshaw*, 10 Ire., 229, RUFFIN, C. J., says: "The principle laid down in *Cameron* v. *Campbell*, 3 Hawks, 285, and in other cases, is a sound one, that when a statute requires a bond from an officer for the faithful discharge of his duty, and a new duty is afterwards attached to the office by statute, such bond given subsequently (an evident misprint for previously) to the latter statute embraces the new duty and is a security for its performance. If it be not so, then with the creation of every additional duty of an officer there would be a necessity for requiring a separate special security which has never been done or thought of."

After referring to the cases of *Crumpler* v. *Govenor*, *Govenor* v. *Barr*, and *Govenor* v. *Matlock*, all reported in 1 Dev., and some of which were cited and relied on in the argument before us, he proceeds to say that in those cases "it was held that the general words in the conclusion of the general bond of the sheriff did not extend to the public and county

taxes," and that these "exceptions were expressly placed on the ground that the statutes which made it the duty of the sheriff to collect those taxes required separate bonds as securities for each species of tax." To the same effect is the recent case *Eaton* v. *Kelly*, 72 N. C., 110.

If the bond of the clerk had contained a stipulation for the proper performance of the duties of his office, as provided in the former law (Rev. Code, ch. 19, § 8,) and nothing more, it is plain, upon the authority of these cases, that all new duties germane and appropriate to the nature of the office, imposed after execution of the bond, equally with those then existing, would have been protected and secured. But upon the reorganization of the courts under the present system, the condition of the bond was enlarged and made to embrace such duties as "now or thereafter shall be prescribed by law." Now, it may be asked, for what purpose was the change made if, without the additional clause, all new duties appropriate to the office would be secured, and with it none others are? The only reasonable answer to the question is that it was intended to leave to the law-making power, in the exercise of a sound discretion, to determine what further duties could properly be placed upon the officer and to remove all controversy as to what are and what are not within the scope of the office, and thus obviate the very difficulty to which the defendant's interpretation leads. It is not necessary to maintain that this power is unrestricted and that the sureties could be held responsible for any and all duties which the law might prescribe, however foreign to the nature of the office and beyond the contemplation of the parties at the time of executing the bond. But that disputable class which lies along the indistinct line by which they are separated may be by the general assembly assigned a place among the protected duties.

We are next to consider whether the special duty devolved upon the clerk by the local, rather than private, act

of December 21st, 1870, as fairly within that reasonable discretion reserved to the law making power, in this clause of the bond. The act directs the clerk to issue inspectors' licenses on payment of $25 for each, and to pay over to the relators the fees received. Are this service and this obligation so repugnant to the office and its functions, as to lose the security of the official bond? Are they without precedent in being annexed to an existing office, and in the responsibility imposed upon the incumbent? Looking into our own legislation we find that the clerks of the superior courts are by law required to collect the tax imposed on mortgages and deeds in trust. Revenue act of 1876–'77, schedule C: The clerk of this court receives and accounts for the tax on attorneys' licenses, and sheriffs are sometimes charged with the collection of taxes levied by municipal corporations, as in the case of the sheriff of Rowan county made collector for the town of Salisbury. *State* v. *Bradshaw*, *supra.*

After the passage of the act of congress in 1837, distributing and depositing the surplus money in the treasury among the states, a commissioner for the loan of the money deposited with New York, gave bond with sureties for the performance of his duties. Subsequently and during his continuance in office the legislature increased the fund in his hands by the transfer of other moneys to the amount of $500. He became a defaulter and the sureties were held not to be discharged, the court saying: "The legislature have power at any and all times to change the duties of officers, and the continued existence of this power is known to the officers and his sureties, and the officer accepts the office and the sureties execute the bond with this knowledge. It is the same in effect as though the power was recited in the bond." We cite from Brandt on Sur. and Guar., § 469.

We are referred to a case briefly described in the same work, § 142, which seems to be in opposition to our view.

We have not access to the volume of the reports in which the case referred to is found, and only know such facts as are summarily stated by that author. The assistant treasurer of the United States, who was also treasurer of the branch mint at San Francisco, gave his official bond, with condition for the faithful discharge of the duties of his office, and all "other duties as fiscal agent of the government *which may be imposed by this or any other act.*" The act of 1864, which provides for furnishing stamps to assistant treasurers, also provides that bonds for the payment of them might be required. Stamps were sent to the officer, but no such bond was required of him, and he failed to pay for the stamps. The sureties to the general bond were held not liable for the default. And it is said, if congress had supposed the general bond covered the case, why was a new bond provided for? It is plain this construction is given to this comprehensive clause of the bond, not because in terms it did not embrace the new duty, but because a new bond was contemplated in the act to secure this fund, and the former left in undiminished force for the protection of the primary duty. The decision rests upon the precise ground on which similar general words in the sheriff's process bond are held in the cases in this court, not to extend to the collection of public taxes, for which other and different securities are required.

The result of our re-examination of the question is to confirm the former opinion and we must declare there is no error.

No error. Affirmed.

T. C. LEAK, Adm'r, v. SOL BEAR & BROS.

Contract—Railroad Bonds—Recognition of.

Where a note executed on the 5th of July, 1869, was made "demandable and payable as soon as and not before the legislature shall pass an act recognizing *a certain class of bonds*," *it was held*, in an action on the note:—

(1) By the provisions of ch. 175, acts 1874-'75, the state recognized the bonds so issued as valid.

(2) The note, in legal effect, imports a promise to pay on that contingency.

(3) According to the true construction of the contract, a right of action accrued to the plaintiff upon said recognition, and that he is entitled to judgment for the value of the note.

CIVIL ACTION tried at Fall Term, 1878, of RICHMOND Superior Court, before *Buxton, J.*

The plaintiff brought this action on a note of which the following is a copy: "We promise to pay James P. Leak (plaintiff's intestate) or order three hundred and fifteen dollars, demandable and payable, as soon as and not before the legislature of North Carolina shall pass an act recognizing a certain class of bonds, embracing bonds from Nos. 3,786 to 4,000 inclusive, issued under act 16th Feb'y 1861, in favor of the Wilmington, Charlotte and Rutherford railroad, for value received,"—dated July 5th, 1869, and signed by defendants. It was alleged that said bonds were issued, to secure the completion of the road, and that by an act ratified on the 17th day of March, 1875. the legislature did recognize that class of bonds which then became due and demandable, and demand was made for payment of the note, which was refused. The defendants admitted the execution of the note, but deny the recognition of the bonds as aforesaid, and the demand for payment of the note, and alleged that the condition upon which the note was made

has not yet been performed. But upon a case agreed it was admitted that the treasurer of the state refused to issue the bonds as provided in various acts of assembly in regard to the above, and especially in the act to compromise, commute and settle the public debt, ratified on the 17th of March, 1875, in exchange for the bonds recognized by the said acts; and that demand was made on defendants. Thereupon His Honor held that the plaintiff was not entitled to recover. Judgment. Appeal by plaintiff.

Messrs. Dowd & Walker, for plaintiff.
Mr. J. D. Shaw, for defendants.

DILLARD, J. This case was presented to the court below on a motion for judgment on a case agreed and the other facts admitted in the pleadings, and His Honor held that the plaintiff was not entitled to recover and put his decision on the ground that the recognition of the bonds specified in the note sued on, in law involved not only an acknowledgment of their validity by the legislature, but also the making of provision for their payment in full, and from this refusal of judgment the case comes to this court by appeal.

The question of the right of the plaintiff to judgment depends upon a proper construction of the contract of defendants as set out in the note sued on in connection with the facts agreed and admitted in the pleadings. The note is for $315 and in so many words is *demandable and payable as soon as, and not before the legislature shall pass an act recognizing a certain class of bonds from Nos.* 3,786 *to* 4,000 *inclusive, issued under an act of the general assembly of the* 16*th of February,* 1861, *in favor of the Wilmington, Charlotte and Rutherford Railroad Company.*

It is a universal principle in the construction of instruments that the intent of the parties shall be regarded as indicated by the terms used so far as the rules of law will per-

mit. And in order to ascertain the intent, the words used will be taken in their popular and ordinary sense, unless it is evident the parties used them in a different sense, or the same have a peculiar artificial or technical meaning. Metcalf on Contracts 275; 1 Greenl. Ev. § 295. Applying these rules, the word "recognizing," about which the main contention exists, must be understood in its usual and ordinary acceptation and none other, as there is nothing in the context or with reference to the subject matter which requires it to be used in a different sense. The word "recognize" according to the best lexicographers signifies "to admit, to acknowledge something existing before," and if we apply this meaning to the word used in the note, the note in legal effect imports a promise to pay on the state's passing an act admitting or acknowledging the particular class of bonds referred to as genuine and binding, and as contradistinguished from other classes not obligatory. It is manifest from the phraseology employed in immediate connection with the words under consideration, that the parties dealing with each other apprehended that the state had bonds, some of which she might regard as valid, whilst there might be others she would classify as not obligatory; and if in construing the instrument we take notice of the time of the issue of the bonds in question and the facts and circumstances in reference to which the parties may be reasonably presumed to have traded, it is quite certain that the parties at the time of their contract apprehended that there was some uncertainty whether the state would recognize the bonds issued under the act of the 16th of February, 1861, as free from, or subject to objection, as being connected with the war; and therefore it was, that the note was made payable on the contingency of an act being passed recognizing the particular bonds issued under said act of assembly as valid and as distinguished from such as might be classed as void.

It is admitted in the case agreed sent up to this court that various acts of assembly, and especially an act to compromise, commute and settle the state debt, ratified the 17th of March, 1875, were passed authorizing the treasurer to issue new bonds of the state in exchange for the bonds recognized by said acts, and it was admitted in the argument that the bonds referred to in the note sued on are part of those recognized in said act; but it is insisted by the defendants that the said act authorized new bonds at forty per cent. of the bonds issued in favor of the Wilmington, Charlotte and Rutherford railroad company only as a compromise, and therefore is not such a recognition as was to be made before the money is demandable according to the true intent and meaning of the contract sued on.

We think the state in said act of the legislature did recognize *the class of bonds*, of which the bonds in question were a part, as a valid subsisting debt, but offered to exchange new bonds for forty per cent. thereof as a compromise from inability to meet her engagements in full, as recited in the preamble to the enacting clause, and not from any objection to the validity of the bonds. We hold, therefore, that, according to the true construction of the note, a right of action accrued to the plaintiff on the said recognition of the *class of bonds* issued in favor of the Wilmington, Charlotte and Rutherford railroad company, and that the plaintiff was entitled to judgment on the case agreed.

There is error. The judgment of the court below is reversed and judgment will be entered in this court in favor of the plaintiff for the amount of the note declared on, to-wit, three hundred and fifteen dollars, with interest thereon from the 17th day of March, 1875, until paid.

Error. Judgment accordingly.

JOSEPH CLAYTON v. A. J. HESTER.

Contract—Conditional Sale—Registration.

An instrument under seal in the following words: I promise to pay J. C. the sum of $150 for one bay horse, "and to secure him, the horse stands his own security;" *Held* to be a conditional sale and not a mortgage, and not void for want of registration.

(*Ellison* v. *Jones*, 4 Ire., 48; *Gaither* v. *Teague*, 7 Ire., 460; *Ballew* v. *Sudderth*, 10 Ire., 176; *Parris* v. *Roberts*, 12 Ire., 268, cited and approved. *Deal* v. *Palmer*, 72 N. C., 582, modified.)

CIVIL ACTION tried at Spring Term, 1878, of PERSON Superior Court, before *McKoy, J.*

The facts are stated by THE CHIEF JUSTICE. Verdict and judgment for plaintiff. Appeal by the defendant.

Messrs. E. G. Haywood and *A. W. Tourgee*, for plaintiff.
Messrs. Merrimon, Fuller & Ashe, for defendant.

SMITH, C. J. The plaintiff claims title to the horse, for the recovery of which the action is brought, under a contract of purchase from one B. V. Riggs to whom he alleges the plaintiff had previously sold the horse. On the trial the following paper writing was exhibited in evidence:

$150.00. One day after date I promise to pay to Joseph Clayton the full and just sum of one hundred and fifty dollars for one bay horse bought of him, and to secure him the horse stands his own security. Witness my hand and seal this the 29th of March, 1873, (signed) B. V. Riggs [seal] and witnessed by W. A. Mebane.

The plaintiff as a witness on his own behalf testified that the contract was in contemplation of the parties at the time of making it, a conditional sale; and there was no evidence conflicting with this statement.

The defendant asked the court to instruct the jury that the contract was in law a lien or mortgage, and as against the defendant a purchaser for value, void for want of registration. The court declined to give the instruction, and charged the jury that upon the evidence it was a conditional sale only.

There are several cases in our reports where the court has been called on to put a construction upon instruments very similar to this. We will briefly refer to them. In *Ellison* v. *Jones*, 4 Ire. 48, the note was in these words: "Five months after date I promise to pay Henry Ellison the sum of fifty dollars for a horse, said horse to be said Henry Ellison's till paid for," and it was held to be a conditional sale. In *Gaither* v. *Teague*, 7 Ire. 460, a bond was given as follows: "Know all men by these presents that I, Edward Teague have this day bargained for a sorrell filly with W. Gaither, which I want to stand as security until I pay him for her. I also promise to take good care of her." Parol evidence was given of the transaction, and the court charged the jury that the instrument was not upon its face a mortgage, but if Gaither transferred the property in the filly to Teague, and that *afterwards they came to an agreement* to secure the price and for this purpose *Teague made the instrument*, it would be deemed a mortgage and void. The jury found for the plaintiff and this court approved the charge, and RUFFIN, C. J., delivering the opinion says: "Under the circumstances of the case this court is of opinion that His Honor was right in so holding and in leaving it to the jury to determine its character as they might find the facts, whether it was given *at the instance of Teague* or *before or after* the sale had been completed by a contract and delivery."

In *Ballew* v. *Sudderth*, 10 Ire., 176, at the foot of the note were appended these words: "It is agreed and understood that a sorrel mare for which the above note is given is to remain the property of P. Ballew until said note is fully paid."

"We concur with His Honor," says PEARSON, J., "that the bill of sale was not a mortgage, but a sale to take effect if the price was paid."

In *Parris* v. *Roberts*, 12 Ire., 268, the words were these: "This day sold to W. D. Jones one gray filly for one hundred and fifteen bushels of corn which the said filly stands to the said Daniel Parris as his own right and property until she is paid for." The jury were charged that by a proper construction of the writing, the property in the horse remained in the plaintiff, and on the appeal, NASH, J., says: "In the charge of His Honor there is no error."

The law would thus seem to have been settled by these concurring authorities, until in *Deal* v. *Palmer*, 72 N. C., 582, a different legal effect was given to words very similar, contained in a note for the purchase money of a mule, to-wit: "The mule to stand security for the price until paid for." In delivering the opinion and after referring to Teague's case, PEARSON, C. J., says: "Here the words of the instrument admit of no question. It was the intention of the parties, and the legal effect of the instrument is to make a sale of the mule with a mortgage to secure the price." We are thus compelled to decide whether we will walk in the well trodden path of former adjudications, or sanction and follow the new departure from it. We prefer to stand "*super vias antiquas*," and in our opinion these adjudications rest upon sound and correct principles of interpretation. It will be noticed that in all the cases, the instrument is executed by the alleged vendee only, and contains his contract with a recognition of the rights of the vendor. It does not profess in terms to reconvey; nor are there any words from which such intent can be inferred. It does not undertake to set out the entire transaction, but the contract only of one of the parties to it, and the terms on which the possession of the property is acquired and held. It may furnish some evidence of an antecedent sale, but is not itself the contract

of sale. For this reason the jury were directed in Teague's case to enquire and ascertain if in fact there had been a sale and the writing was its counterpart, and upon their finding there was none, the deed is declared to be evidence of a conditional sale. In our case, not only is the proof necessary to convert the instrument into a mortgage wanting, but the proof is positive and direct that the parties understood and intended a conditional sale, and that the title to the horse should not vest until the purchase money was paid.

The essential rule governing in the interpretation of contracts is to give them a meaning which carries the common intent into effect, and a construction is never allowed to defeat the purpose when the words employed can be reasonably understood in a different sense. Let us apply the rule to the present instrument. It is quite apparent the parties intended the owner should retain the property while possession was transferred until the price was paid, or in other words as a security for it. This is affected and can only be affected by leaving title in the plaintiff until the condition is accomplished. The writing declares that "the horse stands his own security," by which is plainly meant that the *property* in the horse should "stand," *remain undisturbed*, in the owner as his security, a security incident to his retaining title, until the money specified in the note was paid. This reasonable construction of the words of the writing obviates all difficulty and accomplishes the end that both intended. It cannot be supposed that the plaintiff would transfer his property merely to take it back as a mortgage, when there was no necessity for it, and the means of security were in his own hands. Nor do the facts require us to separate a single transaction into parts, and thus destroy that security. The maxim *res magis valeat quam pereat* should prevail.

Let us suppose the position of the parties to be reversed, and that a writing had been executed by the plaintiff and

delivered to Riggs, containing this or similar language: "I have sold to B. V. Riggs a bay horse for one hundred and fifty dollars, and the horse is to stand as my security for the debt." Would not the intent be clear, and the legal operation of the instrument be to *leave the property in the plaintiff*, notwithstanding a change of possession, until payment was made and then transfer it to Riggs? Can any good reason be assigned why the writing given by Riggs should not bear the same construction and be allowed the same effect? The difference between them is only this: In the one case the *writing itself constitutes the contract of sale* and puts the restriction on the transfer, so that only a qualified property passes. In the other, it is the evidence and recognition of the transaction and of the terms on which the horse is held. The legal consequences should be the same whether the writing be given by the one or the other, as the contract is the same.

But it is suggested that such instruments contravene the spirit and policy of the registry laws, and as tending to encourage fraud and unfair dealings ought not to be encouraged. We do not feel the force of the objection. There is no law requiring transfers of personal property except deeds in trust and mortgages to be registered, and the principle *caveat emptor* applies to all who may deal with those in possession. The purchaser must look to his vendor's title, since while possession is evidence of ownership it is presumptive only, and the fact may be otherwise. The possession may be a bailment or permission by the owner, or under a contract of conditional sale. The vendee must enquire and satisfy himself or take adequate indemnity against loss. The owner's right to make a contingent or conditional disposition of his personal estate, not contravening the law in regard to trusts and mortgages, stands upon the same basis as a bailment or permissive use and possession.

Neither the letter nor spirit of the registry laws is invaded in holding that the plaintiff has never parted with his title to the horse.

No error. Affirmed.

WILSON, PALMER & CO. v. D. P. L. WHITE and another.

Vendor and Vendee—Fraud—Voidable Contract—Claim and Delivery—Evidence—Argument of Counsel—Judge's Charge.

1. An insolvent vendee of goods is not bound to disclose, at the time of the sale, his pecuniary condition, if the same is not inquired into, and such failure, even if there be a preconceived purpose never to pay for the goods, is not sufficient to render the contract of sale voidable at the vendor's option. But if in addition, the vendee fail to disclose his financial condition when asked concerning the same, and induce the vendor to confide in his solvency, and immediately on receipt of the goods, goes into bankruptcy; *Held*, that such facts constitute strong evidence of the fraudulent intent on which the goods were obtained by the vendee, and if so found by the jury, entitle the vendor to reclaim the property.
2. On the trial of an action for claim and delivery of goods purchased by defendant from plaintiff, where plaintiff alleges that the sale was fraudulent and void, certain judgments, obtained against defendant upon which all his property (except a few dollars) was allotted to him as exemptions, are admissible in evidence—(1) To show the undisclosed insolvency of defendant at the time of the contract, and (2) As bearing upon the fraudulent intent with which the purchase was made.
3. In such case if it be objectionable for plaintiff's counsel to comment before the jury upon the failure of defendant to introduce himself as a witness, there is no ground for complaint when the counsel on objection by defendant is restrained by the court and the jury are cautioned in the judge's charge.
4. In such case, it is not objectionable for plaintiff's counsel to comment upon the defendant's going into bankruptcy.
5. It is not the duty of the court to charge the law upon any single se-

lected fact, but to charge the law on the case as it is in reference to the whole facts as the jury may find them.

6. On a sale of goods, induced by fraud on the part of the vendee, the vendor is authorized to reclaim the property and the title thereto revests in him.

CLAIM AND DELIVERY tried at Spring Term, 1878, of MECKLENBURG Superior Court, before *Cox, J.*

The defendant, White, doing business in Charlotte was adjudicated a bankrupt upon his own petition in the district court of the U. S. for the western district of North Carolina, on the 26th of June, 1875, and the defendant, Cuthbertson, was duly appointed assignee of his estate. About the 15th of June, next, before the filing the petition in bankruptcy, White contracted with the plaintiffs through their travelling agent to buy on a credit, thirty-two barrels of syrup, amounting in value to $402.40. At the time of the purchase the plaintiff's agent, before making the sale, told White that he did not know his pecuniary condition, and asked of him references, to which White replied by referring agent to Henry Welch and Moore, Jenkins, & Co., trading firms in the city of New York, and thereupon the sale was concluded. The goods were accordingly shipped from Baltimore on the 19th of June, and arrived in Charlotte on the 23rd, and on the 24th they were taken out of the depot by one Black under the order of White, and were deposited in a cellar, the key to which was kept in White's storehouse, and two days after this, to-wit, on the 26th of June, the said White went to Greensboro and filed his petition in bankruptcy, under which he was adjudicated a bankrupt, and the defendant Cuthbertson appointed his assignee.

The defendant at the time of the purchase of the syrup, was entirely insolvent, being the owner of a house and lot under mortgage for its full value, and a personal estate worth but a few dollars above the exemptions allowed him by law.

The plaintiffs had no notice of the insolvency of White at the time of the sale and were misled and prevented from making inquiry in relation thereto, as they alleged, by the declarations and conduct of defendant. The plaintiffs a few days after petition in bankruptcy filed, demanded the syrup on the ground that the sale was voidable for fraud, and on refusal this action of claim and delivery was brought.

On the trial, issues were submitted to the jury as to property in the goods and the value thereof at the commencement of the action, and the jury in response found that the right was in the plaintiffs, and the same was of the value of $402.40, and from the judgment rendered on the verdict in favor of the plaintiffs the defendant appealed.

Messrs. Jones & Johnston, for plaintiffs.
Messrs. Shipp & Bailey, for defendant.

DILLARD, J. (After stating the case.) If a vendor of goods is drawn in to part with his property by fraudulent misrepresentation or concealment of a fact material to the contract and operating an inducement thereto, and such as a man of ordinary sagacity might reasonably rely on and be influenced by, the sale is voidable, and the vendor has the option to affirm the sale and sue for the price, or hold it null and sue for the goods in specie, as against the purchaser or a stranger holding without valuable consideration or with notice of the fraud. Benjamin on Sales, 342; Story on Sales, § 165; Bigelow on Fraud, § 2.

The plaintiffs urged on the trial that they entered into the contract and forwarded the goods, believing that White was solvent and intended to make payment, and so believed from the representation in words and action of the defendant at the time of the contract; whereas in truth and in fact he was entirely insolvent and well knew it, and yet concealed the fact and had bought the goods with the fraud-

ulent intent never to pay for the same, but to appropriate them to his use by going into bankruptcy and having the goods, together with his other property, set apart to him as an exemption under state law and the bankrupt act.

The defendant was not bound to disclose his pecuniary condition at the time of the sale if not inquired into, nor would that alone or in connection with a preconceived purpose never to pay for the goods be sufficient, although very reprehensible in White, of themselves to make the contract voidable at the option of the plaintiffs. But besides these elements of fraud there was evidence that when asked in regard to his financial condition he withheld information and gave plaintiffs to confide in his solvency by agreeing to pay on short time, and by artfully diverting inquiry from the neighborhood to merchants in a foreign place.

The goods arrived at Charlotte the 23d of June, were taken out of the depot on the 24th under defendant's order by one Black, and stored in a cellar, the key to which defendant kept. Next day he went to Greensboro to go into bankruptcy, and on the 26th he was adjudicated a bankrupt, and these facts with his failure to disclose his condition when inquired of, and a suggestion of references at a distance, constitute strong evidence of the fraudulent intent on which the goods were obtained, and if so found by the jury, warranted the plaintiffs to reclaim the property.

The jury under the issue put to them as to the ownership and right of property at the commencement of the action having responded under the evidence adduced and the instructions of the court as to the law that the property belonged to the plaintiffs, the verdict and judgment must stand, unless there was error in the court below in the admission of evidence against the objection of the defendant or in the refusal of the instructions prayed, and we will now consider them in their order.

1. The plaintiffs offered in evidence the different judg-

ments obtained in a justice's court against the defendant, and therein the assignment of the defendant's property as an exemption covering all he had except a few dollars, and on objection it was admitted: We think it was admissible for the two-fold purpose to show the undisclosed insolvency at the time of the contract, and also as bearing on the fraudulent intent with which the purchase was made.

2. Counsel of plaintiffs began to comment on the failure of defendant to introduce himself as a witness and defendant objected: If there be anything in the objection, it was promptly restrained by His Honor at the time, and the jury were further cautioned in the judge's charge and there is no ground of complaint on this ground.

3. Plaintiff's counsel was allowed in his address to the jury to comment on defendant's going into bankruptcy and defendant objected: It was a proper subject of comment as showing insolvency, and as indicating the intent in the purchase of the goods so recently before, never to pay for them.

The defendant asked two instructions, in substance, that insolvency of defendant alone would not make his title defeasible at the option of the plaintiffs, and that although White was insolvent at the purchase yet if the jury believe the witness, Marsh, the title passed and there was no evidence that plaintiffs had any title at the institution of the suit. His Honor refused to give them in the form in which they were asked and we think he did not err in refusing.

The defendant's first request was as to the legal effect of insolvency alone to authorize the plaintiffs to hold the sale null and reclaim the property, and His Honor's duty was not to declare the law on a single selected fact, but to charge the law on the case as it was in reference to the whole facts as the jury might find them, and there was therefore no error in the refusal of this specific request, inasmuch as in his general charge he distinctly directed the jury that insolvency alone would not authorize the finding of a verdict in favor

of the plaintiffs. As to the second request, to-wit, that the title having passed to White by the delivery of the goods, there was no evidence to show that the plaintiffs had any title at the institution of the suit, it was not error to refuse it, because there was evidence of the fraud alleged fit to be submitted to the jury, and the same if found to be true did authorize plaintiffs to reclaim their property and did revest the title in them.

No Error. Affirmed.

RICHARD W. YORK v. WILLIAM H. MERRITT.

Illegal Consideration—Fraud—Practice.

A conveyance of land made by a debtor to his attorney at the suggestion of the latter with mutual intent to defraud the client's creditors, vests the legal estate as between the parties to the deed, and entitles the grantee to maintain an action for the land against his grantor in possession.

(*Pinkston* v. *Brown*, 3 Jones Eq., 494; *Vick* v. *Flowers*, 1 Mur., 321; *Jackson* v. *Marshall*, Ibid., 323; *Ellington* v. *Currie*, 5 Ire. Eq., 21.

CIVIL ACTION to recover Land tried at Fall Term, 1878, of CHATHAM Superior Court, before *Kerr, J.*

The case states: The plaintiff alleged that he was the owner of the land in dispute, and claimed title under a deed executed by defendant to him on the 25th of December, 1868. The defendant admitted the execution of the deed, but insisted that it was only a contract to convey, and if absolute on its face, it was intended to be a mortgage to secure a fee he owed to plaintiff as his attorney in bankruptcy, upon payment of which the plaintiff was to reconvey the land. It was admitted that defendant had remained

in possession of the premises since the execution of the deed to the present time.

The plaintiff read his deed in evidence, and the court held it to be a conveyance in fee simple upon its face. The annual value of the land was then proved, and plaintiff rested his case.

The defendant was examined as a witness in his own behalf and testified that being greatly in debt in 1868, he consulted the plaintiff as an attorney, informed him of his financial condition, and asked his advice; that plaintiff advised him to go into bankruptcy and offered to procure his discharge for $100—half as a fee, and the other half to pay the costs; that the defendant replied he had no money, and thereupon plaintiff said the defendant could convey land to him to secure said sum; defendant asked if that would be right, and plaintiff replied that the bankrupt act expressly provided for such cases; defendant assented to this arrangement, and on the next day he and the plaintiff and one Wesley Goodwin went to Raleigh, when he executed said deed upon the express agreement with plaintiff that upon payment of the $100, plaintiff would reconvey the land to him, and he thought the deed was so drawn.

The defendant further testified that plaintiff then filed the petition in bankruptcy as his attorney, and he paid him $47 at the time, and shortly after paid him the further sum of $20.56, and in 1871 tendered him the balance of said sum of $100; that the plaintiff then for the first time refused to accept the tender, and claimed the land as his, though he had never demanded rent from defendant; that the land at the time of said conveyance was worth about $800. Defendant put in evidence a deed of composition, executed after the deed to plaintiff, between his creditors and himself to suppress proceedings in bankruptcy, and stated his creditors were satisfied therewith. It also appeared from defendant's testimony and his schedule that his reversionary

interest in a hundred acre tract, conveyed in last mentioned deed, was never surrendered in bankruptcy.

The defendant then read in evidence the deposition of Wesley Goodwin, the subscribing witness to the deed of December, 1868, who stated that it was executed at the suggestion of plaintiff to secure the $100 for which the discharge in bankruptcy was to be obtained, and upon the express understanding that plaintiff would reconvey the land on payment of the money,—the plaintiff further telling defendant that he had more land than he could carry through bankruptcy, and by this arrangement he might secure a home after he got through. Defendant here closed his case, and the plaintiff offered no further testimony.

Issues submittted to the jury:—

1. Is the plaintiff the owner in fee of the land in dispute? Answer—Yes.

2. What is the yearly rental of the land? Answer—Forty dollars.

3. Was the conveyance from defendant to plaintiff executed and delivered as a mortgage? Answer—We find that it is subject to such construction and to a parol trust in favor of defendant.

4. If executed as a mortgage, has the mortgage debt been paid or tendered? Answer—We find it has been paid in part and remainder tendered.

5. Was R. W. York at the time of making said conveyance attorney for defendant? Answer—He was, but had no intention at the time of imposing or using undue influence upon defendant.

6. What was the value of the land at the time it was conveyed? Answer—Eight or ten hundred dollars.

7. Did plaintiff agree with defendant that he would hold the land under the deed of the 25th of December, 1868, until defendant obtained his discharge in bankruptcy, and then, upon the payment by defendant of plaintiff's fee of

one hundred dollars, he would reconvey to defendant, and was this transaction between the parties with intent to defraud the defendant's creditors? Answer—We find, after taking all the circumstances under consideration, that it was a fraud upon creditors, and we are unwilling to put any other construction upon it. Therefore we find in favor of plaintiff.

Special instructions asked by defendant:—

1. That if the jury shall find that plaintiff and defendant sustained the relation of attorney and client at the delivery of the deed in 1868, and that the deed was procured by the suggestion and imposition of plaintiff, then the parties do not stand *in pari delicto* and plaintiff cannot recover, and the first issue should be found in the negative.

2. If the jury shall find that the deed of 1868 was intended as a mortgage, in response to the third issue, and that the sum of one hundred dollars has been paid, then the plaintiff cannot recover.

His Honor refused the instructions as prayed for, and the jury responded to the issues as above. Judgment for plaintiff. Appeal by defendant. See same case, 77 N. C., 213.

Messrs. J. H. Headen and *J. B. Batchelor*, for plaintiff.
Messrs. John Manning and *Jno. M. Moring*, for defendant.

ASHE, J. There were several issues submitted to the jury, the first and third of which were those only upon which instructions were asked. The first, "Is the plaintiff the owner of the land in fee simple?" and the third, "Was the conveyance from defendant to plaintiff executed and delivered as a mortgage?"

The defendant asked His Honor to charge the jury in the first instruction as prayed for, "that if the jury shall find that plaintiff and defendant sustained the relation of attorney and client at the delivery of the deed in 1868, and that

the deed was procured by the suggestion and imposition of plaintiff, the parties do not stand *in pari delicto* and plaintiff cannot recover, and the first issue should be found in the negative." And upon the third issue the instruction prayed for was "that if the jury should find that the deed of 1868 was intended as a mortgage, and that the sum of one hundred dollars has been paid, the plaintiff cannot recover."

His Honor very properly declined to give the instructions. He could not give that asked in the first, because the deed made by the defendant to the plaintiff did vest the legal title to the land in the plaintiff in fee simple. Nor in the view we take of the case could he have given the second instruction, for if the intent of the parties in making the deed of December, 1868, was to defraud the creditors of the defendant, it would make no difference whether the deed was intended as a mortgage or an absolute conveyance. The plaintiff has the legal title and has the right to recover in this action, unless the defendant can set up a sufficient defence at law or in equity to debar his recovery.

The defendant insists that plaintiff ought not to recover because he was his attorney and advised him to go into bankruptcy and offered to advance the money to defray the expenses for him, if he would give him a mortgage on his land; that he did give him a deed for the land in controversy to secure to the plaintiff the sum of one hundred dollars; that plaintiff imposed on him and wrote a deed conveying the property absolutely to him, when it was only to have been a mortgage to secure the $100. And Goodwin, the subscribing witness to the deed, stated in his deposition that the deed was executed at the suggestion of plaintiff to secure him in the advancement he agreed to make for him in obtaining his discharge in bankruptcy, and that upon the payment of the $100 he would reconvey the land to him, telling the defendant at the same time "that he had more land than he could carry through bankruptcy, and

by that arrangement he might have a home when he got through."

We think it is evident from the testimony of the witness, Goodwin, and of the defendant himself, that the defendant knew what he was about, and that it was a plan entered into by both parties and understood by them to cheat and defraud the creditors of the defendant. Whether the plaintiff at the time of receiving the deed contemplated taking advantage of the form of the deed, it is needless to inquire. He may not have formed the purpose of defrauding the defendant until some time after its execution. But he suggested the fraud to defendant, and they conspired together to cheat and defraud his creditors. They are *in pari delicto*, and this court in the exercise of its equitable jurisdiction cannot interfere to give relief. *Pinkston* v. *Brown*, 3 Jones Eq., 494; *Vick* v. *Flowers*, 1 Mur., 321; *Ibid.*, 323; *Ellington* v. *Currie*, 5 Ire. Eq., 21.

We regret that we feel constrained to announce this decision, but we have to administer the law as we find it; and while we decide this case in behalf of the plaintiff, we cannot refrain from expressing our most unqualified condemnation of the part he has acted in this dishonorable transaction. We feel compelled to say that there is no error in the ruling of the court below. Let this be certified, &c.

No error. Affirmed.

*JOSEPH H. SHIELDS v. JOHN W. PAYNE, Adm'r.

Jurisdiction—Contract.

1. The superior court in term has jurisdiction of an action by a creditor against an administrator for breach of a contract made by his intestate.
2. Defendant's intestate owed plaintiff $450, and sold him certain personal property in satisfaction of the debt, the property to be delivered on a specified day, and to remain in the meantime in the debtor's possession, under an agreement that if he should fail to deliver it on the day named, he should pay plaintiff $450, and interest from the inception of the debt; *Held*, that there are two views in which the jury would be justified in finding a special contract to pay plaintiff the above mentioned sum: (1) The delivery of the goods on the day specified would be the consummation of an incomplete contract and a satisfaction of the debt; otherwise, payment must be made in money; (2) The property having vested in the plaintiff, the goods themselves are to remain in possession of the intestate until the time of re-delivery, and in default of such return, it was to be a resale to the intestate and a revival of the original indebtedness.

(*Heilig* v. *Foard*, 64 N. C., 710; *Ballard* v. *Kilpatrick*, 71 N. C., 281, cited and approved.)

CIVIL ACTION tried at Fall Term, 1878, of GUILFORD Superior Court, before *Kerr, J.*

This action was brought to recover the sum of $450 alleged to be due on a special contract entered into between the plaintiff and defendant's intestate. The parties agreed to submit a single issue to the jury in these words: "Does the defendant, as administrator, owe the plaintiff $450 on special contract for two ponies, a buggy, and two sets of harness?" The evidence given on the trial of the issue was in substance as follows: The intestate of defendant was indebted to the plaintiff for a lot bought of him in the sum of $200 for which a note was given, and on the 4th of No-

*Dillard, J., having been of counsel, did not sit on the hearing of this case.

vember, 1874, he became further indebted in the sum of $250 for another lot purchased on that day. To pay the indebtedness, the intestate then sold to plaintiff two ponies, two sets of harness, and a buggy, for $450. The note held by plaintiff was thereupon surrendered and the second lot conveyed to the intestate. It was at the same time agreed that the intestate should retain the ponies, harness, and buggy until the 1st of May, 1875, and then return them in good order to the plaintiff; and in case he failed to do so, he was to pay plaintiff $450 with interest from the 4th of November, 1874; and meanwhile the plaintiff was at liberty to use the articles when the intestate was not using them. There was no controversy about the defendant's failure to deliver in May, or his offer to do so at any time since. No exceptions were taken during the trial, and the instruction asked for the defendant was conceded by the plaintiff's counsel and given to the jury, and they rendered a verdict for the plaintiff.

1. The defendant's counsel moved the court to dismiss the action on the ground that exclusive jurisdiction thereof was vested in the probate court. The motion was refused and defendant excepted.

2. After the rendition of the verdict, the defendant's counsel insisted that upon the face of the complaint as well as upon the evidence, the sum claimed was a penalty, and that damages for the breach of the contract should be assessed by the jury before the plaintiff recovers judgment. The court declared that the objection came too late, and overruled the motion. Defendant excepted.

Judgment for plaintiff. Appeal by defendant.

Messrs. Thos. Ruffin and *J. W. Graham*, for plaintiff.
Messrs. Scott & Caldwell and *Gray & Stamps*, for defendant.

SMITH, C. J. (After stating the case.) In our opinion, both

rulings were correct. The questions will be examined in order:

1. The superior court has jurisdiction of the cause by the express words of the statute. Bat. Rev., ch. 45, § 133. This section enacts that "an action may be brought by a creditor against an executor, administrator or collector on a demand at any time after it is due. But no execution shall issue against the executor, administrator or collector, on a judgment therein against him without leave of the court, after notice," &c. If the provision is, by construction, to be limited to actions in the probate court, there would be no tribunal for the trial of suits for damages, and after death the injured party would be without remedy. The jurisdiction of the superior court is sustained in the case cited by the plaintiff's counsel, *Heilig* v. *Foard*, 64 N. C., 710.

The 73d section of the act and the case of *Ballard* v. *Kilpatrick*, 71 N. C., 281, refer to proceedings in the nature of creditors' bills intended to enforce a final settlement of the administration account and a distribution of the assets of the estate, of which exclusive jurisdiction was vested in the probate court until, by the passage of the act of 1876–'77, ch. 271, § 6, concurrent jurisdiction was conferred upon the superior court in term time.

2. There are two views in which the contract may be considered as shown in the testimony. First, the delivery of the goods in May is to be the consummation of an incomplete contract and a satisfaction for the price of the land; otherwise payment must be made in money. Second, the property having vested in the plaintiff, the goods themselves are to remain in possession of the intestate until the time of re-delivery, and in default of such return, it was to be a resale to the intestate and a revival of his original indebtedness.

In either mode of construing the agreement, the intestate's default or refusal will be attended with the same re-

sults, the property in the goods remaining in or being restored to the intestate, and the obligation to pay the price of the land or the price of the goods, the estimated value of each being the same left unimpaired and in full force. This seems to have been the intention of the parties and is a fair and reasonable interpretation to be put upon their agreement. The issue was framed and the trial conducted, up to the rendering of the verdict, upon this common understanding of its legal effect, and the jury find under instructions, acceptable to the counsel of both parties, the existence of a special contract on which it was admitted the plaintiff's right of recovery depends.

The court very properly refused to arrest judgment or order a new trial, for any reason assigned. The authorities called to our attention by the defendant's counsel do not conflict with this opinion.

No error. Affirmed.

WILLIAMS, BLACK & CO. v. ELIAS CARR, Adm'r R. S. Williams.

Futures—Wagering Contract—Lex Loci Contractus—When it Governs.

1. Where a cotton broker, at the request of his principal, advances money to meet losses sustained by the latter in speculations on what are known as "future" contracts, he can recover upon a count for money paid to the use of the principal, *unless* it should affirmatively appear that there was no intention on one side to sell and deliver the property, nor on the other to buy and take it, but merely that the difference should be paid according to the fluctuations in market values. In the latter event, the contract would be a wagering one, and void as against public policy.

2. A lender may recover from a borrower money paid at his request in discharge of an illegal contract.

3. A contract by a resident of one state, made and to be performed in another, is governed by the *lex loci contractus* as regards its validity and construction, and not by the *lex fori* where remedy is sought for a breach.

(*Kingsbury* v. *Suit*, 66 N. C., 601, cited and approved.)

CONTROVERSY submitted without action under the Code § 315, at Fall Term, 1878, of EDGECOMBE Superior Court, to *Seymour, J.*

The case is sufficiently stated by THE CHIEF JUSTICE. His Honor gave judgment for plaintiffs and the defendant appealed.

Messrs. Geo. Howard & J. L. Bridgers for plaintiffs.
Messrs. Fred. Phillips and *Gilliam & Gatling*, for defendant.

SMITH, C. J. This is a controversy submitted without action under C. C. P. § 315 on a case agreed, the substantial facts of which are these:

The action is to recover the value of a promissory note given by the defendant's intestate and moneys paid by the plaintiffs to the use of the intestate, the aggregate amount of which, due February 24th, 1878, is $8,419.38. The consideration of the indebtedness was successive losses sustained on time contracts for the purchase of cotton, made on his behalf by the plaintiffs and paid by them at his request, and for charges and expenses incurred in the premises. The defence set up is that the contracts were in the nature of wagers or bets on the price of cotton at a given time and are illegal and void. The contracts were numerous, extending over a considerable space of time, and were similar to the one set out in the case which is as follows:

OFFICE OF JOHN T. BLACK, COTTON BROKER, WILLIAM ST.,
New York, June 6, 1877.

Sold for Messrs. Macaulay & Co.

To Messrs. Williams, Black & Co.

45,000 lbs. in about one hundred square bales cotton, growth of the United States, deliverable from dock or store in said city between the first and last day of December next inclusive. The delivery within such time to be at the seller's option, in lots of not less than fifty bales upon five days' notice to the buyer, the cotton to be of any grade from strict ordinary to fair, inclusive, at the price of $11\frac{26}{100}$ cents per pound for middling, with additions or deductions for other grades, according to the rate of the cotton exchange at the time of delivery. Either party to have the right to call for a margin as the variations of the market for like deliveries may warrant, and which margin shall be kept good. This contract is made in view of and in all respects subject to the rules and conditions established by the New York cotton exchange and in full accordance with Art. XVII of the by-laws.

(Signed) JOHN T. BLACK, *Cotton Broker.*"

Across the face of the paper are written these words:

"For and in consideration of one dollar to ..... in hand paid, receipt whereof is hereby acknowledged, accepted this contract with all its obligations and conditions."

(Signed) MACAULAY & Co."

This contract was entered into on the cotton exchange in New York, in the regular and ordinary course of business, and in conformity to its rules and regulations, Macaulay & Co., doing business therein. The cotton exchange is an incorporated institution with authority to make rules and regulations for the government of the cotton trade in the

city not inconsistent with the laws of the state and of the United States. In November, 1877, cotton having declined, the intestate directed the plaintiffs to close out the contract, which was done by the plaintiffs executing another contract, reversing their relations and undertaking to sell and deliver cotton on the same terms to other purchasers, and assigning the first contract to them at a loss of about $150 to the intestate in making the substitution.

The intestate's interest in these transactions was known to the plaintiffs to be speculative merely, and his purchases were made in the expectation of profit from an advance in the market value of the article.

The agreement upon its face is fair and reasonable and free from any imputation or taint of illegality. It purports to contain the terms of sale by Macaulay & Co. of a specified quantity of cotton deliverable at their option during the month of December on proper notice. It contains no intimation that it can be satisfied otherwise than by a delivery at the time appointed. Looking into the pamphlet which accompanies the case and contains the charter and regulations of the cotton exchange, by which, in the absence of express provisions the contract is to be interpreted and executed, we find nothing inconsistent with entire good faith or casting suspicion upon the integrity of the transaction. Rule 8 of the association is framed to insure delivery and acceptance of the subject of traffic, and imposes upon the defaulting party a penalty of one-fourth of a cent per pound in addition to the difference between the contract price and market value of the cotton at the time when it should be delivered and received.

Now while it is true the form of the contract may cover and conceal an understanding between the parties to it, that the payment of differences in price, as the case may be, on the day of delivery shall discharge the obligation, and such understanding if found to exist would render it illegal as a

wagering contract, no such intent can be gathered from its terms, nor from the rules of the cotton exchange applicable to it. The intent must be common to both seller and buyer and not confined to one of them only, to render the transaction unlawful. There is no fact stated in the case connecting Macaulay & Co. with the intestate and his purposes and expectations in entering into his disastrous speculations in an article so uncertain and variable in market value, and none from which their knowledge of his purposes can be inferred. Both must be privy to and participate in the illegal intent to render the agreement void. *Rumsey* v. *Berry*, 65 Maine; *Greizeword* v. *Blaine*, 73 E. C. L. R., 525; *Rouske* v. *Short*, 34 E. L. & E. R., 219.

In *Bigelow* v. *Benedict*, 70 N. Y., 202, the court say: "Contracts of this kind may be mere disguises for gambling, and where an optional contract for the sale of property is made and there is no intention on one side to sell or deliver the property, or on the other to buy or take it, but merely that the difference should be paid according to the fluctuation in market values, the contract would be a wager within the statute." And again: "The form of a contract of sale may be resorted to as a mere cover for betting on the future price of the commodity agreed to be sold, and if this is the real meaning of the transaction and no *actual sale or purchase is intended*, the contract is illegal and will not be enforced. But the illegality is matter of defence, and must be established by proof and found by the jury."

In our opinion this is a correct statement of the law for determining the validity of a contract in form regular and unobjectionable. But there is another view of the case to be taken. The original transactions are closed and settled. The plaintiffs were not the vendors, but acted for the intestate in making the purchases. By the direction of the intestate they have paid his losses and exonerated him therefrom. He has recognized his liabilities and given his note

for a large part of them, and the residue has been since incurred and discharged by the plaintiffs. These constitute the claim in suit. If the original contracts could have been avoided because opposed to public policy, the intestate was not bound to set up the defence. If they were unlawful and incapable of being enforced, the payment by the intestate, or by any one at his instance and for him, was not illegal. The borrowing of money for this purpose will not invalidate the contract of lending. It is not illegal to pay a debt which could not have been recovered, nor to advance money to the debtor to be so applied.

In *Warren, Lane & Co.* v. *Hewitt*, 45 Ga., 501, this very point came before the court on a transaction very similar to the one before us, and it was held that money paid on an illegal contract negotiated by the plaintiffs is recoverable. The proper rule is there stated thus: "When the transaction has been completed and the plaintiffs seek to recover advances made by them in good faith as the agents of the defendant, which advances were authorized or ratified by him, we think they are entitled to do so." If profits resulting from the transaction had come into the hands of the agents, they would belong to the defendant; and why, reversing the case, should he not be liable to repay to the agent losses incurred and paid by the agent at his request? The illegality which vitiates must be inherent in the contract, or the taint pass into the renewal, but does not reach to the contract for borrowed money to pay the illegal debt. The principle is settled in *Kingsbury* v. *Suit*, 66 N. C., 601, and in other cases.

Our case is governed by the laws of New York, and if a contract for the future delivery of an article of trade in the very form prepared by the cotton exchange, as this is, and as we must suppose in general use is recognized as valid and enforced there, so it must be equally effectual elsewhere. It would be a singular circumstance if its rules were such that

contracts made pursuant to them could be avoided for illegality, in a state whose laws as expounded by the courts are as stringent and relentless in the condemnation of wager or other contracts contravening public policy, as those of any other. These rules and the series of minute regulations by which the cotton trade is controlled, appear obnoxious to no just criticism, but on the contrary calculated to secure the faithful execution of engagements, and the obtaining a just compensation for their breach from the party in default. We find no sufficient ground on which to declare the contracts sued on void, and the judgment is affirmed.

No error. Affirmed.

E. MAUNEY & SON v. W. A. COIT.

Partners—Commercial Paper—Protest.

1. When a draft on a third person is given in settlement of an antecedent debt, it is the duty of the holder to present it, and to give notice of its dishonor if not paid, and a failure to do so will discharge the debt.
2. Where a settling partner, after the dissolution of the firm, gives a draft in payment of a partnership debt, he cannot waive protest so as to bind his former copartner, especially when the latter has been a dormant member.

CIVIL ACTION tried at Fall Term, 1878, of ROWAN Superior Court, before *Graves, J.*

The facts necessary to an understanding of the case are embodied in the opinion of this court. Verdict for plaintiffs, judgment, appeal by defendant. See *Bradford* v. *Coit*, 77 N. C., 72.

Mr. J. M. Clement, for plaintiffs.

Messrs. McCorkle and *Bailey*, for defendant.

SMITH, C. J. The record sets out numerous exceptions taken by the appellants during the trial before the jury, to the adverse rulings of the court in the admission and rejection of evidence which need not be considered in disposing of the appeal.

The defendent is sued as a dormant and newly discovered partner of Amos Howes, with whom the debt alleged to be due to the plaintiffs' was contracted, and the verdict finds such partnership to have existed. The business conducted by Howes alone and in his own name terminated on the 1st day of June, 1874, and the Gold Hill mining property under a sale passed into the possession of a corporation known as the North Carolina Amalgamating Company, its successor, and Howes then proceeded to settle up his business.

On the 2d of June, Howes gave to the plaintiffs five several drafts on the said corporation, of which one was at thirty days for $3,000; a second at thirty days also, for $2,000; a third at three months for $3,500; a fourth at five months for $3,000, and the last at six months for $1,000, in the aggregate sum of $12,500, and at the same time paid them $500 in cash.

These drafts the jury say, in response to one of the issues submitted to them, closed the plaintiffs' account, and in amount were sufficient, as the plaintiffs admit to pay the entire indebtedness due to them. The two earliest maturing drafts were paid and the others duly accepted by the company. At the maturity of the third draft, the first falling due of those unpaid, Howes gave to the holders a writing in the following words: "Salisbury, N. C., Sept., 3d, 1874. I, Amos Howes, do hereby waive protest of all the above stated drafts and agree to any extension of time the holders may assent to. (Signed), Amos Howes." Which writing was appended to a descriptive list of claims among which the three unpaid drafts are mentioned.

This agreement of Howes was entered into more than

three months after the dissolution of the alleged partnership association, and the entire discontinuance of its operations, and, so far as the case discloses, without any new consideration therefor. It does not appear whether the drafts were taken by the plaintiffs in payment or as a collateral security for their debt, nor that any arrangement was made by the holders with the acceptors for extending the time of payment; nor that any measures were adopted to collect or secure the drafts, nor is any excuse or explanation offered of the failure to do so. The drafts themselves were produced at the trial and tendered to the defendant.

Upon this evidence and defect of evidence various instructions were asked by the defendant's counsel, the first of which, embodying the substance of all, is in these words: "If the plaintiffs received from Amos Howes his drafts on the North Carolina Gold Amalgamating Co., accepted by said company, then no recovery can be had upon the account existing at that time, notwithstanding that Howes, the drawer, may have waived notice of protest." This and the other instructions were refused, and none of like import given in their stead. In this there is error.

The true rule which should have been laid down for the guidance of the jury may be thus stated:

If the drafts were given and received for and in closing up the account, and were afterwards accepted by the company, it was the duty of the plaintiffs to present them at maturity for payment, and if not paid within a reasonable time to take proper steps for their collection, and if they failed to do this, and the drafts became worthless, it would in law be a discharge of the original debt, and the defendant is not affected by the written agreement of Howes in reference thereto.

The principle contained in the proposed instruction rests upon sound reason and is sustained by ample authority.

In *Smith* v. *Wilson*, Andrews Rep., 187, LEE, C. J., thus

declares the law: "When a note is taken for a precedent debt, which is the present case, it must be intended to be taken by way of payment upon this condition, that the note is paid in a reasonable time; but if the person accepting it doth not endeavor to procure such payment, and the money is lost by his default he must, and it is reasonable he should, bear the loss."

In *Chamberlyn* v. *Delarive*, 2 Wils., 350, the defendant being indebted for work and labor done, gave the plaintiff a draft on one Heddy for the sum due, and the plaintiff held the draft for four months without applying to Heddy, and he became insolvent. It was held that there could be no recovery in an action brought on the original indebtedness, and the court say: "The plaintiff by accepting the note or draft undertook to be duly diligent in trying to get the money of Heddy and to apprize the defendant, the drawee, if Heddy failed in payment. The plaintiff substituted himself in place of the defendant, who has been deluded into a belief that the plaintiff had got the money of Heddy."

In a very similar case where the bill given "for and on account" of a precedent debt, EARLE, C. J., with the concurrence of all the judges lays down the rule thus: "The legal effect of taking a bill as collateral security is, that if, when the bill arrives at maturity, the holder is *guilty of laches and omits duly to present it*, and to give notice of its dishonor if not paid, the *bill becomes money in his hands*, as between him and the person from whom he received it. That being so the *plaintiff's debt is satisfied*. *Peacock* v. *Purcell*, 108 Eng. C. L. R. 728. "When a party contracts a debt," says a recent writer on this subject, "and contemporaneously gives in additional payment, his draft upon a third party, it is the duty of the creditor to present it in a reasonable time for acceptance or payment, and to give notice in the event of its dishonor to the drawer. If he fails to make such presentment or to give such notice the drawer is not only *dis-*

charged from liability on the bill, but also from the debt or consideration, for or on account of which it was given. 2. Danl. Neg. Instr. § 1276. To the same effect are the cases of *Dayton* v. *Trull*, 20 Wend. 345; *Jones* v. *Savage*, 6 Wend. 658.

It only remains to consider the latter branch of the instruction, the effect upon the rights of the parties and their relations as creditor and debtor, of the writing given by Howes at the maturity of the first draft. What is the fair and reasonable interpretation to be put upon the words of this instrument, and what would be their force and effect in an action brought against Howes himself, it is quite certain they cannot be allowed to enlarge the liabilities of the defendant, or to deprive him of any just defence against the plaintiffs' demand. The drafts were the *personal* acts of the managing and settling partner, and not less so was his subsequent consent to the extension of the time of payment by the holder. The partnership was at an end, and his authority was restricted to what was necessary in settling the business. He had no power to bind his associate by new contracts not required for that end. The agreement seems to be a mere gratuity and can bind no one but himself.

"Partners after dissolution," says Judge STORY, "cannot contract new debts, but may pay and collect debts, apply the partnership funds and effects to the discharge of their own debts, adjust and settle the unliquidated debts of the co-partnership, receive any property belonging to the partnership, and may make due acquittances, discharges, receipts and acknowledgements of their acts in the premises." Story Part., § 328.

Retiring members of a firm are not bound by instruments, negotiated in the name of the original firm, after its dissolution, even though they are negotiated by the partner authorized to settle the partnership business. Collyer Part., § 541; 1 Tudor's Lead. Cases, Mercantile and Maritime Law;

notes in *Waters* v. *Taylor*, ... 513; 89 Law Lib., 635; *Evans* v. *Drummond*, 4 Esp. 89.

The principle applies with greater force for the protection of a dormant than an active and known partner whose name is associated with the partnership business. The former is chargeable to third persons only on contracts entered into while the firm was in operation, and he was sharing in the emoluments and profits of the joint business, and his liability as such ceases on his retirement, even without notice, for the reason that those dealing with the partnership have never trusted to his credit, and his liability grows out of the fact that he is a contracting party, taking a part of the profits of such contracts. Collyer Part. § 536; Ross on Sur. Ag. Part. & Ins.; 89 Law Lib., 635.

This view of the case, though contained in the instructions asked for defendant, was not presented in the charge to the jury, and as the defendant was entitled thereto, there must be a new trial.

Error. *Venire de novo.*

JAMES WEBB v. L. L. TAYLOR and HENRY HAYSTY.

Claim and Delivery—When Maintainable.

Claim and delivery is not maintainable against one who has neither possession nor control of the property sought to be recovered, but who has sold and delivered it to another party.

(*Jones* v. *Green*, 4 Dev. & Bat., 354; *Charles* v. *Elliott*, *Ibid.*, 468; *Foscue* v. *Eubank*, 10 Ire., 424; *Haughton* v. *Newberry*, 69 N. C., 456; *Slade* v. *Washburn*, 2 Ire., 414, cited and approved.)

CLAIM AND DELIVERY tried at Spring Term, 1878, of NORTHAMPTON Superior court, before *Seymour, J.*

The opinion contains the facts. Upon overruling the demurrer the defendant appealed.

Mr. W. C. Bowen, for plaintiff.
Mr. R. B. Peebles, for defendant.

SMITH, C. J. This action is brought under C. C. P., Title IX, ch. 2, §§ 176 to 187, to recover possession of a mule.

The complaint alleges the taking of the mule from the plaintiff by the defendant, Taylor, his subsequent selling to the defendant, Haysty, and the possession of the latter. The defendant, Taylor, demurs to the complaint, for that, it does not show possession in him, and his co-defendant answers.

On the hearing of the demurrer it was overruled and Taylor appeals.

We think there is error in the ruling of the court, and that upon the pleadings unamended the demurrer ought to have been sustained.

The gist of the action is the wrongful withholding of the plaintiff's property, and the remedy sought, its restoration to the owner with damages for the detention. It resembles and is substantially a substitute under the new, for the forms of detinue and replevin in use under the old system of practice, and affords the same measure of relief. Possession must be averred and shown to be in the defendant, or that he retains such control over the property if in the hands of his bailee or agent, that it can be surrendered to the plaintiff if the court shall so adjudge. The authorities cited in the argument for the appellant clearly establish this proposition—*Jones* v. *Green*, 4 Dev. & Bat., 354; *Charles* v. *Elliott*, *Ibid*, 468; *Foscue* v. *Eubank*, 10 Ire., 424.

In *Slade* v. *Washburn*, 2 Ire., 414, it was held that a joint action of detinue would not lie against two persons who took certain slaves from the plaintiff at one and the same time, one defendant being in possession of a part of the slaves,

and the other defendant being in possession of the other slaves; though an action of trespass could be maintained against both.

The same principle is applied to the action prescribed in the Code in *Haughton* v. *Newberry*, 69 N. C., 456. In that case the plaintiff sued to recover a boat which the defendant had sold to another person before the action was commenced, and it was decided that as the boat was not in the possession nor under the control of the defendant, the plaintiff could not recover in this form of proceeding. In delivering the opinion of the court, PEARSON, C. J., says: "In face of the fact that the defendant did not have possession at the time of the commencement of the action, as a matter of course, the plaintiff was not entitled to the judgment demanded in the complaint;" and he adds, "that instead of demanding judgment for the recovery of the possession of the boat he ought to have demanded judgment for the value of the boat, by way of damages, as in an action of trover, and thereupon asked leave to amend the complaint so as to conform it to the proof, which would have been allowed without costs as the defendant could not have been misled by the misprision. C. C. P. §§ 128, 129, 132. But instead of this he takes an appeal for the supposed error in ruling that, as the pleading then stood, the plaintiff could not recover."

Not only does the plaintiff here fail to allege any separate possession in the appellant or any common possession in both defendants, but his complaint shows that the appellant had sold the mule to the other defendant and had no control over him. Upon these allegations the plaintiff could not maintain his action against the appellant alone, nor with any more reason against him, when associated in the action with one who may be liable. His defence is several and equally available in either case. The judgment must be reversed. This will be certified to the end that further

proceedings be had in the court below in accordance with this opinion.

Error. Reversed.

JOHN T. WILLIAMSON v. JAMES W. BUCK and GEORGE W. WYNNE.

Claim and Delivery—Sufficiency of Evidence.

On the trial of an action of claim and delivery for a horse (a jury trial being waived) where the court found "that the death of the horse, which died while in defendant's possession, was occasioned by removal out of plaintiff's possession in the country to the possession of defendant in town, and being kept in town and by the uses to which it was put and the manner in which it was tended and managed while it was so detained by defendant;" *It was held*, that the finding was too general and indefinite to warrant the conclusion that the death of the horse was occasioned by the negligence of the defendant in taking and detaining it.

CLAIM AND DELIVERY tried at June Special Term, 1878, of WAKE Superior Court, before *Seymour, J.*

The parties having waived a trial by jury, the court found the following facts as appear from the record:—

1. Defendant Buck took the horse described in the complaint, from the possession of plaintiff on the 12th of May, 1872, and sold it to defendant, Wynne, before this action was instituted, who detained the same until its death, notwithstanding the demand of plaintiff for possession.

2. When so taken and detained, it was not the property of either of the defendants, but was the property of plaintiff.

3. It was the property of Mary Williamson, the wife of plaintiff, who died in 1870, bequeathing said horse to plain-

tiff; and notwithstanding defendant, Buck, is her executor and has never expressly assented to said legacy, yet by leaving the horse in possession of plaintiff for more than two years without ever having claimed it as executor, or setting up any claim thereto as his own individual property, there has been such an implied assent to plaintiff's legacy as vested the property in him before this action was brought.

4. Defendant, Buck, took the horse and sold it as his own property, and not as executor.

5. Defendant, Wynne, detained it after demand of plaintiff for two weeks after action brought, when the horse died in possession of Wynne.

6. The horse having died while so detained and defendants being wrong-doers, they are *prima facie* liable to plaintiff for its value, as a loss occasioned by the taking and detention; and the burden is on them to prove the cause of the death and to show that it was in no degree attributable to their negligence, nor to the fact that they had taken and detained it.

7. Defendants have not shown this; on the contrary the court finds as a fact that the death of the horse was occasioned by its removal out of the possession of plaintiff in the country, into the possession of defendants in town, and being kept in town; and by the uses to which it was put and the manner in which it was tended and managed while it was so detained by defendant Wynne.

8. That the horse was of the value of $125 when taken and at its death, but of no value at time of trial, being dead.

9. The court assesses the plaintiff's damages by reason of the taking and detention of the horse at $125 and interest thereon from the 21st of May, 1872.

The statement of the case is substantially as follows:—

The plaintiff offered evidence tending to prove that the horse in controversy was reared in the country on a farm

in Wake county, and used thereon until it was three years old. It was sold to Mary Williamson, wife of plaintiff, in the winter of 1868, and used on her farm near Raleigh. After her death on the 4th of March, 1870, the plaintiff continued in possession of the horse on the farm with the knowledge of Buck until it was carried to Raleigh by him on the 12th of May, 1872. The will of Mary Williamson in which Buck was named as executor was admitted to probate on the 1st of April, 1870, and was offered in evidence by plaintiff to show his right to the property as legatee. There was also evidence that Buck never claimed the horse as executor, nor exercised any authority over it until he took it, in the plaintiff's absence and without his consent, on the 12th of May, 1872, claiming it as his own private property, and as such delivered it to defendant Wynne who kept it at his livery stable in Raleigh about a week, when Buck sold it to him at $125, being a fair market price. Defendant Wynne hired the horse to customers from time to time, and used it as one of the team to his omnibus until about two weeks after this action was commenced, when it died of colic at the stable, having been hired the day before to a customer who drove the horse twelve miles in the country and back. The plaintiff made a demand for the horse on the 21st of May, 1872, before suit brought, and Wynne refused to deliver. Wynne offered evidence to prove that it was well cared for while in his possession, and did not die in consequence of any negligence or abuse on his part or of those to whom the use of the horse had been entrusted, and that it was not injured by the said drive on the day before its death.

Defendant Wynne insisted:

1. That assuming all the plaintiff's evidence to be true, he had not shown such a property in the horse as would entitle him to recover. The court held otherwise.

2. Defendant Buck, as executor, had never *expressly* as-

sented to plaintiff's legacy, and there was not sufficient evidence from which the court could find *as a fact* that Buck had impliedly assented thereto. The court held there was sufficient evidence to find such fact.

3. Plaintiff would not be entitled to recover unless the death of the horse was caused by defendant Wynne, and in that event, of which there was no evidence, he could only recover the hire of the horse during the two weeks it lived after the sale to Wynne. The court held there was sufficient evidence that the death was occasioned by the negligence of Wynne in taking and detaining it, and found upon these points as set out in the sixth and seventh sections of the findings as above.

Judgment for plaintiff. Appeal by defendants.

Messrs. E. G. Haywood and *Gilliam & Gatling*, for plaintiff.
Mr. D. G. Fowle, for defendants.

ASHE, J. This was an action of claim and delivery for a horse, instituted by the plaintiff against the defendant, brought by appeal from the June term, 1878, of superior court of Wake county. Both parties waived a jury trial and referred all the issues of law and fact, for decision, to the court. The defendant insisted on the trial and we must consider it as a special instruction prayed for, "that plaintiff would not be entitled to recover in this action, unless the death of the horse was caused by the defendant, Wynne, and in that event, of which there was no evidence, only for the hire of the horse during the two weeks he lived after the sale to Wynne."

In answer to this instruction the court held that there was sufficient evidence from which the court might find as a fact that the death of the horse was occasioned by the acts or negligence of the defendant, Wynne, in taking and detaining it or while he was detaining it; and referred as to

his finding, upon these points to the 6th and 7th sections of his findings of fact set out in the record. The sections referred to are as follows:

6. "The horse having died while so detained as aforesaid and the defendants being wrong-doers, they are *prima facie* liable to the plaintiff for its value as a loss occasioned by the taking and detention, and the burden is on them to prove the cause of the death and to show that it was in no degree attributable to their negligence, nor to the fact that they had taken and were detaining it."

7. "That the defendants have not shown this, on the contrary, the court finds as a fact that the death of the horse was occasioned by its removal out of the possession of the plaintiff in the country, into the possession of the defendants in town, and being kept in town and by the uses to which it was put and the manner in which it was tended and managed while it was so detained by the defendant, Wynne." In the 8th and 9th sections, His Honor found as facts, that the horse was worth when taken $125, but being dead was worth nothing at the time of the trial. And he assessed the damages at $125 with interest, for the detention of the horse for two weeks, a finding that can only be warranted upon the ground that the horse came to his death by the ill treatment or negligence of the defendants.

There is no fact of ill treatment or abuse found. But the fact is found by His Honor that the death of the horse was occasioned by its removal from the possession of the plaintiff in the country, into the possession of the defendant in town, and by the uses to which it was put, and the manner in which it was treated and managed while detained by the defendant.

We cannot see from the finding how the health of the horse was affected by his removal to the town, nor how the use to which he was put operated to his injury, nor in what manner he was improperly "tended and managed." The

findings are too general and indefinite to warrant the conclusion His Honor has drawn from them. They are not sufficient to raise the legal inference of negligence.

Negligence is a mixed question of law and fact. The finding of the facts is a question for the jury, or the court in a case like this, and is conclusive. But whether when found they constitute a case of negligence is a question of law for the court, which is reviewable upon error assigned.

There was error in the instruction which His Honor gave to himself as the trier of the facts as to the measure of damages. Let this be certified to the superior court of Wake county, that a *venire de novo* may be awarded to the defendants.

Error. *Venire de novo.*

P. A. HOOVER v. B. H. PALMER.

Injury to Person—Arrest and Bail.

The seduction of a daughter being an infringement of the father's relative rights of person, is an injury to his person within the meaning of C. C. P., § 149 (1), and a sufficient ground for the arrest of the defendant in an action for such tort.

MOTION to vacate an Order of Arrest, heard at Fall Term, 1878, of DAVIDSON Superior Court, before *Graves, J.*

The plaintiff instituted a civil action for damages against the defendant for the seduction of his daughter, and on filing the required bond, an order of arrest was made by the clerk, and the defendant was held to bail. Upon the hearing of the motion to vacate, His Honor held that an order

of arrest could not be granted in such action and allowed the motion, from which judgment the plaintiff appealed.

Messrs. M. H. Pinnix and *W. H. Bailey*, for plaintiff.
Messrs. Merrimon, Fuller & Ashe, for defendant.

DILLARD, J. In this action the plaintiff sued to recover damages for the seduction of his daughter, and procured an order of arrest, under which the defendant was taken and held to bail, and aftewards at fall term, 1878, of Davidson superior court, the defendant moved to vacate the order of arrest, and His Honor granted the motion, on the ground that it is not one of the cases for which an arrest is authorized by the Code of Civil Procedure.

The Code, § 149, (1), prescribes that a defendant may be arrested in an action arising on contract, where he is a non-resident of the state, or is about to remove therefrom; and in an action for the recovery of damages on a cause of action not arising out of contract, where the action is for injury to person or character, or for unlawfully taking, detaining, or converting property.

It is under this clause that the authority to arrest is claimed and in our opinion the claim is well founded.

Blackstone, in his Commentaries, and indeed all the elementary writers divide rights into two kinds,—such as concern or affect the person, called *rights of person*, and such as concern things, which are foreign to the person called *rights of things*. The class, *rights of person*, is sub-divided into rights of person absolute, being such as belong to one, individually and separately considered, and rights of person *relative*, being such as extend to one in relation to and connection with others. Under this classification of rights, criminal conversation and seduction are enumerated and treated of by the law writers as injuries to, and included within the class of, the relative rights of person of a hus-

band and parent. 3 Blackstone, 138; 2 Kent., 1295; 1 Chitty's Pleading, 137.

The section of the Code under consideration, after providing for arrest in actions *ex contractu* as against a non-resident, and one about to remove from the state, authorizes an arrest in causes of action not arising out of contract, in language broad enough to include all actions *ex delicto*, and then particularizes actions for *injury to person*, character, and property in the latter branch of the first sub-division, with a further enumeration of the instances in which arrests may be made in other sub-divisions. On reading the whole section it is difficult to adopt the construction contended for by the defendant. Such a construction involves the absurdity of the legislature's intending to subject a trespasser or a tort-feasor to give bail for his appearance, and answer to an action in respect of property of insignificant value; while no security can be had for the forthcoming of a seducer to answer an action for debauching a daughter. We think it was not so intended, and the words of the statute do not demand such a construction.

It is fair to conclude that the legislature in providing for arrest and bail in an action for *injury to person* used those words—*injury to person*—according to their established legal signification in the classification of rights and injuries thereto as taught in the elementary writers, and, thus considered, the language employed in legal effect authorized, as we think, an arrest for all those injuries (seduction included) which may be suffered in respect of any rights of person, absolute or relative. This, we hold, was intended to be and is the proper construction of the section of the Code in question.

The same construction is given in New York from which the section under consideration was copied. *Delametor* v. *Russell*, 4 How., 234; *Elamburg* v. *Lasker*, 50 How., 432.

There is error in the judgment of the court below in vacating the order of arrest and the same is reversed.

Error. Reversed.

ELIJAH A. TEW v. REBECCA A. TEW.

Divorce.

1. A husband is not entitled to a divorce unless upon a separation by the wife without default of the husband, and a living in adultery by the wife.
2. The adultery of the wife committed by her after a separation caused by the default of the husband, will not avail him to dissolve the bonds of matrimony. Divorces are granted on the application of the party *injured.* Bat. Rev., ch. 37, § 4.

(*Whittington* v. *Whittington*, 2 Dev. & Bat., 64; *Moss* v. *Moss*, 2 Ire., 55; *Wood* v. *Wood*, 5 Ire., 674, cited and approved.)

CIVIL ACTION for Divorce from the bonds of matrimony tried at Spring Term, 1878, of SAMPSON Superior Court, before *Eure, J.*

The facts are sufficiently stated by Mr. Justice DILLARD in delivering the opinion of this court. Upon the finding of issues submitted to the jury His Honor held in favor of defendant and plaintiff appealed.

Mr. J. D. Kerr, for plaintiff.
Messrs. W. S. & D. J. Devane, for defendant.

DILLARD, J. The husband seeks a divorce *a vinculo matrimonii*, and in his petition puts his case on the ground of a separation from him by his wife and alleged adultery of the wife before and after the separation; and the wife de-

nies that she separated from her husband, and also denies the adultery charged. The jury in response to issues submitted to them find that the wife did not separate herself from her husband, but that the husband separated himself from the wife; that the wife was not guilty of the adultery charged against her prior to the separation, but was guilty after the separation; and on the facts as thus found His Honor held that the plaintiff was not entitled to a decree dissolving the marriage. We concur with His Honor.

Marriages may be dissolved on the application of the injured party for the cause of adultery in two cases,—first, if either party shall separate from the other and live in adultery; and second, if the wife shall commit adultery. Bat. Rev. ch. 37, § 4. To entitle the husband to a divorce in the first case, two things must concur, to-wit, separation by the wife without default of the husband, and a living in adultery by the wife; and the jury find but one of the requisites—adultery by the wife since the separation; and as to the other essential fact they find that separation was the act of the husband, and that the incontinence imputed to the wife as prior to the separation was untrue, and it is obvious therefore that the plaintiff's application for divorce is not within the first class of cases mentioned above.

But the plaintiff insists that his wife has *committed adultery*, and although committed only *since* the separation, he is entitled to have a divorce under the second class of cases enumerated in the section aforesaid of Battle's Revisal. The clause of the statute is a new provision, and first introduced into our law at the session of the legislature of 1871–'72, and no case has arisen calling for its exposition and construction. It is in terms absolute, and separately considered it would seem to make the adultery of the wife good ground of divorce whensoever committed, whether before or after separation, and howsoever committed, whether in consequence of, or without the default of the husband.

But this provision in the opinion of this court is to be considered in connection with the declaration in the same statute, that divorces are to be granted on the application of the party *injured;* and thus limited, no husband can have the bonds of matrimony dissolved by reason of the adultery of the wife committed through his allowance, his exposure of her to lewd company, or brought about by the husband's default in any of the essential duties of the married life, or supervenient on his separation without just cause. *Whittington* v. *Whittington*, 2 Dev. & Bat., 64; *Moss* v. *Moss*, 2 Ire., 55.

In *Wood* v. *Wood*, 5 Ire. 674, it is held, that if a divorce be sought on grounds occurring after separation, it is indispensable that the party asking it shall show that he or she did not separate, or if he or she did, that it was unavoidable and made necessary by the conduct of the other party.

Now by the verdict of the jury it is established that the husband separated himself from the wife upon a charge of adultery before the separation, which is found to be untrue, and the default of the husband in withdrawing all conjugal society from the wife and throwing her out upon the world stained with a false imputation, in the opinion of this court, disables him to avail himself of the wife's subsequent adultery as a ground to dissolve the bonds of matrimony.

No error. Affirmed.

MARY SCOGGINS v. WILLIAM SCOGGINS.

Divorce—Alimony—Custody of Children.

1. Where the complaint of a *feme* plaintiff seeking a divorce alleges facts which, if believed, entitle her to the relief demanded, and is sup

plemented by an affidavit that the husband is trying to dispose of his property and has offered his land for sale with the avowed purpose of leaving the state, and that the children are small and need the mother's care; it is proper to grant an order for alimony *pendente lite*, without reference to the time when the facts relied on as grounds for the divorce occurred.

2. In such a case it is also competent for the court to award to the mother the custody of the younger children.

(*Gaylord* v. *Gaylord*, 4 Jones Eq., 74, cited and approved.)

CIVIL ACTION for Divorce *a mensa et thoro* heard on motion in the cause at Spring Term, 1878, of RUTHERFORD Superior Court, before *Cox, J.*

This was a motion by the plaintiff at the appearance term for alimony *pendente lite* and for the custody of the children of the marriage. The alleged cause of divorce was cruel treatment on the part of the defendant, the complaint setting out the nature of and specifying the occasions when the several acts of cruelty were perpetrated; notably that on or about the last of January or first of February last, one of the children of the parties was seriously ill, needing the attention of both parents, and while it was in this low state of health, from which it soon died, the defendant was drinking and abusing the plaintiff and threatening her life, and on a certain night ordered persons who were visiting the sick child to leave the house, and also ordered the plaintiff to leave. Being greatly alarmed and fearing her life would be taken, she went to her father's on that night.

The plaintiff's affidavit states that some of the facts complained of have existed more than six months before suit brought, and that defendant "is trying to dispose of his property for the purpose of leaving the state, and has offered his land for sale, avowing his intention to leave the state," and that the children were small and needed her care. It also appeared by the affidavit of Wade Hill, the father of plaintiff, that she was without means to support herself or

to defray the expenses of this action, and that defendant was the owner of a tract of land of the value of one thousand one hundred dollars, subject to a mortgage of about two hundred dollars, and also owned horses, cattle and other stock.

Thereupon His Honor found the following: That the complaint set forth facts which, if true, were sufficient to entitle the plaintiff to the relief demanded; that plaintiff has not sufficient means for support during the prosecution of the action and to defray the necessary expenses thereof; that defendant owned a tract of land worth $1,000, and personal property worth $300, and that his income was $225 or more; and adjudged that defendant pay to plaintiff seventy-five dollars a year as alimony, and awarded the custody of the three youngest children, girls, to the plaintiff, and of the oldest child, boy, to the defendant. From which judgment the defendant appealed.

No counsel for plaintiff.

Messrs. Hoke & Son and *J. C. L. Harriss,* for defendant.

ASHE, J. In an action for divorce where the wife applies for alimony out of the estate of her husband *pendente lite,* the court can look only to the complaint, and will make the allowance when the facts set forth in it are sufficient to warrant the judgment of divorce.

One of the requirements of the statute empowering the courts to decree a divorce either *a vinculo matrimonii* or *a mensa et thoro,* is that it should be stated in the affidavit of the plaintiff filed with the complaint, that the facts set forth in the complaint, as grounds for divorce, have existed to her knowledge at least six months prior to the filing thereof. But there is an exception to this requirement whenever it is averred that the husband is then removing or about removing his property from the state. In such a case, to

prevent her from being defeated of her alimony, the statute allows her to file her complaint without regard to the time when the facts alleged as cause of divorce may have occurred. Bat. Rev., ch. 37, § 6. *Gaylord* v. *Gaylord*, 4 Jones Eq., 74.

In the 10th section of chapter 37 of Battle's Revisal, it is provided that if any married woman shall apply to a court for a divorce from the bonds of matrimony or from bed and board with her husband, and shall set forth in her complaint such facts as, if true, will entitle her to the relief demanded, and it shall appear to such court, either in or out of term, by the affidavit of complainant or other proof, that she has not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary and proper expenses thereof, the judge may order her husband to pay her such alimony during the pendency of the suit as shall appear to him just and proper, having regard to the circumstances of the parties.

The fact stated in the complaint that the defendant "is trying to dispose of his property for the purpose of leaving the state, and that he has offered his land for sale, avowing his intention to leave the state," brings this case within the exception, and the plaintiff may rely upon the facts set forth as having occurred within the six months before filing the complaint as grounds for the relief demanded therein. And while the facts set forth as existing more than six months before the filing of the complaint are too general and indefinite, we are of opinion that those alleged to have occurred about the last of January or the first of February, are sufficient, if true, to warrant a decree of divorce *a mensa et thoro;* and the plaintiff having proved by the affidavit of Wade Hill that she has no means with which to support herself during the prosecution of her action and to defray the necessary and proper expenses thereof, we think that the law in this behalf has been fully complied with, and that

plaintiff is entitled to alimony. We are further of the opinion that it was perfectly competent for His Honor to dispose of the children of the marriage as he did.

No Error. Affirmed.

SARAH PAIN v. DANIEL PAIN.

Judge's Discretion—Divorce—Alimony, not a debt.

1. It is discretionary in a judge to re-open a case for additional testimony and argument. His refusal to do so is not reviewable.
2. In an action by a wife for divorce *a mensa*, where acts of cruelty were alleged as the ground of separation, and also an estimate of the value of defendant's estate, *it was held* to be sufficient evidence to decree alimony and fix the amount.
3. The allowance in such case is not a debt within the meaning of the constitution, and the defendant may be held to answer a rule for contempt in default of payment.

(*Gaylord* v. *Gaylord*, 4 Jones Eq., 74; *Schonwald* v. *Schonwald*, Phil. Eq., 215; *State* v. *Cannady*, 78 N. C., 539, cited and approved.)

CIVIL ACTION for Divorce *a mensa et thoro* heard on a motion for alimony *pendente lite*, at November Special Term, 1878, of MADISON Superior Court before *Avery, J.*

At the regular term the plaintiff's counsel made the motion for alimony, and a reference was ordered to ascertain what estate or property was held by defendant, and his annual income, and a report returned. The motion was argued before His Honor at chambers, and it appeared that neither a demurrer nor an answer was filed to the complaint, for which failure the plaintiff insisted that judgment should be entered. After argument upon this question and upon intimation of the court that a demurrer embodying

the grounds of objection stated by counsel would be sustained, the defendant submitted the demurrer in writing, but it was held to be insufficient. Leave was then granted to file another setting out specifically the grounds of objection, and also to amend the complaint. On the following day the pleadings were read, and the plaintiff moved for an allowance to enable her to prosecute the action, and the defendant was heard in reply. Thereupon His Honor adjudged "that defendant pay into court within twenty days the sum of one hundred dollars to enable plaintiff to prosecute the action till the next term, and in default thereof the defendant shall show cause on the second of January, 1879, at Waynesville, before *Gudger, J.*, why he shall not be attached for contempt." Upon hearing this order read, the defendant insisted on reading at length the report of the referee, and on further argument His Honor declined to hear the report read, but permitted some discussion between counsel as to the amount of defendant's property and income. The defendant announced his readiness for trial, but the jury had been previously discharged, and the case was continued and the court adjourned.

In reply to a question of defendant's counsel, His Honor stated that he had not read the referee's report. Defendant excepted on the ground of the refusal to hear the report read, and to allow further argument after the foregoing order was made; and on the further ground that upon the testimony reported by referee the court did not have the power to make said allowance. From the judgment of the court the defendant appealed.

Messrs. Gilliam & Gatling and *A. T. & T. F. Davidson*, for plaintiff.

Messrs. J. L. Henry and *Reade, Busbee & Busbee*, for defendant.

SMITH, C. J. This appeal from the interlocutory order, allowing the plaintiff alimony, *pendente lite*, brings before us for examination two exceptions only:

1. The refusal of the judge to hear further evidence of the amount and value of the defendant's estate and argument from his counsel.

2. The penalty imposed in the decretal order for failure to comply with it.

The case shows that on the motion for the allowance the amended complaint verified by the plaintiff's oath was read, and no other evidence was offered by either party. The subject matter of the complaint and the sufficiency of its averments, upon an issue raised by demurrer, had been fully discussed before the judge at chambers the day previous. The motion was granted and the written order set out in the record was prepared and read in the hearing of both parties. Thereupon the defendant's counsel insisted upon the reading of the referee's report in full and his right to further argument. His Honor declined to hear the report read, but its statements as to the defendant's property and income were commented on by both the counsel. This refusal is now assigned for error.

The complaint not only sets out the plaintiff's grievances and the defendant's acts of cruelty and wrong, the grounds on which she seeks a separation, but an estimate of the value of his real and personal estate. This was sufficient evidence to warrant the making the allowance and fixing its amount. *Gaylord* v. *Gaylord*, 4 Jones Eq., 74; *Schonwald* v. *Schonwald*, Phil. Eq., 215.

If the defendant desired to introduce further evidence as to the value of his property and his ability to pay, it should have been offered before the question was decided. This he did not do, nor offer to do, until the decision was made and announced. This was not in apt time, and it rested in the sound discretion of the judge to re-open the case for addi-

tional testimony and debate, or to decline to do so. We cannot review the exercise of this discretion. The point was for him and not for us to determine, and his action is conclusive. It may not be improper in us, however, to say we see no indications of undue haste in the manner in which the issue was disposed of, whereof any just complaint can be made.

2. The order itself is said to be harsh in its mode of enforcing payment, and unauthorized by law. The allowance is not a debt within the meaning of the constitution, as contended before us, for which imprisonment is not permitted. It is an order of a competent court, only to be enforced as are other judicial commands when necessary by process of attachment against the person. The power to award the process is inherent in the court, essential to the exercise of its jurisdiction and the maintenance of its authority. Without the ability to compel obedience to its mandates—whether the order be to surrender writings in possession of a party, to execute deeds of conveyance, to pay money, as in the present case, or to perform any other act the court is competent to require to be done—many of its most important and useful functions would be paralyzed. The wilful disobedience of a lawful order is itself criminal, much more so than the non-payment of costs adjudged against a prosecutor in a criminal action, and for which he may be imprisoned. *State* v. *Cannady*, 78 N. C., 539.

But inability to comply with an order, unlike the commitment for costs, is an answer to a rule to enforce it, and when made to appear, discharges from its obligation.

The rule contained in the order in this case and intended to secure compliance, is but an anticipation of the one which would have been granted after the fact of disobedience was made to appear, and is not more severe or stringent in its terms. The payment of the money would render it wholly inoperative. While it is perhaps prema-

ture in assuming that the order will be disregarded by the defendant, and every subsequent proceeding become necessary, we cannot on this account regard it invalid as unwarranted by law.

No error. Affirmed.

JAMES W. ALSTON and wife v. THE OLD NORTH STATE INSURANCE COMPANY.

Insurance—Notice—Unoccupied Premises.

1. Under a fire insurance policy requiring notice to be given if the insured premises become vacant, and the assured fails for six weeks to give such notice, it is inexcusable neglect which will relieve the company from liability in case of loss by fire occurring within the period of the vacancy.
2. Such notice must be given in a reasonable time. And it seems that a company would not be discharged from its obligation if no notice is given of a temporary interruption of continuous possession incidental to a change of tenants.

CIVIL ACTION to recover the amount of a Fire Insurance Policy, tried at January Special Term, 1879, of WAKE Superior Court, before *Seymour, J.*

The policy of insurance on which this action is brought was issued by the defendant corporation (whose principal place of business is Warrenton) on the 21st of July, 1876, to run for one year, and contains a clause making it void, if among other causes recited the insured premises "shall be used so as to increase the risk, or *become vacant and unoccupied*, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured, without the assent of the

company endorsed thereon." The houses, dwelling and kitchen, had been insured for two years preceding, and it was then made known to defendant's agent who effected the insurance that they were intended for renting and were then rented to the tenant in possession. The tenant in possession when the last insurance was effected, under a contract of lease for that year, left on or about the 16th of December, 1876, and thence the premises remained unoccupied, though some of his furniture was still in the houses, until the 29th of January following, when the buildings were fired by an incendiary and destroyed. The plaintiffs had an agent to rent out the premises and he had not done so that year, but the vacancy was not known to plaintiffs until they visited the place (Manson, Warren county,) some five or six days before the burning.

The several issues submitted to the jnry were found for the plaintiffs, and the only question reserved by consent to be decided by the court was the effect upon the policy of "the failure of occupancy." The court was of opinion that the vacancy and the failure to make it known and have it endorsed upon the policy with consent of the company, avoided the policy and plaintiffs could not recover. From which judgment they appealed.

Messrs. A. M. Lewis and *Gilliam & Gatling*, for plaintiffs.
Mr. D. G. Fowle, for defendant.

SMITH, C. J. (After stating the case.) In this ruling we concur. It is made an essential condition of the contract that the property should not be exposed to the perils of an unoccupied tenement without the fact being communicated to the insurer and the consent of the company obtained and endorsed by an entry on the policy. This is a just and reasonable precaution against an increased risk without an increased premium, and a substantial and important ele-

ment of the contract. The danger to unoccupied buildings is certainly greater in the absence of any one to protect them, or to extinguish the fire at the beginning or to detect and punish the incendiary; and this is quite manifest from the facts of the present case. It may be that the attempt would not have been made if a vigilant and careful person had been present, interested in the preservation of his own property as well, or if made, would not have been successful. And if this was not so, it is an essential condition of the insurance that if the premises become vacant, the consent of the company must be obtained in the manner specified, or the policy become void. By this condition the plaintiffs must abide, and the consequences of their neglect must rest upon themselves. The proposition seems to be too plain for discussion.

"If in the description," says Mr. May, "the recital is that the property insured is only to be used or occupied in a certain way, or not to be used or occupied at all, this is an agreement and must be complied with; and so it is if the policy provides that unoccupied buildings must be insured as such, and in case the *building becomes vacant*, the assured shall give notice or forfeit his right to recover." May on Insurance, § 248.

We do not put so vigorous a construction upon this provision of the contract as to require that immediate information of the vacancy be conveyed to the insuring company, but if it is to be held liable after this change in the condition of the insured premises, such notice should be given in a reasonable time thereafter, and the assent of the company to the continuance of the policy obtained and manifested in the mode specified. This was not done for more than six weeks preceding the fire, although the defendant's principal place of business was but a few miles distant, and the delay is inexcusable. Nor do we mean to say that such temporary interruption in a continuous possession as is incidental

to a change of tenants would without such notice and consent vitiate the policy and discharge the insurer from its obligations. But this is not a case of the kind. The vacancy has lasted as we have said for more than six weeks and might have been protracted for months, so far as we can see, but for the destruction of the buildings.

We have considered the case as presenting the question of the effect upon the plaintiffs' rights of their failure to give the required notice, which as we understand the case was intended to be presented on the appeal for our determination; and we have not considered the technical criticisms upon it, made in the argument of the plaintiffs' counsel. We therefore declare there is no error, and the judgment must be affirmed.

No error. Affirmed.

L. A. PASCHALL, Adm'r, v. L. H. BULLOCK.

Bankruptcy—Practice—Setting aside Judgment.

A discharge in bankruptcy, obtained before judgment in an action on one of the debts discharged, must be set up in apt time as a bar to the plaintiff's recovery, and will not avail the defendant on a motion to set aside an execution issuing on such judgment.

(*Dawson* v. *Hartsfield*, 79 N. C., 334, cited and approved.)

MOTION by the defendant to recall and set aside an execution in favor of the plaintiff, heard at Fall Term, 1878, of GRANVILLE Superior Court, before *Kerr, J.*

The opinion contains the facts. The motion was denied and the defendant appealed.

Messrs. E. G. Haywood and *Batchelor & Edwards,* for plaintiff.
Messrs. Merrimon, Fuller & Ashe, for defendant.

SMITH, C. J. This action was commenced in January, 1867, by J. T. Leach, executor of R. C. Maynard, against the defendant and one Kinchen Haithcock, and judgment recovered against them at August term, 1870, of Granville superior court. Execution was issued thereon which was returned to the next term unsatisfied, and none other until this which the defendant now asks to have recalled and set aside.

Pending the action the defendant Bullock instituted proceedings in bankruptcy which terminated in a decree of discharge from his debts on the 10th of June, 1870.

The judgment became dormant and the executor having died, the plaintiff, who had taken out letters of administration *de bonis non,* gave notice and on the 13th of October, 1877, applied to the clerk and obtained leave to sue out his execution against the defendant. This order on appeal was affirmed by the judge and a further appeal was taken to this court.

Execution accordingly issued and action under it was arrested by a restraining order until a proposed motion of the defendant to set aside the writ could be heard. On the hearing of the motion to recall and set aside the execution, and for an order of perpetual stay, the certificate of discharge was offered in evidence and relied on to support it. The court denied the motion, from which the defendant appeals to this court, and in our opinion acted correctly in doing so.

No reason is suggested why the defence was not made to the further prosecution of the action at the August term of Granville superior court, when final judgment was rendered, two months after the discharge had been granted to the defendant. Again, he failed to present it as cause why execution should not issue at the hearing of

the application for leave before the clerk, and again before the judge on his appeal from the order of the clerk.

In *Dawson* v. *Hartsfield*, 79 N. C., 334, this court decided that when the defendant obtained his discharge after judgment and had therefore no opportunity to plead it, the defence was available upon motion for leave to issue execution on the judgment which had become dormant. The decision was not made with entire unanimity and we are not disposed to go beyond it.

The bankrupt act contemplates and authorizes a suspension of legal proceedings against a defendant who has filed his petition in the bankrupt court, until his right to a discharge can be passed on, to the end that if granted it may be set up as a defence to the action. This was not done in the case referred to, and the motion for leave furnished the first and only occasion where the defence could be offered, and we held that there was not such laches on his part as to deprive him of the benefit of his discharge. Here, the defendant could have arrested further proceedings in the action and with no sufficient excuse neglected to take advantage of the opportunity. Again, he failed to offer his discharge in opposition to the plaintiff's application for leave to issue execution, if indeed it was not then too late to do so. Defences must be brought forward in apt time, and usually the judgment precludes all enquiry between the parties into matters antecedent to its rendition. Relief is given in proper cases under C. C. P., § 133, when it is sought by an aggrieved party within one year after he has notice. The statutory bar, now not obstructing the remedy but defeating the cause of action, and the discharge in bankruptcy which it closely assimilates, are defences founded on reasons of public policy, and they will not be denied when presented properly and in apt time. But they are not such as to call for the exercise of the unusual power of restoring a lost opportunity to the defendant in setting aside the ex-

ecution, and taking from the plaintiff the fruits of his recovery. Without the citation of adjudged cases we adhere to a well established rule in judicial proceedings by refusing to the plaintiff the relief which he seeks.

No error. Affirmed.

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*W. H. SIMPSON, Adm'r, v. ROBERT SIMPSON and others.

Bankruptcy—Guardian—Surety.

A discharge in bankruptcy does not operate to discharge a guardian debt of the bankrupt; otherwise as to the sureties upon his guardian bond. The fact that such debt is evidenced by a judgment does not divest it of its fiduciary character.

(*McMinn* v. *Allen*, 67 N. C., 131; *Dawson* v. *Hartsfield*, 79 N. C., 334, cited and approved.)

APPLICATION by defendant for an Injunction heard at Fall Term, 1878, of UNION Superior Court, before *Schenck, J.*

The facts appear in the opinion. The injunction was refused and the defendant appealed.

Messrs. Wilson & Son, for plaintiff.
Messrs. C. Dowd and *Shipp & Bailey*, for defendant.

SMITH, C. J. The plaintiff, W. H. Simpson, administrator of Peter Simpson, an infant of whom defendant, Robert Simpson, had been appointed guardian, at fall term, 1870, of Union superior court in an action on the guardian bond recovered judgment against him and his sureties as damages for the

*Ashe, J., having been of counsel in the original suit did not sit on the hearing of this case.

breaches thereof the sum of three hundred and ninety-five dollars and thirty-five cents and the costs of the suit. Successive executions have issued, and on one of them, by a sale of land a part of the money due has been made and applied. Other executions have since issued for the residue of the judgment, but nothing made on them.

On the 16th of June, 1873, Robert Simpson filed his petition in bankruptcy, and on the 23rd of December following obtained his discharge. The plaintiff proved his judgment in the bankrupt court as a fiduciary debt against the bankrupt's estate.

The defendant, the former guardian and principal in the bond, now applies for an order recalling the execution in the sheriff's hands and for a perpetual stay of further proceedings to enforce the judgment on the ground that he is discharged therefrom by the decree of the bankrupt court.

Waiving the preliminary question of the defendant's right after such long and unexplained delay, to set up the defence and avail himself of its benefits, we will consider the point intended to be presented in the appeal for our decision. The point is as to the effect of the discharge upon the judgment, and we are of opinion it is not discharged.

Section 33 of the bankrupt act provides, "that no debt created by the fraud, embezzlement, of the bankrupt or by his defalcation as a public officer, or *while acting in any fiduciary character*, shall be discharged; but the debt may be proved and the dividend thereon shall be a payment on *account of said debt.*"

That the judgment recovered for the mismanagement and waste of the infant's estate is a debt incurred or created by the defendant "while acting in a fiduciary character," and consequently not affected by the discharge, is too plain to admit of debate. But the sureties to the bond who are but guarantors of the fidelity of their principal are discharged

from their liability. *Jones* v. *Knox*, 46 Ala., 43; *McMinn* v. *Allen*, 67 N. C., 131.

In *Catlin* v. *Catlin*, Bush. (Ky.), 141, it is held that not only is the guardian not relieved by his discharge from his fiduciary obligations to his ward, but he remains liable also to the surety to his bond who has been compelled to pay money for him and sues for reimbursement. Nor does the merger of the liability upon the bond in the judgment change the nature of the debt and divest it of its fiduciary character.

The judgment exclusively ascertains and fixes the amount of the defalcation, but it still remains a debt created while the defendant was acting in a fiduciary capacity, and under the act exempt from the operation of the discharge. *Dawson* v. *Hartsfield*, 79 N. C., 334. The fiduciary character of the debt does not depend upon its form, but the manner of its origin and the acts by which it is incurred.

There is no error in the ruling of the court and the judgment is affirmed.

No error. Affirmed.

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*SAMUEL CALVERT v. NICHOLAS PEEBLES.

Bankruptcy—Delay in obtaining Discharge—Fiduciary Debt.

1. Where there is unreasonable delay on the part of the bankrupt in obtaining his discharge (here five years) the stay of proceedings against him in an action to recover a debt provable in bankruptcy, will not be continued, but judgment may be rendered.
2. A discharge in bankruptcy does not discharge a debt of a fiduciary character.

CIVIL ACTION tried at Spring Term, 1878, of NORTHAMPTON Superior Court, before *Seymour, J.*

*Smith, C. J., did not sit on the hearing of this case.

The plaintiff and others had become sureties on a guardian bond of the defendant, taken by the late county court of Northampton, on the 6th of March, 1865. Suit was brought on said bond against the defendant as principal and the plaintiff and others as sureties, and a large recovery had. Execution was issued on the judgment rendered in the case and about $8,600 collected from the plaintiff, who brings this action to recover the amount so paid by him to the use of the defendant. The cause was continued from term to term until the third Monday in February, 1874, when the defendant suggested his bankruptcy; and it was then continued from term to term until spring term, 1878, of said court, when judgment was rendered in behalf of the plaintiff against the defendant for the sum so paid and interest. From this judgment the defendant appealed. See *Simpson* v. *Simpson*, *ante*, 332.

Messrs. Mullen & Moore and *Willis Bagley*, for plaintiff.
Mr. R. B. Peebles, for defendant.

ASHE, J. (After stating the facts.) The defendant insists there was error in the court below in rendering the judgment whilst his proceeding in bankruptcy was depending; that having suggested his bankruptcy on the record, the court was restrained by the 21st section of the bankrupt act from proceeding with the case, and the stay provided for in that section of the act should have been continued until the question of his discharge should be determined; that this was a provable debt, and this amount was not in dispute, and is such an action as comes within the purview of that section.

It is true that section of the act provides that "no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the

debtor's discharge shall have been determined, and any such suit or proceeding shall upon the application of the bankrupt be stayed to await the determination of the court in bankruptcy on the question of discharge." And the construction given to this section is that it applies to state as well as federal courts. If this were all, it would seem that the court below should have continued the stay until the discharge of the bankrupt was either granted or refused. But there is a proviso to that section: "*Provided*, there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge."

This suit was brought to the spring term, 1873, of Northampton superior court, and up to June term, 1878, of said court, the defendant had not obtained his certificate—during a lapse of five years. We think the case comes clearly within the purview of the proviso, and there has been an unreasonable delay on his part in obtaining his discharge; and, therefore, the court did right in vacating the order of stay and granting the judgment.

The debt is of a fiduciary character, *Carlin* v. *Carlin*, 8 Bush., 141, and though provable will not be discharged by the bankruptcy of the defendant. And as there is no dispute about the amount of the debt, we do not see how he is to be hurt by the judgment, especially after the lapse of five years, for if the stay had been continued he would not have had the right to plead his discharge in bar to the action. The judgment was properly rendered. Let this be certified, &c.

No Error. Affirmed.

JOHN COLLETT and others v. L. R. HENDERSON and others.

Tenants in Common—Partition of Land.

Upon partition of land among tenants in common, the tenant who has improved a part thereof is entitled to have it allotted to him at a valuation without regard to the improvements.

(*Pope* v. *Whitehead*, 68 N. C., 191, cited and approved.)

PROCEEDING for division of land between tenants in common, heard on appeal at Fall Term, 1878, of BURKE Superior Court, before *Gudger, J.*

Commissioners were appointed by the court and ordered to divide the land described in the pleadings into three equal parts, assessing the more valuable dividends with such sums as may be necessary to be paid to the dividends of inferior value to make the division equal; and they were directed to assign to the tenants such shares in the land as would include the part improved by them respectively, valuing the share at what it would have been worth without the improvements, and to report their proceedings to court for further orders. From this judgment the defendants appealed.

No counsel for plaintiffs.

Messrs. Bynum, Armfield and *Bailey* for defendants.

SMITH, C. J. The judgment for partition among the several tenants of land held by them in common directs the commissioners, when any of them have caused valuable improvements to be put on portions of the land, to assess their value as if no such improvements had been made and to allot the parts improved to those who had made them. In this we find no error. It would be unjust and inequitable in the others to take the common property enhanced in

value by the expenditures of one of them without making him compensation, and he would be entitled to an account. The same result is reached without the expense and delay of a reference, by allotting to such the improved parts, valued without regard to the improvements. Such is the judgment in this case and it has the sanction of the ruling in *Pope* v. *Whitehead*, 68 N. C., 191.

As no statement of the case accompanies the transcript and no errors are assigned by the appellant, or are apparent in the record, according to the settled practice in this court the judgment must be affirmed, and it is so ordered.

No error. Affirmed.

ELIZABETH G. HAYWOOD, Ex'x, v. ELIZABETH B. DAVES.

Tenants in Common—Contribution—Costs.

Plaintiff's testatrix and defendant, tenants in common of a fee in land, contracted in writing to convey the same to a third party. Prior to such contract, plaintiff's testatrix had made a will devising her share, which remained unrevoked at her death; *Held*,

(1) That each tenant was bound as principal to convey her own individual share, and each was secondarily bound as surety for the performance of the other;

(2) That the surviving tenant was not liable to contribute to defraying the costs of a suit against the infant devisees of the tenant, deceased, to compel a performance of the contract to convey.

CONTROVERSY submitted without action under the Code, § 315, and heard at January Special Term, 1879, of WAKE Superior Court, before *Seymour*, *J.*

The plaintiff as executrix of Jane F. Haywood, seeks to recover of defendant the sum of $304.61 with interest, and the facts upon which the claim is based are as follows:

1. The defendant and the plaintiff's testatrix were tenants in common in fee simple of a parcel of land in the city of New York, the defendant being entitled to four-ninths, and the said testatrix to five-ninths. On the 5th of May, 1873, Jane F. Haywood made her last will and testament, whereby she devised three-twenty-eighths of her interest in the land to Allen G. Rogers, Sion H. Rogers, and Minnie B. Rogers, then and now infants, under the age of twenty-one years.

2. On the 9th of November, 1876, Mrs. Daves and Mrs. Haywood, through their agent in New York, contracted in writing with Margaret S. Boyd to sell and convey to her in fee the said land, and authorized their agent to employ legal advisers in making title. By the terms of the contract, Mrs. Boyd was to pay $5000 on the 9th of December, 1876, and she deposited $500 of said sum with said agent when the contract was signed, and on the same day the grantors were to make title.

3. On the 14th of November, 1876, Jane F. Haywood died, and on the 27th of the month the plaintiff qualified as executrix, and the will admitted to probate. Shortly after Mrs. Haywood's death, Mrs. Daves and all the adult heirs and devisees of the testatrix tendered and delivered a deed in fee to Mrs. Boyd for the land, conveying all their interest in the same. But Mrs. Boyd refused to pay the balance of purchase money, $4,500, because the legal title to a part thereof was by the will vested in the devisees, who were incapable in law of making title to the same.

4. Mrs. Boyd subsequently instituted an action in the supreme court of New York against said infant devisees to compel a specific performance on their part of said contract. Mrs. Daves was not a party to this action, nor were the adult heirs and devisees of Mrs. Haywood, nor her executrix. But a decree for specific performance was made as prayed for, and the said agent appointed special guardian of said infant devisees and ordered to make title and enter into bond with

surety conditioned to faithfully account for and apply the funds under the direction of the court. And upon the coming in of his report, it appearing that after deducting costs and charges he had the amounts due said infant devisees placed to their credit in pursuance of the former order, he was released from all liability as special guardian aforesaid. In pursuance of said decree $248.20 were retained out of the purchase money for plaintiff's costs; $191.13 for defendant's costs; and $246.05 appropriated to said infant devisees.

5. The said special guardian, who was the agent both of the plaintiff's testatrix and of the defendant in this case, accounted for only so much of said purchase money as remained after deducting the said three specified sums; and the defendant claims that in dividing said sum so received by said agent, the whole of the said three sums are to be charged against the five-ninths of the purchase money belonging to the plaintiff as executrix; while the plaintiff claims that only five-ninths of said three sums shall be charged against the five-ninths of the purchase money to be received by her.

His Honor gave judgment in favor of the plaintiff for the amount claimed by her, and the defendant appealed.

Mr. E. G. Haywood, for plaintiff.
Mr. D. G. Fowle, for defendant.

DILLARD, J. The contract of sale made with Mrs. Boyd was an obligation on the tenants in common, each to convey her individual share or interest in the land at the time appointed for payment of the purchase money; and the testatrix of the plaintiff and the defendant having both signed by agent a written memorandum of the contract, they were jointly bound for title to the vendee, one as much as the other, but *inter se*, each was bound as a principal to

convey her own undivided share, and each was secondarily bound as a surety for the performance of the other.

Mrs. Daves, as it appears from the case agreed. executed a deed to the purchaser conveying her four-ninths of the land, and the same was accepted as a performance of the contract to that extent. By force of this fact she was not then further bound than simply as a surety for the execution of title for the five-ninths of Jane F. Haywood by her during her lifetime, and by her heirs and devisees since her death.

In such situation of the parties in respect to each other no promise could be raised or implied by the law against Mrs. Daves to pay anything towards any costs and charges incurred by the heirs and devisees of Mrs. Haywood, or any of them, in specifically executing the contract of their ancestor, whether incurred through a suit in court or otherwise; for in that case the expenditure obviously would be on their own behalf and operate to exonerate Mrs. Daves from her suretyship as she had a right to demand.

2. Having seen, as above, that no recovery can be had, if Mrs. Daves be taken to occupy the relation of a surety to Mrs. Haywood in respect to the conveyance of her title, we will next inquire if the plaintiff can make a good cause of action under the doctrine of contribution.

This doctrine of the right to contribution rests on the idea of equality of burdens and benefits, and in order to establish such liability, it is necessary that the plaintiff show that the estate of her testatrix has borne singly a burden common to it and to Mrs. Daves; in other words, it must appear that the suit in New York, and the payments therein decreed made by the estate of Mrs. Haywood, removed an impediment to a complete title common to both sisters. Adams' Eq., 267; Freeman on Co-Tenancy, § 322.

According to the case agreed, the sisters were seized of several freehold estates undivided in the land contracted to

be conveyed, and Mrs. Daves having by satisfactory deed conveyed her four-ninths, the only impediment to the execution of a perfect title consisted in the incapacity of certain infant devisees, under Mrs. Haywood's will, to join with the adult heirs and devisees in a deed to Mrs. Boyd. This impediment grew out of an omission of the testatrix, after making a contract of sale to Mrs. Boyd, to revoke the devise to the infants, and in such case the burden of all the costs and deductions authorized by the decree of court in New York ought to fall on the estate of her through whose omission the necessity arose and whose duty it was to convey her interest.

It may be as was argued in this court that the decree pronounced in the New York court in a cause constituted against the infants, Allen Rogers, Sion H. Rogers and Minnie Rogers, without the joinder of a personal representative of Mrs. Haywood, was erroneous, if not irregular; and that the same might be reviewed and reversed, or modified. But if so, it being a decree concerning the execution in specie of Mrs. Haywood's contract with Mrs Boyd, it is the business of the plaintiff or some other in the interest of the estate to look after that matter, and no concern of Mrs. Daves.

In our opinion the plaintiff is not entitled to recover a proportionate part of the several sums mentioned in the case agreed, or either of them against the defendant.

There is error. The judgment of the court below is reversed, and it is adjudged in this court that the plaintiff take nothing, and that defendant have judgment for her costs in this behalf expended.

Error. Reversed.

LEWIS GRIM v. J. J. WICKER, Sheriff, and J. M. MONGER.

Tenants in Common—Remedies inter se—Liability of Sheriff.

1. One tenant in common of a chattel cannot sue another for a conversion unless the common property is destroyed, carried beyond the limits of the state, or, when perishable, so disposed of as to prevent the other from recovering it.
2. Where a tenant in common of personalty has assigned his share, and after such assignment, the sheriff, under an execution against the assignor, sells the common property and delivers the same to the other original tenant, who had become the purchaser at such sale, the assignee cannot sue the sheriff for a conversion.

(*Moye* v. ....., 2 Hay., 186; *Campbell* v. *Campbell*, 2 Mur., 65; *Bonner* v. *Latham*, 1 Ire., 271; *Pitt* v. *Petway*, 12 Ire., 69; *Lucas* v. *Wasson*, 3 Dev., 398; *Lowthorp* v. *Smith*, 1 Hay., 255; 4 Dev. & Bat., 199; *Powell* v. *Hill*, 64 N. C., 169, cited and approved.)

CIVIL ACTION in the nature of Trover, tried at Fall Term, 1878, of MOORE Superior Court, before *Buxton, J.*

The defendant, John M. Monger, and one Richardson, had been tenants in common of a turpentine still, the property in dispute. Richardson sold his interest in the same to the plaintiff. The defendant, Monger, obtained a judgment against Richardson and issued an execution thereon to the other defendant, Wicker, who was sheriff of Moore county, and directed him to levy on Richardson's interest in the still; and upon his giving Wicker a bond of indemnity, he took the still, cutting a chain by which it was fastened, and sold it at public sale, when Monger became the purchaser, and the still was delivered to him by Wicker. Verdict and judgment for plaintiff, appeal by defendant.

Messrs. Reade, Busbee & Busbee, for plaintiff.
Messrs. Hinsdale & Devereux, for defendants.

ASHE, J. (After stating the case.) It is a well established principle of law that one tenant in common of a chattel cannot sue the other for a conversion. *Moye* v. ....., 2 Hay. 186; *Campbell* v. *Campbell*, 2 Mur., 65; *Bonner* v. *Latham*, 1 Ire., 271; *Pitt v. Petway*, 12 Ire., 69.

The only exceptions to this principle are where the property is destroyed, carried beyond the limits of the state, or when being of a perishable nature such a disposition of it is made as to prevent the other from recovering it. *Lucas* v. *Wasson*, 3 Dev., 398; *Lowthorp* v. *Smith*, 1 Hay., 255.

A petition for the division of personal property held in common, or a sale for the purpose of division depending upon the nature of the property, is the only remedy one tenant in common has against another for withholding from him the possession. *Powell* v. *Hill*, 64 N. C., 169.

Monger is not liable in damages to the plaintiff for a conversion of the still, because he had as much right to the possession as the plaintiff, and it was not destroyed by him nor carried beyond the limits of the state, nor was it of a perishable nature and disposed of by him so that he could not recover it. Nor was the other defendant liable because he seized the still by the direction of Monger, and delivered it to him, who had a legal right to the possession. 4 Dev. & Bat., 199.

If Monger could take possession of the still himself, he certainly could do so by an agent, and we cannot see how the fact of that agent's being a sheriff and having an execution in his hands could change the application of the principle.

Error. *Venire de novo.*

T. R. WARING and others v. J. W. WADSWORTH and others.

Incumbrance—Equality of Partition—Practice.

1. The purchaser of mortgaged property subject to a judgment lien, under an agreement that the purchase money shall be first applied to the discharge of the prior incumbrance, must see to it at his peril that it is actually so applied.
2. Charges for equality of partition should be enforced by proceedings *in rem* against the more valuable shares of the land divided, and not by personal judgments against the owners thereof.

MOTION to reform a Judgment made before the Clerk and heard on appeal at Fall Term, 1878, of MECKLENBURG Superior Court, before *Schenck, J.*

The plaintiffs, T. R., Louis, Robert and Virginia Waring were tenants in common of a tract of land, and in 1871, filed an ex parte petition to divide the same, which was done, and into four lots of unequal value. Lot No. 3 was allotted to T. R. Waring; and it being the most valuable was charged with the payment of certain sums to those of inferior value to produce equality. The report in that proceeding was made and confirmed, and judgments entered for the several amounts against T. R. Waring personally.

Subsequently, the part assigned to T. R. Waring was mortgaged by him to the Mecklenburg building and loan association, and upon his default, it was sold by the mortgagee to W. S. Norment for $1,180. The purchaser had notice of said judgments, and was informed at the sale by the attorney of the said association that the proceeds would be applied to their satisfaction before the mortgagee would be paid, and that he would get a good title. A few days after the sale the purchaser paid said attorney the money, and received a deed for the lot from F. H. Dewey, the secretary of said association, to whom the attorney handed the

money, which was deposited in the bank of Mecklenburg, and in a few days thereafter and before it was applied to said judgments, the said bank failed and the money lost. Norment had previously sold the lot to the defendant, Wadsworth, for the amount of his bid, who agreed with the association to release them from all responsibility, they transferring to him all their interest in the money deposited as aforesaid.

T. R. Waring is of full age, and the other plaintiffs were infants represented by a guardian *ad litem*, and the notice of the motion to reform the judgment in behalf of said infants was issued to T. R. Waring, the said association, W. S. Norment and J. W. Wadsworth; it being to strike out the judgment against T. R. Waring personally, and substitute therefor a judgment against the dividend of superior value—lot No. 3.

Thereupon His Honor adjudged that said lot be sold to satisfy the amounts charged against it as aforesaid, that a writ of *venditioni exponas* issue, and a *procedendo* to this effect issue to the clerk of said court, and the defendants appealed.

Messrs. Jones & Johnston, Shipp & Bailey and *Hindsdale & Devereux*, for plaintiffs.

Messrs. Wilson & Son and *C. Dowd*, for defendants.

ASHE, J. We are of the opinion that the payment of the money arising from the sale of lot No. 3 by the mortgagee, to John E. Brown, the attorney of the Mecklenburg building and loan association, or to F. H. Dewey, the treasurer of said company, was not a satisfaction of the judgments rendered for equality of partition by the clerk of the superior court in the case of T. R. Waring and others; and that the statutory lien is still in force upon the said lot into whosoever hands it may have passed. The case remains in the superior court under the jurisdiction of the clerk, and the

only questions carried by appeal to the judge of the district were, whether the clerk had the power to reform the judgments rendered by him in the case by striking out the personal judgments against T. R. Waring, and entering them against the share, to-wit, lot No. 3, allotted to T. R. Waring, in favor of the other parties respectively—Louis, Robert and Virginia Waring—agreeably to the report of the commissioners, and to issue writs of *venditioni exponas* as applied for, or to issue the writs upon the judgments as entered.

The clerk clearly not only had the power to reform the judgments and make them more regular, and issue the writs upon them as prayed for, but it was his duty so to do; but we think the judgments as they now stand are substantially a compliance with the requirements of the statute.

The judge below may have transcended his power as an appellate court by making the order for the sale of the land, but as it was virtually doing what it was the duty of the clerk to have done, and a *procedendo* was ordered to be issued to him to carry the order into effect, there is no error. Let this be certified to the superior court of Mecklenburg, to the end that a writ of *procedendo* may be issued to the clerk of the superior court of said county, directing him to modify the judgments as prayed for, and issue the writs of *vend. ex.* thereon, or to issue the same writs upon the judgments as they now stand against lot No. 3, as the said Louis, Robert and Virginia may be advised.

No Error. Affirmed.

DANIEL WHISSENHUNT v. W. C. JONES and others.

Landlord and Tenant—Practice.

1. One who is admitted to defend in an action of ejectment, with or instead of, the tenant in possession, cannot set up any defence which is forbidden to the tenant, but stands in his place, with its accompanying rights and disadvantages.
2. Exceptions not apparent in the record, and which ought to have been taken and brought to the notice of the court below, will not be heard for the first time on appeal; and *therefore*, this court will not entertain an application for a new trial on account of the improper admission of testimony, or a defect of evidence on a material point, where the attention of the lower court was not called in apt time to the error complained of.

(*Belfour* v. *Davis*, 4 Dev. & Bat., 300; *Wiggins* v. *Reddick*, 11 Ire., 380, cited and approved.)

PETITION to Rehear filed by defendants and heard at January Term, 1879, of THE SUPREME COURT.

The errors assigned are stated by THE CHIEF JUSTICE in delivering the opinion. See same case, 78 N. C., 361.

Messrs. R. F. Armfield and *Johnnstone Jones*, for plaintiff.
Messrs. G. N. Folk and *J. G. Bynum*, for defendants.

SMITH, C. J. Two errors are specified in the petition to rehear:—

1. A misconception of the manner in which the defendant, Jones, became a party to the action, and the inference therefrom that he was, as landlord, identified with the other defendants in their defence and not entitled to notice.

The portion of the opinion to which this exception is intended to apply is in these words:

"Yount (an evident misprint for Jones) was allowed to come in and defend the action as landlord, and in such case

it is settled that no notice before bringing the action is necessary." Let us see if this statement is supported by the record. The entry on the docket at spring term, 1873, is as follows: "In this case W. C. Jones comes in and is made party defendant in the above case by consent of parties and files his answer." The second article in his answer then filed states that "he denies that he or the other defendants unlawfully withhold the possession of said land from the plaintiff, and avers that he is the owner of said land, and that *the defendants Mac Chester and Wesley Watson were his tenants,* and that Henry Yount never was in possession of said land."

In the case it is stated that the plaintiff for the purpose of estoppel introduced in evidence a deed from the sheriff of Caldwell to W. C. Jones, the defendant landlord, who came in and *made himself party as landlord of the other defendants.* It is thus apparent that the facts were correctly understood by this court at the former hearing, and the law properly applied to them. Besides the case cited in the opinion and commented on in the brief of defendants' counsel, we will refer to two others of the same import:—

In *Belfour* v. *Davis,* 4 Dev. and Bat., 300, the court say, that one who is admitted to defend in an action of ejectment with or instead of the tenant in possession, cannot set up any defence which is forbidden to the tenant, and that he *stands with, or in place* of the tenant, and is *entitled to his rights* and is *subject to his disadvantages.* The same doctrine is announced, and in the same language, in *Wiggins* v. *Reddick,* 11 Ire., 380.

2. The other alleged error consists in giving judgment against Jones for rents paid him by his co-defendants, in two particulars, (1) that there was no evidence that he received rents up to the time of bringing suit, and (2) that rent in kind cannot be followed into the hands of Jones and he be held liable therefor.

The case shows that all the issues desired by the defend-

ants' counsel in addition to those first prepared, were drawn up and the responses thereto agreed upon. No specific instructions were asked of the judge, and the counsel of both parties consented to let the jury pass on the annual damages, so that the court could award the damages to the time when the summons issued, or up to the trial as the court might decide to be recoverable; the defendants' counsel reserving the right to except to the giving of damages up to the date of trial. The plaintiff was not allowed any rent or damages for the year when by his consent the other defendants accounted therefor to Jones.

No exception seems to have been taken in the court below to the want of evidence that the rents were received by Jones up to the time when the action was commenced; nor was any separate finding asked for as to him. The defence set up in the answers and relied on was one and the same for all the defendants, and the trial was conducted on the idea of an equal and common responsibility to the plaintiff.

We have repeatedly declared that exceptions not apparent in the record, and which ought to have been taken and brought to the notice of the court below, will not be heard here for the first time. The reason for the rule is obvious. The case containing a statement of facts is presumed to have been prepared to present for review such exceptions only as are therein set out, with the facts necessary to their being understood and no others.

It is not proposed to follow the rent in kind, as a specific fund, belonging to the plaintiff and passing from the hands of one wrong-doer to another, but to charge them all with a fair rent for the time they have been in possession of the premises appropriating the profits to their own use. As these are the only errors complained of and pointed out in the petition, we are restricted by the rules of practice from noticing any others suggested in the argument of counsel.

As among the defendants, one of them has received the

rents and applied them to his own benefit, and he is equally liable as the others; it is just and proper, and in accord with our present system of procedure that he should be held primarily liable for them.

No error. Petition refused.

STATE v. J. T. DAVIS.

Affray—Public Road—Trespass.

The public have only an easement in a highway to pass and repass along the same, and when one stops in the road and uses loud and obscene language, he becomes a trespasser, and the owner of the land has the right to abate the nuisance which he is creating; and in case the trespasser is armed with a pistol and acting in a belligerent manner the principle of *molliter manus* does not apply.

(*State* v. *Buckner*, Phil., 558; *State* v. *Perry*, 5 Jones, 9; *State* v. *Robbins*, 78 N. C., 431, cited and approved.)

INDICTMENT for an Affray tried at November Term, 1878, of WAKE Criminal Court, before *Strong, J.*

The opinion contains the facts. That portion of the charge of the court to which exception was taken is as follows: (the defendant and one Lassiter being on trial under the indictment) "Should the jury find that defendant Davis while in a public highway passing over lands of which Mrs. Laws was in possession, or while out of the highway but on such lands, used obscene, vulgar, and profane language to the annoyance of men and women in the house of Mrs. Laws situated near by, and that defendant, Lassiter, was her son and lived in said house with his mother, and that he struck Davis for the purpose of suppressing said annoyance and used no more force than was necessary for that purpose, you

will find him not guilty." Verdict of not guilty as to Lassiter and guilty as to Davis. Judgment, appeal by defendant.

Attorney General, for the state.
Mr. T. M. Argo, for the defendant.

ASHE, J. The defendant and one Evans were quarrelling near the dwelling house of Mrs. Laws in a public road running over her land. The defendant armed with a pistol which he had in his hand was vaporing, cursing, and using very vulgar language in the hearing of the inmates of the house. Lassiter who was the son of Mrs. Laws and lived with her, came out with an ordinary walking stick in his hand and remonstrated with the defendant, who still holding his pistol cursed and denounced him, saying he was in the public road and he would curse as much as he pleased. After the interchange of a few words, the lie was given by defendant, and Lassiter struck him with his stick, when the defendant attempted to use his pistol but was prevented by those present.

He seems to have rested his defence upon the ground that he was in the public road and had the right to do there as he pleased. In this he was mistaken. The public have only an easement in a highway, that is, the right of passing and repassing along it. The soil remains in the owner, and where one stops in the road and conducts himself as the defendant is charged to have done, he becomes a trespasser, and the owner has the right to abate the nuisance which he is creating. The principle of *molliter manus* does not apply to a case like this, where the trespasser armed with a pistol is acting in such belligerent defiance. See *State* v. *Buckner*, Phil., 558.

The defendant used language which was calculated and intended to bring on a fight, and a fight ensued. He

is guilty. *State* v. *Perry*, 5 Jones, 9; *State* v. *Robbins*, 78 N. C., 431.

We find no error in the charge given by His Honor to the jury. Let this be certified, &c.

PER CURIAM. No error.

STATE v. ASBURY CHAVIS.

Arraignment—Evidence—Judge's Charge—Murder.

1. Upon removal of a trial for murder the transcript of the record showed that the prisoner was brought to the bar of the court, arraigned, plead not guilty, and then remanded to jail; *Held*, that it appeared with sufficient certainty the arraignment was *in open court*.
2. The *similiter* to the tender of issue upon the plea in such case, need not be entered of record.
3. Where there is but slight provocation, if the killing be done with an excess of violence out of all proportion to the provocation, it is murder.
4. *Therefore*, where the prisoner and two others being intoxicated and using vulgar and profane language met the deceased quietly coming along a public road and assaulted him, he using a fence rail in his defence, but not striking; and in the progress of the fight, they knocked him down with a rail; he rose up, ran, was pursued 130 yards by them, stabbed with a knife and killed; *Held* to be murder.
5. *Held further*, that on the trial in such case evidence of the violent character of deceased was properly rejected. It does not fall within the exception to the general rule against the admissibility of such evidence.
6. It is not error in the court to refuse to charge upon a supposed state of facts which do not appear in the evidence; nor to state an abstract principle of law not applicable to the facts.

(*State* v. *Craton*, 6 Ire., 164; *Langford's case*, Busb., 436; *Collins'*, 8 Ire., 407; *Carroll's*, 5 Ire., 139; *Lamon's*, 3 Hawks., 175; *Hogue's*, 6 Jones, 381; *Barfield's*, 8 Ire., 344; *Ingold's*, 4 Jones, 216; *Hill's*, 4

Dev. & Bat., 491; *Rash's*, 12 Ire., 382; *Peace's*, 1 Jones, 251; *Haney's*, 2 Dev. & Bat., 390; *Brown* v. *Patton*, 13 Ire., 446; *Curry's*, 1 Jones, 280; *Howell's*, 9 Ire., 485; *Hildreth's*, *Ibid.*, 429, cited and approved.)

INDICTMENT for Murder removed from Richmond and tried at Spring Term, 1878, of STANLY Superior Court, before *Moore, J.*

The first exceptions are stated in the opinion of the court. The prisoner and Allen Jacobs were charged with killing one Jere Everett. The evidence was in substance as follows: Laura Leak, a witness for the state, testified that she was going along a lane leading into a public road near the town of Rockingham in the afternoon of the day on which the homicide is alleged to have been committed, and having approached within fifty yards of the road, she saw deceased going towards Rockingham with a bundle on his head. On arriving at the road she saw deceased and three other men standing together about thirty yards from her; they were talking, but she did not understand what was said; they took hold of deceased and threw him down, but did not strike him at that time; deceased got up and took a fence rail and struck at them, but did not know whether he hit any of them; one of the men then struck deceased with a rail and knocked him down, and while down the prisoner struck as though with a knife, and when he rose the prisoner then struck at him again as with a knife; deceased said "let me alone," and ran; he was pursued by them one hundred and thirty yards (distance given by another witness) and she saw them have deceased down in the road; their names were James Chavis (now dead), Allen Jacobs and Asbury Chavis; they left him lying in the road, Allen Jacobs saying "come on, somebody is coming," and the prisoner ripped with his knife against the fence and replied "that he would kill any damned man who came there." She was very much frightened, and when deceased ran she got

over the fence into a corn field; did not know the parties, but afterwards recognized them as the men who killed deceased.

Another witness testified that he saw three men on that day pass his place, and that they were intoxicated and were using vulgar and profane language; his attention on this account was attracted to them, and he saw them standing in the road near the mouth of the lane spoken of, and upon going in that direction, came upon deceased lying in the road, stabbed in several places and in a dying condition. He further testified that he heard the witness, Laura, make a different statement as to the point where they first took hold of deceased, from the one made by her on the trial, and did not think she could have seen them from where she was.

There was evidence that prisoner and deceased lived within five miles of each other, and had worked together several years. Evidence of violent character of the deceased was excluded, and prisoner excepted. The parties were arrested the evening of the homicide, and a bloody knife was found in prisoner's pocket.

The following instructions were asked in behalf of the prisoner:

1. Whatever either prisoner could do in his own defence he could do in defence of the other.

2. If the jury believe that deceased made the first assault, the prisoners had the right to repel force with force, and if they were assaulted with a rail, they were not bound to retreat, and if either of them killed deceased under these circumstances, the jury must acquit.

3. If the jury believe that prisoners threw deceased down in a mere drunken frolic and sport, not intending to harm him, and deceased becoming enraged assaulted them with the rail, and they were not able to retreat and killed out of necessity, the jury must acquit.

4. If the jury believe prisoners threw deceased down in sport and in consequence engaged in a sudden fist fight and their passions warming with the blows, they killed deceased, it would be manslaughter.

5. Even if the jury believe prisoners made the first assault with no intention of killing deceased or doing him any great bodily harm, and deceased returned the assault with a rail, and prisoners then killed him, it would be manslaughter only.

His Honor declined to give the instructions on the ground that they did not apply to the facts, but charged the jury, as to Asbury Chavis, that according to the evidence, if the jury should believe it, Laura Leak was the only eye witness to the transaction, and the guilt or innocence of the prisoner depended mainly on her testimony; and in estimating its value they should consider the excitement under which she naturally labored, her distance from the parties, and all the surrounding circumstances; and if fully satisfied from the whole evidence that she saw the difficulty as it occurred and has correctly stated it on the trial, the prisoner was guilty of murder. There was a verdict of guilty as to Asbury Chavis, and not guilty as to Allen Jacobs. Judgment, appeal by prisoner.

Attorney General, for the State.
Messrs. Cole & Legrand, for the prisoner.

ASHE, J. Before the case was submitted to the jury, the prisoners' counsel suggested a diminution of the record from Richmond superior court, and moved for a *certiorari* on the ground that it did not appear that the prisoners were arraigned in open court, and that the solicitor had not entered a *similiter* to the tender of issue on the plea of prisoners. The motion was refused and the prisoners excepted. Both of these exceptions were properly overruled. The first, because

the transcript of the record does show that the prisoners were brought to the bar of the court by the sheriff of Richmond county and arraigned on the charge of murder and plead not guilty, and were then remanded to the jail until the further order of the court in the cause. It has been held that where a record shows that a prisoner was brought to the bar in custody of the sheriff, and then, setting out the drawing of the jury and their verdict contains the entry—"the prisoner is remanded"—the presence of the prisoner during the whole trial appears with sufficient certainty. *State* v. *Craton*, 6 Ire. 164; *State* v. *Langford*, Busb., 436; *State* v. *Collins*, 8 Ire., 407' The second, because there is no necessity for entering a *similiter* on the record. It may be done *ore tenus*. *State* v. *Carroll*, 5 Ire., 139; *State* v. *Lamon*, 3 Hawks, 175.

2. The prisoner introduced no testimony, but offered to prove that deceased was a man of very dangerous and violent character. His Honor refused to admit the testimony and the prisoner excepted. The exception was properly overruled. *State* v. *Hogue*, 6 Jones, 381; *State* v. *Barfield*, 8 Ire., 344. The general rule upon this subject is laid down in these cases to which there are some exceptions (*Turpin's case*, 77 N. C., 473) but this case does not fall under them.

3. The first three instructions prayed for by the prisoner are predicated upon the idea that this is a case of excusable homicide, but there is no evidence in the case to warrant such instructions. Before the prisoner could excuse himself for the act of killing, he must have shown that he quitted the combat and retreated as far as he could before the mortal stroke was given, or was prevented from doing so by the fierceness of the attack, or that he was "sorely pressed" and killed the deceased to save his own life or prevent great bodily harm. *State* v. *Ingold*, 4 Jones, 216; *State* v. *Hill*, 4 Dev. & Bat., 491. In our case there is no pretence that the prisoner was reduced to any such necessity. There is no error in the refusal to give the instructions.

4. Nor was it error in the judge to refuse the fourth instruction, because there was no evidence to warrant it, and there was no evidence that the prisoner threw down the deceased *in sport*, or that they were engaged in a fist fight. It is the duty of the judge to lay down the law to the jury as applicable to the evidence introduced, and it is not error in him to refuse to give a charge upon a supposed state of facts which do not appear in the evidence. *State* v. *Rash*, 12 Ire., 382; *Brown* v. *Patton*, 13 Ire., 446; *State* v. *Peace*, 1 Jones, 251; *State* v. *Haney*, 2 Dev. and Bat., 390.

5. In the abstract, the fifth instruction asked for is a correct proposition of law, but is not applicable to the facts of this case. It is true as a general rule that where two men meet and fight upon a sudden quarrel, no advantage being taken, and one kill the other with a deadly weapon, it will be but manslaughter; and in such case it matters not which struck the first blow. The law presumes malice in every wilful killing, and it is the provocation given in a mutual combat that extenuates the offence to manslaughter; *therefore*, in every case of killing upon sudden quarrel, the grade of the crime depends upon the character of the provocation. If the provocation be great, it will be but manslaughter; but if slight, and the killing be done with a degree of violence out of all proportion to the provocation, it will be murder. *State* v. *Curry*, 1 Jones, 280. There, Chief Justice PEARSON defined the exceptions to the general rule to be: 1st. Where there is a strong provocation and the killing is in an unusual manner, it is murder. 2nd. Where there is but slight provocation, if the killing be done with an excess of violence out of all proportion to the provocation, it is murder. 3rd. Where the right to chastise is abused, if the measure of chastisement or the weapon used is likely to kill, it is murder. See also *State* v. *Hildreth*, 9 Ire., 429.

We are constrained to hold that the facts of this case bring it within the second exception: The prisoner and his

comrades were going from the town of Rockingham, intoxicated, cursing and using vulgar language. They met the deceased quietly coming along the public road. They all three laid hold on him and threw him to the ground. He rose and struck at them with a rail, as he had the right to do, considering the overwhelming force opposed to him. But it does not appear that a blow was given. There is no proof that there were any bruises or marks of violence on the person of either of them,—and a blow with such an instrument would be apt to leave its mark. The deceased was then knocked down with a rail, and while on the ground, the prisoner struck at him as though with a knife. He rose up, and the prisoner struck at him again as if he had a knife. The deceased then said "let me alone" and ran. The prisoner and James Chavis pursued him one hundred and thirty yards, overtook him and were seen to have him down in the road, and no doubt it was there he received the last fatal stabs, for he never rose again; and in a few moments afterwards he was found lying there badly stabbed in several places, and in a dying condition. A man endued with the ordinary feelings of humanity, no matter how high his passions may have been excited, upon seeing his victim wilting in blood and struggling in the throes of death, would evince some relenting symptoms, but not so with the prisoner. He manifested no compunction for his bloody deed, and when called by Jacobs to "come on, somebody was coming," he ripped with his knife against the fence and said "he would kill any damned man that came there."

We think the cruel, brutal, and excessive violence used by the prisoner was out of all proportion to the provocation given by the assault with the rail under the circumstances. To use the language of Chief Justice NASH in the opinion delivered by him in *State* v. *Howell*, 9 Ire., 485, "this case is relieved from all doubt and uncertainty. The facts are few and simple, furnishing a full and complete instance in them-

selves of that malice which is essential to constitute a case of murder; of that *mala mens*, a mind regardless of the obligations of social duty, and fatally bent on mischief." We have carefully examined the record and find no error. Let this be certified, &c.

PER CURIAM. No error.

STATE v. W. M. EDNEY.

Appeal—Practice—Jurisdiction.

1. This court will, on appeal, affirm the judgment in criminal actions in the absence of a bill of exceptions, unless there are errors in the record.
2. The criminal jurisdiction of justices of the peace is confined to cases where the punishment cannot exceed a fine of fifty dollars or imprisonment for *thirty days*.

(Remarks of Ashe, J., on the effect of the substitution of "thirty days" in Art. IV, § 27 of the amended constitution, for "one month" in Art. IV, § 33, of the constitution of '68.)

(*State* v. *Upchurch*, 72 N. C., 146; *State* v. *Orrell*, Busb., 217, cited and approved.)

INDICTMENT for a Misdemeanor tried at Spring Term, 1878, of HENDERSON Superior Court, before *Cloud, J.*

This action was commenced before a justice of the peace, in which the defendant was charged with entering upon the land of the prosecutor, J. H. Townsend, in violation of Bat. Rev., ch. 32, § 116. Judgment was rendered against him for a small sum and costs, from which he appealed to the superior court where the case was submitted to a jury who found him guilty. Defendant then moved for a new trial which was refused by the court, and judgment was pronounced, from which he appealed.

Attorney General, for the State.
Messrs. McLoud and *Carter*, for the defendant.

ASHE, J. There is no bill of exceptions or statement in nature thereof accompanying the record, and it is the rule of this court in all state cases when there are such omissions, to affirm the judgment below, unless there are errors in the record. *State* v. *Orrell*, Busb., 217.

Upon an examination of this record it appears that the magistrate had no jurisdiction of the case. By the constitution of 1868, Art. IV, § 33, jurisdiction of all criminal matters was given to the justices of the peace, when the punishment did not exceed a fine of fifty dollars or imprisonment for *one month*. There was no such limitation to the punishment prescribed for trespasses to land until the legislature, in order to give justices of the peace jurisdiction of that offence, passed the act of 1873–'74, amending Bat. Rev., ch. 32, §116, by providing that the punishment for a violation of the provisions of that section should not exceed a fine of fifty dollars or one month's imprisonment; and so stood the law, unlil the adoption of the amended constitution when "thirty days" were substituted in that instrument for the words "one month" in the constitution of 1868. But it has been decided that "month," as used in that constitution, meant a calendar month, and a calendar month may be more than thirty days; so that if a judgment for a violation of that section should be rendered by a justice of the peace in one of those months which have thirty-one days, the imprisonment might exceed by one day the present constitutional limit to the jurisdiction of justices of the peace. *State* v. *Upchurch*, 72 N. C., 146.

There is another defect in the proceedings had before the magistrate which is good ground for the arrest of the judgment, but as we are of the opinion for the reasons above given that the magistrate had no jurisdiction, it is needless

to advert to it. The judgment is reversed. Let this be certified to the court below that the defendant may be discharged.

Error. Reversed.

STATE v. A. J. SPURTIN and others.

Appeal—Practice.

1. No appeal lies from the inferior courts directly to the supreme court.
2. An appeal will be dismissed where there is no bond to secure the costs, or no order allowing a defendant to appeal without security.

(*State* v. *Patrick*, 72 N. C., 217; *State* v. *Lane*, 78 N. C., 547, cited and approved.)

INDICTMENT for a Misdemeanor tried at September Term, 1878, of ALLEGHANY Inferior Court. The defendants were convicted, and from the judgment pronounced on the verdict they appealed to the supreme court. The statement of the case sets forth the facts proved on the trial and the prayer of defendants for special instructions which were refused. Upon the hearing in this court, a motion was made on behalf of the state that the appeal be dismissed.

Attorney General, for the state.
Mr. R. F. Armfield, for the defendants.

DILLARD, J. The appeal must be dismissed on two grounds:—

1. No bond to secure the costs of the appeal accompanies the record; nor was there any order of the court allowing

the defendants to appeal without the usual security. *State* v. *Patrick*, 72 N. C., 217; Bat. Rev., ch. 33, §§ 111, 112.

2. No appeal is given by law from the inferior courts to the supreme court. The supreme court under the constitution of 1868 had the jurisdiction to review on appeal any decision of the courts below upon any matter of law or legal inference. Art. IV, § 10. And under the statutes defining and regulating the right of appeal, the jurisdiction extended only to appeals from the superior courts. The amended constitution retains the same courts provided for in the constitution of '68, and gives the legislature power to establish *other* courts inferior to the supreme court, and to parcel out the jurisdiction other than that pertaining to the supreme court, provide a proper system of appeals, and regulate by law the method of proceeding in the exercise of those powers in all the courts below the supreme court, so far as may not be in conflict with other provisions of the constitution. Art. IV, §§ 2, 12. Under our new constitution the legislature has created inferior courts, and as empowered in section 12 has parceled off to them a criminal jurisdiction, and provided a system of appeals to persons convicted in those courts, whereby the right of appeal is expressly given from the inferior to the superior courts. Acts 1876–'77, ch. 154, § 10; ch. 292, § 1.

The clause of the constitution defining the jurisdiction above quoted, is the same in the new constitution as in that of 1868, and the language used is broad enough to take in appeals from the inferior courts, if the legislature should pass a law providing for appeals directly to the supreme court. But no such act has been passed, and therefore we conclude that no right exists to appeal from the inferior directly to the supreme court. The right of appeal is to the superior court where the trial is to be had *de novo*, and thence to this court.

It has been decided that no appeal lies for the state from

the judgments of the inferior courts to the supreme court; and in the opinion of the court, the omission to provide such an appeal for the state was not accidental, but of purpose and on sufficient reasons of public policy. *State* v. *Lane*, 78 N. C., 547. And so we think, the provision of a right of appeal to defendants to the superior instead of directly to the supreme court, was of purpose and consistent with the best interests of the convicts and the public as well. The appeal must be dismissed.

PER CURIAM. Appeal dismissed.

STATE v. JOHN C. MURRAY.

Appeal—Practice—New Trial.

1 Where there is no statement of the case and no error appears on the record in criminal actions, this court will, on appeal, affirm the judgment.

2. A new trial will not be granted where the judge who tried the cause went out of office without making up a case of appeal, unless it sufficiently appears that the appellant was guilty of no laches.

(*State* v. *Orrell*, Busb., 217; *Isler* v. *Haddock*, 72 N. C., 119, cited and approved.)

INDICTMENT for an Affray, tried at Spring Term, 1878, of Buncombe Superior Court, before *Cloud, J.*

The facts are sufficiently stated by Mr. Justice ASHE in delivering the opinion. Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.

Mr. C. M. McLoud, for the defendant.

ASHE, J. This is an indictment against the defendant for making an affray with one Elbert Murrell. He was tried and convicted at the spring term, 1878, of Buncombe superior court and upon the judgment being pronounced against him, he appealed to this court.

As there is no bill of exceptions or statement of that nature accompanying the record, according to the settled practice and long established rule of this court in criminal cases, the judgment below must be affirmed, unless upon looking into the record some error may be found therein; but upon inspection of this record we find no error. The judgment is affirmed. *State* v. *Orrell*, Busb., 217.

It was stated by counsel at the bar as an excuse why a statement of the case did not accompany the record, that the judge holding the court had gone out of office. According to the authority of the case of *Isler* v. *Haddock*, 72 N. C., 119, we would grant a new trial if it appeared from the case or by affidavit that the appellant was guilty of no laches in having his case made up for this court. But it is not made to appear to us whether he applied to the judge to make up the case or whether he or the judge was in default. There is no error. Let this be certified to the end that the case may be proceeded in according to law.

No error.

STATE v. JOHN E. SCOTT.

Appeal—Trial—Examination of Witnesses.

1. No appeal lies from a refusal of a judge to continue a cause.
2. Where on cross-examination a witness was proceeding to answer a question and was stopped by counsel who proposed to ask another, and the judge interposed and allowed the witness to finish the reply; *Held*, not to be error.

STATE *v.* SCOTT.

INDICTMENT for an Assault with intent to commit rape, tried at Spring Term, 1878, of CUMBERLAND Superior Court, before *Moore, J.*

The facts necessary to an understanding of the case appear in the opinion. Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.
Mr. T. H. Sutton, for the defendant.

SMITH, C. J. The record sets out several exceptions taken during the progress of the trial which will be noticed as follows:

1. The court refused to continue the cause on the defendant's affidavit and ordered the trial: The refusal to continue a cause is a matter resting in the sound discretion of the presiding judge, and no appeal lies from the exercise of that discretion.

2. During the cross-examination of the prosecutrix by the defendant's counsel and while she was detailing what passed between her mother and herself immediately after the assault, she testified that her mother asked,—"What is the matter, has he done anything to you? and that she did not answer at first because"—at this point she was stopped by the counsel who was about to propound another question, when His Honor interposed, remarking, "she ought to be allowed to tell why she did not answer her mother at first," and put the question to her himself, when the witness said—"I was so scared I could not answer. I almost immediately, however, and in defendant's presence, told my mother what had occurred."

We think the judge properly interposed and gave the witness an opportunity to make the explanation and finish what she was then prevented from saying. This was an exercise of that control which a judge has over proceedings conducted before him, and necessary to the proper ad-

ministration of the law. He would have been derelict in duty had he failed to interfere and prevent the cutting off an unfinished sentence. The other exceptions are unsupported by the record, and as the judge says in passing on them, have no foundation in the facts of the case.

The exceptions are overruled. There is no error. This will be certified to the end that judgment on the verdict be pronounced according to law.

PER CURIAM. No error.

STATE v. SIMPSON PETTIE.

Assault and Battery—Husband and Wife—Punishment.

Where it appeared that a husband beat his wife in great excess, without excuse or provocation, and to such a degree of cruelty as to indicate malice towards her, *it was held*, that a sentence of imprisonment for two years in the county jail on his conviction for the assault and battery, was not in violation of the constitution.

(*State* v. *Rhodes*, Phil., 453; *Miller's case*, 75 N. C., 73; *Driver's*, 78 N. C., 423, cited and approved.)

INDICTMENT for Assault and Battery tried at Spring Term, 1878, of BUNCOMBE Superior Court, before *Cloud, J.*

The defendant was indicted for an assault and battery upon his wife, and on conviction was adjudged to be imprisoned in the county jail for two years. On appeal to this court the position is taken that the punishment inflicted is cruel and unusual, and therefore violative of the constitution. The particulars as gathered from the case, were, that defendant after being absent from home in the morning, on his return in the afternoon, inquired of his wife if one Sluder had been at his house and left any tobacco for him, and on

being told he had not, he called his wife a liar and commenced to beat her with a stick larger than the middle finger, and continued to beat her until her left arm, shoulder, and back were covered with bruises; that the beating occurred about four weeks before the trial, and she had been and was still unable to use her left arm at all, and was hardly able to be present in court. The wife said she had not indicted her husband, that he had whipped her before, and threatened to kill her if she caused him to be arrested. The father and mother of the wife were at defendant's house on the next day, and found her in bed and unable to raise herself up without assistance; they cut off her dress and found her left arm very much swollen, and her person covered with bruises; they then carried her to their house, and she had been totally unable to do any work since the beating, and was brought to court with great trouble.

Attorney General, for the state.
Mr. C. M. McLoud, for the defendant.

DILLARD, J. (After stating the facts.) It is the settled law of this state that the courts will not invade the domestic forum or interfere with the right of a husband to control and govern his family; and from motives of public policy, even if a husband should chastise his wife, it is regarded as best not to take any cognizance thereof, unless some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that the chastisement was inflicted to gratify his own bad passion. *State* v. *Rhodes*, Phil., 453. In this case there was no provocation whatever so far as we can gather from the case of appeal. We are therefore to take it that the battery of the wife was without excuse, and unprovoked. And it is further aggravated by the fact that it was inflicted in great excess and to such a degree of cruelty as to indicate malice against her, and to

disable her very seriously and perhaps permanently. Upon the facts as above recited, the conduct of the defendant was brutal, and such as to call for exemplary punishment, adequate to correct him and to deter all others from offending in like manner. There being no specific punishment provided by statute for such an offence, it was the duty of the judge in the exercise of his legal discretion to fix upon the term of imprisonment suited to the case without restriction save that in the constitution which forbids "cruel or unusual punishments" to be inflicted.

His Honor pronounced judgment of imprisonment for two years in the county jail, and thereupon the question is made,—whether the punishment inflicted be or be not in violation of the constitution, Art. 1, § 14. It was intimated in *Miller's case*, 75 N. C., 73, and since then, decided in *Driver's case*, 78 N. C., 423, that an imprisonment for five years was excessive and in violation of the constitution for any misdemeanor at common law. In the latter case the court, in speaking of the limit to the power of the judge to punish, say—"what the precise limit is, cannot be prescribed. The constitution does not fix it, precedents do not fix it, and we cannot fix it, and it ought not to be fixed. It ought to be left to the judge, who inflicts it under the circumstances of each case, and it ought not to be interferred with except when the abuse is palpable." The case of the defendant is an unusual one in its features, and it called for a punishment unusual in its kind and duration. He whipped his wife without provocation, excessively and cruelly, and inflicted most likely a permanent injury on her. He had whipped her before, and had put her under fear of death if she had him arrested. When such maltreatment appears and it is clearly evinced that the husband acts wantonly and for the gratification of malice, it is difficult to say how long an imprisonment may be adjudged without violating the constitution. In respect to the

kind and quantum of the punishment, regard is always to be had to the circumstances as developed on the trial; and the judge presiding has the opportunity to know the case better than an appellate tribunal. Therefore it is to be assumed in this case that His Honor could understand and see the extent of the injuries inflicted and the motives operating on the defendant, and properly weigh any matter in mitigation, and thus be enabled to decide upon the propriety of the punishment to be suffered for the protection of the wife, and through it, for the protection and good order of society.

We will not undertake to fix upon the extent to which a judge in his discretion may go in inflicting punishment for an assault and battery. We simply decide that the judgment in this case was not unwarranted. There is no error. Let this be certified that the court below may proceed to execute the sentence of the law.

PER CURIAM. No error.

STATE v. LEWIS JAMES.

Assault and Battery—Justification under process.

1. The protection afforded by a precept regularly issued to an officer for the arrest of a party charged with crime, extends to all who aid in its execution.
2. Where a defendant in an indictment for an assault accompanied an officer to identify the party charged, and it was alleged that the precept was based upon a false affidavit made by defendant; *Held*, that he was not guilty.
3. The guilt or innocence of the party charged, or the false evidence on which the precept was based, does not impair its authority.

(*Meeds* v. *Carver*, 8 Ire., 298, cited and approved.)

STATE *v.* JAMES.

INDICTMENT for Assault and Battery tried at August Term, 1878, of NEW HANOVER Criminal Court, before *Meares, J.*

The facts appear in the opinion of this court delivered by THE CHIEF JUSTICE. Upon the special verdict His Honor held the defendant guilty. Judgment. Appeal by defendant.

Attorney General, for the state.

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

SMITH, C. J. The defendant is charged in the usual form with having committed an assault and battery upon one L. V. Smith, and in a special verdict, the jury found the following facts:

That the defendant went with one C. W. Oldham, an officer, to the county of Onslow to execute the warrant from Harris, J. P., the copy of which, together with the affidavit, is set out and made part of the verdict; that the defendant accompanied the said officer for the purpose of identifying the person described in the warrant, and did identify him as the Miles Smith who had committed the murder charged in the warrant, and did point him out to the officer as the man who was charged with the murder in South Carolina; that Smith who was arrested was known by the name of L. V. Smith, and that the Smith who was so arrested is the person who was intended to be arrested by the person who made the affidavit on which the warrant issued; that the defendant is the person who made the affidavit, and that the Smith arrested is not the man who committed the murder in South Carolina.

We are at a loss to discover any ground upon which the court could adjudge the defendant guilty of an assault and battery upon the facts thus ascertained. In the brief argument before us, no view of the case was presented to sustain the ruling of the judge, nor after a diligent examination of the record has any such suggested itself to us.

The warrant was issued, upon affidavit for the arrest of

the person alleged to have been assaulted, by a justice of the peace having full jurisdiction, was made effective by the endorsement of a justice of the county of Onslow, wherein the defendant was found, as provided by law, and executed by the arrest of the very person described in the process and identified by the defendant and without any excess of force. Bat. Rev., ch. 38, §§ 9, 10, 13. So far as we can discover from the record, justification under the precept was denied to the defendant on account of his false oath in charging the accused with the homicide. But it is quite plain that the guilt or innocence of a party charged with crime, or the false evidence on which the precept for his arrest was based, cannot impair the authority which the precept conveys to make the arrest. And the protection which it affords is not restricted to the officer to whom it is directed, but equally extends to all who may aid him in its execution. If the warrant issued from competent authority and the extra-territorial efficacy provided by the statute is imparted to it in the county wherein the accused party was arrested, the justification is full to the officer and all who co-operated with him, and no enquiry is admissible into the circumstances under which it was issued. Obedience to the commands of a lawful precept cannot itself be an offence. Nor does the lawfulness of an arrest depend on what an officer says, but upon the authority he has to do the act. So far has this principle been carried, that when a deputy made an arrest under process which did not justify and at the same time his principal held a precept which did, this latter was held to protect both from an action for false imprisonment. *Meeds* v. *Carver*, 8 Ire., 298. Whatever redress the wrongfully accused party may have against the defendant, in an action for malicious prosecution, and whatever punishment may be incurred by him for his false evidence given in the prosecution, these can in no manner impair the protection afforded by the warrant to those who assist in its execution.

There is error. This will be certified to the end that judgment be given in the court below according to this opinion.

Error. Reversed.

STATE v. JOHN A. MONROE.

Construction of Constitution—Legislative Power.

The provision of the constitution (Art. IV, § 11,) requiring the judges to preside in the different districts successively and prohibiting them from holding the courts in the same district oftener than once in four years, applies to the series of successive courts constituting a circuit or riding, and does not restrict the legislature from creating an extra term of the superior court of a county and designating the resident judge to hold the same.

(*State* v. *Adair*, 66 N. C., 298, cited and approved.)

INDICTMENT for an Affray tried at January Special Term, 1878, of CUMBERLAND Superior Court, before *Buxton, J.*

The case is sufficiently stated by THE CHIEF JUSTICE.

Attorney General, for the State.

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

SMITH, C. J. At January term, 1877, of the superior court of Cumberland, the defendant and one Small were indicted for an affray. They both submitted at January term, 1878. The defendant Monroe was adjudged to be imprisoned for three months, and from this judgment he appealed.

The only defence presented in the record or insisted on in the argument here is an alleged want of power in the presiding judge, the resident judge of the district, to hold this term and pronounce sentence. The term of the superior

court of this county held on the last Monday in January of each year is in addition to its regular spring and fall terms, and is establ shed by the acts of 1874-'75, ch. 32. No original or final process in civil actions could be issued returnable to it. Subsequently an amendatory act was passed requiring this "extra term to be held by the judge residing in the district unless otherwise directed by the governor. Acts 1876-'77, ch. 66. The constitutional provision which is supposed to conflict with the statute is as follows: "Every judge of the superior court shall reside in the district for which he is elected. The judges shall preside in the courts of the different districts successively, but no judge shall hold the courts in the same district oftener than once in four years, but in case of protracted illness of the judge assigned to preside in any district, or of any other unavoidable accident to him, by reason of which he shall become unable to preside, the governor may require any judge to hold one or more specified terms in said district, in lieu of the judge assigned to hold the courts of said district." Art. IV, § 11. Under this section of the constitution the state has been divided into nine judicial districts, and the time fixed for holding the successive superior courts in each. Acts 1876-'77, ch. 469.

It is insisted in the argument for defendant that the words "but no judge shall hold the courts in the same district oftener than once in four years" annul the act of 1877, which designates the judge to hold this extra term, and denies to him jurisdiction in the premises. We do not concur in this rendering of the constitution, which practically abrogates not only this but all the other extra or additional terms of the superior courts of other counties. They are not within the scope of this constitutional inhibition, and were obviously not intended to be affected by it. It is the purpose of the clause to re-establish the former system of rotation among the judges, and to require them to ride the dif-

ferent districts and hold the several courts therein successively until each had gone over the whole state. It is this series of courts which the constitution means constituting a circuit or riding and following each other without interruption, and not such additional and exceptional terms as the business of some of the larger counties may require, and for which special provision is made by law. The prohibition applies to the holding of "*the courts in the same district,*" obviously meaning the series of successive courts which belong to and constitute the regular spring and fall ridings. And this construction derives some support from the concluding qualifying words by which in case of personal disability, the governor is authorized to require some other judge to preside at *one or more* specified terms in the district in his stead.

In the case of *State* v. *Adair*, 66 N. C., 298, the trial was prolonged into the third week of the term, and it was insisted that the power conferred upon the presiding judge to continue the term in certain criminal trials, (Bat. Rev., ch. 33, § 108,) was revoked by Art. IV, § 12, of the constitution of 1868, which directs a term of the superior court to be held in each county, "at least twice in each year, *to continue for two weeks*, unless the business shall be sooner disposed of." But it was held that this was not the effect of that section, and that the law authorizing an extension of the term was still in force. We are therefore of opinion that the term was rightfully held by the resident judge.

But we do not wish to be understood as conceding the proposition that a term held by a judge of general jurisdiction, though not the one designated to hold it, can be treated as a nullity and the objection made available in the manner attempted here. It is unnecessary to expresss any opinion on this point, and it is alluded to only to avoid misconception. Let this be certified to the end that judgment may be pronounced.

No error. Affirmed.

STATE v. TONEY BURNS.

Disposing of Property under Mortgage.

An indictment for disposing of mortgaged property under the act of 1873–'74, ch. 31, is fatally defective, if it fails to set forth that the lien was in force at the time of sale, the party to whom sold, and the manner of disposition.

(*State* v. *Pickens*, 79 N. C., 652, cited and approved.)

INDICTMENT for a Misdemeanor tried at January Term, 1879, of WAKE Criminal Court, before *Strong, J.*

At November term, 1877, the defendant was indicted for the violation of the act of 1873–'74, ch. 31, in that he sold one bale of cotton upon which he had given a chattel mortgage to secure certain rent due the prosecutor. The principle on which this case was decided is the same as in *State* v. *Pickens*, 79 N. C., 652. There was no motion in the court below to arrest the judgment from which defendant appealed.

Attorney General, for the state.
Mr. T. M. Argo, for defendant.

ASHE, J. There were some exceptions taken by the defendant on the trial below, but it is only necessary to notice that taken to the form of the indictment.

The bill of indictment does not charge that the lien was in force when the bale of cotton was disposed of, nor to whom it was sold. For these reasons the bill is fatally defective, and the judgment below must be arrested. *State* v. *Pickens*, 79 N. C., 652.

There is error. Let this be certified to the superior court of Wake county that the defendant may be discharged.

PER CURAIM. Error.

STATE v. CHARLES P. McGIMSEY.

Discharge of Jury before Verdict—Sunday—Ridings of Judges—Certiorari.

1. Where a jury, charged in a case of capital felony, retired at 12 o'clock on Saturday night for deliberation, and were discharged at 6 o'clock the next evening, Sunday, before verdict, because "it appeared they could not agree," *it was held*, that the prisoner was entitled to be discharged.
2. The facts which constitute the necessity for discharging a jury before verdict must be distinctly found by the judge and set out in the record. The facts found are conclusive, and the law arising thereon reviewable.
3. The expiration of a term of court is no ground for discharging a jury before verdict. The term may be continued for the purposes of the trial. Bat. Rev., ch 33, § 108.
4. If the judge is not present to hold a court at the time fixed by law, it is the duty of the sheriff to adjourn from day to day until sunset on the fourth day. Bat. Rev., ch. 17, § 396.
5. The fact that under the circumstances of this case the court sat on Sunday, is not assignable for error.
6. Before the act of 1879, assigning the judges to the different districts, an exchange of circuits with the consent of the governor under the act of 1877, was not in violation of section eleven, article four, of the amended constitution.
7. A writ of *certiorari* to bring up the record in a case is the proper substitute for an appeal.

(*State* v. *Garrigues*, 1 Hay., 241; *Honeycutt's case*, 74 N. C., 391; *Spier's*, 1 Dev., 491; *Ephraim's*, 2 Dev. & Bat., 162; *Prince's*, 63 N. C., 529; *Alman's*, 64 N. C., 364; *Jefferson's*, 66 N. C., 309; *Wiseman's*, 68 N. C., 203; *Adair's*, 66 N. C., 298; *Taylor's*, 76 N. C., 64; *Rickett's*, 74 N. C., 187; *Biggs'*, 64 N. C., 202, cited, commented on and approved.)

PETITION for a Writ of *Certiorari* filed by the prisoner and granted at January Term, 1879, of THE SUPREME COURT.

The record sent up in obedience to the writ shows that the prisoner was tried, for the murder of one Lawson

Weaver, at Fall Term, 1878, of BUNCOMBE Superior court, before *Avery, J.*

The jury were discharged before verdict, and the following order entered of record: "The jury having been sworn and impannelled in this case on Thursday evening of the second and last week of the term, and the trial having been commenced on said evening and lasted until 12 o'clock on Saturday night of the regular term, and it now appearing at 6 o'clock on Sunday evening following that the jury cannot agree on a verdict, it is therefore ordered by the court that a juror be withdrawn and a mistrial had, and that the prisoner be remanded to jail till the next term of the court."

His Honor filed the following additional statement which was also sent up by the clerk as part of the record: The charge was delivered to the jury and they retired between 12 and 1 o'clock on Sunday morning after the expiration of the regular term, and the sheriff under instructions of the court, announced that the court was adjourned until Sunday morning at 9 o'clock, at which hour the prisoner was brought in court, and it appearing that the jury had not agreed, the sheriff announced an adjournment until 6 o'clock p. m. of the same day, and the prisoner was remanded. At 2 o'clock the judge went into the court house at the request of the jury, communicated through the officer in charge, for further instructions, and the solicitor, the prisoner's counsel and the prisoner being present in court, the jury were brought in and asked in the usual manner if they had agreed, and the foreman said they had not, but desired further instructions. The court reiterated the charge upon the point as requested, and immediately the said juror and another juror stated, "with that instruction they were satisfied the jury would never agree." And the judge said before the jury had again retired and in their hearing, but addressing the counsel as well as the jury, "we will meet again at 6 o'clock and then see what can be done"—consid-

ering the question at that time as to whether he had the power to take the jury with him, in case they did not agree, to Madison county where he was required by law to hold court the following day, Monday. He then prepared the order set out above, and on coming into court at 6 o'clock and ascertaining that the jury had not agreed, directed the clerk to enter said order on the minutes of the court, after stating that he would have to order a mistrial. The prisoner was remanded to jail and the court adjourned.

Attorney General, T. F. Davidson and *J. L. Henry*, for the state.

Messrs. Carter, Merrimon and *McLoud*, for the prisoner.

ASHE, J. The question presented for the consideration of this court is, whether the court below had the right to discharge the jury who were impannelled in the case, and hold the prisoner for another trial.

It is a maxim of the common law that no person shall be twice put in jeopardy of life or limb; and this principle founded in humanity has been incorporated in the constitution of the United States. It has been adopted and acted upon in our courts from the foundation of the government to the present time. We are aware that in many of the states there has been a strong tendency to ignore the maxim of the common law and submit the question to the discretion of the courts. But in this state, beginning with *Garrigues'* case in 1795, reported in 1 Haywood, through a current of decisions down to the case of *State* v. *Honeycutt*, 74 N. C., 391, the principle of the common law has been steadily kept in view and adhered to with some relaxation of the rule. *State* v. *Spier*, 1 Dev., 491; *Ephraim*, 2 D. & B., 162; *Prince*, 63 N. C., 529; *Alman*, 64 N. C., 364; *Jefferson*, 66 N. C., 309.

By these and other decisions of this court, it has been uni-

formly maintained that where a jury has been charged in a capital felony and the prisoner's life put in jeopardy, the court has no power to discharge the jury and hold the prisoner for a second trial, except in cases of absolute necessity. These cases of necessity form exceptions to the general rule, and in every case where the court undertakes to exercise the power of discharging a jury in a capital case, it will be error unless brought within one of the exceptions. The inability of a jury to agree upon a verdict has been recognized by our courts as an exception to the general rule. See cases of *Jefferson, Prince,* and *Honeycutt, supra.*

In *Jefferson's* case the prisoner was discharged, but PEARSON, C. J., in the opinion of the court, says: "If His Honor had remained at court ready to instruct the jury and had found the fact that the case had been with the jury four days, and that from declarations of jurors in the presence of the others and in open court, before him, he was satisfied the jury would not agree, and that it was useless and unnecessary for the purposes of the case to continue the term longer, and had thereupon discharged the jury, there would have been no error;" and in *Honeycutt's* case in giving the opinion he said the conditions laid down in *Jefferson's* case had all been complied with: "The case had been with the jury for six days, and His Honor, not content with the declarations of some of the jurors in presence of each other in open court before him, polls the jury on that question, and on this evidence finds as a fact that the jury could not agree and orders a discharge of the jury and the prisoner be held for trial at the next term." And he proceeded to say "that the supposed facts in *Jefferson's* case were fully considered by the members of the court, and although that is a *dictum* as rather matter used for illustration, after full consultation we now hold it to be the law of the land." This *dictum,* then, is the law of this state, and the last expression of judicial determination on this sub-

ject. Let us then see if in the present case there has been a compliance with the conditions laid down in that *dictum*.

From the record it appears that the jury were impannelled in the case on Thursday evening of the second week of the term, and the arguments were closed and the jury retired to make up their verdict between twelve and one o'clock on Saturday night, and His Honor for the purpose of the trial had the court adjourned until the next morning, Sunday, at nine o'clock, when it being ascertained that the jury had not agreed, the court was adjourned until six o'clock p. m. At two o'clock the jury sent for the judge and requested further instructions and after receiving them, two of the jurors in the presence of the others and before His Honor in open court, said, with that instruction they were satisfied they would never agree; and as they were retiring His Honor in their hearing said "we will meet again at six o'clock and see what can be done;" and at six o'clock the jury were called in and asked in the usual form by the clerk, if they had agreed, and their response through their foreman, was, that they had not. His Honor states that he prepared the order for withdrawing a juror and ordering a mistrial before he went to the court house at six o'clock, and had determined to order a mistrial if the jury should announce that they had not agreed, and it should not appear probable that they would agree. And when the jury did announce they had not agreed, he signed the order and had it spread on the record. The statement in this order that "it appearing the jury cannot agree" is not a finding of the fact that the jury cannot agree so as to be a compliance with the conditions of the *dictum*. Nor is it helped by the return of His Honor to the *certiorari*, which is to be regarded as a part of the record. For when the jury came in at two o'clock and the judge gave them the instructions asked, two of the jurors only, without consultation with their fellows, said they could never agree. His Honor was not

satisfied then that they could never agree, for he sent them to the jury room for further deliberation, and when they came in at six o'clock and in response to the question by the clerk announced that they had not agreed, His Honor could not then have been satisfied they could not agree, for they were not polled, nor even asked the question if they were likely to agree, and a juror was withdrawn and a mistrial had by an order which His Honor had drawn up before he went into the court house at six p. m., he having determined to order a mistrial if it was probable the jury could not agree. The amount of the finding is that it was probable the jury would not agree upon a verdict. That does not meet the requirement of the law. His Honor should have found the fact distinctly and set it out in the record, that the jury could not agree, or he was satisfied they would never agree, and that it was unnecessary to prolong the term for the purposes of the trial, before he undertook to exercise the power of withdrawing a juror and ordering a mistrial. It was his duty to find the facts and place them on the record; and these findings of the court below are conclusive and not the subject of review here, but the decision of His Honor as to the law arising upon them may be reviewed and reversed. *State* v. *Wiseman*, 68 N. C., 203; *Prince* and *Jefferson*, *supra*.

The expiration of the term was no ground for discharging the jury; for it is provided by statute that "in case the term of a court shall expire while a trial for felony, &c., shall be in progress, and before judgment shall be given therein, the judge may continue the term as long as in his opinion it shall be necessary for the purposes of the case." Bat. Rev., ch. 33, § 108. It was under the authority of this provision that His Honor continued the term until Sunday, and perhaps if he had continued the time for two or three days longer, the jury would have agreed, for we have instances of their coming to an agreement after several days of delib-

eration. In *Adair's* case, 66 N. C., 298, they were kept together from Saturday evening until the following Wednesday and agreed. In *Taylor's* case, 76 N. C., 64, they were deliberating several days, and came to an agreement. His Honor might well have continued Buncombe court until the following Wednesday, consistently with his duty and the law; for Madison court which was to begin on Monday after Buncombe court, would by law have been adjourned by the sheriff from day to day until sunset of the fourth day. Bat. Rev., ch. 17, § 396.

We think there is nothing in the objection raised that the court was held on Sunday for the purposes of this trial, under the circumstances. *State* v. *Ricketts*, 74 N. C., 187.

Nor do we think there was any force in the objection that His Honor, Judge Avery, had no right to hold the superior court for the county of Buncombe at fall term, 1878. He and Judge Gudger had agreed upon an exchange of circuits, and as appears from the record, the consent of the governor was obtained in accordance with the requirements of the act of 1876–'77, ch. 27, § 14, and Judge Avery was authorized to hold the courts of the ninth district, and Judge Gudger those of the eighth district. This does not violate the provisions of section eleven, article four of the amended constitution, because they apply to the ridings after the judges shall be assigned by law to the districts, and that was not done before the act of January 29th, 1879, ch. 11.

The case was properly brought to this court by writ of *certiorari*. The supreme court has the power to issue any remedial writs necessary to give it a general supervision and control of the superior courts. Const., Art. 4, § 8. Therefore when the matter involves the power of the superior court and error in its exercise the record may be brought up by *certiorari* for review. *Biggs ex parte*, 64 N. C., 202; *Jefferson's case, supra.*

We think the ancient rule of the common law has been

sufficiently relaxed by our predecessors, and we are unwilling to move a step further in the direction of discretion. We abide the law as we find it established, acting upon the principle of *stare decisis;* and governed by this principle after a careful and deliberate consideration of this case, we are of the opinion that the state of facts set out in the record does not show the existence of a necessity for the discharge of the jury. In coming to this conclusion, we are aware that its effect may possibly be to turn loose a bad man upon society, but it is better in the administration of the law there should be an occasional instance of violence even to the sense of public justice, than that a principle should be established which in times of civil commotion that may occur in the history of every country would serve as an engine of oppression in the hands of corrupt time servers and irresponsible judges to crush the liberties of the citizen. The prisoner, Charles P. McGimsey, is entitled to his discharge. Let this be certified, &c.

PER CURIAM. Prisoner discharged.

STATE v. JESSE DAVIS.

Discharge of Jury before Verdict—Challenges—Weight of Evidence—Amendment.

1. On trial for a capital felony a juror was withdrawn and a new trial granted at the request and by the consent of the prisoner and his counsel at 12 o'clock on Saturday night of the second week of the term; *Held*, that the prisoner was not entitled to be discharged.
2. A prisoner charged with a capital felony has no right to more than twenty-three peremptory challenges to the jury.
3. Whether the verdict in a criminal action is contrary to the weight of evidence is a matter addressed to the discretion of the presiding judge, and not reviewable.

4. It is competent to a court to amend its record so as to make it speak the truth.

5. An indictment concluding against the "force" instead of the "form" of the statute is sufficient. Bat. Rev., ch. 33, §§ 60, 66.

(*State* v. *Wiseman*, 68 N. C., 203; *Alman's case*, 64 N. C., 364; *Bailey's*, 65 N. C., 426; *Prince's*, 63 N. C., 529; *Ephraim's*, 2 Dev. & Bat., 162; *Spier's*, 1 Dev., 491; *Storkey's*, 63 N. C., 7; *King's*, 5 Ire., 203; *Smith's*, 63 N. C., 234; *Tribatt*, 10 Ire., 151; *Jefferson*, 66 N. C., 309; cited, commented on and approved.)

INDICTMENT for Rape tried at Fall Term, 1878, of JOHNSTON Superior Court, before *Buxton, J.*

This was an indictment for rape found at spring term, 1878, of Franklin superior court, and issue being joined on prisoner's plea of not guilty, a jury were regularly formed and charged to pass on said issue; and the jury not being able to agree on a verdict, were discharged at 12 o'clock Saturday night of the second week of the term and an entry thereof made by the clerk on the record in these words,—"juror withdrawn, mistrial, new trial granted by consent of counsel at 12 o'clock Saturday night of second week of said term."

At fall term of Franklin superior court, the prisoner was brought to the bar of the court, and on motion of the solicitor, in the presence of the prisoner and his counsel, the court ordered that the record of the trial at the said spring term in respect to the mistrial, be amended so as to read thus,—"juror withdrawn, mistrial, new trial granted, in the presence of the prisoner and his counsel, at the request and by the consent of the prisoner and his counsel." This amendment was made without objection so far as the record states, and at the same term of the court, on motion of the prisoner and for cause shown the case was removed for trial to the county of Johnston.

At the fall term of Johnston superior court the prisoner was brought to the bar of the court for trial, and he then

and there moved the court for his discharge on the ground that he had once been in jeopardy of his life by the trial had in Franklin superior court at the spring term thereof, and on the further ground that the amendment of the record of Franklin superior court at spring term, 1878, had been made without authority as appeared from the transcript from that court. On consideration of said motion His Honor refused to discharge the prisoner, and ordered the trial to proceed, and prisoner excepted.

In forming the jury the prisoner exhausted the peremptory challenges allowed him by law, and offered to challenge peremptorily other jurors, but His Honor disallowed his challenge, and the jurors were sworn and the prisoner again excepted.

There was no exception to any evidence received or rejected, nor to the directions of the court, and on return of a verdict of guilty, the prisoner moved for a new trial on these grounds:—

1. Because the motion to discharge the prisoner was not allowed.

2. Because the prisoner was not allowed to challenge more than twenty-three jurors, and was forced to trial against his consent.

3. Because the verdict was against the weight of the evidence.

The motion for a new trial was overruled, and the prisoner then moved in arrest of judgment, for that, the indictment concluded against the *force* of the statute instead of against the *form* of the statute, and this motion was also overruled and the prisoner excepted. Verdict of guilty, judgment, appeal by prisoner.

Attorney General, for the state.

No counsel in this court for prisoner.

DILLARD, J. (After stating the case.) It is a fundamental principle in criminal procedure that a man shall not be subject for the same offence to be twice put in jeopardy of life or limb, and its authority rests on a clause in the fifth article of the amendments to the constitution of the United States, which being a part of the supreme law of the land, is obligatory on all judicial tribunals, whether state or federal. And if it be not accepted as resting on this basis, it may at least be agreed, that it is a principle of the common law, and as such, of the same force in our state as if made authoritative by our own state constitution. In accordance with this general rule, it is undoubtedly the law as settled by this court in several decisions, that when a jury is sworn and once charged with the case of a prisoner accused of a felony, they cannot be discharged before rendering a verdict, except for sufficient cause constituted by facts found by the judge presiding, and set out on the record, so that the prisoner may have the benefit of a review by this court of the judge's conclusions as a matter of law on the facts found by him. *State* v. *Jefferson*, 66 N. C., 309; *State* v. *Wiseman*, 68 N. C., 203; *State* v. *Alman*, 64 N. C., 364.

It is thus seen that the general rule admits of exceptions, but how many, and in what cases to be allowed, it is difficult, if not impossible to define precisely; and therefore we will not undertake to do so, but leave each exception as it shall arise to depend for its legal sufficiency on the facts and circumstances by which it is attended, with this remark, however, that no exception to the general rule, without the consent of the prisoner, ought to be tolerated unless it amounts to a physical necessity or a strong and palpable legal necessity as expressed by this court in the cases of *State* v. *Bailey*, 65 N. C., 426, and *State* v. *Wiseman*, *supra*.

Such being the strictness of the rule as regards a mistrial by act of the court, *without* the consent of a prisoner, it remains to be considered what is the effect of a mistrial *with*

the consent of the prisoner on the right of the state to hold the prisoner, and put him to trial before another jury.

In *Prince's case*, 63 N. C., 529, it was ruled that the prisoners each had the right to use the other for a witness and the solicitor appealed, and a juror was withdrawn and a mistrial had, against the objection of the prisoner; and this court held that there was no reason or cause of necessity to dissolve the jury, and so the prisoner could not be held for another trial. It is to be inferred that it would have been otherwise if the mistrial had occurred on the request or by consent of the accused. In the case of *State* v. *Ephraim*, 2 Dev. & Bat., 162, Judge RUFFIN says, a jury cannot be discharged without the prisoner's consent but for evident, urgent, overruling necessity. In *State* v. *Spier*, 1 Dev., 491, HENDERSON, J., says that modern authorities have introduced the exception, where the discharge takes place with the prisoner's consent, and for his benefit, and this being reasonable and just it may be deemed settled. In the *Kinloch's case*, reported in 1 Bennett & Heard Lead. Cr. Cases, 440, a juror was withdrawn and a mistrial had in order to let in prisoners to plead to the jurisdiction. Afterwards they sought to invoke the principle of once in jeopardy, and it was ruled that the discharge of the jury with their consent disabled them to put up that plea. In 1 Chitty Cr. Law, 630, the doctrine is, that a juror may be withdrawn and the trial put off with the consent of the prisoner. In this case the statement of the record is that a juror was withdrawn and a new trial granted in the presence of the prisoner and his counsel, at the request, or by the consent of the prisoner and his counsel, at 12 o'clock Saturday night of second week of the term; and from the time of this entry on the record, it is to be assumed that the prisoner, represented by his counsel, conceived it to be for his benefit to have a mistrial rather than run the hazard of a coercion of a verdict by confining the jury on his case until the next week. Such discharge of the

jury appearing to be reasonable and not unfavorable to the prisoner, we hold there was no error in the court below in overruling the motion for his discharge and putting him on trial again.

As to the error assigned in the refusal of the judge to allow the prisoner more than twenty-three peremptory challenges: The number is fixed by the statute and he appears to have been allowed the number and he has no cause to complain. Bat. Rev., ch. 33, § 77.

There is nothing in the refusal of the court to grant a new trial on the ground that the verdict was contrary to the weight of the evidence, that being a matter of discretion in the court below and not reviewable by us. *State* v. *Storkey*, 63 N. C., 7.

As to the error assigned in the amendment of the entry on the minutes of the spring term, 1878, in relation to the withdrawal of a juror and mistrial: It was competent to the court to make the amendment so that the record when made up should speak the truth, and no court can incidentally question the record as amended in point of verity. *State* v. *King*, 5 Ire., 203.

The prisoner moved in arrest of judgment, for that, the indictment concludes against the *force* of the statute instead of against the form of the statute, and His Honor refused the motion. We think the objection is merely formal and not to be regarded, there being enough on the bill of indictment to enable the court to proceed to judgment, and the objection being one of misspelling and fully cured by the acts passed for such defects. Bat. Rev., ch. 33, §§ 60, 66; *State* v. *Smith*, 63 N. C., 234; *State* v. *Tribatt*, 10 Ire., 151.

There is no error. Let this be certified to the end that the court below may proceed to judgment.

PER CURIAM No error.

STATE v. J. A. BALDWIN.

Escape—Indictment—Sufficiency of—Quashing.

1. An indictment will not be quashed on the ground of a defect in the accusing body, unless the motion is made at the earliest opportunity after bill found—on arraignment of defendant.
2. Relationship of a juror to a prisoner is good ground of challenge.
3. An indictment alleging that defendant, a jailor, did negligently permit the escape of prisoners charged by the superior court with murder, and that said prisoners were duly committed to his custody as jailor, is sufficient.

(*State* v. *Griffice*, 74 N. C., 316; *Haywood's case*, 73 N. C., 437; *Jones'*, 78 N. C., 420; *Shaw's*, 3 Ire., 20, cited and approved.)

INDICTMENT for an Escape tried at Fall Term, 1878, of MACON Superior Court, before *Avery, J.*

The bill of indictment was found at fall term, 1877, and is as follows: The jurors, &c., present, that at spring term, 1876, of the superior court of Macon county, one William A. Shepherd and one Henry W. Watson, charged with the murder of one James P. Luckey, were duly committed to the care and custody of J. A. Baldwin, he the said Baldwin then and still being keeper of the common jail of said county, there to be kept and imprisoned in the jail aforesaid until further proceedings be had in pursuance of law. And the jurors, &c., do further present, that whilst the said Shepherd and Watson were in the custody of said Baldwin, as such keeper of the common jail as aforesaid, on the first of October, 1877, in the county aforesaid, he the said Baldwin as keeper aforesaid, unlawfully, negligently and contemptuously did permit and suffer the said Shepherd and Watson to escape and go at large, &c. Under the charge of the court, the jury rendered a verdict of guilty. Judgment, appeal by defendant. The facts are sufficiently stated in the opinion.

Attorney General, for the State.
Messrs. Reade, Busbee & Busbee, for defendant.

DILLARD, J. The defendant as keeper of the common jail of Macon county was charged with the negligent escape from said jail of Wm. A. Shepherd and Henry W. Watson duly committed to the jail upon a charge of the murder of one James P. Luckey.

From the transcript and the case of appeal it appears that the defendant was indicted at fall term, 1877, and that the cause was continued at spring term, 1878, without any statement on the record for whom it was so continued, whether the state or the defendant. At fall term, 1878, on calling the cause for trial, the defendant moved the court to quash the bill of indictment on the ground of the disqualification of four of the grand jurors by whom the bill of indictment was found, by reason of the non-payment of their taxes for the previous year. The motion as to the alleged fact of non-payment of taxes was predicated on the *ex parte* affidavit of the sheriff of Macon county, and it was urged by defendant that his motion was in apt time, because on his first arraignment his counsel had been misled and prevented from making his motion by a proposition of the solicitor to send a new bill, which it is stated was sent at spring term, 1878, and was ignored by the grand jury. The judge in his case says this did not appear to the court except by the statement of counsel. His Honor overruled the motion to quash, and after a careful consideration of his ruling we do not see that he erred in law.

It is settled that the defendant, as indeed every person accused of a violation of the criminal law of the state, has the right not to be put to a public trial except on a bill of indictment preferred by a grand jury composed of persons qualified as by statute prescribed. If there be a defect in the accusing body, it is the right of the party indicted, by

plea in abatement or by motion to quash, to avail himself of such defect; but it is required to be exercised at the earliest opportunity after bill found, which must be upon the arraignment when the party is first called upon to answer. *State* v. *Griffice*, 74 N. C., 316; *State* v. *Haywood*, 73 N. C., 437.

Now the motion to quash at fall term, 1878, in its time as set out in the case of appeal, is an admission that defendant on his arraignment, which he calls his first arraignment, had not by plea or otherwise sought to abate the bill against him; and he attempted to except himself from the operation of the rule in such cases by claiming to have been misled and prevented by the sending of a new bill at spring term, 1878, at which time he must have been arraigned and pleaded, and as to the matter urged as constituting an exception to the general rule His Honor in the case says it did not appear to the court except by the statement of counsel.

The defendant on his first arraignment ought to have urged the disqualification of the grand jurors and not traversed the bill; or, if he delayed to do so, upon the expectation to be allowed that liberty at another term, he should have secured to himself that right by an understanding to that effect with the state's counsel, which might have been respected in the sound discretion of the judge. His Honor overruled the motion to quash and in so doing we are not able to see any error committed of which defendant may rightfully complain.

In making up the jury for the trial, the solicitor challenged a juror on the ground of his relationship to one or both of the prisoners for whose negligent escape from the jail the bill was found. His Honor sustained the challenge, and the defendant excepted. It was reasonably to be assumed that relationship of a juror to the prisoners, on a trial against the jailor for negligently allowing them to

escape, would or might affect his indifference as between the state and the jailor, and we think it was competent to the court on objection of a juror to himself for such cause, or on challenge by the state, if the cause on inquiry was found true, to reject such juror and therein the defendant would have no right to complain. *State* v. *Cunningham*, 72 N. C., 469; *State* v. *Adair*, 66 N. C., 298.

It has been moved in this court in arrest of judgment on the ground that the bill of indictment is defective, in that, there is no averment for what crime, or by what authority the two prisoners were committed to the care and custody of the jailor. The bill charges "that at spring term, 1876, of the superior court of Macon connty, one William A. Shepherd and one Henry W. Watson, charged with the murder of one James P. Luckey, were duly committed to the care, &c.," of the defendant. From these words used in the bill, we think it sufficiently appears that the commitment was to the defendant as keeper of the jail, upon a specific charge of murder, and by authority of the superior court of Macon county at term, and these essential facts being contained in the bill, the offence is well charged and in law there is no ground to arrest the judgment. *State* v. *Jones*, 78 N. C., 420; *State* v. *Shaw*, 3 Ire., 20. Let this be certified, &c.

PER CURIAM. No error.

STATE v. J. A. LAMBETH.

False Pretence—Insufficient Indictment.

An indictment for false pretence, charging that defendant represented a horse which he traded to prosecutor, "to be all right, whereas in truth and in fact he was not all right, but diseased to such an extent as to

render him worthless," is too vague and indefinite, and a motion in arrest of judgment after conviction was properly allowed.

(*State* v. *Hill*, 79 N. C., 656; *State* v. *Jones*, 70 N. C., 75; *State* v. *Young*, 76 N. C., 258, cited and approved.)

INDICTMENT for False Pretence tried at Fall Term, 1878, of ROBESON Superior Court, before *Buxton, J.*

The bill of indictment was substantially as follows: "The jurors, &c., present the J. A. Lambeth did designedly, &c., pretend to one A. S. Baker, that a certain horse which he, Lambeth, offered to trade and did trade to said Baker, was all right; whereas in truth and in fact the said horse was not all right, but diseased to such an extent as to render him almost entirely worthless, he the said Lambeth well knowing the statement to be false, by which said false pretence he did unlawfully, &c., obtain of said Baker, one mule of the value of $75, the property of said Baker, with intent, &c. The jury found the defendant guilty. Motion in arrest of judgment made and allowed, and *McIver*, solicitor for the state, appealed.

Attorney General, for the state.
Mr. W. F. French, for the defendant.

ASHE, J. Every indictment must be certain to a general intent. It must state all the facts and circumstances which constitute the offence with such certainty and precision that the defendant may be enabled to see whether they constitute an indictable offence. The object of all indictments is to inform the prisoner with what he is charged, as well to enable him to make his defence as to protect him from another prosecution for the same criminal act. It should therefore be reasonably specific and certain in all its material averments. *State* v. *Hill*, 79 N. C., 656; Whar. Crim. Law.

The false pretence charged in the indictment is that the

defendant represented the horse which he traded to the prosecutor to be "all right," whereas in truth and in fact he was not all right, but diseased to such an extent as to render him worthless. What is meant by "all right?" Does it refer to color, gait, docility of disposition, working qualities or soundness? Whatever it does mean, it was incumbent on the state to allege in what respect he was not all right, and to make that allegation certain and definite so that the court can see that an indictable offence has been committed, and the defendant may know what he has to defend.

Every indictment should contain all the material facts necessary to be proved in order to procure a conviction. 1 Bish. Crim. Pro., § 48. To convict the defendant upon this indictment, it was necessary to prove not only that the horse was diseased, but in what respect he was diseased; then according to the last authority, it should have been specifically alledged in the indictment how and in what manner the horse was not all right, that the defendant might see whether a criminal offence was charged, and if it was that he might prepare to meet it.

In the case of *State* v. *Jones*, 70 N. C., 75, the false pretence alleged there was that some barrels of turpentine were "all right," just as good at bottom as at top, but when examined were found to contain some little turpentine on the top of each barrel, and the rest, chips, billets of wood, and dirt. This indictment was good because the averment negativing the pretence was specific and gave notice to defendant of what he had to meet, and if he could prove that there were no chips and dirt in the barrels he must be acquitted. But in our case it only alleged that the horse was diseased, but which of the numerous diseases the equine flesh is heir to, is not stated. If it had been alleged that he was blind, lame, affected with fits, or subject to cholic, the defendant would have been apprised of what he was called upon to defend.

It is a well established principle and one that furnishes a good criterion by which the sufficiency of an indictment may be ascertained, "that if all the facts alleged in an indictment may be true and yet constitute no offence, the indictment is insufficient." The horse in this case may have been very badly diseased and yet the defendant be guilty of no violation of the criminal law, as for instance if the unsoundness was patent, the horse was affected with spavin, or had lost the frogs of his feet, defects which may be discovered by ordinary inspection, the defendant could not be convicted, for in such cases the rule of *caveat emptor* applies. *State* v. *Young*, 76 N. C., 258.

PER CURIAM. No error.

STATE v. SEWELL GILLESPIE.

False Pretence—Value of Property.

In an indictment for obtaining goods by false pretence, no averment of the value of the property need be made.

INDICTMENT for obtaining goods under False Pretences tried at Fall Term, 1878, of IREDELL Superior Court, before *Gudger, J.*

After a verdict of guilty the defendant's counsel moved in arrest of judgment on the ground that the bill of indictment did not charge the property, alleged to have been obtained by false representations of defendant, to be of any value. The motion was refused, judgment, and the defendant appealed.

Attorney General, for the state.

Mr. R. M. Allison, for the defendant.

ASHE, J. The defendant has been convicted for a violation of the provisions of Bat. Rev., ch. 32, § 66, which makes it a misdemeanor, "by means of any forged or counterfeit paper in writing or in print, or by any false token or other false pretence whatsoever, to obtain from any person or corporation within the state, any money, goods or property, or other thing of value, or any bank note, check," &c. There was a motion in arrest of judgment, motion overruled, and judgment pronounced, from which the defendant appealed. Mr. Bishop, in his valuable work on criminal procedure in treating of the subject of cheats and false pretences (vol. 2, § 139,) says,—"whether the value of the property should be stated in the indictment depends upon the law which fixes the punishment;" and again in § 676,—"that when the degree of the punishment depends in any measure upon the value of the thing stolen, the indictment must state its value; in other cases it need not." There are no degrees of criminality in the offence charged in this indictment, and no other punishment can be inflicted than that prescribed in Bat. Rev., ch. 32, § 29. There is no necessity for alleging the value with the view of fixing the punishment to be imposed.

The statute under which the indictment is framed does not require the property obtained to be of any particular value; nor do we think the words "or other thing of value" were used by the law makers to qualify the words immediately preceding—"money, goods, property"—but only to enlarge the class of personal things which they were making it penal to obtain by false pretences. Such was the construction put upon the New York statute which is very similar to ours. The words there used were "money, personal property, or valuable thing;" and it was there held in *People* v. *Stetson*, 4 Barb., 151, that the statute under which the indictment was framed did not require that the property obtained should be of any particular value. The words are,

any money, personal property, or valuable thing; therefore it need not be alleged in the indictment. 2 Bish. Cr. Pro., § 139. There is no error. Let this be certified to the court below that further proceedings may be had according to law.

PER CURIAM. No error.

STATE v. JOHN COOLEY.

Fine and Costs—When Discharged.

Where a defendant, after conviction for an assault, confessed judgment with sureties to secure the fine and costs imposed, and execution issued and was returned unsatisfied, *it was held* that the original judgment was discharged, and that a motion to order the defendant again into custody until the fine and costs were paid, was properly refused.

(*Bryan* v. *Simonton*, 1 Hawks., 51; *State* v. *Love*, 1 Ire., 264; *State* v. *Simpson*, 1 Jones, 80, cited and approved.)

MOTION in a Criminal Action heard at Fall Term, 1878, of YADKIN Superior Court, before *Graves, J.*

The defendant was convicted upon an indictment for assault and battery at fall term, 1874, of said court, and adjudged to pay a fine of ten dollars and costs, and committed to the custody of the sheriff until the same were secured. Thereupon the defendant and two sureties confessed judgment to the state for the sum of fifty dollars to be discharged upon payment of the fine and costs. Execution was duly issued to the sheriff, and returned *nulla bona*. The defendant was then arrested on a *capias* and brought into court, and the solicitor for the state moved that he be ordered into custody until the said judgment was performed—payment of the fine and costs. His Honor refused the motion on the

ground that defendant had been discharged by the confession of judgment as aforesaid, which was a debt for the non-payment of which he could not be legally imprisoned. From this judgment, *Dobson*, solicitor for the state, appealed.

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

DILLARD, J. We concur with His Honor in his judgment in this case. It is well settled that if a party be arrested on a *capias ad satisfaciendum*, and he be set at liberty by the directions or with the assent of the creditor, the judgment on which the execution was issued was in law discharged, and no subsequent execution could be issued on the same. This proceeds on the idea that the creditor has received a satisfaction by having once his debtor in execution. *Bryan* v. *Simonton*, 1 Hawks, 51.

The only exception is in the case of the debtor who escapes with or without the consent of the sheriff, and the reason is, that the debtor is then not legally out of custody. In this case the defendant with his sureties confessed a judgment for fifty dollars to the state to be discharged on the payment of the fine and costs, and therefore he did not escape but was discharged by the sheriff. In thus arranging the matter there was conformity to a practice which is very common on the circuits and is commended by humanity to the debtor, and by the fact that in many instances it is the only mode of securing the payment of the money. It has been expressly decided in this court that a party committed for fine and costs may confess a judgment to the state for the security thereof, as well as to an individual, and that the solicitor representing the state has power in the exercise of an honest discretion to secure the money in that way. *State* v. *Love*, 1 Ire., 264.

Now in this case the record accompanying the judge's

statement contains the judgment of the court, and it is therein expressed in so many words that the defendant is ordered into custody "*until the fine and costs are secured,*" and thus it would seem that the imprisonment of defendant was expected and designed to be terminated by the usual security of a confession of judgment with sureties, and that his discharge consequent thereon was with the consent of the solicitor and with the express sanction of the court.

The discharge of the defendant under the circumstances above recited, operated as we think as a satisfaction of the original judgment as effectually as a discharge of a debtor in a civil suit with the consent of the creditor would extinguish the judgment in that case. And we feel fortified in this conclusion by the ruling of this court in the case of *State* v. *Simpson*, 1 Jones, 80. In that case the party convicted was ordered into custody and he was permitted to go at large by the sheriff *without the sanction or consent of the solicitor*, and he was brought up and again ordered into custody, and the court decided it was admissible to order him into custody, and upon the ground that what was done was without the consent of the solicitor, and from the remarks of the judge delivering the opinion of the court, it is clear that if the discharge had been with the solicitor's consent, it would have been held a satisfaction of the orignal judgment in accordance with the rule in civil actions.

There is no error in the refusal of the judge to order the defendant into custody, and this will be certified that the court below may proceed in conformity to this opinion.

PER CURIAM. No error.

STATE v. WHITSON WALLER and MALINDA HOIFER.

Fornication and Adultery—Evidence.

On a trial for fornication and adultery the evidence was,—that the male defendant, an orphan and a cripple, ten years old, went to live at one H's. where the female defendant resided; she assisted in caring for him, and at H's. death, both defendants removed to another place and have since lived together in a house in which there were three beds; they are aged, the male 23, the female 50 years; a witness testified he went there one morning at 4 o'clock and saw the female in one bed, the other bed in the room not tumbled, and the male was up and dressed, but witness did not know where he staid that night; *Held*, not sufficient to warrant a verdict of guilty.

State v. *Patterson*, 78 N. C., 470, cited and approved.)

INDICTMENT for Fornication and Adultery tried at Fall Term, 1878, of CATAWBA Superior Court, before *Gudger, J.*

The facts appear in the opinion. The defendants requested the court to charge the jury that there was no evidence of any criminal intercourse, which was refused; but His Honor told the jury there was some evidence and that they must determine from the circumstances whether there was enough to satisfy them beyond a reasonable doubt of defendants' guilt. Verdict of guilty, judgment, appeal by defendants. *Poteet's case*, 8 Ire., 23, was relied on for the state in this court.

Attorney General, for the state.

Messrs. M. L. McCorkle and *W. G. Burkhead*, for the defendants.

DILLARD, J. In a recent decision of this court the rule is laid down that if "there is no evidence, or if the evidence is so slight as not reasonably to warrant the inference of the defendant's guilt, or furnish more than materials for a mere

suspicion, it is error to leave the issue to be passed on by the jury, and they should be directed to acquit." *State* v. *Patterson*, 78 N. C., 470.

It is to be collected from the statement made up in the court below for our consideration, that the defendant Waller, an orphan and a cripple, at ten years of age, went to live at one Hoke's, at whose house the defendant, Malinda Hoifer, resided, and she assisted in taking care of and raising him; and at Hoke's death both of the defendants left there and went to live together and have ever since lived together at another place. The defendants are now aged, Waller about twenty-three and Malinda about fifty. They have in their house sometimes two beds and sometimes three, and on one occasion a witness for the state went to the defendants' house about four o'clock in the morning and found the female defendant in one bed, and the other bed in the room not tumbled, and Waller was up and dressed and had a fire built, but witness did not know where he had staid that night.

The facts found are not inconsistent with the entire innocence of the parties. It was not shown that there was no other room in the house than the one in which the state's witness saw the parties at four o'clock in the morning. And the defendants having as it is stated sometimes two beds and sometimes three, and the witness seeing but the one in which the female defendant was lying, and another in the same room not tumbled, it is reasonable to suppose that the defendant, Waller, had lodged the night spoken of by the witness in another room of the house, and on that third bed which he did not see.

The law presumed these parties innocent until the contrary was proved, and the evidence adduced in our opinion was so slight as to give rise to a mere suspicion or possibility of guilt, and not reasonably sufficient to warrant an inference of guilt and the court in the language of the rule an-

nounced in *Patterson's* case should have charged as requested by the defendants and directed the jury to acquit.

Error. Judgment reversed and *venire de novo*.

STATE v. EMANUEL LEAK.

Forgery—Judge's Charge—General Verdict.

1. Where there are three counts in an indictment, it is not error in the court to tell the jury to disregard two of them and consider only the third; and a general verdict of guilty under such instruction will be applied to the third count.
2. On the trial of an indictment for forgery containing a general averment of an intent to defraud, it is not necessary that the verdict should specify the person intended to be defrauded. (Bat. Rev., ch. 33, § 67.)
3. An indictment for forging an order for delivery of goods under Bat. Rev., ch. 32, § 58, which fails to allege that it was drawn by one having the power to dispose of the goods upon a person under obligation to obey, is defective. But in such case a conviction will be sustained for the offence at common law.

(*State* v. *Long*, 7 Jones, 24; *Walker's case*, Term. Rep., 229; *Upchurch's*, 9 Ire., 454; *Cook's*. Phil., 535; *State* v. *Lamb*, 65 N. C., 419; *State* v. *Thorn*, 66 N. C., 644, cited and approved.)

INDICTMENT for Forgery tried at Fall Term, 1878, of RICHMOND Superior Court, before *Buxton, J.*

The defendant is charged with the crime of forgery in an indictment containing three counts, in each of which the alleged forged instrument is described in these words: "May 4th, 1878. Everett & Co.—Let this boy have $2.65 worth of goods." Signed—"Joseph Flowers." The several counts differ only in the following particulars,—the first count charges an intent to defraud the said Joseph Flowers; the second, an intent to defraud William J. Everett and others,

and avers that they were under obligation to fill orders drawn by the said Joseph Flowers; and the third, an intent to defraud generally.

On the trial the following facts were given in evidence: The proper firm name of the partnership of which William J. Everett was a member, is Leak, Everett & Co. About four years before the forged order was presented, Everett, the head of the firm, on its behalf agreed with Flowers that his orders for goods should be filled, and they had been since that time uniformly honored. One-fourth of the orders drawn by Flowers were directed to Everett personally, or to Everett & Co., and all were recognized and complied with by the firm. Orders were frequently drawn by other persons, addressed sometimes to Everett, Leak & Co., and at other times to Everett, Ledbetter & Co., neither of which is the proper partnership name, and were accepted and taken up by Leak, Everett & Co. The false making and forging the written instrument, set out in the indictment, by the defendant was not controverted. Several instructions were asked for the defendant:—

1. That if it be not necessary to specify in the indictment the names of the persons intended to be defrauded, it must be shown to the jury on the trial who they are.

2. That there is no evidence of an intent to defraud any person except Joseph Flowers, W. J. Everett, or Leak, Everett & Co.; nor of any legal obligation resting on the two last named parties to pay the order.

3. That the order was not specified in the statute and there was no such partnership as that to which it was directed.

4. That in order to convict, the indictment must allege and the evidence show a right in Flowers to draw, and an obligation on the firm to pay the order.

The court among other instructions not complained of charged the jury that they might disregard the first and

second counts, and consider only the third; and that while there is no evidence of an intent to defraud any person except Flowers, Everett, or Everett & Co., it was not necessary to discriminate among them; and if the jury were satisfied the intent was to defraud any of them, it was sufficient. The jury found the defendant guilty, as we understand the case, upon the third count, and from the judgment thereon he appealed. See *State* v. *Long*, 7 Jones, 24.

Attorney General, for the state.
Mr. J. D. Shaw, for the defendant.

SMITH, C. J. (After stating the case.) The charge in substance is, that if the intent to defraud either of the parties named was satisfactorily proved to the jury, they were warranted in finding against the defendant on the last count under the general allegation to defraud. In this we see no error. The form of this count is authorized by the express words of the statute, and it is sufficient at the trial to show any person who could be defrauded and against whom the intent to defraud is directed, in proof of the general averment of an intent to defraud. But it is neither necessary nor proper that the verdict should specify the person intended to be defrauded. The intent is often legally ascertained from the act itself, and it is quite apparent the fraud would have been consummated, had the defendant's attempt been successful upon those whose property had been taken from them through the instrumentality and use of the forged order; and against them therefore must the fraudulent intent have been directed.

We think the exception founded upon the misdescription of the proper firm name of the persons to whom the order is directed, entirely untenable. The firm of Leak, Everett & Co., constituted of W. J. Everett and others, recognized and acted upon orders drawn by Flowers, and thus directed, and he after-

wards paid them. This concurrent understanding of both parties to the transaction gives legal validity to the form of the order.

But the indictment cannot be sustained for forgery under the statute (Bat. Rev. ch. 32, § 58) as construed by the adjudications in this state. The words "order for the delivery of goods" used in the enumeration of those written instruments the false making of which is in the act declared to be forgery, are held to include such orders only as are drawn *by a person having a disposing power over the goods upon a person under obligation to obey.* The instrument described in the indictment is rather in the nature of an application to purchase goods on credit, and the contract of sale is consummated by delivering to the boy. To bring it within the statute, there must be averments of such disposing power in one, and corresponding duty to deliver on the other, and proof to support them. These averments are not contained in the count on which the defendant was convicted. *State* v. *Lamb*, 65 N. C., 419; *State* v. *Thorn*, 66 N. C., 644.

But the conviction may be sustained for the offence at common law, as is held in *Lamb's case, supra.* There is error in the judgment below. This will be certified to the end that judgment may be rendered upon the verdict of guilty on the third count in the indictment as for an offence at common law. *State* v. *Walker*, Term. Rep., 229; *State* v. *Upchurch*, 9 Ire., 454; *State* v. *Cook*, Phil., 535.

PER CURIAM. Order accordingly.

STATE v. BENJAMIN LANE.

Forgery—Indictment—Sufficiency of Evidence.

In an indictment for forgery, the defendant was charged with the forgery of the following order—"Dulks & Helker: You will please pay to the boy $3.00 in merchandise and oblige, J. B. Runkins." On the trial it was proved that the true name of the alleged drawer was J. B. Rankin and of the drawee firm Helker and Duts, that defendant could not write, and that he had obtained merchandise from Helker and Duts on the faith of the forged order; *Held*,

(1) That the indictment charges an offence at common law.

(2) That the variations in the spelling of the names of the drawer and drawees fall within the principle of *idem sonans*, and the reversed order in which the names of the drawee firm are put is not a material and fatal variance.

(3) That the possession of the forged order and his obtaining merchandise thereon, constituted complete proof that the defendant had either forged or assented to the forgery of the instrument; and the fact that he could not write did not rebut the legal presumption of his guilt.

(*State* v. *Britt*, 3 Dev., 122; *State* v. *Morgan*, 2 Dev. & Bat., 348; *State* v. *Patterson*, 2 Ire., 346, cited and approved.)

INDICTMENT for Forgery tried at Fall Term, 1878, of MECKLENBURG Superior Court, before *Schenck, J.*

The facts appear in the opinion. Verdict of guilty, judgment, appeal by defendant. See *State* v. *Leak*, *ante*, 403.

Attorney General, for the state.

No counsel in this court for the defendant.

SMITH, C. J. The indictment charges that the defendant unlawfully, wilfully, of his own head and imagination, did willingly and falsely forge and make, and did willingly and falsely cause to be made and forged, a written order in the following words: "Dulks & Helker—You will please to

pay to the boy $3.00 in merchandise, and oblige—J. B. Runkins," with the other usual and necessary averments.

At the trial "J. B. Runkins" testified that his proper name was J. B. Rankin and not J. B. Runkins, and that the signature to the order was a forgery.

It was also shown that the partnership firm upon whom the order was drawn and by whom it was recognized and filled was Helker & Duts.

It was in evidence that the defendant called at the store of Helker & Duts and asked if "Col. Runkins had left an order for him," and being told that he had not, the prisoner said, "I will go and get an order from Col. Runkins." After a short absence he returned with the order, presented it, and received goods of the value of three dollars in payment. It was proved that the defendant could not write.

The court charged the jury that if from the evidence they believed the defendant caused the instrument to be written and forged and obtained goods by means of it, he would be guilty.

1. After verdict the defendant's counsel moved the court for a *venire de novo* because he was shown to be unable to write, which was refused.

2. For an arrest of judgment for the reason that the verdict was unauthorized by the evidence, and was void for uncertainty, which was also denied.

The form of the indictment charges an offence at common law as we have decided at this term in *State* v. *Leak*, *ante*, 403.

The evidence fully warranted the finding of the jury.

In *State* v. *Britt*, 3 Dev., 122, RUFFIN, J., says: "That the order was not in the hand-writing of the defendant did not rebut the legal presumption of his guilt. Being in possession of the forged order, drawn in his own favor, were facts constituting *complete proof* that either by himself or by false conspiracy with others, he forged or assented to the forgery of the instrument; that he either did the act or *caused it to be*

done until he showed the actual perpetrator and that he himself was not privy." To the same effect is *State* v. *Morgan*, 2 Dev. & Bat., 348. It is wholly immaterial whether the defendant himself forged the order or procured and caused it to be done. In either case his guilt is the same.

The variation from the true in the spelling of the forged name is not fatal to the prosecution. It falls within the principle *idem sonans*, and it is quite manifest from the defendant's own manner of pronouncing the name, who is pointed out and intended as the maker of the instrument.

The same answer may be given to the objection based upon the misdescription of the names of the drawee firm, and of its constituent members.

The difference is slight and creates no uncertainty as to who were meant. The reversed order in which their names are called, as constituting the firm, while the name of each within the rule is correctly given, is not a substantial and fatal variance. The defendant presented the order to the firm, the firm answered to the name, and furnished the goods, and this mutual recognition sufficiently identifies the parties mentioned in the indictment. *State* v. *Patterson*, 2 Ire., 346.

There is no error in the rulings of the court to which the defendant excepts. The forgery charged in the indictment is not within the statute, Bat. Rev., ch. 32 § 58, as we have already determined in a similar case, but an offence at common law, the punishment of which was fine, imprisonment and pillory, 4 Black. Com., 247, for the latter of which a substitue is provided in same chapter, § 29.

This will be certified to the end that judgment may be pronounced on the verdict according to law.

PER CURIAM. No error.

STATE v. A. A. SMITH and another.

Incompetent Juror.

1. Upon motion made in apt time, an indictment will be quashed where one of the grand jury who found the bill was a party to an action pending and at issue in the superior court. Bat. Rev., ch. 17, § 229 (g).
2. Such juror is incompetent, and the defendant in a criminal action is not required to show affirmatively that the juror was present and participated in the deliberations of the grand jury when the bill was found.

(*State* v. *Griffice*, 74 N. C., 316; *Haywood's case*, 73 N. C., 437; *Liles'*, 77 N. C., 496, cited and approved.)

INDICTMENT for an Affray tried at Fall Term, 1878, of YADKIN Superior Court, before *Graves, J.*

The facts necessary to an understanding of the case are embodied in the opinion of this court. Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the state.

No counsel for the defendant.

DILLARD, J. The defendant had the right before he was put to answer a charge of the state against him, to require that the accusation should be preferred by a bill of indictment found by a grand jury composed of men qualified as prescribed by law, and he was at liberty to avail himself of any want of qualification in the grand jury, in whole or part, when called on to plead. This is settled by the decisions of this court. *State* v. *Griffice*, 74 N. C., 316, and *State* v. *Haywood*, 73 N. C., 437.

When called on to make his defence the defendant pleaded in abatement of the bill, that Wm. Reaves, one of the grand jury who found the bill, had a civil suit at issue in the court at the term at which the bill was found, and on the trial by

the court of the issue joined on the plea in abatement (a trial by jury having been waived) the fact alleged as a disqualification was found to be true, as the case of appeal states, and thereupon the defendant was entitled to judgment abating the bill. But His Honor held that the having a suit at issue in the court did not amount to a disqualification of the juror, unless the defendant showed, as he had not done, the presence and participation of the juror in the deliberations of the jury when the bill against him was acted on. The existence of a suit at issue to which the juror is a party at the time he is drawn as such, renders the juror incompetent and makes abatable any bills of indictment that may be found by the body of which he is a member if objection be taken before plea of traverse to the bill. The statute, Bat. Rev. ch. 17, § 229, (g) is absolute and unconditional, and the disqualification created thereby depends on the status of the juror in this respect, and that only; and to take advantage of such incompetency, it is incumbent on the party accused to show that fact by proof, and he is not required to show affirmatively that the juror was present and participated in the deliberations of the jury on the bill against him, as that is presumed to be true. *State* v. *Liles*, 77 N. C., 496.

We hold that the juror, Reaves, upon the facts found by His Honor was disqualified to be of the grand jury at the term of the court when the bill against the defendant was found, and that His Honor on the plea of the defendant should have pronounced judgment abating the bill.

There is error. Judgment of the court below is reversed, and this will be certified that judgment may be entered in accordance with this opinion.

Error. Reversed.

STATE v. H. A. DAVIS and others.

Juror—Challenge after Verdict.

1. On a trial for burglary the prisoner offered to show upon information received since the verdict of guilty that one of the jurors who tried the cause was an atheist, and the court refused; *Held* not to be error.
2. The challenge *propter defectum* should be made before the juror is sworn,—otherwise the prisoner waives his right of challenge.
3. Where the ground of objection to a juror existed at the time he was sworn, but was not discovered until after verdict, the court may in its discretion allow the challenge and grant a new trial. Its refusal to do so is not reviewable.

(*State* v. *Seaborn*, 4 Dev., 305; *Perkin's case*, 66 N. C., 126; *Lamon's*, 3 Hawks., 175; *Griffice's*, 74 N. C., 316; *Patrick's*, 3 Jones, 443; *Crawford's*, 2 Hay., 485, cited and approved.)

INDICTMENT for Burglary tried at Fall Term, 1878, of ORANGE Superior Court, before *Kerr, J.*

The defendants, Henry A. Davis, Henry F. Andrews and Lewis Carlton, were tried and convicted of burglary. The statement of the case shows that after their conviction, no exceptions having been taken by them during the progress of the trial, the court being about to pronounce its judgment inquired of them if they or either of them had anything to say why the sentence of the law should not be pronounced upon them, and the defendants' counsel replied that since the trial and verdict he had been informed that one of the jurors who sat on the trial disbelieved in the existence of Almighty God, and asked His Honor to allow him to introduce proof upon that point with the view of laying the foundation for a motion for a new trial. The motion was refused and the judgment of the court pronounced. Appeal by defendants.

Attorney General, for the state.
No counsel in this court for the defendants.

ASHE, J. (After stating the case.) Have the defendants been injured or deprived of any legal rights they possessed by the refusal of the court to grant their motion? We think not. If their motion had been allowed and they had proved that the juror referred to was an atheist, and that fact had only come to their knowledge after the trial, the court might still have refused a new trial without committing an error. Their objection to the juror comes too late. It is well settled by English authorities sanctioned by the uniform practice of centuries and by numerous decisions in this state, that no juror can be challenged by the defendant without consent after he has been sworn, unless it be for some cause which has happened since he was sworn. The challenge *propter defectum* should be made as the juror is brought to the book to be sworn and before he is sworn; if not then made the defendant waives his right of challenge. *State* v. *Seaborn*, 4 Dev., 305; *State* v. *Perkins*, 66 N. C., 126; *State* v. *Lamon*, 3 Hawks, 175; *State* v. *Griffice*, 74 N. C., 316; *State* v. *Patrick*, 3 Jones, 443; 1 Whar. Cr. L., 472; Joy on Jurors, § 10; Hawkins P. C., ch. 43, § 1; Hale P. C., 274. And in conformity to this rule of practice is the ancient formula used by clerks both in England and in this country in their address to prisoners before the jurors are drawn—"those men that you shall have called and personally appear are to pass between our sovereign (or the state) and you upon your trial of life and death; if therefore you will challenge them or any of them, your time is to speak to them as they *come to the book to be sworn and before they are sworn.*"

There is one point in this connection upon which there are few authorities, but those we have found are in harmony with the principle above stated:—It is where the ground of

objection to the juror existed at the time of his being sworn but not discovered, as in our case, until after verdict. In *State* v. *Crawford*, 2 Hay., 485, a new trial was moved because one of the jurors was not a freeholder, and this not known to defendant until after the trial, but TAYLOR, J., refused the motion. *McClure* v. *State*, 1 Yerger, (Tenn.), 206, is almost identical in the facts with our case. There, after the jury had rendered their verdict in the court below, the prisoner's counsel moved the court for a new trial upon the ground that one of the traverse jury was an atheist, and that fact was unknown to the prisoner until after the jury were sworn. The motion was disallowed, because not made before the juror was sworn, and CATRON, C. J., in the opinion says: "It is said the want of knowledge is an exception to the general rule. This is a mistake. The case of *Watson* in Yelverton was this very case, where the exception was discovered after the juror was sworn and the court declared it within the general rule."

We think the principles deducible from all the authorities above cited, are, that where the challenge is to the poll, made for good cause, in apt time—that is before the juror is sworn—it is strictly and technically a ground for a *venire de novo;* if made after the juror is sworn the court may in its *discretion* allow the challenge; but its refusal to do so, is no ground for a *venire de novo,* because the prisoner has lost his legal right by not making his objection at the proper time. And the same principle applies if the objection existed at the time the juror was sworn, but not discovered until afterwards; in that case the refusal by the court to grant a *venire de novo* or new trial which in effect are the same, would not be error, and the only redress then left the prisoner is an appeal to the sound discretion of the court before whom the case was tried for a new trial, and if refused, he has no right of appeal.

There is no error. This will be certified to the court below that further proceedings be there had according to law.

PER CURIAM. No error.

STATE v. ROBERT JONES.

Juror Challenging—Evidence—Indictment.

1. A juror was passed to the prisoner who challenged him for cause, and on *voir dire* he stated he had formed and expressed the opinion that the prisoner was not guilty, and the court then allowed the challenge of the state and directed the juror to stand aside; *Held* not to be error.
2. Declarations of one who had made threats against the deceased on the night of the homicide are hearsay and not admissible in evidence.
3. A defect in an indictment in stating the time imperfectly, where it is not of the essence of the offence, is cured by statute. Bat. Rev., ch. 33, § 66.

(*State* v. *Adair*, 66 N. C., 298; *State* v. *Duncan*, 6 Ire., 236; *State* v. *May*, 4 Dev., 328, cited and approved.)

INDICTMENT for Murder tried at Fall Term, 1878, of EDGECOMBE Superior Court, before *Seymour, J.*

The prisoner was charged with killing one Rudolph Eaton on the 25th of December, 1877, and the exceptions taken on the trial were as follows:—

1. A juror was called and passed by the state to the prisoner without challenge. He was challenged by the prisoner for cause and on being asked by prisoner's counsel if he had formed and expressed the opinion that the prisoner at the bar was guilty, he answered that he had,—that the prisoner was not guilty. The state then challenged him, and the court held that he was not impartial, and directed him to stand aside.

2. The prisoner offered to prove that about 11 o'clock on the night of the 25th of December, one Freeman got a pistol from one Gordon, saying deceased had shivered his arm, and he was going to hunt him up, and that Freeman absented himself thereafter and did not return until after prisoner was convicted of the murder of deceased. The state objected and the evidence was excluded.

3. A motion in arrest was made, for that, the bill charged that deceased died on the 26th of December, 1878, instead of 1877. Motion overruled. Verdict of guilty, judgment, appeal by prisoner. (See same case, 79 N. C., 630.)

Attorney General, for the state.

No counsel in this court for prisoner.

ASHE, J. The first exception taken was to the ruling of His Honor in allowing a juror to be challenged by the state after he had been passed to the prisoner, and while he was under examination by the prisoner upon his *voir dire* as to the cause of challenge. We are of opinion there was no error in this ruling. The juror stated that he had formed and expressed the opinion that the prisoner was not guilty. He was therefore not an impartial juror, and without a challenge by the state, it was the right and duty of the court to stand aside such juror at any time before the jury were impannelled and charged with the prisoner. *State* v. *Boon*, *post* —, and authorities there cited; *State* v. *Adair*, 66 N. C., 298; *State* v. *Ward*, 39 Ves. 225.

2. His Honor refused to admit testimony that one Freeman about eleven o'clock on the night the murder was committed got a pistol from one Gordon, saying deceased had shivered his arm and he was going to hunt him up, and that Freeman absented himself thereafter and did not return until after prisoner was convicted of the murder. The admission of this testimony was properly refused. It was

but hearsay and did not tend to disprove the guilt of the prisoner. *State* v. *Duncan*, 6 Ire., 236; *State* v. *May*, 4 Dev., 328.

3. The prisoner moved in arrest of judgment because in one of the counts of the indictment it is charged that the deceased died on the 26th of December, 1878, instead of 1877. This defect is expressly cured by the act of 1811. Bat. Rev., ch. 33, § 66. There is no error. Let this be certified to the court below that further proceedings may be had agreeably to this decision and the laws of the state.

PER CURIAM. No error.

STATE v. SIDNEY MATTHEWS and FRANK HUMPHREYS

Juror Challenging—Evidence—Practice.

1. The usual and proper question by which one offered as a juror on a trial for murder is examined on his *voir dire* as to his bias against the defence, "have you formed and expressed the opinion that the prisoner at the bar is guilty?" refers to every grade of unlawful homicide, and obviates the necessity of specially interrogating the juror as to whether or not he has formed and expressed the opinion that the prisoner is "guilty of either murder or manslaughter." Especially is this so when the ordinary formula is explained by the judge, in the presence of the juror offered, as including manslaughter.

2. If there be *any* evidence tending to prove a controverted proposition, and reasonably sufficient to establish it, such evidence should be submitted to the jury.

3. In support of an allegation by the state that one of two prisoners on trial for murder killed the deceased in pursuance of a common design between him and the other prisoner, it was shown that some two or three months before the homicide, the prisoners, M and H, referred to deceased as "a damned rascal;" that on the day of the homicide the prisoner H had a quarrel with deceased in the presence of M; that after said quarrel, and on the same day, H declared in the presence of M that if deceased would fight with him, he would kill him; that some

hours later, deceased, on his way home from the scene of the quarrel, stopped on the road in front of prisoner H's house and engaged in a contention with another party; that thereupon prisoners came out from the house to the road, and H at once charged deceased with having sworn to a lie against him, and called upon M to "step up" to deceased and prove it; that M did "step up" as directed, whereupon deceased knocked him down upon his knees, M crying out "boys don't let him kill me!" that H then drew a pistol and said, "take care. I'll shoot him," about which time M drew a knife and from his recumbent position, gave deceased a fatal stab; *Held*, that it was proper to submit to the jury the foregoing facts as evidence of the common design alleged, and of express malice on the part of both prisoners.

4. When the solicitor for the state, in the course of his argument, makes an improper remark of so brief a character that it goes to the jury before the court has time to interrupt him, it is sufficient that the judge reprobates the impropriety when he comes to deliver his charge.

(*State* v. *Benton*, 2 Dev. & Bat., 196; *Patterson's case*, 78 N. C., 470; *Williams'*, 2 Jones, 194; *Simpson's*, 6 Jones, 21, cited and approved.

INDICTMENT for Murder removed from Yadkin and tried at Fall Term, 1878, of SURRY Superior Court, before *Graves, J.*

The prisoners were charged with killing one Costin D. Butner and were found guilty of manslaughter. Judgment and appeal. See same case, 78 N. C., 523. The case is sufficiently stated by Mr. Justice DILLARD in delivering the opinion.

Attorney General, for the state.
Messrs. Watson & Glenn, for the prisoners.

DILLARD, J. The prisoners were tried and convicted of manslaughter at fall term, 1878, of Surry superior court and from the judgment pronounced, an appeal is taken to this court, for alleged irregularity in the formation of the jury which tried them, and for error of the presiding judge in the instructions given, and in the refusal of other instructions requested. In order to understand the matters

complained of and to make the opinion of this court intelligible in relation thereto, it will be necessary to state briefly the material facts as they appear upon the record sent up to this court.

When the jury were being formed, a juror regularly drawn was challenged by the prisoners, and on being sworn to answer touching his competency to serve on the jury, the prisoners proposed to ask him,—whether he had formed and expressed the opinion that the prisoners at the bar or either of them was guilty of either murder or manslaughter; and on objection, His Honor ruled that the question should be put, have you formed and expressed the opinion that the prisoners at the bar or either of them is guilty, remarking at the time that the inquiry in that form covered both murder and manslaughter, and was in accordance with the usual practice in the courts, and to this ruling the prisoners excepted.

We think there was nothing in the ruling of His Honor of which the prisoners have just cause of complaint. It is the undoubted legal right of the parties to any action, whether civil or criminal, to have the matter in issue passed upon by a jury, competent and free from all just cause of challenge; and it is settled law that the forming and expressing of an opinion on the matter to be tried is ground of principal challenge and renders the juryman incompetent. The mode of proceeding, to test the fitness of a person to be of the jury in a capital case, is, according to our observation and experience, to examine him on his *voir dire* as to the formation and expression of an opinion upon the guilt or innocence of the accused, and to elicit that fact, the question is put, generally, if not universally, in the form required by the court below in this case. The manner of putting the preliminary question to the juror in this case is in the same words as was done upon the challenge of the prisoner in the case of *State* v. *Benton*, 2 Dev. & Bat., 196;

and Judge GASTON, in delivering the opinion of the court, speaks of the form in which the question was put, and says it was and had been the practice for many years to put the question in that manner in this state. It is true there is no statute prescribing the formula in which the inquiry as to the formation and expression of opinion is to be made, and it may be that the phraseology of the question as proposed by the prisoners was proper, but without entering into any inquiry whether the departure from the usual form was legally sufficient or not, we hold it was not error of which the prisoners can complain, that the judge disallowed their manner of putting the preliminary question, and required it to be put in the manner and form of universal and long use in capital trials in this state. The judge in requiring the preliminary question to be put in the approved form, explained that the inquiry therein made covered murder and manslaughter, and the jurors would understand that the formation and expression of opinion as to the guilt or innocence of the prisoners referred to both of the grades of homicide, and thus it is perfectly manifest that no injury did or could by possibility accrue to the prisoners.

The facts material to the understanding of the exceptions of the prisoners to the instructions of the judge given to the jury and to his refusal of others are briefly as follows: On the day of the homiside the prisoners, Costin Butner, the deceased, John Carter, and Kennedy Carter were all at Conrad's store, and in the evening the deceased, John Carter and Kennedy Carter went together homeward, and as they went the deceased and John Carter were in a quarrel, and when in the road opposite the house of the prisoner, Frank Humphreys, and about 100 yards distant, they stopped and continued to quarrel, and while they were quarreling, Frank Humphreys and Sidney Matthews came up from Humphreys' house to the road. In a short time Humphreys charged deceased with having sworn to lies against him

and said he could prove it, and called to Sidney Matthews, "come up here," and Matthews went up and Humphreys asked him, "didn't he say it?" and just about that time the deceased struck Matthews and he fell on his knees, and deceased kicked him and Matthews cried out, "boys, don't let him kill me." Thereupon Humphreys said, "take care, I'll shoot him," and put his hand behind him as if about to draw a pistol. While Matthews was down he struck up, but nothing was observed to be in his hand. In a few moments Butner staggered and fell and died.

One witness, Kennedy Carter, testified substantially to the facts above, except that he says after Matthews was knocked down, he ran in front of deceased and that they both had knives in their hands, but did not then use them, and in a moment or so Butner fell down and died.

It was in proof by Frank Matthews that the prisoners some two or three months before the homicide, at Conrad's store, in speaking of the deceased said he was a damned rascal. Andrew Swift proved that at Conrad's store on the day of the homicide the prisoner, Humphreys, in speaking of a matter to him said, "it was some of Butner's damned lies," and late in the evening he and Sidney Matthews came to him and Humphreys said he had cursed Butner and offered to fight him and called on Sidney Matthews to say if it was not so, and Matthews answered it was so. Humphreys repeated he had offered to fight him and if he did he would kill him.

Dr. Hunt testified that deceased was stabbed in the groin and the wound was given by some one prostrate or in a bending position. Matthews after the fight had bruises on his thigh. William Spellman heard the noise and went out and saw Humphreys and deceased standing confronting each other, heard Humphreys curse deceased and say he could whip him, heard a lick and saw a man on the ground; the man rose up and Butner fell and died.

It was in proof that Butner was a large, strong man and violent when drunk, and Matthews was a cripple and weakly and peaceable.

In his instructions to the jury, His Honor explained correctly what constitutes murder, and mitigates to manslaughter, or makes the killing excusable, as done *se defendendo;* and directed the jury that if Matthews, in law, was guilty of no offence at all then Humphreys would not be guilty, and that under no circumstances could Humphreys be found guilty of a greater offence than Matthews; and he gave the special instructions designated 1 and 2 requested by the prisoners, and to this extent no complaint or assignment of error is made.

The prisoners requested an instruction numbered 3 in the case of appeal, in the following words: "That in order to convict Matthews of murder, the jury must be satisfied that he killed the deceased from malice; that there is no evidence of express malice, and that the evidence taken together, if true, rebuts such malice as the law presumes from the killing, and that the jury should therefore only consider whether as to Matthews it is a case of manslaughter or excusable homicide." His Honor refused to direct the jury in the terms of the request, but instructed them that if they should find that the prisoners with a previously formed design went together to provoke the deceased into a fight with one or the other and then to kill him or do him some great bodily harm, and Matthews did inflict the fatal blow in pursuance of such design, then it would be murder in both; that if the common design was to provoke a fight without the intent to kill but only beat the deceased, and in pursuance thereof, both being present and aiding and encouraging each other, and in the heat of passion the deceased was slain, it would be manslaughter in both. If Humphreys had not entered into any understanding with Matthews beforehand, and happened to be present, and after Matthews got into

the fight gave him encourgement, and Matthews in the heat of passion killed the deceased without necessity to save himself from death, or great bodily harm, then Matthews would be guilty of manslaughter, but Humphreys would not, unless he intended to abet the killing." The prisoners except to the refusal of this instruction, and claim that the judge should have told the jury there was no evidence on which they were at liberty to consider of the question of murder, and thereby limited the consideration of the jury to the question of manslaughter and excusable homicide alone. When this case was heretofore in this court, and to be found reported in 78 N. C., 523, this court on the evidence then sent up declared there was no proof of malice, and that the malice presumed from the killing was rebutted, and there being no evidence of a previous concert and design on the part of the prisoners, it was held that the judge below should have withdrawn from the jury all consideration of the offence of murder. On the last trial, however, there was evidence that the prisoners some two months before the homicide in speaking of the deceased said he was a damned rascal, and on the day of the homicide were together at Conrad's store, and Humphreys then sought to draw the deceased into a fight, and late that evening he spoke of his having offered him a fight, and said in the presence of Matthews that he had cursed the deceased and proved it by Matthews, and declared that if he would fight him he would kill him. That evening the prisoners went together to Humphreys' house and when the deceased and John Carter were quarreling in the road near his house, the prisoners went up to the road and sat upon the fence, and in a short time got down about the same time and went to the deceased, and Humphreys then began by charging deceased with swearing lies against him and called up Matthews to prove it. Matthews went up and something

being then said the deceased struck Matthews and he fell to his knees and the homicide followed immediately.

It is settled that if there be evidence tending to prove a fact or matter in issue and reasonably sufficient to warrant an inference of the truth thereof, the court should submit it to the jury whose province it is to weigh and determine its sufficiency to establish the matter in dispute. *State* v. *Patterson*, 78 N. C., 470; *State* v. *Williams*, 2 Jones, 194. It is equally well settled, if the prisoners had formed the purpose of wrongfully drawing the deceased into a fight, and accordingly did so, and one of them without provocation slew him, it is murder. *State* v. *Simmons*, 6 Jones, 21. Now the formation of a common purpose of the kind in question is always secret and not often capable of proof otherwise than by circumstances, and therefore whilst the evidence of the alleged concert and common design may be slight we are not prepared to say that it was error to refuse the instruction asked by prisoners, and to submit it to the jury on the question of the offence of murder.

It was asked of the court below to charge the jury in request No. 4, that if Matthews stabbed deceased under circumstances of such apparent danger as to render him excusable on the ground of the right of self-defence they should acquit both, although they should believe that Humphreys himself was seeking a difficulty with the deceased; and it is assigned for error that the judge failed to give the instruction as requested. The court had already directed the jury that if Matthews was guilty of no offence, then Humphreys was guilty of no offence; and as to the guilt of Matthews, he had instructed the jury in the first direction, that if Matthews had reasonable ground to believe and did believe that the assault made on him by deceased was made with intent to kill or do him some great bodily harm, he was not bound to retreat, but might kill in his self-defence, and the subject matter of this 4th instruction asked for having been already

given, it is not error of which prisoners can complain that the court did not give it again.

It was asked of the court as set forth in request No. 5 to direct the jury that if the difficulty between Matthews and the deceased was sudden and unexpected to Matthews, that what was said by Humphreys in the previous quarrel between him and deceased should not be considered by them as affecting the guilt of either of the defendants; and it is assigned for error that the court failed to give any directions under the request. The record shows that His Honor in answer to this request instructed the jury that evidence of threats by one would be no evidence against the other, unless there had been a common design, but that evidence of what was said at the time of the killing was a part of the transaction, and if it was in the presence of both parties it would be evidence to be considered of as to both and to have such weight as the jury might think it entitled to. We think no error was committed in this instruction. His Honor had already submitted the evidence to the jury as to the existence of a common purpose and design in the prisoners to bring on a fight with the deceased and to kill him, and the consideration of previous threats was properly guarded and restricted by the court, and as to the consideration of the declarations of Humphreys at the time of the killing, however sudden and unexpected the difficulty to Matthews, the declarations then made by Humphreys were material to show his connection with the killing, and as explaining how Matthews became involved in the fight, and his conduct on the progress of the difficulty; and we hold there was no error of the court in refusing the direction asked and in directing as he did.

It is assigned as error that the solicitor in his argument urged to the jury that the offence of the prisoners was manslaughter at the least, and said in that connection that the punishment for that offence would not be imprisonment for

life in the penitentiary, but might not be greater than the punishment for stealing a pound of rags, and that His Honor did not interfere. It is difficult to see from the record how the judge could have interfered and prevented the utterance. The idea required but few words to express it, and such a statement would be generally complete before the judge could see its tendency or impropriety, and therefore it being communicated to the jury, all the judge could do in such case would be to warn the jury against such an argument in his direction at the close of the case. This His Honor did. He told the jury it was for them to respond to the question of guilt merely, and that the punishment to be annexed was a matter of law to be pronounced by the court; and it thus appears that the prisoners were as well protected against the allusion of the solicitor to the punishment for manslaughter as was possible after the utterance was made. Upon a careful consideration of the numerous exceptions of the prisoners, it is the opinion of the court that no error was committed by His Honor for which a new trial should be granted. Let this be certified that the judgment of the law be pronounced.

PER CURIAM. No error.

STATE v. MITCHELL BYERS.

Judge's Charge—Alibi—Evidence.

Where the judge charged that if the jury should find that defendant in alleging an *alibi* on the trial of an indictment was guilty of falsehood and misrepresentation as to his whereabouts, they might consider such falsehood as additional evidence of guilt; *Held* to be error.

Remarks of DILLARD, J., as to the proper charge in cases where an *alibi* is relied on as a defence.

(*State* v. *Matthews*, 78 N. C., 523, cited and approved.).

STATE *v.* BYERS.

INDICTMENT for an Assault tried at Fall Term, 1878, of GUILFORD Superior Court, before *Kerr, J.*

In support of the charge alleged against the defendant, the prosecutrix testified among other things that upon one occasion she was forced to change the route she was going from one place to another by reason of the conduct of defendant, in that, he pursued her, made indecent propositions to her, and frightened her so greatly that she took refuge in a neighbor's house. The defendant set up an *alibi*, and his exception to the charge of the court which constitutes the basis of the decision here, is stated by Mr. Justice DILLARD in delivering the opinion. There was a verdict of guilty, judgment, appeal by defendant.

Attorney General, for the state.
Messrs. Scott & Caldwell and *Batchelor*, for defendant.

DILLARD, J. Upon the trial the defendant introduced a number of witnesses to prove an *alibi*, and in relation thereto His Honor charged the jury, "if in view of all the evidence in the cause they should believe and find that the defendant in alleging an *alibi*, was guilty of falsehood and misrepresentation as to his whereabouts, such falsehood might be considered by them as an additional evidence of guilt," and upon this direction of the judge, an assignment of error is made.

The judge undertook to instruct the jury as to the law pertaining to the defence of *alibi*, and he should have told them what facts constituted the defence in law, and then explained the law to them arising on any and every phase of the facts under the evidence adduced, as they might find them to be. This should have been done, not only as a guide to the jury but as just on the issue between the state and the defendant. *State* v. *Matthews*, 78 N. C., 523. For example, after explaining the facts necessary to make out the *alibi*, the jury should have

been directed if they found such necessary facts to exist, to acquit; and if the proof of such facts was not such as to satisfy them beyond a reasonable doubt of the *alibi*, then they needed to be and should have been instructed whether they could or could not consider the legal presumption of innocence, in aid; and how in that state of facts as a matter of law, the jury should be guided in making up their verdict.

His Honor in his instruction to the jury inadvertently omitted to submit the case to their consideration in view of these states of fact arising out of the evidence, but instead thereof, began *in medias res*, and directed them if they should find defendant guilty of falsehood in his allegation of an *alibi*, then they might consider such falsehood additional evidence of his guilt.

This omission of the judge left the jury uninformed as to the aspects of the case looking to an acquittal of the defendant on the ground of the defence of *alibi*, and thereby it was not to be expected that the jury could respond on the plea of not guilty with any intelligent view of the defendant's rights under the law, or of their duty as jurors. It would not be surprising if their verdict by reason of such omission on the part of the court should have been against the defendant, when otherwise it might have been in his favor.

Superadd to this omission of His Honor the only instruction he gave on the subject of the *alibi*, which was, that if the jury found defendant guilty of falsehood in his allegation of *alibi*, such falsehood might be considered as additional evidence of guilt, and it will appear how easily the defendant may have been prejudiced before the jury. His Honor, it is manifest, gave great prominence to the idea that the defence set up was founded in falsehood, from the fact of omitting all allusion to the law of *alibi*, otherwise. It was, therefore, most natural for the jury to understand His Honor as intimating an opinion against the

weight of the evidence offered to establish the *alibi.* We think the jury may have been thus misled.

In our opinion there was error entitling the defendant to a new trial, and therefore it is not necessary that we should consider and decide the other points discussed in this court.

There is error. Let this be certified that a new trial may be had in the court below.

PER CURIAM. *Venire de novo.*

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*STATE v. B. A. ANDERSON.

Jurisdiction.

The superior court has jurisdiction of a misdemeanor for failing to list purchases under the revenue act of 1876-'77, ch. 156, § 12, unless it appears that a justice of the peace has assumed jurisdiction under the provisions of the act of 1868-'69, ch. 178; especially as the word "exclusive" is omitted in the amended constitution, Art. IV, § 27.

(*State* v. *Drake*, 64 N. C., 589; *State* v. *Buck*, 73 N. C., 630, cited, commented on and approved.)

INDICTMENT for a Misdemeanor tried at Fall Term, 1878, of COLUMBUS Superior Court, before *Buxton, J.*

When the case was called for trial the defendant's counsel moved to dismiss for want of jurisdiction. His Honor allowed the motion, and *McIver*, solicitor for the state, appealed.

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*Since the decision in this case the legislature passed an act defining the criminal jurisdiction of justices of the peace. Acts 1879, ch. 92. The ruling, therefore, may be of no practical importance.

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

ASHE, J. The defendant was indicted at spring term, 1878, of Columbus superior court for violating a provision contained in section 12, chapter 156 of the acts of 1876-'77, which is as follows: "Every person required by law to list his purchases shall on the first day of January and July, in each year, list on oath to the register of deeds the total amount of his purchases for the preceding months." The indictment was dismissed by the judge of the superior court and the solicitor appealed. The question presented for the consideration of this court is whether the superior court had jurisdiction of the case.

There is a further provision in the same section that "the register of deeds shall have power to require the merchant making his statement to submit his books for examination to him, and every merchant failing to render such list, or refusing on demand to submit his books for examination, shall be guilty of a misdemeanor and on conviction shall be fined not more than fifty dollars or imprisonment not more than thirty days." The punishment prescribed is within the constitutional limit to the jurisdiction of justices of the peace, and unquestionably gives them final jurisdiction; but this court has held that that did not divest the superior courts of their original jurisdiction. It was held under the constitution of 1868, which gave *exclusive* criminal jurisdiction to justices of the peace within their counties where the punishment did not exceed a fine of fifty dollars and one month's imprisonment, that the superior courts have jurisdiction of all offences except such as have been heard or are pending before a justice according to the terms of the act of 1868-'69, ch. 178. *State* v. *Drake*, 64 N. C., 589; *State* v. *Buck*, 73 N. C., 630. In this latter case READE, J., in delivering the opinion of the court, said: "The con-

stitution, Art. IV, § 33, gives to justices of the peace exclusive original jurisdiction when the punishment cannot exceed a fine of fifty dollars or imprisonment for one month. But this is to be under such regulations as the general assembly shall prescribe. The general assembly has prescribed regulations:—

1. That the complaint must not be by collusion and must be by the injured party.

2. It must be made within six months and in writing and under oath.

It has frequently been discussed whether when the legislature fixes the punishment for any given offence within the limits of a fifty dollar fine and one month imprisonment, it thereby becomes cognizable before a justice *to the exclusion* of the superior court, and we have held that it did not." However this may be, under the constitution of 1868, if the superior courts retained their jurisdiction under that constitution which purported to give exclusive jurisdiction to justices of the peace when the punishment could not exceed a fine of fifty dollars and imprisonment for one month, how much better reason for awarding to them jurisdiction in like cases under the amended constitution in which the term "exclusive" is omitted? Art. IV, § 27.

We are of the opinion that the superior court had jurisdiction inasmuch as it does not appear that the justice of the peace had assumed the jurisdiction by a compliance with the provisions of the act of 1868–'69, ch. 178, but more especially because the word "exclusive" is omitted in the amended constitution.

There is error. Judgment below is reversed. Let this be certified to the superior court of Columbus county that further proceedings may be had according to law.

PER CURIAM. Error.

*STATE v. THOMAS P. BOWMAN.

Judge's Charge—Jury—Evidence—Post Mortem Examination—Ridings of Judges.

1. It is not error in a judge, after giving an instruction asked by the prisoner on a trial for murder, that he was entitled to an acquittal unless the state proved him guilty beyond a reasonable doubt, to superadd thereto, that when a wilful killing was proved the law presumed malice and the burden of showing mitigating circumstances was thrown on the prisoner.
2. Nor is it error where the court refused to charge, that in case one of the jury had a doubt as to the guilt of the prisoner the other jurors should yield to him.
3. The prayer was, that every link in the chain of circumstantial evidence must be as satisfactorily proved as the main fact of the murder; and the judge in reply said, that in a case in which the jury are asked to convict on circumstantial evidence they must be fully satisfied of every link in the chain; *Held* to be a substantial compliance with the prayer.
4. The jury are the sole judges of the weight of testimony.
5. A juror who stated on his *voir dire* that he had conscientious scruples against capital punishment is incompetent.
6. Where declarations were offered as evidence on a trial for murder as having been made in prisoner's presence and not contradicted by him, *it was held* to be properly left to the jury to determine whether they were made in his hearing, whether he understood them, what his conduct was on the occasion, and to say what value should be attached to these circumstances as tending to prove the prisoner's guilt.
7. A *post mortem* examination of the body of a deceased person alleged to have been poisoned, and a chemical analysis of organs and tissues taken therefrom, may be had without the presence of the prisoner or his counsel.
8. The provision of the constitution that no judge shall hold the courts in the same district oftener than once in four years, has reference to the ridings of the nine districts under the new apportionment.

(*State* v. *Johnson*, 3 Jones, 266; *State* v. *Willis*, 63 N. C., 26; *State* v. *Perkins*, 3 Hawks, 377, cited and approved.)

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*Dillard, J., having been of counsel did not sit on the hearing of this case.

STATE *v.* BOWMAN.

INDICTMENT for Murder removed from Guilford and tried at Fall Term, 1878, of RANDOPH Superior Court, before *Kerr, J.*

The prisoner was charged with killing his wife by administering poison. The evidence in support of the charge was circumstantial, and only that part as was deemed material to the exceptions taken is incorporated in the statement of the case sent to this court; and that which is deemed sufficient to an understanding of the opinion is as follows: Martha Cole, a witness for the state, testified in the course of her examination that about two hours after the death of Mrs. Bowman, she went around the prisoner's dwelling towards the kitchen which was situated about twelve yards from the dwelling, and was about seventeen by fourteen feet in size, with a north door and a south door. The witness on going into the kitchen at the north door saw prisoner sitting on a bench at the east end of the kitchen, just twelve feet from the south door. The prisoner and deceased's little daughter, Eliza Jane Bowman, was sitting in the south door and a servant was putting on her shoes. Just as the witness went into the kitchen, having the instant before seen prisoner sitting on the bench as above stated, one of the women present said, "I'd like to know what Mrs. Bowman did say when she was dying;" and thereupon the little girl turned around, put both hands on the floor, looked up, and said, "I can tell you what she said. Mama told papa when she was dying that she was poisoned, and she got her dose in that drink of liquor he gave her this morning; and that was the last word mama said." The prisoner then came and took the child up in his arms, smiled, carried her off, and kept her with him in his immediate presence while the company remained at the house. The witness further stated that she knew the prisoner was in hearing when these declarations were made. The exception to this testimony was overruled, and in the charge to the jury in respect thereto, His Honor said "that

it was admissible, not as in itself of any weight against the prisoner, but as calculated, should the jury believe he heard and understood what his little daughter then said, to call forth from him some response in words, or some action, which response and which action are alone to go to the jury and to be considered by them in making up their verdict." The court further charged that it was for the jury to say, from all the evidence in the case, whether the declarations of the little girl were made in the hearing of the prisoner, and how far his action tended to prove his guilt.

Prof. Redd, an expert in chemistry, was introduced by the state and testified that he went to Reidsville on the 24th of July, 1877, on his way to disinter the body of the deceased, and to take therefrom the tissues and organs for chemical analysis; that he declined to proceed until the prisoner's counsel were notified; upon notice given, three gentlemen of the bar of counsel for prisoner went with the witness and saw the organs, &c., actually taken from the body of the deceased, and the means the witness used to preserve and transport them to the state university at Chapel Hill where the analysis was made; that he informed said counsel of his intention to make a chemical analysis of said organs, and would have admitted an expert or agent of the prisoner to be present, had the prisoner or his counsel requested it. When the witness was about to give the result of the analysis, the prisoner's counsel objected on the ground it had been made without notice to the prisoner or his counsel, and was therefore *ex parte* and inadmissible. The objection was overruled, and the witness stated that the analysis disclosed the presence of strychnia in the said organs and tissues.

The facts applicable to the other exceptions are stated in the opinion. Verdict of guilty, judgment, appeal by prisoner. See same case, 78 N. C., 509.

Attorney General and *Boyd & Reid*, for the state.
Messrs. Reid & Glenn, for the prisoner.

ASHE, J. The record and statement of the case are quite voluminous, but it is only necessary to notice so much thereof as is pertinent to the instructions prayed for and the exceptions taken by the prisoner.

First, as to the special instructions asked:—

1. "That the burden of proof was on the state, and that the state must prove the prisoner to be guilty to the satisfaction of the jury beyond a reasonable doubt, or else the prisoner was entitled to an acquittal." This was given, and His Honor committed no error in superadding thereto, "that when the act of killing a human being wilfully is fully proved, the law presumes the killing to have been done with malice aforethought, and the burden of proving mitigating and justifying circumstances is thrown on the party who claims the benefit of these circumstances. *State* v. *Johnson*, 3 Jones, 266; *State* v. *Willis*, 63 N. C., 26; Foster, 255.

2. "That the law requires them to be unanimous in their verdict, and in case one of the jury had doubts as to the guilt of the prisoner, it was the duty of the other jurors to yield their convictions and give the prisoner the benefit of the doubt existing in the mind of the juror. His Honor did not give this instruction, and there was no error in his refusal, for it is an extraordinary proposition that eleven jurors who are satisfied beyond a reasonable doubt of the guilt of a prisoner should yield their convictions to the *doubt*, the mere doubt of one of their number; or, in other words, that one juror who might have or profess to have a doubt should control his eleven fellows. If that were the law, it would be found difficult to convict of a capital offence.

3. "That every link in the chain of circumstantial evidence must be as satisfactorily proved to the jury as the

main fact of the murder itself." His Honor did not give the instruction in so many words, but the charge he did give was a substantial compliance with the prayer of prisoner, to-wit, "that in a case in which a jury are asked to convict on circumstantial evidence, they must be fully satisfied of every link in the chain of evidence upon which the state relies for conviction."

4. "That the testimony of Prof. Redd as to his *ex parte* analysis was entitled to but little weight." In response thereto, His Honor told the jury that they were the sole judges of the weight of testimony, and in this there was no error.

Second, as to the exceptions taken :—

1. In the formation of the jury: A juror was called who stated that he had conscientious scruples against capital punishment, and that it would hurt and do violence to his conscience to render a verdict of guilty, but if the evidence satisfied him beyond a reasonable doubt that the prisoner was guilty, he could bring in a verdict of guilty; yet it would hurt and do violence to his conscience. He was challenged for cause by the state, the challenge was allowed, and the prisoner excepted. We think there was no error in allowing the challenge, for the juror was clearly exceptionable. It is the object of the law and the duty of the court to see that the prisoner has a fair trial, and at the same time to guard the interest of the public; and to that end the jury impanneled to pass upon the issue between the prisoner and the state should be impartial and competent. A man who has conscientious scruples against capital punishment, no matter how much disposed to discharge his duty, would be an unsafe juror, because he would naturally be influenced by his prejudices and go into the jury box with such a bias in favor of the prisoner as would render him incompetent to do justice to the state. Therefore he has been held to be an im-

competent juror. *People* v. *Daman*, 13 Wend., 351; *Com.* v. *Fisher*, 17 Serg. & Rawle, 155.

2. The prisoner excepted to the admission of the declarations of Eliza Jane Bowman, the daughter of the prisoner, in reference to the "last words" of her mother, the deceased; They were clearly admissible for the purpose for which they were proved, and the remarks of His Honor in commenting upon this testimony before the jury were perfectly legitimate. They were told it was for them to determine whether the declaration was made in the hearing of the prisoner, whether he heard and understood the statement, and if so, what was his conduct on the occasion; did he immediately take up the child and bear her away in his arms and keep her constantly in his immediate presence while the company remained; and if they believed this testimony, it was for them alone to say what value was to be attached to these circumstances as tending to prove the prisoner's guilt. *State* v. *Perkins*, 3 Hawks, 377.

3. The prisoner objected to the testimony of Prof. Redd on the ground that there was no notice given to the prisoner or his counsel of the time of the disinterment of the remains of the deceased, nor of the analysis of the organs and tissues taken from her body to be subjected to the test to ascertain the presence of poison. The objection has no foundation, and if it had, the proof is that Prof. Redd was accompanied by at least one of the counsel for the prisoner, when the body was disintered; but we know of no law which gives the prisoner the right to be present in person or by counsel or agent, when the body is disintered, or when the organs and tissues are subjected to a chemical analysis.

4. The prisoner moved in arrest of judgment on the ground that under the constitution, Art. IV, § 11, it is provided that "no judge shall hold the courts in the same district oftener than once in four years," and that Judge *Kerr*, who presided in the court in which the prisoner was tried,

had held the courts in the district to which Randolph county was then and is now attached, during a period short of four years. Under the amended constitution the judicial districts of the state were reduced from twelve to nine, which caused a very considerable change in the formation of the districts. This new apportionment of the districts did not go into operation until after the first Thursday in August, 1878, and this provision of the constitution had reference only to the ridings under the new arrangement. Randolph county before the alteration of the districts was in the seventh, and is now in the fourth district, which is not identical in its component parts with what had been the seventh. There was no violation of the constitution. Judge *Kerr* had the right to hold the court in Randolph county in the fall of 1878, and the motion in arrest was properly disallowed.

Being fully sensible of the great stake the prisoner has in the result of our deliberations, we have given this case the most careful consideration and have been unable to discover that he has been prejudiced by anything which has occurred in the conduct of his trial. There is no error. Let this be certified to the superior court of Randolph county that further proceedings may be had according to the laws of the state.

PER CURIAM. No error.

STATE v. MARY PACKER.

Liquor Selling—Sufficiency of Indictment—Port Wine—Common Knowledge.

1. An indictment under the act of 1876-'77, ch. 38, for selling "intoxicating liquors" is sufficient without specifying the particular kind of liquor.
2. On the trial of such indictment it was proved that defendant sold port wine, but there was no evidence that it was intoxicating, and after a verdict of guilty the court refused a motion for a new trial; *Held*, not to be error. The fact of its intoxicating quality is a matter of common knowledge, and can be passed on by the jury without proof.

(*State* v. *Stanton*, 1 Ire., 424, cited and approved.)

INDICTMENT for a Misdemeanor tried at April Term, 1878, of NEW HANOVER Criminal Court, before *Meares, J.*

The facts are sufficiently stated in the opinion. There was a verdict of guilty, judgment, appeal by defendant.

Attorney General, for the state.
Messrs. A. T. & J. London, for the defendant.

DILLARD, J. This is a prosecution under an act of the general assembly passed at the session of 1876-'77, ch. 38, wherein it is enacted that it shall be unlawful for any person to sell spirituous or malt or other intoxicating liquors on Sunday, except on the prescription of a physician or for medical purposes. The indictment framed under this act charges that defendant on Sunday sold to one White intoxicating liquors, negativing the exceptions. On the trial it was proved by White that he purchased and paid for port wine. The jury returned a verdict of guilty, and thereupon the defendant moved in arrest of judgment because the indictment does not name the particular liquor alleged to

have been sold, and failing in this, she then moved for a new trial upon the ground that no testimony was adduced to prove that port wine was intoxicating, which motion being also denied, the defendant appealed.

It is sufficient as a general rule, in an indictment for an offence created by statute to describe the offence in the words of the statute, and there are but few exceptions. 1 Bish. Crim. Law, § 359, and *State* v. *Stanton*, 1 Ire., 424. The statute enumerates spirituous liquors and malt liquors, as instances merely of intoxicating liquors; and then in order to cover all other instances without naming them, was the more general expression, "intoxicating liquors;" and thereby in legal effect it is the same as if the statute had forbidden the sale of intoxicating liquors without other words. The indictment charging the offence as a selling of intoxicating liquors on Sunday is in a form to fit the proof of guilt as it might turn out to be, and was so designed by the legislature as we think and is held to be sufficient, unless there be something in the rules of law and practice in our state upon the subject of the requisites of indictments in such cases, which shall compel a different construction. In this state we have long had a law forbidding the sale of spirituous liquors, a species of intoxicating liquors, by the small measure without license. And the invariable practice has been to charge the violation in the words of the statute, and no decision can be found holding such description to be insufficient. It was always held competent to convict on proof of the illegal sale of any one of the liquors embraced within the scope of *spirituous liquors.*

So we think it was designed under the statute forbidding the sale of intoxicating liquors on Sunday, that a charge preferred in the bill of indictment in the words of the statute should be sufficient without naming any particular kind of liquors, and on the trial a conviction may be had on proof of rum, brandy, or indeed any liquor that will in-

toxicate, not sold on prescription of a physician or for medical purposes. Whatever may be the doubts of the sufficiency of the bill in this case on account of the generality of the charge, when viewed with reference to the requisites of indictments as treated of in the books on criminal law, the practice in this state with the sanction of the courts under the statute against the sale of spirituous liquors and the construction and rulings of other states on statutes, the same as the one under which this bill is found, or very similar to it, bring us to the conclusion that the bill is sufficient. If a bill charging the offence in the general words of the statute be held insufficient, and it is held that the state is bound to allege and prove in every instance the precise character of the articles sold in violation, then it would become utterly impracticable effectually to enforce any law restraining the sale of intoxicating liquors, by reason of the difficulty of proving the article sold to be the same as that charged, and the facility of proof by the accused of its being different in fact, or by adulteration and mixture.

In Massachusetts they have a statute very similar to ours, and under it bills of indictment were drawn charging the offence in the very words used in the bill against this defendant, and it was objected that the bill was insufficient for want of a specification of the particular liquor alleged to be sold, and the court say that the offence is sufficiently alleged under the description of an "*intoxicating liquor.*" *Com.* v. *Conant*, 6 Gray, 482; *Com.* v. *Odlin*, 23 Pick., 279. To the same effect is the construction in New Hampshire of a statute similar to ours. *State* v. *Blaidsell*, 33 N. H., 388. We hold therefore that the bill of indictment is sufficient and that the defendant's motion in arrest was properly overruled.

As to the motion for a new trial, because no proof was offered that port wine was an intoxicating liquor, the defendant in our opinion has no legal cause of complaint. It was of course a question of fact for the jury, and after proof

of the sale of the liquor and that it was port wine, the jury could rightfully as to matters of common knowledge and experience find without any testimony as to such matters. Now everybody who knows what port wine is, knows that is a liquor and also knows that it is intoxicating. Proof therefore that defendant sold port wine was proof upon which the jury could find the fact of its being intoxicating as a matter within their general knowledge, and the refusal of the court to grant the new trial was not error. Let this be certified to the court below that the judgment of the law may be pronounced.

PER CURIAM No error.

STATE v. FRED. REEL.

Indictment—Several Counts.

1. An indictment which contains several counts charging different felonies of the same grade and subject to the same punishment may be quashed on motion made in apt time, or the solicitor required to elect on which he will proceed.
2. But in such case it is not error to refuse to arrest judgment after conviction.

(*State* v. *Haney*, 2 Dev. & Bat., 390; *State* v. *Simons*, 70 N. C., 336, cited and approved.)

INDICTMENT for Larceny tried at Spring Term, 1878, of CRAVEN Superior Court, before *Kerr, J.*

The bill of indictment contained two counts, in one of which the defendant was charged with stealing an ox, and in the other one pound of beef. After the jury returned a general verdict of guilty, the defendant's counsel moved in

arrest of judgment. Motion overruled, judgment, appeal by defendant.

Attorney General, for the state.
Messrs. Green & Stevenson, for the defendant.

ASHE, J. The only question presented in this case for our consideration is whether the joinder of several distinct felonies in different counts in an indictment is a ground for arrest of judgment after a general verdict.

It is well settled that several counts which merely describe the same transaction in different ways can be made without objection, but upon the question whether several felonies can be charged in different counts of the same indictment, the authorities are in conflict. Archbold says they ought not to be joined. In some of the states, as in Massachusetts and Tennessee, it is held that it can be done, while in South Carolina and some other states such a joinder is held not to be good on a special demurrer. We have been unable to find any case in our reports where it has been directly decided. *Haney's case* approaches the nearest to it. There, the indictment contained two counts, but both relating to the same transaction, the one charging the defendant with stealing a negro, and the other with conveying him away by seduction, &c., and Judge GASTON, who delivered the opinion of the court, said: "It is no objection on a demurrer, and is certainly therefore not good in arrest of judgment, that several felonies are charged against a person in the same indictment, for on the face of an indictment every distinct count imports to be for a different offence. It is, however, in the discretion of the court to quash an indictment, or compel the prosecutor to elect on which count he will proceed, when the counts charge offences actually distinct and separate." And in the case of the *State* v. *Simons* where exception was taken to the indictment after ver-

dict, for duplicity, because it was charged in the same count that the property belonged to different persons, this court, PEARSON, C. J., delivering the opinion, refused to arrest the judgment. The current of authorities is, that it cannot be done when there are several counts charging different felonies where the degree of the offence and the punishment are the same. But Wharton in his work on Criminal Law goes even further, and holds that "after a general verdict of guilty it is no objection to an indictment on a motion in arrest, that offences of different grades and requiring different punishments, are charged in different counts." Vol. 1, § 418.

From all the authorities, uncertain and conflicting as many of them are, we think it is clearly deducible that when the indictment contains several counts charging different felonies of the same grade, and subject to the same punishment, lest the prisoner should be confounded in his defence, or prejudiced in his challenges to the jury, or the jury be distracted in their deliberations, the courts on motion of the prisoner in the exercise of their discretion will quash the indictment, or require the solicitor to elect on which count he will proceed, but when this is not done, it will be too late after verdict. It is no ground for the arrest of judgment. *State* v. *Haney*, 2 Dev. & Bat., 390; *State* v. *Simons*, 70 N. C., 326; Whar. Cr. L., §§ 416, 417, 418; Archbold Cr. L., 61; Bish. Cr. Pro., § 181; Bat. Rev., ch. 33, § 60.

There is no error. Let this be certified to the superior court of Craven county that further proceedings may be had according to law.

PER CURIAM. No error.

STATE v. HENDERSON ALFORD.

Indictment—Murder—Manslaughter—Homicide of Officer.

On the trial of an indictment for murder, it was in evidence that the prisoner had escaped from jail the day previous to the homicide, where he had been confined on a charge of larceny; that the deceased, an acting constable and deputy sheriff, went at night with a *posse* to arrest him and sat down in the edge of a path, near prisoner's house; that the prisoner came along the path and was commanded by deceased to "halt and give an account of yourself," when he fired and killed deceased; that it was a dark night, but the prisoner could have seen the sheriff's *posse*; *Held*, to be error in the court below to refuse to charge "that if deceased did not make known to prisoner and prisoner did not know he was an officer the offence was manslaughter."

INDICTMENT for Murder tried at August Term, 1878, of WAKE Criminal Court, before *Strong, J.*

The prisoner was charged with the murder of Thomas J. Passmore, a constable and deputy sheriff. He was arrested by deceased upon a warrant of a justice of the peace for larceny and committed to the jail of Wake county, where he was confined for three months, and then made his escape by assaulting the jailor and taking his pistol which he carried off with him. The sheriff immediately sent a message to the deceased informing him of said escape and instructing him to arrest the prisoner. T. R. Wilson, a witness for the state, testified that he lived in the neighborhood of the prisoner, and on the night of the 17th of September, 1876, the day after the escape, he received a message from the deceased and in consequence he went to the house of one Simon Mann and found there five other men, among whom was deceased. The deceased then explained to them that he wished them to aid him in arresting the prisoner. Thereupon they went to the prisoner's about three-quarters of a mile distant, and at eight or nine o'clock at night, and sat down in the edge

of a path near prisoner's house. The prisoner told his wife to take care of herself, he was going off and did not know when he would see her again. He came along the path in eight or ten feet of deceased, when deceased said "halt and give an account of yourself," and the prisoner immediately shot him and ran. The party were armed, but deceased had given them orders not to shoot prisoner, that he was not authorized to shoot him. Upon cross-examination he stated that prisoner's house was in the woods, not very thick, but some undergrowth; it was right smart dark at the time; there were some small clouds; the prisoner could have seen the sheriff's *posse*.

There were fourteen instructions prayed by prisoner's counsel, the seventh upon which the case turns being as follows: "If deceased did not make known to prisoner, and prisoner did not know that he was an officer, the offence is manslaughter." His Honor refused to charge as requested, but told the jury in substance, if they should find that deceased and his associates were seeking to arrest the prisoner in obedience to instructions, and prisoner shot deceased under the circumstances deposed to by the witness Wilson, the prisoner at the time having good reason to believe from all the circumstances that deceased was an officer engaged in arresting him on the charge aforesaid, he would be guilty of murder; but if he did not know or have good reason to believe he was an officer and attempting to arrest him, and believed that he was in danger of life or great bodily harm and fired the fatal shot to protect himself, he would not be guilty; and if the prisoner did not know or have good reason to believe that deceased was an officer engaged with his associates in attempting to arrest him, and being restrained of his liberty or having reasonable ground to believe that he would be immediately so restrained by deceased unless he was prevented, and shot him under the influence of passion

thereby excited, he would be guilty of manslaughter. Verdict of guilty of murder, judgment, appeal by prisoner.

Attorney General and *D. G. Fowle*, for the state.
Messrs. J. E. Bledsoe and *B. B. Lewis*, for the prisoner.

ASHE, J. The prisoner took several exceptions to the ruling of His Honor in regard to the formation of the jury and the admission of testimony, and prayed for numerous instructions to be given to the jury, but for the purposes of this appeal it is only necessary to notice the seventh in the series, which is as follows: "If deceased did not make known to prisoner, and prisoner did not know that he was an officer, the offence is manslaughter." The court refused to give this instruction, in which we think there was error.

The prisoner some months previous to the homicide had been committed to jail on a charge of larceny, and on the day preceding had escaped from prison, committing at the time the further crime of robbery by carrying off the pistol of the jailor. These facts were known to the deceased who was an acting constable and deputy sheriff in the county of Wake, whose right and duty it was to arrest the prisoner; and on the night after the prisoner's escape, he went with a *posse* to the prisoner's house, and they concealed themselves near by in the woods where there was some undergrowth. It was night, but whether the moon shone, or it was light enough to distinguish one's face or person does not appear. The prisoner left his house and went along a path leading by the place where the deceased and his party were concealed, and when he approached within eight or ten feet of them, the deceased commanded him to "halt and give an account of yourself," when the prisoner immediately fired upon the deceased and gave him the wound of which he died.

The deceased and several of his party had guns, and the witness, Wilson, thinks the prisoner could have seen them, though it was "right smart dark, and some small clouds." If the prisoner had known the deceased was an officer, or it had been shown that it was light enough to distinguish one man's face or person from another, or that the prisoner had been well acquainted with deceased and most probably would have recognized his voice, it might have materially changed the character of the case. But none of these circumstances were proved on the part of the state.

If it had been daylight, the deceased being an officer "*jurus et conus*," it would not have been necessary for him to have told his business, or to have indicated the character in which he had come. But being in the night time, for aught that appears too dark for him to recognize the deceased, it was the duty of the latter to have notified the prisoner of his purpose and official character. The law throws its protection around ministers of justice while in the discharge of their official duties, but they must perform them with due care and in compliance with its requirements; otherwise the law gives them no greater protection than is given to private individuals. And though a private person may arrest when a felony has been committed, yet unless he gives notification of his purpose to arrest for the crime, the slaying of him by the felon would be no more than manslaughter. 1 East, P. C., 314; 1 Whar. Cr. Law, § 1,040; Foster, 311.

If the officer attempting an arrest in cases of riots and affrays is known or generally acknowledged to be the officer he assumes to be, the law will presume the party killing him had due notice of his intent, especially if it be in the day time. In the night some notification is necessary, as commanding the peace, or using words of like import notifying his business. Foster, 310.

"In these cases," says Mr. East, "small matter amounts to

notification. It is sufficient if the peace be commanded, or the officer declares in any other manner with what intent he interferes, or if the officer be in his proper district and known or generally acknowledged to be the officer he assumes to be, or if in order to keep the peace he produces his staff of office or any other ensign of authority, the law will presume that the party killing had due notice of his intent, especially if it be in the *day time;* if in the *night* when such ensigns of authority cannot be distinguished, some further notification is necessary."

This doctrine seems directly applicable to the present case. It was in the night, dark and cloudy; the deceased and his party who were armed with guns could be seen by the prisoner, but it does not appear that there was light enough for him to distinguish the one from the other; and the deceased used no words that intimated his intent or official character. The prisoner may have supposed they had come to take his life.

Wharton, in his valuable work on criminal law, mentions the case of a man who was violently set on in the night time by a mob, and in self defence killed a person seizing him, which person was an officer seeking to arrest him, and it was held necessary to bring notice of this fact to the prisoner to deprive him of his plea of self defence; and also another case, where a bailiff rushed into a gentleman's bed chamber early in the morning without giving the slightest intimation of his business, and the gentleman not knowing him, in the impulse of the moment, wounded him with his sword and killed him, and it was held to be manslaughter. 2 Whar. Cr. Law, § 1,041, 2.

There is error. Let this be certified that a *venire de novo* may be awarded to the prisoner.

Error. *Venire de novo.*

STATE v. H. C. SECREST.

Indictment—Murder—Practice—Appeal—Competency of Witness—Expert.

1. On an indictment for murder brought by appeal to this court, an exception that the case contained in the record fails to disclose sufficient proof of the *corpus delicti* cannot be taken in this court, it not appearing that any such point was made on the trial below or any such instruction asked of the court.
2. When the competency of a witness is called in question, it is error to permit him to testify before the facts upon which the competency depends are determined by the court, and on appeal these facts must be set out in the record.
3. Where, on the trial of an indictment for murder, a witness was allowed to testify as an expert, without any preliminary examination of his opportunities for acquiring professional knowledge and skill, the defendant objecting; *Held* to be error. And in such case, it is not indispensable to entitle the defendant to the benefit of the objection in this court, that the ground of his objection to the personal competency of the witness should have been stated on the trial below.

(*Green* v. *Collins*, 6 Ire., 139; *State* v. *Parish*, Busb., 239; *State* v. *Norton*, 1 Winst., 296, cited and approved.

INDICTMENT for Murder removed from Burke and tried at Fall Term, 1878, of McDOWELL Superior Court, before *Gudger, J.*

The prisoner was charged with the murder of his wife by means to the jurors unknown. The case states that the prosecution relied wholly on circumstantial evidence tending to show that the homicide occurred on the 6th of March, 1877, while the prisoner alleged that his wife was living long after that date, and proposed to prove by a witness that about christmas, 1877, a lady and child came on board the cars at Chester, S. C., and the lady told the witness she was going to Monroe in Union county, N. C. (It had been shown by the state that a few days before she was last seen, she had left Union county, which was her home, in com-

pany with the prisoner, and travelled with him to one Cline's, near the town of Hickory in Catawba county.) Objection was made, but withdrawn, and the evidence admitted. There was other evidence offered on behalf of the prisoner for the purpose of showing that his wife was seen in Charlotte in January, 1878.

Certain remains had been found in Burke county, alleged to be those of the wife and little daughter of the prisoner, and the state offered evidence to the effect that bones, hair, a snuff box, pair of copper-tipped child shoes, stockings, pieces of calico, flannel and blanket, and a lady's cloth gaiter, were found in a grave about six feet long, eighteen inches deep, and twenty inches wide; and that these various articles belonged to the deceased, Maggie Secrest and her four year old child Minnie, and were parts of their dress.

"The prisoner introduced Dr. R. C. Pearson, as an expert, who stated that the bones shown him were parts of the skeletons of two human beings, one an adult and the other a child, and gave much other evidence in regard to the remains, and also his opinion on many questions as to the condition of human remains, when buried, how long before decay would set in, when it would be complete," &c.

"The state called Dr. W. A. Collet, as an expert, and proposed to examine him in reply to Dr. Pearson's testimony in regard to these remains. Objection was made by the prisoner, which was overruled and Dr. Collet allowed to testify, and the prisoner excepted."

"It was in evidence that a pair of small copper-tipped leather shoes were found in the grave, one lying on top of the other, with the soles to the east, the toes towards the south and turned a little upwards, with a small stocking in each; that there were no bones or animal remains in the shoes or stockings, except a white mould in the shoes. Dr. Pearson was asked by the prisoner if in his opinion the bones of the foot or leg could have been drawn out of the

shoes and stockings without disturbing their position, and he said he thought not. In reply to Dr. Pearson, the state asked the following question of Dr. Collet: 'If a child from three to four years old should be buried with its clothes on, which child had died by violence and with animal heat in it, in a grave eighteen inches deep without a coffin, would putrefaction or decomposition of the soft parts of the feet have been so far advanced, that at the expiration of three, four, or five months, or if longer, how much longer a time, the bones could have been pulled out without disturbing the shoes.' This question was objected to by the prisoner, objection overruled and Dr. Collet allowed to answer, and prisoner excepted."

"All the questions asked by both sides of the medical witnesses were by consent propounded on the assumption of the facts stated being found true by the jury."

It is not necessary to an understanding of the opinion that the facts applicable to the other exceptions should be stated. Verdict of guilty, judgment, appeal by prisoner.

Attorney General, for the state.

Messrs. Reade, Busbee & Busbee and *D. A. Covington*, for the prisoner.

SMITH, C. J. In the able and earnest argument on behalf of the prisoner his counsel insisted that the case contained in the record failed to disclose sufficient proof of the *corpus delicti*, or offence charged, to authorize the jury to pass upon the question of the prisoner's guilt. It is contended that the evidence does not establish the death of the prisoner's wife with whose murder he is charged, nor identifythe remains taken from the place of their deposit in the pit, as hers, nor show that the person found died from an act of violence, and that without proof of these facts the jury should have been instructed not to prosecute the enquiry further, but to acquit.

The argument is not warranted by the record. No such point seems to have been made at the trial, and no such instruction asked of the court. We cannot assume that all the facts proved at the trial are contained in the case sent up for our review, and under the well settled rule they ought not to be. In the preparation of cases on appeal, as we have often had occasion to remind the profession, no more of the evidence should be stated than such as relates to the exceptions intended to be presented and is calculated to elucidate and explain them. The rule was enforced under the old, as it is under the new system of practice, and its observance is essential to the proper exercise of the appellate power conferred upn this court. "It would be much better," says RUFFIN, C. J., in *Green* v. *Collins*, 6 Ire., 139, "to state only so much of the evidence as raised a question of law at the trial, and then the opinion prayed and given thereon with simplicity and precision."

This course is prescribed "so that it may be distinctly known what error is alleged, and the parties not be surprised by decisions in this court on points different from those intended."

We must so understand the statement to have been prepared in this case, and consequently the exception, not appearing therein and now for the first time pressed, cannot be entertained.

There were several exceptions taken for the prisoner during the trial, but it is only necessary to notice one in our view decisive of the case.

The defendant introduced Dr. R. C. Pearson as an expert who was examined in regard to the disinterred bones, alleged by the state to be those of the prisoner's wife and child, and gave his opinion "on many questions asked him as to the condition of human remains, when buried, how long before decay would set in, and when it would be complete, &c."

Thereupon the state called on Dr. W. A. Collett *as an*

expert, and "proposed to examine him in reply to the testimony of Dr. Pearson in regard to these remains," &c. The prisoner objected to the competency of the witness; the objection was overruled and the witness allowed to testify.

The following question was then propounded by the solicitor: "If a child from three to four years old should be buried with its clothes on, who had died by violence and with animal heat in it, in a grave eighteen inches deep, without a coffin, on its side, would putrefaction or decomposition of the soft parts of the feet have been so far advanced that at the expiration of three, four or five months, or if longer, how much longer a time, the bones could have been pulled out without disturbing the shoes?" &c.

The question was objected to by the prisoner's counsel, the objection overruled and the witness permitted to answer it. It does not appear what his answer was.

The objection to the competency of Dr. Collet to testify at all, though the grounds of the objection are not stated and seem not to have been demanded, must be understood to refer to the absence of evidence of his possessing the qualifications acquired by study and experience which entitled the witness to give an opinion to the jury. This objection, as far as the record shows, was not removed by the preliminary examination of the witness as to his opportunities for acquiring professional knowledge and skill so as to enable him to testify *as an expert*, nor does his qualification appear in the evidence set out in the case. He is called Dr. Collet, but the name and address of the witness do not furnish the necessary proof, and none other was offered.

It is usual and proper, when objection is made to the personal competence of the witness to testify, or to the admissibility of the proposed testimony, to require the grounds of the objection to be stated, as well that an intelligent ruling may be made upon the question presented, as to prevent surprise. The practice is reasonable and convenient and

should be pursued. But it has been held in a capital trial that this was not indispensable to the validity of an exception to improper evidence received. The rule is distinctly declared and acted on in the case of the *State* v. *Parish*, Busb., 239. In that case the solicitor proposed to prove confessions of the prisoner to the examining justices before whom he was brought. The evidence was objected to, and thereupon the solicitor understanding the objection to be directed to the restraint and influences under which the confessions are supposed to have been obtained, at once removed the objection by showing that they did not proceed from any threat, promise, or other inducement of hope or fear held out to the prisoner, and that they were entirely voluntary. The evidence was received, and for this error in the ruling of the court a new trial was granted. In delivering the opinion, PEARSON, J., adverting to the duty of an examining magistrate to reduce to writing the statements of a prisoner brought before him and the legal presumption that this was done, proceeds to say: "In the case before us it was not proved that the examination had not been taken down in writing by the magistrate as it was his duty to do. The objection therefore is fatal if it is presented by the bill of exceptions. In reference to this we had some difficulty. The evidence was objected to in general terms." Then referring to the removal of the ground of objection that the declarations were not voluntary, he continues: "And thereupon His Honor admitted the evidence without adverting to the fact that there was still the ground of objection above referred to. And the question is, was it the duty of the prisoner's counsel to apprise the solicitor for the state, or to inform the court, that there was still this ground of objection to the admissibility of the evidence? or was it the duty of the solicitor or of the court to call upon the prisoner to state his ground of objection? As this requisition was not made on the prisoner's counsel, we are unable to see any

reason why the omission to state the ground of objection to the evidence should preclude the prisoner from insisting that he is entitled to a *venire de novo.*"

The same ruling was made afterwards in *State* v. *Norton,* 1 Winst., 296. In that case objection was made by the prisoner to the examination of a witness for the state on the ground that the witness was of negro blood and within the prohibited degree. To meet the objection, evidence was offered by the state to prove that the prisoner was also of negro blood and the witness was competent to testify against him as provided in Rev. Code, ch. 107, § 71. The witness was allowed to testify, and PEARSON, C. J., reviewing this ruling, says: "But he," the presiding judge, "does not find or set out the fact or facts found. In other words, he did not have his attention called to the difference between the *evidence* and the *fact* or *facts* established by the evidence. So the case comes up in such a condition that this court cannot revise his decision, because we do not know upon what state of facts he formed his opinion." Then comparing the case to that of a special verdict setting out the evidence and not the facts, and on which no judgment can consequently be pronounced, he adds: "In our case there is the same error. The judge does not find the facts. As the matter relates to a collateral issue touching the competency of a witness, its effect is to entitle the prisoner to a *venire de novo.*"

There are authorities for the rule contended for in the argument for the prisoner, that when the competency of a witness is called in question it is error to permit him to testify before the facts upon which the competency depends are determined by the court, and those facts must be set out in the record. It only remains to consider the application of the principle to the case now before us.

It is undoubtedly the province of the court in this as in other cases touching the competency of the witness, to examine and decide the preliminary question whether the

witness offered as such is an expert and possesses the knowledge and experience which the law requires before his opinions upon a matter of science will be permitted to go to the jury. The same principle is declared in *Flynt* v. *Bodenhamer, ante,* 205. We did not then deem it necessary to sustain our opinion by the citation of authorities and shall now refer to but few.

In *Boardman* v. *Woodman,* 47 N. H., 120, the court say: "Whether he" (the witness) "had the qualifications of an expert was a question of fact for the court to settle, and when the court had ruled that he was competent, the opinion of the witness on his own competency was in law entirely immaterial."

"It was for the court," says WILSON, J., "in the first instance to determine whether these witnesses possessed sufficient skill to entitle them to give an opinion as experts, before they were admitted to give evidence to the jury, as to the identity of the standards with the contested paper." *State* v. *Ward,* 39 Vt., 225; *Berry* v. *Reed,* 53 Me., 487.

The court simply decides upon proof of the opportunities which the witness has had for acquiring special knowledge and his experience in his profession, that the jury may hear the opinions of the witness as a person of science and skill, but the value and weight of the evidence rests exclusively with the jury to determine. We do not mean to intimate that the witness in this case is not an expert in the full sense of the term, but no proof seems to have been made of the fact and none appears in the record.

In the absence of any proof of the witness' qualifications as an expert in the matter about which he was called on to give, and did give an opinion, the prisoner's objection to the testimony was well taken and it ought not to have been received. For the error in admitting the evidence there must be a *venire de novo,* and it is so ordered.

PER CURIAM. *Venire de novo.*

*STATE v. WYATT McK. McKINSEY.

Murder—Evidence—Judge's Charge.

On the trial of an indictment for murder, where the homicide occurred at the house of one C, the state offered in evidence the declarations of the prisoner "that he had killed him (the deceased) in self-defence; that he had got a gun at one F's and shot him at C's," &c., and also, "that he had shot him through and through and had cut his way out; that G (the deceased) and his crowd had waylaid him on the road near Y's, and he had cut his way out;" *Held*, to be error to charge the jury "that there was no evidence that the deceased and others were banded together at C's for the purpose of taking the life of the deceased."

(*State* v. *Allen*, 3 Jones, 257; *Wells* v. *Clements*, *Ibid.*, 168; *Wittkowsky* v. *Wasson*, 71 N. C., 451, cited and approved.)

INDICTMENT for Murder tried at Fall Term, 1878, of ROCKINGHAM Superior Court, before *Kerr, J.*

The prisoner was charged with the murder of one George Goode.

The details of the homicide and the attending circumstances were testified to by several witnesses who were present at the time when it was committed. Their testimony was in substance that the deceased was sitting at the supper table at the house of one Jane Crutchfield on the night of the last day of September, 1877, with his back towards the south door of the room, when the prisoner made his appearance at that door with a gun in his hands and called out, "George Goode, damn you, say your prayers, I am going to kill you," and immediately discharged his gun. As the prisoner uttered the words, the deceased sprang up and was making his escape from the room at the north door as the gun was fired. The prisoner rushed through the room

*Dillard, J., did not sit on the hearing of this case.

in pursuit with a large sword in his hand exclaiming, "O damn you, I'll get you," and as soon as he had passed out, several distinct blows were heard and the prisoner said: "I have killed him. and there is another I am going to put in the same fix."

The deceased was shot through the body and wounded with cuts on the head, from the effects of which he died early the next day. There was much evidence offered of previous difficulties between the parties and of threats uttered by the prisoner against the life of the deceased, which in the view we take of the case need not be further noticed.

James P. Dalton, introduced for the state, testified that on the 2nd day of October, after the homicide, the prisoner came to his house and on being asked his name and if he was the person who killed George Goode, said in reply, that he was. On being questioned about the matter, the prisoner said further, "that he killed him in self-defence; that he got a gun at one Fulps, and shot him at Crutchfield's, and did not know that he had hit him, and then pursued him and hit him several licks with a sword."

Another witness examined for the state, J. H. Clark, testified that the prisoner came to his house late on the night of the homicide and said "he had shot George Goode through and through with a rifle, and had cut his way out; that George Goode and his crowd had way-laid him on the road near George Young's, and he had cut his way out."

This evidenee was brought out by the state, the defendant introducing no testimony. There was a verdict of guilty, judgment, appeal by prisoner.

Attorney General, for the state.
Mr. Thomas Ruffin, for the prisoner.

SMITH, C. J. (After stating the case.) Several exceptions

are taken to the charge of the court, but only one of them, to which the foregoing confessions apply, will be considered.

The ninth instruction given to the jury is in these words: "There is no evidence in this cause that the deceased, George Goode, Elijah Knight and Joseph Nelson were banded together at Mrs. Crutchfield's for the purpose of taking the life of the prisoner at the bar." This instruction we understand to refer to the prisoner's account of the transaction as given to the witness, Clark, and to exclude it from the consideration of the jury in determining the facts of the homicide, for the reason that a conspiracy alleged to exist on the road near George Young's is no evidence of any conspiracy at Mrs. Crutchfield's house, where the deceased received his mortal wounds. A strict and literal interpretation of the prisoner's words would seem to warrant and sustain the charge. But in fairness to the prisoner, we do not think his language ought to be thus restricted. It is manifest he refers to the time and place where the fatal shot was fired, and professes to describe the transaction itself, and to give his reasons for taking the life of the deceased. The confessions are drawn from the witness for this purpose only. Moreover, the prisoner said to the other witness that he did the act in self-defence. However slight the evidence may be, when confronting the concurring testimony of the witnesses who were present and saw what was done, the judge had no right to withdraw it from the jury and to tell them there was no evidence of the conspiracy and waylaying as stated by the prisoner. It was the exclusive province of the jury to consider and give such weight to the prisoner's self-excusatory account of the transaction as in their judgment it was entitled to in making up their verdict; for his declaration is some evidence of the truth of the fact declared.

"When there is a defect or entire absence of evidence," says PEARSON, J., in *State* v. *Allen*, 3 Jones, 257, which was

a case of murder, "it is his duty so to instruct the jury;" but if there be any competent evidence relevant and tending to prove the matter in issue, "it is the true office and province of the jury" to pass upon it; although the evidence may be so slight that any one will exclaim, "certainly no jury will find the fact upon such insufficient evidence!" See also the cases *Wells* v. *Clements*, 3 Jones, 168, and *Wittkowsky* v. *Wasson*, 71 N. C., 451.

For the reasons given the prisoner is entitled to have his case passed on by another jury. There is error and a *venire de novo* is awarded.

PER CURIAM. *Venire de novo.*

STATE v. THOMAS BOON.

Murder—Evidence—Juror—Special Venire.

1. On a trial for murder, evidence of the declarations of a third party that he shot deceased is inadmissible.
2. A juror related to the prisoner and deceased is not indifferent, and may be ordered to stand aside before he is sworn.
3. It is the duty of the court to see that a competent, fair and impartial jury are impannelled on the trial of criminal actions.
4. Objection to an order directing the sheriff to summon a special venire of persons possessing particular qualifications, or to any alleged irregularity in the formation of a jury, or to the right of the state to challenge for cause, must be taken before verdict and *in apt time.*

(*State* v. *May*, 4 Dev, 328; *State* v. *Duncan*, 6 Ire., 236; *State* v. *White*, 68 N. C., 158; *State* v. *Crawford*, 2 Hay., 485; *State* v. *Douglass*, 63 N. C., 500; *State* v. *Ward*, 2 Hawks., 443; *State* v. *Davis*, *ante*, 412, cited and approved.)

INDICTMENT for Murder tried at Fall Term, 1878, of YANCEY Superior Court, before *Gudger, J.*

STATE *v.* BOON.

The prisoner and one Edward Boon were indicted for the murder of John S. Woodfin, the latter as having done the killing, and the prisoner as being present, aiding and abetting. The case states that His Honor instructed the sheriff in executing the writ of *venire facias* to summon such men only as were freeholders and had paid their taxes for the last year, and in selecting the jury challenges were allowed both to the state and to the prisoner, because those challenged were not freeholders, or had not paid their taxes.

One of the jurors was called and passed without challenge to the prisoner, and was tendered and accepted by him. On coming to the book to be sworn, he stated that he was related both to deceased and prisoner; thereupon and at his request the court directed him to stand aside, and declined to allow him to serve as a juror. Prisoner excepted.

It was in evidence that Edward Boon was present at the time of the homicide, and there was some evidence that he shot the deceased. And on cross-examination of a witness for the state, the prisoner proposed to prove that about a half hour after the shooting, on the same night, and as the witness and said Edward Boon were on their way home, Edward Boon said he shot deceased because he was trying to cut him with a knife. This evidence was objected to, and ruled out. Prisoner excepted.

After the verdict of guilty, the prisoner moved for a new trial on the exceptions above stated, and also, because of the instructions given to the sheriff in summoning the special venire. The prisoner exhausted his peremptory challenges before a jury were obtained, and two jurors were sworn after his challenges were exhausted, and he insisted that the order to summon freeholders and such as had paid taxes was to his prejudice, as it might have been otherwise had the order not been given. The rule for a new trial was discharged, and judgment pronounced, from which the prisoner appealed.

Attorney General, for the state
Messrs. Reade, Busbee & Busbee, for the prisoner.

ASHE, J. After the prisoner was found guilty by the jury, a rule was obtained in his behalf for a new trial on the following grounds—(1) because proper evidence had been rejected, (2) because a juror was made to stand aside and was not allowed to serve on the jury after he had been tendered and accepted by the prisoner, but before he was sworn, he being related to prisoner and deceased, and (3) because when the order was made for a special venire, His Honor instructed the sheriff to summon only freeholders and such as had paid their taxes for the last year. Rule discharged.

The first exception to the ruling of the court,—the declaration of Edward Boon that he had shot the deceased was inadmissible, is overruled. There was no error. The evidence was properly rejected. It was only hearsay, and if admitted could not have disproved the guilt of the prisoner. *State* v. *May,* 4 Dev., 328; *State* v. *Duncan,* 6 Ire., 236; *State* v. *White,* 68 N. C., 158.

The second exception is equally untenable. It is the duty of the court to see that a competent, fair and impartial jury are impannelled, subject to the right of the prisoner to peremptory challenges. *McCarty* v. *The State,* 26 Miss., 299; *State* v. *Marshall,* 8 Ala., 306; *Montague* v. *Com.,* 10 Gratt., 767; Whar. Cr. Law, § 3,139.

The other ground for a new trial, and the only one seriously urged by the prisoner's counsel in this court, was, that when the order was made for a *venire facias* the judge instructed the sheriff to summon only freeholders and such persons as had paid their taxes for the *last year.* It was insisted here that the prisoner was entitled to a new trial on account of this irregularity; that while it was conceded that ordinarily the proper course for the prisoner to take would be to challenge the array, yet in this case it could not have

been done, because the court had undertaken to instruct the sheriff whom to summon, to-wit, freeholders, &c.; that in England if there was cause of challenge to the sheriff, the process shall be directed to the coroner, and if any against the coroner, then the court shall appoint elisors against whose return no challenge shall be made to the array, because they were appointed by the court, and the directions given to the sheriff in this case to summon freeholders, &c., was the act of the court, and therefore the prisoner could not challenge the array. This we think is an unwarranted inference. In our case there was no cause of challenge to the sheriff; nor was he appointed by the court. The order to summon the venire was regular. The sheriff was not bound to obey the oral instructions given him by the judge, and in fact he did not do so, for the prisoner challenged some of the special venire on the ground that they were not freeholders. He complains that he exhausted his peremptory challenges before a jury were obtained, and two jurors were sworn after his challenges were exhausted, and alleges as ground for a new trial that the instructions of the court directing the venire to be of freeholders and tax payers was to his prejudice by causing him to exhaust his challenges before a jury were obtained, when it might have been otherwise, had the directions not been given to the sheriff. The prisoner certainly had no ground to complain that the persons summoned had paid their taxes for the preceding year, and it is very probable there would not have been two jurors sworn after he exhausted his peremptory challenges, if he had not challenged some of them because they were not freeholders.

The act of 1868, ch. 9, § 1, prescribes as a qualification for jurors that they should have paid their taxes for the last year and be of good moral character and of sufficient intelligence. In the view we take of this case, it is unnecessary to consider the constitutional question raised on the argu-

ment before us,—whether the freehold qualification for jurors on a special venire has been abolished. For if the sheriff had strictly carried out the verbal instructions given him by His Honor, and all the persons summoned by him on the venire had been both freeholders and those who had paid their taxes for the last year, they would have been competent jurors because they possessed the requisite statutory qualifications, and their being freeholders could not affect their competency.

But the prisoner alleges that there was error in allowing the state to challenge jurors because they were not freeholders. He has no just ground for complaint on that account. He gave his tacit consent to the error, if it be one, by not taking exception at the time, and by exercising the same right himself. He further insists that the sheriff should have summoned on the venire only such persons as were on the jury list. There is nothing in this objection, because it does not appear from the record but that every person summoned was on the jury list; if the law requires it to be done, it is to be presumed in the absence of proof to the contrary that the sheriff did his duty.

Conceding that the objections raised by the prisoner are tenable, he has no right to a new trial. His objections were not made in apt time. When the court gave the instructions to the sheriff as to the kind of persons he should summon, the prisoner ought then to have excepted; then on the return of the sheriff, he ought to have challenged the array; and when the state challenged a juror because he was not a freeholder, he ought at the time to have excepted to that; but having failed to do so, he has waived his right of taking exceptions, and they will not be allowed after verdict, only in the discretion of the court. *State* v. *Crawford*, 2 Hay., 485; *State* v. *White*, 68 N. C., 158; *State* v. *Douglas*, 63 N. C., 590; *State* v. *Davis*, *ante*, 412, and the authorities there cited. The law will not allow a party to sit by and silently acquiesce in

irregularities in the formation of a jury, and then after conviction raise objections and thereby take a double chance. *State* v. *Ward*, 2 Hawks, 443; 1 Bish. Cr. Pro., § 807, and notes. There is no error. Let this be certified, &c.

PER CURIAM. No error.

STATE v. DAVID BARNWELL.

Murder—Evidence—Judge's Charge—Malice.

1. When properly moved by counsel, and when the evidence makes the distinction relevant, it is error for the judge to fail to discriminate between a homicide where the prisoner enters the fight with a deadly weapon prepared beforehand, and one, where being hotly pressed, he uses such a weapon on the impulse of the moment. To ignore the distinction in such case is to confound murder and manslaughter.
2. Where, on a trial for murder, express malice is shown to have once existed, but a subsequent reconciliation, followed by fresh provocation, is proved, the law will refer the motive of the slayer to the recent provocation and not to the antecedent malice, unless the special circumstances of the case forbid such a presumption.

(*State* v. *Hill*, 4 Dev. & Bat., 491; *Jacob Johnson's case*, 2 Jones, 247; *Madison Johnson's*, 1 Ire., 354; *State* v. *Floyd*, 6 Jones, 392, cited, commented on and approved.)

INDICTMENT for Murder tried at Spring Term, 1878, of BUNCOMBE Superior Court, before *Cloud, J.*

The prisoner was indicted for killing Anderson Garron, and the only witness introduced by the state who saw the difficulty was one M. T. Benefield, who testified substantially as follows:—On Saturday the 24th of November, 1877, the prisoner, deceased and witness, with a four ox team, two of which with the wagon belonged to deceased, and the other two to witness, hauled from Henderson county to Asheville,

a distance of twenty miles, some household furniture and other chattels for a Mrs. Maxwell, who lived in Asheville. The deceased had been hired by prisoner, and the witness by Mrs. Maxwell to do the hauling. They arrived at her house about dark, and after driving into the yard, unyoked the oxen, witness hitching his to a tree near the dwelling, and deceased his to a fence near the wagon.

The prisoner was a brother-in-law of Mrs. Maxwell, and the deceased a brother-in-law of the prisoner. After supper the deceased proposed to unload the wagon, but the prisoner suggested that they wait until Monday morning, as he might be fined for unloading on Sunday in violation of a town ordinance. Deceased then went to a neighbor's house and on inquiring was informed that it was about ten o'clock. When he returned, the prisoner was in the house and again said, wait till Monday, but deceased refused, saying he was not going to stay there on expense. Prisoner asked witness to prevail on him to stay until Monday. Deceased then got in the wagon, and commenced cursing and throwing out the chattels; prisoner said "hold on and I'll help you unload;" deceased replied "d—n you if you are going to do anything, go to work, don't stand there;" prisoner walked off towards the house without saying anything; deceased continued throwing out the things until only some corn was left, which he told witness to put out while he would go and get the oxen, and on returning with them the prisoner spoke from behind the wagon and said "hold on;" deceased said "d—n you, don't jaw me or I'll give you what you want," and left the oxen and went around the wagon towards the prisoner.

It was a dark night, but witness could see the parties, though not very distinctly, and the next thing he noticed was the deceased who called him and said he was bleeding; he jumped out of the wagon and ran towards them, when he saw deceased jerk prisoner down, and had his hand in

prisoner's hair, when he parted them. Deceased had no weapon; asked witness to stop the blood; witness went to the house, and on his return found deceased in a dying condition; met prisoner about ten steps off and asked him if deceased was dead, and he replied, "he was a dead man, get some one here as quick as you can." Witness said "you ought not to have done it," to which prisoner replied, "he ought not to have rushed on me; I did not do it, he did it himself." A pocket knife of prisoner's was found near the wagon with a broken back-spring, which he had owned for a long time. Deceased was under the influence of liquor, and witness did not hear prisoner say an angry word.

The day before the difficulty the parties had hunted together and the prisoner stayed at the house of deceased all night, and they came to Asheville together and were friendly, and witness did not hear prisoner curse or use any insulting or provoking language during the fight.

Another witness introduced by the state testified that a short time before the homicide he heard prisoner, speaking of deceased, say, "if he fools with me I'll kill him;" and another witness testified that about five years before the homicide the prisoner said to him, "if deceased did not quit bothering him he would kill him."

It was also in evidence that deceased was a large man, of powerful muscle, and was under the influence of liquor, and that prisoner was a man of ordinary strength, and greatly inferior to deceased. The prisoner introduced no testimony. That part of the charge of His Honor which is reviewed by this court is sufficiently stated by Mr. Justice ASHE in delivering the opinion. There was a verdict of guilty, judgment, appeal by prisoner.

Attorney General, for the state.

Messrs. Reade, Busbee & Busbee, M. E. Carter and *C. M. McLoud*, for the prisoner.

ASHE, J. From the statement of the case which forms a part of the record, it does not appear to have been controverted that the homicide was committed by the prisoner, and the only question presented is, whether he was guilty of murder or a less offence.

A number of instructions were asked for by the counsel of the prisoner, some of which were correct, and others not, and some His Honor gave, and others he declined to give; but for the purpose of this appeal it is only necessary that we should notice one of the instructions given by him, and one other which he refused to give. In his first charge to the jury, His Honor in alluding to the threats which were proved to have been made by the prisoner against the deceased, said: "the state insists there was previous malice; if so, it would be a clear case of murder;" and again, when the jury came in and asked the court to read to them a passage from Foster's Crown Law which he had read to them in his charge, he read the passage and made some explanatory remarks, when the counsel for the prisoner stated that he had not succeeded in getting His Honor in his main charge to instruct the jury as to the point made by him as to the difference between the preparation beforehand of a weapon with a view to use it in a fight, and its use without having been so prepared, and asked the court then to charge the jury that "unless the knife had been prepared for the purpose its use was not necessarily evidence of malice." His Honor replied excitedly and in a raised voice, "I'll charge no such thing." This was a proper charge and it was error to refuse it. The refusal to give it was calculated to mislead the jury by creating the impression on their minds that His Honor held the converse of the proposition embodied in the instruction to be the law, to wit, that though the knife was not prepared for the purpose, its use was necessarily evidence of malice. The refusal to give this charge, taken in connection with the instruction—equally

erroneous—previously given by His Honor in his main charge, "if there was previous malice it was a clear case of murder," very probably brought the jury to the conclusion that the prisoner was guilty of murder—a conclusion, it seems to us, not warranted by the facts of the case. For after a careful perusal and consideration of all the facts and circumstances disclosed by the evidence in the case, we are unable to discover the first element of murder, unless it is to be found in the previous threats; but we think the malice that might be presumed from them is fully rebutted by the circumstances developed in the testimony offered by the state. One of the threats had been made five years before the homicide, and the other, the witness says, a short time before. What he means by a short time, whether a week, a month or a year, we are not informed. But let that be as it may, after these threats were made the state proved that a reconciliation had taken place, and that they were friendly when they came to the town of Asheville. Even if the prisoner had borne malice towards the deceased a week or a month previous, they were friendly at the time, and the quarrel being sudden and great provocation given, the law does not refer the motive to the previous malice, but to the provocation. Such is the indulgence shown to human frailty that when two persons have fought even on malice and afterwards to all appearances are reconciled, and fight again on fresh quarrel, it will not be presumed that they were moved by the old grudge, unless it appear from all the circumstances of the fact. Hawkins, P. C., ch. 31, § 30; *State* v. *Jacob Johnson*, 2 Jones, 247; *State* v. *Hill*, 4 Dev. & Bat., 491.

But in this case all the "circumstances of the fact" lead to the conclusion that the prisoner was not moved by malice; that though time and again cursed and insulted by the deceased, he never uttered the first word of anger or recrimination; nor did any act that was calculated to provoke or

excite his ire; and when deceased cursed him, saying, "d—n you, if you are going to do anything, go to work and don't stand there," if he had been harboring malice towards the deceased and cherished a purpose to gratify it, then was his opportunity, by reproach, taunt, or insult, to provoke him to some demonstration of violence when he might use the knife he had prepared for the purpose. But he did no such thing. He did not use a profane or angry word, but walked away as if to avoid a difficulty with his brother-in-law, whom he saw excited with spirits and passion. Such is not the conduct of a man moved by malice, and when he is suddenly set upon by the deceased, a man of extraordinary muscle and great physical strength, who it is reasonable to presume commenced the fight from the violent and impetuous temper he was displaying, the threat he had just made, —"d—n you, don't jaw me, or I'll give you what you want"— and the suddenness with which he left his oxen and made for the prisoner, rushing upon him, as the prisoner said—a declaration brought out by the state. The prisoner being the weaker of the two had resort to what His Honor held to be a deadly weapon, an ordinary pocket knife, with a broken back-spring which he had carried about his person for a long time. His Honor must have supposed that these facts taken in connection with the previous threats, brought this case within the rule laid down in *Madison Johnson's case*, 1 Ire., 354; but not so; "to have that effect there must be a particular and definite intent to kill, as if the weapon with which the party intends to kill is shown, or the time and place are fixed on, and the party goes to the place at the time for the purpose of meeting his adversary with an intent to kill him." If they meet as in this case upon sudden quarrel, fight, and one kills the other even when there was malice, the law will not refer the motive to the malice, but to the provocation, and extenuate the offence to manslaugh-

ter. *State* v. *Jacob Johnson*, 2 Jones, 247; *State* v. *Floyd*, 6 Jones, 392.

There is error. Let this be certified to the superior court of Buncombe, that further proceedings may be had in this case agreeably to this decision and the laws of the state.

Error. *Venire de novo.*

STATE v. JOHN KEETER and another.

Practice—Appeal—Forgery.

1. Where there is a repugnancy between the "record" and the "case," the record controls.
2. No appeal lies from an order setting aside a verdict of guilty. Nor does an appeal lie at the instance of either party to a criminal action where is no final adjudication.
3. An indictment for forgery charging defendant in the first count with falsely making the forged order and causing it to be made, and in the second, with uttering and publishing the same, is in accordance with precedents and is sufficient.
4. Where one forged an order to pay "the amount of 300 and charge the same to me;" *Held*, to be indictable.

(*Farmer* v. *Willard*, 75 N. C., 401; *State* v. *Wiseman*, 68 N. C., 203; *Stevens* v. *Smith*, 4 Dev., 292, cited and approved.)

INDICTMENT for Forgery tried at Fall Term, 1878, of HENDERSON Superior Court, before *Avery, J.*

The record states that the bill charged that defendants did feloniously and falsely make, forge and counterfeit and caused to be falsely made, &c., a certain order as follows: "Mr. Jackson Barnett—Please let young lady have the amount of 300 and charge the same to me. John Sexton." And in the second count the defendants were charged with uttering and publishing the said forged order, with intent

to defraud, &c. The jury found the defendants guilty, the verdict was set aside, and solicitor for the state appealed.

From the statement of the case, it appeared that defendants moved to quash the bill, motion overruled. After the charge to the jury upon the testimony offered, there was a verdict of guilty, and thereupon the defendants moved in arrest of judgment, for that, the paper writing alleged to have been forged was neither an order "for the payment of money nor for the delivery of goods," and that the charge of falsely making in the first count should not have been joined with that of causing to be falsely made, &c., but should have been in separate counts. The motion was allowed and the solicitor for the state appealed.

Attorney General, for the state.
No counsel for the defendants.

SMITH, C. J. The defendants are charged in the first count with the forging, and in the second count with uttering and publishing the forged instrument described in the bill, and upon their trial were both found guilty. The record shows that the verdict was set aside and from this order the solicitor appealed. The case accompanying the record states that the judgment was arrested and from this the appeal is taken for the state. Where there is a repugnancy between the record and the case stated, the record will control. *Farmer* v. *Willard*, 75 N. C., 401.

As there has been no final adjudication, an appeal does not lie at the instance of either party. *State* v. *Wiseman*, 68 N. C., 203, and other cases therein cited.

As the exceptions taken to the sufficiency and form of the indictment must be again met upon another trial, we will dispose of them now:—

1. The form of the first count follows approved precedents,

3 Chit. Cr. Law, ch. 15, p. 1,049, and is not obnoxious to the imputation of duplicity.

2. There is no misjoinder, and the propriety of uniting the two counts is manifest from the proofs in the case.

3. The omission of any qualifying words after the figures in the forged order as set out in the indictment is not fatal to the indictment.

If the order was genuine, the omission of the word would not render it invalid, nor will it take away the criminality of the act of forging or uttering the instrument in the same form. *Stevens* v. *Smith*, 4 Dev., 292.

PER CURIAM. Appeal dismissed.

STATE v. JAMES BLACKBURN.

Practice—Murder—Evidence—Dying Declarations.

1. This court will not grant a petition by prisoner, after the argument here, for a *certiorari* to supply alleged omissions in the judge's statement of the case on a trial for murder.

2. It is not error to refuse a motion to quash an indictment not made in apt time.

3. Declarations of the deceased made immediately previous to his death, that he was going to die from the effects of a wound and detailing the circumstances under which it was inflicted by the prisoner, are admissible as dying declarations on a trial for murder.

4. Where there is evidence tending to destroy the effect of such declarations, it is competent for the state to corroborate them by showing that deceased made similar declarations a few minutes after the fight, though it did not appear that he was then under the apprehension of immediate death.

State v. *Poll*, 1 Hawks, 442; *Tilghman's case*, 11 Ire., 513; *Moody's*, 2 Hay., 31; *Thomason's*, 1 Jones, 274; *Twitty's*, 2 Hawks, 449; *George's*, 8 Ire., 324; *Dove's*, 10 Ire., 469; *March* v. *Harrell*, 1 Jones, 329, cited and approved.)

STATE *v.* BLACKBURN.

INDICTMENT for Murder tried at Spring Term, 1878, of PENDER Superior Court, before *Eure, J.*

The bill was found at fall term, 1877, of Sampson superior court, and at the following term an order was made on affidavit of prisoner, after his arraignment and plea of not guilty, to remove the case to Pender, and when it was called, the prisoner moved to quash the bill, for that, it had been found by an incompetent grand jury—one of whom not having paid his taxes for the preceding year, which fact came to his knowledge after the order for removal was made. Motion refused and prisoner excepted.

The dying declarations of the deceased, John D. Lamb, (as set out by Mr. Justice ASHE in the opinion) were admitted as evidence after objection by prisoner, that part of which detailing the transaction being as follows: The deceased said he went to prisoner's cooper-shop and asked him if he had missed two barrels, and if he did that he (deceased) took them. Prisoner replied by telling him to take the other barrels and every thing he had away from there, that he had treated his (prisoner's) children badly. Deceased said, "Jim, you must be a fool," and the prisoner caught up a hatchet and struck him with it on the side of the head above the ear; did not know how the wound on the top of his head was made; he fell and after getting up tried to go to the road; did nothing to prisoner except to make the remark aforesaid; did not strike prisoner, and no one was present except prisoner and himself.

A witness was then introduced who testified that he went to the prisoner's shop shortly after the difficulty, and saw a bloody hatchet, pole and adz, and blood sprinkled about on the shavings, and some other evidences of a mutual combat; that on the day before the fight he heard deceased say that prisoner's children had taken some of his wood, and if prisoner bothered him he would wear him out to a frazzle; that deceased did not appear to be mad at the time he made

this remark. Another witness testified that there was an altercation between them, deceased walking up to prisoner and slapping his hands at him, and he then knocked prisoner down with a frow, and prisoner struck him with the hatchet and threw the adz at him.

The state then introduced evidence to corroborate the dying declarations, and the witness testified as to declarations made to him by deceased a few minutes after the difficulty occurred, which were in substance the same as above stated.

The prisoner asked the court to charge:

1. If deceased struck prisoner, and by reason of the *furor brevis* caused by the blow, prisoner killed deceased, it would be manslaughter. Given.

2. If deceased made the assault and it was violent and sudden, and prisoner was unable to retreat without danger of death or great bodily harm, and prisoner slew him, it would be homicide excusable. Refused.

3. If prisoner was in his yard at work when assaulted, he was not bound to retreat to the wall, but had the right to repel force with force so as to overcome his assailant, and if the killing occurred in this way, it was excusable. Refused.

4. If the jury believe deceased went into prisoner's enclosure and assaulted him, knocking him down, and prisoner struck with the hatchet but did no serious injury, and thereupon the deceased used the frow, a deadly weapon, and prisoner believed that he was in danger of losing his life or receiving great bodily harm, and slew the deceased, it would be excusable homicide. Refused.

5. If deceased went to prisoner's, having been forbidden to come upon his premises, he was guilty of a forcible trespass, and if he there made an assault on prisoner, the latter was not bound to retreat, and if the killing occurred by repelling force with force, it would be excusable homicide. Refused.

These instructions were refused on the ground that they

were not applicable to the facts. The jury found the prisoner guilty of manslaughter. Judgment, appeal by prisoner. After the argument in this court, a petition for a *certiorari* was presented.

Attorney General, for the state.
Mr. J. D. Kerr, for the prisoner.

ASHE, J. Since the argument of this case, a petition has been presented to this court for a *certiorari* to supply alleged omissions in the statement of the case made out by the judge before whom it was tried. To grant the petition, would establish a precedent for a practice that would lead to the greatest confusion and uncertainty in the administration of the criminal law. This court can only look to the record and the statement of the case made by the judge which accompanies it, to see whether there was error in the proceedings of the court below by which the prisoner has been prejudiced. A different practice cannot be allowed to obtain. The *certiorari* is therefore refused.

The prisoner moved to quash the indictment, after he had plead not guilty, for an alleged defect in the organization of the grand jury. The objection came too late. It was not taken in apt time. *State* v. *Davis, ante,* 412, and the authorities there cited.

To show how the fight between the prisoner and the deceased commenced, the state proposed to prove the dying declarations of deceased, and for that purpose introduced Dr. A. M. Lee, a practicing physician, who testified that he was called in to see the deceased on the first of November, 1877, and found him propped up in a rocking chair, with a wound on the side of his head above the left ear, which was made with a sharp instrument, and cut through the skull, which produced his death, and another slight wound on the top of his head. The deceased then told him that he was

going to die, or the wounds would kill him. On the third of November, he saw him again, and the deceased told him "he was going to die and would never be able to get out of the house again." On the fifth he saw him again, and he said "he was going to die;" and he was unconscious from that time until he died on the twentieth of the month. The prisoner objected to the introduction of the dying declarations, but His Honor overruled the objection and admitted the evidence, and the prisoner excepted. There was no error in this ruling. *State* v. *Poll*, 1 Hawks, 442; *State* v. *Tilghman*, 11 Ire., 513; *State* v. *Moody*, 2 Hay., 31.

After the state had rested in its examination of the witnesses, the prisoner introduced two witnesses whose testimony contradicted the dying declarations of the deceased in material points. Thereupon, the state in order to corroborate the dying declarations introduced one J. R. Beaman to prove declarations of deceased made within a few minutes after the fight, as to how it had occurred. The prisoner objected to the evidence, and the objection was properly overruled. *State* v. *Thomason*, 1 Jones, 274; *March* v. *Harrell*, *Ibid.*, 329; *State* v. *Twitty*, 2 Hawks, 449; *State* v. *George*, 8 Ire., 324; *State* v. *Dove*, 10 Ire., 469.

At the close of the testimony, the prisoner prayed the court for the special instructions set out in the statement of the case. The first was given, but His Honor refused to give the others on the ground that they were not applicable to the facts. In this there was no error.

In any view of the case, the killing was manslaughter. Taking the testimony of the witnesses for the defence alone, together with the facts which it is proposed by the petition for the *certiorari* to interpolate in the statement of the case, and there is no ground upon which the killing can be justified as an act of self-defence. The prisoner should be content with the verdict, and might congratulate himself that the jury have awarded to him the full benefit of the benig-

nity of the law. There is no error. Let this be certified to the court below that further proceedings may be had according to law.

PER CURIAM. No error.

STATE v. JAMES H. CHADBOURN and others.

Traders—Manufactures—Taxes and Taxation.

A trader is one who sell goods substantially in the form in which they are bought, and who has not converted them into another form of property by his skill and labor; *Therefore*, one who carries on the business of buying timber and converting it into lumber for sale is a manufacturer, and not liable to indictment for failure to pay the tax and obtain a license as provided in the revenue act of 1877, ch. 156, § 12, 31.

(Remarks of Smith, C. J., upon the construction of penal statutes and substitution of "and" for "or.")

INDICTMENT for a Misdemeanor tried at October Term, 1877, of NEW HANOVER Criminal Court, before *Meares, J.*

The defendants are charged with violating the provisions of section 12 and 31 of chapter 156 of the revenue act of March 10, 1877. Section 12, so far as it is necessary to be set out, is in these words: "Every merchant, jeweler, grocer, druggist, and every other *trader* who as principal or agent carries on the *business of buying or selling goods, wares or merchandise* of whatever name or description, except such as are specially taxed elsewhere in this act, shall in addition to his *ad valorem* tax pay as a privilege tax, five dollars and one-tenth of one per cent. on the total amount of purchases in or out of the state, for cash or on credit; but no retail merchant shall be required to pay any tax on purchases made from wholesale merchants residing in this state."

Section 31 declares that "every person who shall practice any trade or profession, or use any franchise taxed by the laws of North Carolina, without having first paid the tax and obtained the license as herein required, shall be deemed guilty of a misdemeanor," &c.

The indictment alleges that the defendants "did unlawfully follow the trade of timber and lumber merchants without having paid the tax and obtained the license therefor required by law." A special verdict was found by the jury, so much only of which will be set out as presents the question of law involved. The jury find that the defendants are partners under the firm name of James H. Chadbourn & Co., and are the owners of a large steam saw and planing mill in the city of Wilmington. Their sole business is to buy timber and convert the same by sawing and planing into lumber and boards, which they sell in the market. They do not sell timber, and do not buy lumber. There are certain persons well known in the trade as lumber merchants, who buy lumber to sell again, but the defendants are not of that class."

And thereupon His Honor, being of opinion with defendants, held that they were manufacturers and not embraced within the provisions of the act, from which ruling *Moore*, solicitor for the state, appealed.

Attorney General, for the State.

Mr. E. S. Martin, for the defendants, cited and remarked upon, among other authorities, *Potter* v. *Madre*, 74 N. C., 36; 2 Parson's Con., 427; *Brown* v. *Maryland*, 12 Wheat., 439; Dwarris Const. Stat., 236; *Com.* v. *Campbell*, 33 Penn. St., 380.

SMITH, C. J. (After stating the facts as above.) The judge before whom the cause was tried was of the opinion that the employment and business in which the defendants were engaged did not bring them within the prohibition of

the statute, and ordered their discharge. The appeal brings before us the question, whether the defendants are included in any of the descriptive words of section 12—"merchants, jewelers, grocers, druggists, or other trader who carries on the business of buying or selling goods, wares, or merchandise;" in other words, are they *traders* within the purview and meaning of the act? We concur in the opinion of the judge in the court below that they are not. Words used in a statute bear that sense in which they are understood in the common business of life and in the intercourse of men. Their meaning is ascertained from general use. A *trader* as defined by an eminent lexicographer "*is one engaged in trade or in the business of buying and selling*," and such is the popular acceptation of the term. The goods are sold substantially in the form in which they are bought, and the difference between the sums paid and received constitutes the profit of the business. The defendants' occupation does not answer this definition. They are rather manufacturers who by skill and labor convert what they get into another and more valuable form of property. The manufacturer of shoes purchases the leather and other materials from which they are made, and then sells them at a large advance. He both buys and sells, but he is not a trader. So with the defendants who purchase the tree or log and dispose of the lumber and boards which are made from it. They do not buy and sell the same article and in an unchanged condition. The manufacturing process intervenes, and this gives name and character to their pursuit. The statute obviously refers to a different class of business men, in imposing the license tax in this clause. The meaning is also manifest from the preceding and associated words. Merchants and the others named are such as buy and sell for profit, without transforming the article into something else to which their labor and skill have imparted a higher value. The word, though of more comprehensive scope than those pre-

ceding, belongs to the same general class. *Noscitur a sociis* is a rule of interpretation applicable to the case.

It is true the act speaks of those who carry on the business of *buying or selling,* using the disjunctive preposition and separating the one act from the other, and apparently making each a distinct offence; but still, they are traders who buy or sell, and not others of a different calling. Though by a strict interpretation either act, buying or selling, without a pre-payment of the tax and a license, may be a misdemeanor and punishable as such, still they must be *traders* who buy or sell, and not others who follow a different occupation. The offence is consummated only when the act of buying or selling is done by one whose business it is to buy and sell, and in the exercise of his calling. This interpretation relieves the statute from many of the difficulties pointed out in the elaborate argument of defendants' counsel. But if it were neccessary in a law so highly penal, the sentence might perhaps admit of a construction which substitutes the copulative in place of a disjunctive word and thus make this harmonious with the other provisions of the act. But we do not deem it necessary to change the phraseology of the sentence to give it full operation and effect according to the obvious intent of the framers of the law.

That the mere act of selling without a previous buying by one who is not a trader is not within the contemplation of the act, is manifest in the fact that the per centum tax to be paid is imposed only on the amount of purchases, and in the case supposed could not be collected at all. And if the act of selling by those who are not traders without the license is not an offence, neither for the same reason can the act of buying be an offence. We will not pursue the discussion further, nor do we deem it necessary to cite authorities in support of our conclusions.

It will be noticed that no specific act is charged in the bill,

the averment being that the defendants did at a certain day and place "follow the trade or profession of timber and lumber merchants." We do not wish to be understood as holding that an averment in terms so general is sufficient to describe the offence. Perhaps it could not be set out in a more precise and specific form. We advert to the matter only to say as it is not necessary we express no opinion on the point. The special verdict does not sustain the allegations in the indictment, nor do the facts found bring defendants within the penalty of the act. This will be certified, &c.

No error. Affirmed.

STATE v. RICHARD LEE.

Trial—Recalling Witness—Indictment, return of, in open court.

1. On the trial of an indictment, the presiding judge may recall a witness and examine him to supply an omitted fact material either to the prosecution or defence.
2. Where a transcript of the record in a case removed to another county for trial, recites in the usual form that the court was opened and held, a grand jury drawn and organized, &c., and states "it is presented in manner and form following," and then sets out a copy of the indictment; *Held*, that it appeared with sufficient certainty the bill of indictment was returned *into open court.*

(*State* v. *Collins*, 3 Dev., 117, cited and approved.)

INDICTMENT for Burglary tried at Fall Term, 1878, of CUMBERLAND Superior Court, before *Buxton, J.*

The indictment was found by a grand jury in Bladen, and the case was removed to Cumberland for trial. After conviction the prisoner moved for a new trial and in arrest

of judgment on the grounds as stated in the opinion of this court. His motion was refused. Judgment, appeal by prisoner.

Attorney General, for the state.
Messrs. Guthrie & Carr, for the prisoner.

DILLARD, J. The first error assigned is, that on the trial in the court below the state allowed the prosecuting witness to retire from the stand without making proof that the dwelling house in which the offence was alleged to have been committed was closed on the night in question, and thereupon His Honor recalled the witness and had the omitted proof supplied under his own examination. In this there was no error.

The conduct of a trial is generally under the management of the solicitor and the counsel of the prisoner, with the right and duty in each to adduce their testimony to the facts by them deemed material and in their proper order, without further action on the part of the court than to pass upon the questions which may arise as to the admissibility and competency of the testimony, and at the close thereof to sum up the evidence and declare the law for the guidance of the jury. It would not be proper for the judge in the course of a trial to usurp the place and duty of the state's counsel on the one hand, and prescribe the order of introduction of the witnesses and become active in their examination; nor yet on the other hand to take the place of the prisoner's counsel and assume the duties resting on him in the general conduct of the defence. But it is expected of the judge in presiding at a trial, in the exercise of a perfect impartiality, to see the law properly administered and justice done both as respects the state and the accused. If a fact material to the state or to the prisoner be obviously overlooked and about to be omitted, it is usual in practice

and within the scope of the judge's duty, on motion, to allow a witness to be recalled to supply the omitted fact; or in his discretion to recall the witness and have the oversight repaired under his own examination. It would be a reproach to our system if a judge were required to sit and see a prisoner convicted of a crime or his acquittal brought about through a failure to ask a particular question of a witness and not be allowed to interpose to supply so obvious an omission. In many cases in our reports it has been decided to be within the discretion of the presiding judge to allow an omission of the kind under consideration to be repaired by calling back a witness; and what he may allow to be done on request may surely be done without request by the judge of his own head. There can be no doubt about the question. We find it laid down by the writers on criminal law, that during the progress of a trial the judge may question a witness; and even though the case has been closed and the prisoner's counsel has taken an objection to the evidence, the judge may himself make further inquiries if he thinks fit in order to remove the objection, or he may allow it to be done. Arch. Cr Pl., 163; 1 Whar. Ev., § 496. We conclude therefore that the judge might properly interfere as he did in supplying the omitted fact, and the prisoner has no just cause of complaint.

Failing in his motion for a new trial, the prisoner moved in arrest of judgment on the alleged ground that it does not appear from the transcript of the record from Bladen, that the bill of indictment was returned into open court.

There can be no doubt that it is necessary that a bill of indictment should be returned by the grand jury into open court; and we think according to the proper construction and import of the transcript from Bladen superior court, the bill against the prisoner was returned as required by law. The transcript, after stating the court as open and held on the 8th Monday after the 2nd Monday in August,

1878, for the county of Bladen, a *venire facias* returned by the sheriff, a list of persons summoned as jurors, and the drawing and organization of a grand jury therefrom, uses the language,—"it is presented in the manner and form following;" and then comes the bill of indictment under which the prisoner was tried. The jury are required to come into court and make their return, and on coming in for this purpose, they pronounce their return, or are presumed to do so, and the court records their return, and the record of the return thus pronounced is made by the use of the words,—"it is presented in manner and form following." In legal import, the record having stated the court as open and the grand jury sworn and charged, it is to be taken when the record recites "it is presented," &c., that the court is sitting, and therefore that the return is made in open court. *State* v. *Collins*, 3 Dev., 117. As confirmatory of the sufficiency of the transcript to show the return was made in open court, it will be found on reference to the forms in universal use in our state, that the transcript from Bladen superior court is in exact compliance therewith. Eaton's Forms. We hold, therefore, that there was no error in the judge in ruling that the return of the grand jury was in open court. Let this be certified, &c.

PER CURIAM. No error.

CASES REMANDED, &c.

Busbee v. *Sarles*, from Harnett—Judgment reformed.

Jones v. *Russ*, from Beaufort—Judgment below affirmed, no error being assigned.

Nowland v. *Brown*, from Mecklenburg—Remanded for finding of further facts.

Rogers v. *Grant*, from Northampton—Remanded for finding of further facts.

Wadsworth v. *Carroll*, from Craven—Appeal of plaintiff dismissed with leave to move for writ of *certiorari* on laying proper grounds therefor to bring up the case for review.

RULES

OF THE

SUPREME COURT,

(HERETOFORE ADOPTED, TOGETHER WITH THE CHANGES MADE AT JANUARY TERM, 1879.)

ARRANGED BY THE REPORTER.

The Districts will be called in their numerical order, one week being assigned to each.

APPLICANTS FOR LICENSE.

Monday and Tuesday of the first week of each term will be devoted to the examination of applicants for license to practice law. They are expected to have read the following:

Blackstone's Commentaries, (2nd book diligently).
Coke, Cruise, or some other standard work on real property.
Stephen and Chitty on Pleading.
Adams' Equity and 1st Greenleaf on Evidence.
Executors and Administrators—some standard work on.
Code of Civil Procedure.

APPEALS:

1. *Docketing*—Appeals will be docketed for their proper districts in the order in which the papers are filed with the clerk.

2. *When Heard*—Appeals from a county in which a court

shall be held during a term of this court, if filed before the first call of the docket, will be heard in their proper order; otherwise they will stand continued.

3. *Order of Hearing*—Appeals will be called in their proper order; if either party is not ready, the case may be put to the end of the district by consent or for cause shown, and be again called when reached; otherwise the first call is peremptory; or it may, by consent of court or for cause shown, be put to the end of the docket or continued; and if no counsel appear for either party at the first call, it will be put to the end of the district, and if none appear at the second call, it will be continued.

4. *Dismissed if not Prosecuted*—Cases not prosecuted for two terms will be dismissed at the costs of the appellant, unless continued for cause, with liberty, however, to either party to move at the next term to reinstate it; or afterwards upon sufficient cause.

5. *Motion to Dismiss*—A motion to dismiss an appeal for want of notice of appeal or for want of compliance with other provisions of law required in perfecting an appeal, can only be made at or before the calling of the case. Upon hearing the motion, such notice or compliance must be shown, or shown to have been waived, and will not be presumed merely because the appeal appears to have been taken during a term of the court.

6. *Time of Filing*—Appeals from judgments rendered before the commencement of a term of this court, must be filed within the first eight days of the term, or before entering on the call of cases from the district to which the case belongs; otherwise they will be continued. But this shall not apply to motions to docket and dismiss appeals.

7. *Dismissed by Appellee*—If the appellant in a civil action shall fail to bring up a transcript of the record and cause the case to be docketed before the end of the week assigned to the district, the appellee may file a transcript thereof and

cause the case to be docketed, and move to dismiss the appeal at the costs of the appellant, which may be allowed, unless cause be shown to the contrary.

AGREEMENT OF COUNSEL:

1. *Must Appear of Record*—The court will not regard any agreements of counsel unless they appear of record, or are in writing and filed in this court.

ARGUMENT OF COUNSEL:

1. *Order of*—The appellant is entitled to open and conclude the argument.

2. *Time, Appellant*—Counsel for appellant shall have the right to address the court for not over two hours—including the opening argument and reply. The time may be divided between them at their discretion.

3. *Appellee*—Counsel for appellee shall be allowed not over one hour.

4. *Reading Record*—The time occupied in reading so much of the record as may be necessary shall not be counted under the above rules.

5. *Extended by Court*—Time for argument allowed above may be extended by the court in proper cases; *provided*, the extension be allowed before the argument begins.

6. *Number of Counsel*—Any number of counsel will be heard on either side within the limit of time above described; but it is required where several counsel speak that each shall confine himself to a distinct part or parts of the argument, so as to avoid tedious repetition.

BOOKS:

No book in the supreme court library will be allowed to be taken out except by special permission of the clerk for use before some court in session, or referee; and the North

Carolina reports, digests and statutes will not be allowed to be withdrawn at all.

BRIEFS:

1. *Of Appellant*—In every case, the appellant before the hearing shall file with the clerk one or more written or printed briefs in which shall be set forth the exceptions taken below. Under each shall be briefly stated so much of the pleadings, case agreed, or other findings of fact as will make it intelligible. Also, if several acts of assembly are relied on, a citation of them by date and chapter; also the authorities in law principally relied on; but this shall not forbid the citation of others on the oral argument. If a statement of the record, or any part of it, be necessary to an understanding of the case, it shall be briefly made, and the page of the record containing it referred to.

2. *Copies of, when furnished*—If the brief be printed, ten copies shall be delivered to the clerk, one of which shall be filed with the record, one for each of the justices of the court, one for the reporter, and one for the opposing counsel.

3. *Cost of*—Whenever printed briefs shall be filed, and the matter in controversy equals or exceeds three hundred dollars, the costs of such briefs shall be taxed in the bill of costs in favor of the party filing them, if he be successful, at the rate of five cents for each printed page of the usual size of reports of this court.

4. *Of Appellee*—The appellee may in like manner file such briefs, and shall under like circumstances be entitled to have the costs thereof taxed for him.

CLERKS AND COMMISSIONERS:

1. *Report of Funds in hands of*—Every clerk of a superior court and every commissioner appointed by such court, who, by virtue or color of any order, judgment, or decree of the

court in any action pending in it, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action, or of any other person, shall, at the term of such court, held on, or next after the first day of January in each year, report to the judge a statement of said fund, setting forth the title and number of the action and the term of the court at which the order or orders, under which the officer professes to act, was made; the amount and character of the investment and the security for the same, and his opinion as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto.

2. *Report to be Recorded*—The reports above required shall be handed by the clerk of the superior court to the register of deeds, and acknowledged or proved by said clerk; and said report shall be registered at the cost of the fund; the originals shall be returned after registration to the clerk of the superior court and filed among the papers in the cause.

3. *Of Supreme Court*—The above rules shall apply to the clerks of the supreme court and to any commissioner appointed by it to receive and invest funds. His report shall be registered in the county from which the appeal was taken in the cause in which the order is made.

4. *Breach of Rules, How Punished*—A breach of the above rules shall be punishable as a contempt of the court to which the report is required to be made.

COSTS OF APPEAL:

1. *Undertaking for costs*—The clerk will docket no appeal in a civil action unless it appears that the appellant has filed in the court below an undertaking payable to the appellee, with sufficient surety and in a sufficient sum, for the payment of the costs which may be adjudged against him;

or has made a deposit in lieu of such undertaking; or unless by leave of this court here, he shall file such an undertaking or make such deposit with the clerk here. This rule shall apply, notwithstanding an appeal bond shall have been waived by the appellee.

2. *When not required*—The preceding rule shall not apply: 1st—If the judge shall have allowed the appellant to appeal as a pauper: 2nd—Where the state is the appellant in its own interest: 3rd—Where an officer of the state is the appellant in his capacity as such, and the interest of the state alone is concerned.

3. *When appeal is dismissed*—Where an appeal is dismissed by reason of the failure of appellant to bring up a transcript of the record, and the same is procured by the appellee and the case docketed, no order will be made setting aside the dismissal, or allowing the appeal, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid the costs of the appellee in procuring the transcript of the record and in causing the same to be docketed.

4. *Of unnecessary records*—The costs of copies of unnecessary and irrelevant testimony or of other irrelevant matter, not needed to explain the exceptions, shall in all cases be charged to the appellant, unless it appears expressly that they were sent up by the appellee, in which case the costs shall be taxed on him.

DOCKET:

1. *Judgment Docket*—The clerk of this court will keep a judgment docket with an alphabetical index of the names of the defendants. On this docket he will enter a brief memorandum of every final judgment of this court affecting the right to real property, and of every judgment requiring in whole or in part the payment of money; stating the names of the parties, the term of the judgment, its

number on the docket of the term; and when it shall appear from the return on an execution or from an order for an entry of satisfaction by this court, that the judgment has been satisfied in whole or in part, the clerk, at the request of any one interested in such entry and on payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

EXCEPTIONS:

1. *Statement of*—Every appellant, at the time of settling the case, or if there be no case within ten days after the appeal, shall file in the clerk's office his exceptions to the judgment or proceedings briefly stated and numbered. And in civil (as distinct from criminal) actions, no other exceptions than those so filed and made part of the record, will be considered in this court.

EXECUTIONS:

1. *Teste of*—When an appeal shall be taken after the commencement of a term of this court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

2. *Issuing and return of*—Executions from this court may be directed to the proper officers of any county in the state. At the request of a party in whose favor execution is, it may be returnable on any specified day after the commencement of the term of this court next ensuing its teste. In the absence of such request, it shall be made returnable on the first day of the term next ensuing its teste; and on motion for special cause, execution may be taken out during the term.

3. *Dated when issued*—Writs of execution issued from a superior court shall not be tested of any term; they shall be dated the day of their issue, and shall state when the judg-

ment was docketed in the county from the court of which the execution issues.

ISSUES:

1. *Preparation of*—During the term at which replication is filed, or as soon thereafter as may be, the attorney of plaintiff will draw up in writing such issues arising upon the pleadings as he deems material to be tried, and submit the statement to the attorney of defendant; and if he concur, the statement signed by the attorneys will be filed with the clerk; otherwise the defendant's attorney will make a like statement, and the two will be handed to the judge who will "settle the issues" and file them with the clerk to stand for trial at the next term.

2. *How Framed*—Issues shall be framed in concise and distinct terms, and prolixity and confusion shall be avoided by not having too many issues.

3. *Additional*—Before the argument of an appeal, if the court considers the trial of one or more other issues necessary for the decision of the case upon the merits, additional issues will be made up under the direction of the court, and be sent to the superior court for trial, and the case be retained.

JUDGMENTS:

1. *Docketing during Term*—All judgments recovered during any term of the superior court, which shall be docketed during the term, shall be held and deemed to be docketed on the first day of the term.

2. *Transcript of*—Clerks shall not make out transcripts of judgment to be docketed in another county, until at the expiration of the term at which such judgments are rendered.

3. *Lien of*—All judgments rendered in any county at the same term and sent to another county to be docketed shall

be equal in respect to lien: *Provided*, they be docketed in a reasonable time, say ten days after the end of the term.

4. *Lien of Justice's Judgment.*—All judgments rendered by a justice of the peace upon writs of summons returnable on the same day shall, when docketed, stand on the same footing in respect to lien: *Provided*, such judgments shall be docketed within a reasonable time, say ten days, after their rendition.

PLEADINGS:

1. *Memoranda of*—Memoranda of pleadings will not be received in this court as pleadings, even by consent of counsel, but will be regarded as frivolous or impertinent.

2. *When scandalous*—On motion of either party, or, in a gross cause, of its own motion, the court will refer it to the clerk or to some member of the bar to report whether pleadings in a cause are scandalous and impertinent; and if they be found so, the court will order the scandal or impertinence to be stricken out at the cost of the party.

REHEAR:

1. *Application to*—Any party, within two terms after a judgment of this court, may apply to have the cause reheard upon any matter of law. To each petition shall be attached a certificate, signed by two counsellors of this court, who did not appear in the cause at its first hearing, stating their opinion that the judgment was erroneous. It must also appear that the judgment has been performed, or that its performance has been properly secured; or some sufficient cause be shown for dispensing with these conditions. Such petition must also assign the errors complained of.

TRANSCRIPTS:

1. *Of Record*—In every record of an action brought to this court, the proceedings shall be set forth in the order of

time in which they occurred, and the several processes, orders, &c., shall be arranged to follow each other in order when possible.

2. *Pages Numbered*—The pages of the record shall be numbered, and there shall be written on the margin of each a brief statement of the subject matter, opposite to such subject matter.

3. *Index*—On some paper attached to the record, there shall be an index to the record in the following or some equivalent form:

Summons—date..... .....page 1
Complaint—first cause of action..... " 2
" second cause of action..... " 3
Affidavit for attachment, &c..... " 4

4. *Consequences of Non-Compliance*—If any cause shall be brought on for argument, and the above rules shall not have been complied with, the case shall be put to the end of the district, or of the docket, or continued as may be proper; and it will be referred to the clerk of this court or to some other person to put the record in the prescribed condition, for which an allowance of five dollars will be made to him, in each case, to be paid by the appellant, and execution may immediately issue therefor.

5. *Marginal References*—No case will be heard until there shall be put in the margin of the record, brief references to such parts of the text as it is necessary to consider in a decision of the case.

PROCEEDINGS

IN MEMORY OF

WILLIAM H. BATTLE.

IN THE SUPREME COURT,
March 15th, 1879.

On the opening of the court the Attorney General announced the death of WILLIAM H. BATTLE, formerly an associate justice of the supreme court, and an adjournment was ordered in honor of his memory. A meeting of the bar was then held and Chief Justice Smith appointed chairman, and Messrs. John W. Hinsdale and John Devereux, secretaries. Appropriate arrangements were made to attend the funeral services of the deceased, and a committee consisting of Messrs. E. G. Reade, D. G. Fowle and T. C. Fuller were appointed to draft suitable resolutions to be submitted to an adjourned meeting.

ADJOURNED MEETING.

IN THE SUPREME COURT,
April 2d, 1879.

Mr. E. G. Reade, for the committee, submitted the following report:—

Mr Chairman:—The committee appointed at a meeting of the bar on 15th March, to prepare resolutions commemorative of the life and services of the late Hon. William H. Battle, respectfully report:

In Memoriam.

William Horn Battle was born 17th October, 1802. He was the eldest of six brothers. His father was Joel Battle, and his mother was a daughter of Amos Johnson. They were of the first families in Edgecombe county.

William H. Battle graduated at the University of North Carolina at the age of about eighteen, with distinction, delivering the valedictory address.

Soon after graduating he began the study of the law with Chief Justice Henderson, and some three years thereafter was so well prepared that the supreme court gave him license for both the county and superior courts at his first examination, which was unusual at that time.

He married Miss Lucy Plummer, the daughter of Kemp Plummer, a distinguished lawyer of Warren; and soon after located at Louisburg.

He had not the qualities to push him early to the front in his profession. He was modest and retiring, and won his way to public confidence by industry and fidelity.

He represented his county for a few years in the legislature, but his public services were almost entirely professional.

From 1834 to 1839 he was, in conjunction with Thomas P. Devereux, reporter to the supreme court.

In 1835 he and Governor Iredell and Judge Nash were appointed to revise the statutes of the state; and to his learning and industry the Revised Statutes owed much of its excellency. After he was seventy years of age the legislature again appointed him alone to revise the statutes, allowing him but little time for the work. This was a high compliment, but it was too much for any man to perform, and he did not complete it to his own satisfaction.

He republished some of the older supreme court reports, with annotations, and at different times published four volumes of digests of the reports, which are the only digests now in use.

In 1840 he was appointed by the governor, and during the same year was elected by the legislature, a judge of the superior court, which office he filled with great acceptability until 1848, when he was appointed by the governor to fill a vacancy on the supreme court bench. The legislature, however, did not elect him to that position, solely on account of his location in a county where there were already three judges, and a senator in congress; but he was, however, by the same legislature, reinstated in a very complimentary manner upon the superior court bench. In 1852 he was elected to the supreme court bench, which place he occupied until 1865, when all the state offices were declared vacant. He was then again elected to the supreme court bench, and occupied that position until the new organization of the court in 1868. The discharge of his

duties on the supreme court bench was entirely satisfactory. His decisions were just, and his opinions plain and learned.

He was for many years professor of law at the University, and many of the lawyers of the state were his pupils. After he left the supreme court bench in 1868 he associated himself with his sons, Kemp and Richard, in the law firm of Battle & Sons, and prepared and argued cases in the supreme court.

Judge Battle gave not a few years of worn out life, but his whole manhood of half a century to the service of God. Not a cold, formal service, but a warm, active, useful service, to which every thing else was subordinate. And he died supported by the christian faith on 14th March, 1879, without fear and without reproach.

The following resolutions are recommended:

The members of this meeting will wear the usual badge of mourning during the present term of the supreme court.

That a copy of these resolutions be sent to the family of the deceased by the chairman.

That a copy of the resolutions and report be presented to the supreme court with the request that they be entered on its minutes.

E. G. READE,
D. G. FOWLE,
T. C. FULLER,
Committee.

REMARKS OF MR. A. S. MERRIMON.

Mr. Chairman: I was acquainted a long while with the late Judge Battle. I came to understand very well and to appreciate highly his character and worth as a man and as a citizen in private and public life. I entertained for him while living a profound respect and an unusual warmth of friendly feeling. Now that he has passed away from our midst forever I venerate his memory. My recollections of him will ever be fresh and of the most pleasing and agreeable character. I experience a mournful satisfaction in joining in these solemn ceremonies, and am glad to have this opportunity to pay a brief and imperfect tribute to the worth of my departed friend.

Judge Battle's was a high type of personal character. He possessed a vigorous and well developed intellect, and took large and clear views of every subject that came within the range of his thought. His mind was well stored with general and varied information. He had decided convictions upon most questions interesting to him, and when necessary acted upon them with becoming firmness: but he was singularly free from bigotry. He was catholic, just and tolerant in his views of men and things. His moral nature predominated in his character. He had a high moral

sense. He thought that the happiness of society collectively and individually depended upon the rectitude of human conduct in all the relations of life. He loved the right and to promote all its ends. It was always his purpose to think and act rightly; he did no intentional wrong. If sometimes he made mistakes, he generally gave his support to the right side of all questions involving doubt. He was foremost in the advocacy of such measures as his judgment approved and he deemed important.

His nature and his conduct were alike gentle, affable and kind—he was just and charitable, generous and merciful, courteous and honorable—he was polite and paid due regard to his fellow man in every condition of life; he was justly beloved by everybody who knew him, of all classes. I do not think he had an enemy in the world. He was not insensible to praise; he appreciated commendation, and he did not withhold it from the meritorious.

He had deep religious convictions. He believed firmly in God and the christian religion, and earnestly and consistently laid hold of the cross as the sure foundation for his hopes of immortality and eternal blessedness.

His physical stature was not large; it was well proportioned; he had a manly presence and bearing, but he was not obtrusive; on the contrary he was modest and retiring. His face was usually lit up with a pleasant smile and good will beamed forth in every feature.

Judge Battle was an earnest and true patriot. He sincerely loved his country and her institutions. He was ever the firm and unyielding friend of civil liberty. I never saw him more earnest and determined than in a protracted struggle in behalf of public liberty some years ago, in which he bore a leading part.

His views on political questions and measures were decided, and he quietly identified himself with some political party, but he was never a politician in the ordinary acceptance of that term.

He was a well-read, painstaking and sound lawyer. He was well grounded in the great principles of the law, and was especially familiar with the laws and judicial decisions of our state. Indeed, there has been no lawyer more learned than he in the laws of this state. He was exceedingly fond and proud of his profession, he upheld its honor always and everywhere, and he was an honor to it.

He was a learned, patient and upright judge. In this capacity, he was much identified with the public and most distinguished. He sat upon the superior court bench for many years, and for a much longer period on the supreme court bench. His deportment as a judge was orderly and dignified, always commanding the confidence, respect and affection of the legal profession and the people. His judicial opinions were well considered and able, some of them strikingly so, and they afford an enduring monument to his memory, while they reflect high distinction on the bench of our state.

I shall not say that Judge Battle was a great man in any single respect, but he was great in the unity, symmetry, goodness and beauty of his character. His whole record is stainless. It is a long one, alike honorable to himself, to his profession, the bench and the state. His life was a long and eminently useful one. In the order of things, he died peacefully, full of consolation, and crowned with blessings and honor.

It affords me pleasure to say these plain words, because they are true and just. Let us ever remember and endeavor to emulate this noble example. May my end of this life be that of our departed friend!

REMARKS OF MR. SAM'L A. ASHE.

Mr. Chairman:—Although my acquaintance with Judge Battle was of comparatively recent date; my association with him was so agreeable that I cannot remain silent on this occasion, when we have assembled to do honor to his memory.

To portray the virtues of departed citizens who have worthily filled high station in the state, has been the custom among men in all ages and all countries, and the practice is no less honorable to human nature than it is beneficial in its tendencies to the social condition of man.

By presenting to public view the characteristics of men eminent for noble qualities of mind and heart, and tracing the relation which these characteristics have borne to an honorable career, we recommend them to those who would profit by human experience and convert the illustrious dead into living influences even more potent for good than while they yet moved in their accustomed places among the homes of men.

By this means men survive their material annihilation, and live through time as bright exemplars, or as beacon lights to warn posterity against the defects of human character.

In the lapse of years as the period of their activity recedes in the obscurity of the past, what they had in common with mankind is utterly forgotten, and they are known only in an action or a sentiment which elevates their names above the stagnant waters of oblivion. Thus the virtue of Cato, the patriotism of Cincinnatus, the heroism of Leonidas, are now the ideas these names evoke, the lessons they teach to each succeeding generation of distant nations.

Fortunate then is that land where monuments are erected to the memory of its illustrious dead, where the lesson of their lives is constantly enforced, and where their great actions, noble qualities and their virtues are not buried away out of sight with the useless dust that once was vivified by the immortal parts of departed worth.

There was but little about Judge Battle to dazzle the fancy, excite the

imagination or inflame ambition, but yet the story of his life is one of the most valuable to be found in the history of our state.

The heroes of our battles, it is true, have not engaged in carnage either for conquest, plunder, or lust of glory. Our statesmen are honored in proportion as they devote themselves to securing the rights of man, to ameliorating the condition of their fellow-citizens and establishing society on the eternal principles of justice. But these are actors in exciting scenes; their lives feverish; their success uncertain and subject to varying vicissitudes; their triumphs oftentimes mingled with bitterness; their pathways beset with dangers and full of snares. Courageous, patriotic, virtuous, wise as they may be, their career not unfrequently terminates in disaster and their sun goes down with lowering clouds obscuring its effulgence, while envy, jealousy and repining augment the evils that have overtaken them.

But when we consider the life of Judge Battle we feel emotions of pleasure similar to those which affect us on viewing some lovely and picturesque landscape. The awful chasm, the stupendous and grand mountain, the sublime and majestic ocean moved by an unseen and mysterious power, are absent from the picture. All is placid, serene and harmonious, and we are sensible of a lively gratification whether the eye rests upon any particular part or we take in the entire scene at one general view.

Here are displayed great amiability, joined with firmness and decision of character; unusual modesty, associated with self-reliance and courage of opinion; learning and high station, adorned by a gentle carriage and polite courtesy; a laborious life uncankered by scheming ambition; virtue and honor, fostered by manly sentiments, and resting on the simple faith that the source of all virtue, and the fountain of all honor, is that Supreme Being to whom he ascribed his creation, preservation, and all the blessings of his life.

There was a roundness and completeness about Judge Battle's character that accords well with the symmetry of his life.

In every relation he was a true and lawful man. In assuming duties he discharged them zealously and to the best of his ability.

As a lawyer, he was studious, conscientious and faithful, and never deviated from that honorable deportment whose general observance has exalted our profession above all other secular employments.

The bar has ever been the mainstay of popular liberty. It has long been its traditionary office to hold the mean between license and oppression; to preserve the liberties of the people, to conserve the just powers of government on whose efficacy depends the whole fabric and structure of our civilization and social polity. Knowing the limits of lawful power, it is our glory to have ever interposed to check by peaceful means its un-

lawful exercise. From generation to generation the story repeats itself. And in our own day we have witnessed Bragg, Graham and Battle (and another still living,) standing side by side in a doubtful contest for the supremacy of law and the right of the citizen to freedom and personal liberty.

It would hardly become me to pass even favorable judgment on this distinguished jurist, who served most acceptably upon the bench for more than a quarter of a century.

His opinions as written in the reports speak for themselves. They will go down to posterity an enduring monument of his judicial excellence and juridical attainments. It is enough for me to say that his fellow citizens placed him on the bench with Ruffin and Pearson—*noscitur a sociis!*

As a judge he was upright, learned and full of veneration for the sages of the law.

In the administration of justice he was patient, prompt, firm and courageous.

A trivial incident recently narrated to me by one who witnessed it, illustrates a phase of his character. It was many years ago when he was riding the circuit in a distant county. A solicitor, who was a man of desperate resolution and unbridled will, not unfrequently appeared in court greatly under the influence of drink. His high spirit and determined and reckless bearing had apparently deterred some of the judges from enforcing decorum on these occasions. Indeed it was supposed that he would not submit to interference or rebuke on the part of any judge. When, however, Judge Battle rode that circuit and the solicitor appeared in court intoxicated, the judge promptly told him he was in no condition to perform his duties, and directed another lawyer to take charge of the docket, and then added: "And if you, sir, appear before me intoxicated again, I will put you in jail for contempt." It is said that after that other judges found no difficulty in making the same order.

It was my fortune to have been associated with this distinguished citizen, not only at the bar but in some other relations. And I may be pardoned for making a brief allusion to the fervor with which he discharged his religious duties. A person of his cast of mind and singleness of purpose might well be presumed to have strong religious convictions. His faith was indeed a part of his daily life. Believing, he accepted christianity, and the principles of the gospel became his principles, and its precepts, as far as may be, his practice. Speaking after the manner of men, he was an ornament to the church with which he was connected; and his christian faith and walk in life adorned and enobled his character, enlarged and refined his virtue, and gave him an indefeasible title to be known as a christian gentleman, the worthiest appellation that can be earned by mortal man.

IN MEMORIAM.

It is said that when Judge Battle first came to the bar, he was like Blackstone, so unsuccessful in obtaining business that for years no case was committed to his charge. And yet he achieved the highest honors of his profession! Truly in his case may it be said, that labor conquers all things.

Possessed of no dazzling qualities, not gifted with splendid genius, unversed in the art of pushing one's fortunes to a successful issue, by his shining virtue, by his high character, by his solid learning, by his industry and professional attainments, he won for himself the respect and admiration of a noble people, and gained without solicitation the measure of a worthy ambition.

Little could he have anticipated when year after year passed and left him as it found him, briefless, despairing, hopeless of professional preferment, that in his after life there would be full compensation for all the despondency of that gloomy period. But a cold winter brings its hot summer, and with him the thaws of spring gave way to a warm sunshine that lasted far into the autumn of his life, until indeed he was in the sere and yellow leaf, ready to fall when nature should do its kindly office and transfer his immortal soul to another sphere.

Such is the record of this man's life! Many days well spent; many duties well performed; a life of labor high in judicial station; a life of courtesy and stainless honor; a life devoted to his country and his God!

Than this, lawful ambition hath no higher mark!

REMARKS OF MR. WM. R. COX.

Mr. Chairman :—In placing a garland upon the tomb of our distinguished brother, I do not propose to linger upon his early struggles, his triumphs at the bar, nor dwell upon his accomplishments as a judge. For those matters have been comprehensively and appropriately epitomized by those who have preceded me, some of whom have known him longer, but not more intimately than myself.

The few remarks I propose to submit, shall be confined chiefly to his distinguishing characteristics as a private citizen and as a public man. From our first acquaintance he impressed me with his great purity and simplicity of character, and though then in the zenith of his fame, there was nothing ostentatious, nothing pretentious in his manner or bearing.

I readily perceived that his promotion had not been in any respect meretricious, and sought to discover by what means his success had been achieved, and the task was not a difficult one. It arose from a zealous economy of his time; a methodical manner; great purity of character and a conscientious and punctilious observance of every duty required of him.

He was steadfast, but not obtrusive in his opinions, charitable to all, firm and unswerving in his personal and political integity.

And thus he furnished to the young men of the profession, to whom he was ever kind and considerate, a living example of what may be accomplished without brilliant talents, by a rigid adhesion to principle and a diligent improvement of those opportunities which may be enjoyed by all.

He took much pleasure in attending the general and diocesan conventions of his church, and in these bodies of distinguished men ever occupied a prominent, yea, a leading part, and hereafter his absence will be greatly lamented. His christian character at all times was hopeful, cheerful and conspicuously exemplary, and was the crowning glory of his old age. There was nothing ascetic in his nature. In every enterprise calculated to promote the welfare of his state, he took an active interest, as well as in those matters which were intended to benefit the community in which he lived, and in discharging the duties then imposed upon him through committees, without demurrer on his part he moulded the thought and performed the chief part of the labor.

Wielding a ready pen, I assert with confidence, without enumerating his various memorials, that he contributed more to the legal and biographical literature of our profession than any man in the state. He was a friend to popular education and sensitive to calls of poverty and distress, which he relieved with a generous hand, according to his ability. "Take him for all in all," he came nearer employing usefully all the talents with which he was endowed than any man with whom I was ever brought into intimate relations.

On the bench his uprightness and integrity of character caused even the humblest to feel that justice would be administered without prejudice or favor, and his courtesy to the bar restrained and controlled those ebullitions of feeling which will occasionally arise in the trial of important causes.

When Sir Matthew Hale died, his friend Baxter purchased a Bible, in which he placed a print of the deceased, and underneath wrote these words; "Sir Matthew Hale—the pillar of justice, who would not have done an unjust thing for any worldly prize or motive."

This eulogium to England's great judge may be truthfully applied to our distinguished friend, and those who knew him intimately and his conduct in regard to his elections can most fully appreciate its appropriateness. However coveted the prize of the ermine, no assurance of success could tempt him to veer from what he believed to be right to secure it; he considered that a judgeship should be a free-will offering, and the same purity and independence which ought to distinguish its possessor should regulate the action of those by whom it was conferred.

And thus able, amiable, courteous, unselfish and just, true to his coun-

try endeared to his friends, respected by all his neighbors, tender and exemplary in his family relations, he closed a long life of usefulness and ended his mission surrounded by his children, after having participated in the baptism of a descendant of the third generation. After such a life, who would not desire that his last days might be such as his? Thus departing, he has left e'en upon the mountain top of death a light which gives assurance of a blessed immortality.

"Light be the sod which rests upon his breast; green be the grass that grows upon his grave; eternal be the laurels that flourish round his tomb."

SUBSTANCE OF THE REMARKS OF MR. F. H. BUSBEE.

Mr. Chairman:—It will be difficult to add aught to the well considered eulogies we have just heard, but my own gratitude to my dead friend will not permit me to keep silent. My first lessons in the law were learned at his feet, and as a student at the University, of slender means, I received kindnesses at his hands which I shall never forget.

A recent newspaper has sneeringly commented upon the resolutions and addresses of meetings of the bar in honor of deceased brethren, and suggests that our admiration of, and love for, these gentlemen was never suspected while living. The shaft falls hurtless to-day. It is true, that while our brethren are with us, there is no occasion for an expression of our estimates of their lives and characters, and it is only when they have passed "over to the great majority beyond," that we are called upon to place on record the memorial of their life work. I have been struck to-day with the moderation, and, as far as I can judge, the accuracy with which Judge Battle's character has been portrayed. He was no splendid genius, no thrilling orator; he was a laborious and learned jurist; he lived and died a christian gentleman. Who could desire a nobler epitaph?

I desire simply to point a single moral from his life for the instruction and encouragement of the younger members of the profession. The leading features of Judge Battle's career were his unwearied industry, and his unbending integrity; wherever these characteristics came into prominence his success was sure. At the University he stood among the first in a class of great intellectual ability; as a law student his preparation was so thorough that the supreme court gave him both superior and county court licenses upon a single examination. And then, when he had settled in the quiet village of Louisburg, came the days of doubt and despondency. Possessed of a small library, his studies were for the most part confined to the old text books, and to the North Carolina decisions, the latter especially. Not a popular orator, with no art of the demagogue, daily seeing men, his inferiors, attaining a success in the smaller

criminal and county court practice beyond his own, how he must have wearied in his work, and have asked himself what good will all this labor accomplish? The temptation to follow in their easier pathway must have been strong. Yet he was then laying the foundation for his future success in life; but for the struggling years of slender practice at Louisburg, his familiarity with the decisions of North Carolina could never have been attained, and his subsequent career would have been totally different.

When the opportunity came, an opportunity so gratefully and gracefully acknowledged in the preface to his Digest, he showed in his work upon the reports the stuff that was in him, and his future was assured. Step by step, laboriously he rose until he received the highest professional honors in the gift of his state, and won them by the divine right of labor and of merit.

I shall not trespass upon the time of the meeting by adding my appreciation of the beauty of Judge Battle's christian character. It permeated the whole man. You cannot view him as a lawyer, as a judge, or as a citizen, without seeing everywhere his perfect faith in christianity, his stainless delicacy of thought and expression, his unswerving honor and honesty. If he be not a fit exemplar for the young men of North Carolina, I know not where one can be found. He crowned a long life of usefulness with a peaceful death among his kindred, and in sound of the college bell that had called the best youth of the state around him for so many years. I join Mr. Lewis in congratulating his sons upon the manner and the time of his death. *Felix non solum vitæ claritate, sed etiam opportunitate mortis.*

SUBSTANCE OF THE REMARKS OF MR. E. R. STAMPS.

Mr. Chairman:—I only ask the indulgence of the brethren of the bar for one moment. I have seen somewhere that a certain Englishman had such reverence for the character of Sir Philip Sidney that he said he wanted no prouder epitaph upon his tomb than this: "Here lies the friend of Sir Philip Sidney," and so I arise simply that I may be recorded as a friend and admirer of our honored and lamented brother. A man is never great, Mr. Chairman, unless he is good. Judge Battle was good and true, and his death, unlike that of most of us causing but a slight shadow upon our own family hearthstone, casts a sombre gloom across our whole state. I will mention but one trait of his character that has come to my notice, and which has not been touched on by the gentlemen who have preceded me, that is, he never used his tongue to back-bite his fellow, he never "took up a reproach against his neighbor," but was always kind and courteous, and ever ready to cheer and encourage his younger professional brother. Mr.

Chairman, no man should desire a nobler heritage than that which Judge Battle has left, the glory of a life of toil, and an unsullied name.

The resolutions were unanimously adopted, and the meeting adjourned. On the following day the Attorney General presented the report and resolutions to the Court, and, on motion, they were ordered to be entered of record.

INDEX.

HOMICIDE:

In opinion in *State* v. *Chavis*, 353, for "*wilting*," read *weltering*.

In sixth line of opinion in *State* v. *Reel*, 442, for "*made*," read *joined*.

And in nineteenth line on page 471, *comma* instead of *period*, after the word state.