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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA,

JANUARY TERM, 1880.

REPORTED BY

THOMAS S. KENAN,

(Vol. 7.)

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1880.

JUSTICES OF THE SUPREME COURT,

January Term, 1880.

CHIEF JUSTICE:

WILLIAM N. H. SMITH.

ASSOCIATE JUSTICES:

THOMAS S. ASHE, JOHN H. DILLARD.

CLERK OF THE SUPREME COURT:

WILLIAM H. BAGLEY.

ATTORNEY GENERAL,

THOMAS S. KENAN.

JUDGES OF THE SUPERIOR COURTS.

MILLS L. EURE,	1st Dist.	*JOHN A. GILMER,	5th "
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.

*Appointed by GOV. JARVIS on the 10th of September, 1879, *vice* JOHN KERR, deceased.

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.

JUDGE OF THE CRIMINAL COURT.

OLIVER P. MEARES, Wilmington.

SOLICITOR.

BENJAMIN R. MOORE, Wilmington.

LICENSED ATTORNEYS.

JANUARY TERM, 1880.

Frank T. Baldwin,
William M. Bond,
Edgar W. Chandler,
John E. Fields,
Williamson W. Fuller,
Charles W. Gallaway,
Edward S. F. Giles,
Jesse Jenkins,
Julius Johnston,
Franklin P. Jones,
John D. Kernodle,
Enoch F. Lamb,
Charles K. Lewis,
George McCorkle,
James H. Moore,
Walter E. Moore,
John T. Morphew,
David B. Nicholson,
Walter L. Parsons,
William S. Pearson,
Thomas C. Phillips,
John W. Powell,
Nereston R. Richardson,
Laban F. Smith,
Chester D. Turner,
David H. Tuttle,
Samuel Wilder,
William W. Willson.

CASES REPORTED.

CASES CITED.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

JANUARY TERM, 1880.

MIZELL & WALKER v. DENNIS SIMMONS and W. J. HARDISON.

Petition to Rehear—Affirmance of Judgment.

The decision in *Mizell* v. *Simmons*, as reported in 79 N. C., 182, is affirmed, and must stand as the judgment of this court.

(*Watson* v. *Dodd*, 72 N. C., 240, cited and approved.)

PETITION by defendants to Rehear heard at January Term, 1880, of THE SUPREME COURT.

Messrs. P. H. Winston, Sr., and *Mullen & Moore* for plaintiffs.

Messrs. Gilliam & Gatling and *Reade, Busbee & Busbee* for defendants.

ASHE, J. This is a petition to rehear and reverse the judgment rendered in this court in the case of *Mizell* v. *Simmons*, at its June term, 1878, and reported in 79 N. C., 182.

In the case of *Watson* v. *Dodd*, 72 N. C., 240, which, like this, was a petition to rehear, Chief Justice PEARSON in delivering the opinion of the court said: "The weightiest considerations make it the duty of the court to adhere to their decisions. No case ought to be reversed upon petition to rehear unless it was decided hastily and some material point was overlooked, or some direct authority was not called to the attention of the court." And to the same effect are the cases of *Haywood* v. *Daves*, 81 N. C., 8; *Devereux* v. *Devereux*, *Ibid.*, 12.

This case seems to have been considered in 1878, when before this court, with very great care, deliberation and labor, from the numerous authorities cited and the able and well considered opinions delivered. But it does not appear that any material point was then overlooked or that any important authority was then omitted which is now brought to the attention of the court. So far from that being the case, the same authorities then cited are now relied upon, and we are unable to discover any error in the decision then made. We are, therefore, of the opinion that the decision made in this case at the June term, 1878, shall stand as the judgment of this court.

No error. Affirmed.

H. J. SMITH v. J. J. LYON and others.

Practice—Appeal to Supreme Court.

An appeal to this court must be taken to the *next* term after it is granted in the court below.

(*State* v. *Hawkins*, 72 N. C., 180, cited and approved.)

SMITH *v.* LYON.

MOTION to dismiss an Appeal heard at January Term, 1880, of THE SUPREME COURT.

At February term, 1879, of the superior court of Wake county, a judgment was rendered (by *Eure, J.*, presiding) in behalf of the defendants in a civil action then depending, wherein Hilliard J. Smith is plaintiff, and James J. Lyon, Wiley Lyon and William Jackson, administrator of Lewis Jackson deceased, are defendants. From this judgment the plaintiff prayed for and obtained an appeal, but no transcript of the record of the case was sent up until the present term of this court. The defendants' counsel now move to dismiss the case upon the ground the appeal has not been prosecuted in apt time.

Messrs. Geo. V. Strong and *S. G. Ryan*, for plaintiff.

Messrs. Battle & Mordecai and *J. B. Batchelor*, for defendants.

ASHE, J. The law requires that appeals to the supreme court shall be taken to the next term after the appeal is prayed for and granted in the court below. The appeal in this case should have been taken to June term, 1879, of this court and the transcript then filed, but as the plaintiff has failed to do so, he has lost his appeal. *State* v. *Hawkins*, 72 N. C., 180. The motion is sustained and the appeal dismissed. Let this be certified to the superior court of Wake.

PER CURIAM. Appeal dismissed.

A. C. SANDERS v. J. A. NORRIS.

Practice—Appeal—Certiorari.

Where one loses his right of appeal and fails to apply for a *certiorari* in apt time, but by no neglect of his own, as is shown by the circumstances in this case, and an execution issues upon the judgment obtained against him, *it was held* that his petition for a *certiorari* may be filed and the adverse party notified to show cause why it shall not be granted; and that the sheriff be restrained from proceeding under the execution until the further order of this court.

PETITION for *Certiorari* heard at January Term, 1880, of THE SUPREME COURT.

Mr. W. H. Pace, for defendant petitioner.

DILLARD, J. On the petition of defendant for a writ of *certiorari* as a substitute for an appeal, and restraint of the sheriff from acting under an execution now in his hands, the following facts appear:

The action was begun in a justice's court, and brought by appeal to the superior court of Wake county, in which latter court a trial was had and judgment obtained against the defendant at the January term, 1879. On the rendition of the judgment, the defendant caused entry of appeal to be made, and notice of appeal was waived and bond executed as required by law for costs of the appeal and for the stay of execution by securing the debt ascertained by the judgment recovered. A statement of a case of appeal was made out by defendant and served on plaintiff's counsel within the time required, and the plaintiff having returned the same with a counter-statement, the judge of the court appointed the 15th day of February to settle the case for the supreme court, and since then the following entries appear

of record in the cause, to-wit: At February term—"Continued, Seymour, Judge, has the papers." At August term —"Continued, appeal not perfected by statement of case, carried to judgment docket No. 58, page 63, execution issued September 29th, 1879."

Besides these facts, the petitioner sets forth that he has repeatedly applied to the judge to make out the case and received for answer that he had mislaid the papers and was unable to settle the case; and that execution is now in the hands of the sheriff of Wake, and he is about to sell and will sell defendant's property under its command, unless he is restrained until he can have his case brought up and heard by the writ of *certiorari* now prayed for.

The defendant had the right to appeal from the judgment recovered against him, and assuming the facts to be true as stated in the petition, he did everything required of him to perfect his appeal, and has lost the benefit thereof by the accident of the mislaying of the papers by the judge. The apparent laches, in not applying for the writ of *certiorari* at June term last of this court, appears to be explained by the continuances and entries of record at the June and August terms of the superior court, from which it may be inferred that it was reasonably expected His Honor would find the papers and be able to make out and settle a case of appeal for this court.

Without passing on the truth of the facts stated in the petition, but taking them to be true for the present purpose, we are of opinion and so decide, that the petition of the defendant may be filed, and an order will be issued to be served on the plaintiff and the sheriff of Wake county, commanding the plaintiff to show cause, if any he have, against the grant of the writ of *certiorari* as prayed for, before this court on the 28th day of the present month (February) and restraining them, the plaintiff and the sheriff, from any sale or other proceeding under the execution now

in the hands of the sheriff, issued on the judgment recovered by the plaintiff against the defendant at January term, 1879, of the superior court of Wake county, until the further order of this court.

PER CURIAM. Order accordingly.

ALFRED WHITE v. DAVID CLARK.

Practice—Judge's Charge—Contract—Parol promises.

1. An alleged error or omission in a judge's charge must be accepted to on the trial below, and cannot be assigned for error *ore tenus* and for the first time in this court.
2. In an action against A for goods sold and delivered, the question being for whose use they were furnished, there was evidence tending to show that an overseer employed by A and B managed their farms and bought the goods on orders drawn by him as agent of B (B being the agent of A) without specific directions to make purchases, and that some of the articles were used on A's and others on B's farm, A promising to pay the whole account if upon inquiry he found that the articles were used on his farm, the court charged the jury that plaintiff was entitled to recover if they were satisfied the goods were bought for defendant and he promised to pay for them; but that defendant was not liable for any articles furnished B or any one else except himself, and if any of them were not furnished to defendant and he had not promised to pay for them, the plaintiff was not entitled to a verdict for such articles:

   Held, in the absence of special instructions asked for, the jury were substantially and properly instructed as to the distinction between parol promises to pay one's own debt, and those to pay the debt of another.

(*Utley* v. *Foy*, 70 N. C., 303; *Sampson* v. *R. R. Co.*, *Id.*, 404; *Swepson* v. *Summey*, 74 N. C., 551; *Rush* v. *Steamboat Co.*, 67 N. C., 47, cited and approved.)

CIVIL ACTION tried, on appeal from a justice's judgment,

at Spring Term, 1879, of HALIFAX Superior Court, before *Eure, J.*

The plaintiff complains that the defendant is indebted to him in the sum of one hundred and forty-one dollars and sixty-five cents for goods sold and delivered, and the justice of the peace gave judgment for the plaintiff, and the defendant appealed to the superior court. On the trial below, one J. J. Judge was introduced for the plaintiff, and testified that he was overseer on the plantation of the defendant in 1877, the year when said goods were bought, and was also overseer on the plantation of Walter Clark who was the general agent of the defendant; that his instructions were to manage the farm as his predecessor, one Hopkins, had done; that he was informed by Hopkins how he had managed it, and under that authority he purchased the articles mentioned in plaintiff's complaint, one of which was a horse which was used on the farm, and subsequently bought by witness from the defendant; that a lot of harrows mentioned in the complaint were also purchased of plaintiff and used on the farm, which Walter Clark, defendant's agent, saw while in use and did not give notice to plaintiff that he did not want them, or that they were subject to his demand.

On cross-examination he testified that said plantations were distinct though adjoining, and both were under his control, and under the general management of Walter Clark, and that he kept separate books for the two farms; that some of the articles mentioned in the complaint were furnished to hands on Walter Clark's farm, and some to renters on David Clark's farm; that in giving orders on plaintiff, he would sign them himself as the agent of Walter Clark.

The plaintiff, a witness in his own behalf, testified that he sold the goods to J. J. Judge as agent, and that they were charged on his books to Walter Clark; that he made out the account against the defendant and sued him for the amount, under advice of counsel; that he presented the account to

the defendant after Judge had been discharged as overseer, and he said it was all right except the harrows and that he would ascertain whether they were used on his farm, if so, he would pay the whole account.

Walter Clark was then introduced and testified that he gave Judge no authority to trade, that his authority was expressly limited to plantation duties; he instructed him in regard to plantation management to follow the custom of his predecessor, and that the rule for ten years on his and defendant's farm had been to forbid purchases by overseers.

John Hall was introdueed by plaintiff and testified that he paid the defendant for one of the harrows mentioned in the complaint; that he was a renter, and when he paid the defendant he stated that he would hold the amount so paid to abide the result of this action.

There was no exception to the evidence, or to the charge of the court, which is set out in the opinion. Verdict for plaintiff, judgment, appeal by defendant.

Messrs. J. B. & W. P. Batchelor, for plaintiff.

Messrs. Day & Zollicoffer and *Gilliam & Gatling* for defendant.

DILLARD, J. In the statement of the case of appeal made out by His Honor in the court below, there is no error pointed out in the reception or rejection of evidence nor in the instructions given or withheld from the jury, and in such case the rule is to affirm the judgment. It was the duty of the appellant to see that the case made out by the judge fully and distinctly sets forth his exceptions and the grounds thereof. *Utley* v. *Foy*, 70 N. C., 303; *Swepson* v. *Summey*, 74 N. C., 551; *Sampson* v. *R. R. Co.*, 70 N. C., 404.

The appellant, admitting the rule, insists, however, that although there is no special assignment of error in the case of appeal, yet His Honor undertook to charge the law per-

taining to the controversy and therein committed an error apparent on the record to his detriment, and that it is competent to him on the trial here to assign his error *ore tenus* and have this court to consider and pass on it. We do not assent to this mode of assigning errors as admissible under the established rules of practice of this court, but in this case as we have a definite opinion on the point made we will go on and express it.

In the absence of any special requests, His Honor, in his general charge to the jury, instructed them, "that they must be satisfied from the evidence that the articles charged in the account were purchased by and delivered to David Clark, or that he ratified and confirmed the action of J. J. Judge and promised the plaintiff to pay for them; that they could not give a verdict against the defendant for any of the articles furnished to Walter Clark or any other person except the defendant. That if upon the testimony they should believe that the articles charged in the account, or any of them, were not furnished to said Clark, and he had not promised to pay the plaintiff for them, they should not render a verdict for the plaintiff for such articles."

These instructions of His Honor are claimed to be erroneous, in that His Honor omitted to call the attention of the jury to the distinction in law between the obligation of a parol promise to pay one's own debt and the parol promise to pay the debt of another, and to charge them in relation thereto. To determine the question of alleged error, the charge of His Honor must be considered in reference to the controversy before the jury and the exact points in dispute upon the evidence adduced. The goods, for whose value recovery is sought, were furnished on the orders of Judge, an overseer of defendant and also of Walter Clark, on their two adjacent plantations, and were furnished on orders signed by the overseer "as agent of Walter Clark," and charged on the books of plaintiff to Walter Clark. On the trial in the

superior court, the fact of the furnishing the goods was not disputed, but the inquiry was, *for whom and for whose use were they furnished, for David Clark or for Walter Clark.* And as pertinent to this point, evidence was introduced by the plaintiff tending to show the purchase to have been made for David Clark and an admission thereof, and a promise by him to pay for the same; and on the part of the defendant, evidence was offered and received tending to show a want of authority in the overseer to buy articles for either David Clark or Walter Clark, and tending to show also that some of the items in the account were for articles bought for Walter Clark.

Interpreting the judge's charge with reference to such state of the controversy as shown forth in the contentions before the jury, it clearly appears that His Honor in his instructions sought to have the jury classify the items in the account, separating those bought for David Clark from those bought for Walter Clark, and for this purpose, as it seems to us, the terms of the directions given were reasonably intelligible and definite, and not such as to mislead the jury or to admit of any wrong action in the making up of the verdict. His Honor's charge in substance was, that whatever articles had been bought for the defendant and he had promised to pay for he was liable for; and that the jury might find a verdict against him to that extent. And that if they should find that the articles or any of them were not bought for David Clark and he had not promised to pay for them, they should not find a verdict against defendant for such articles. To make the meaning of the intention clear, and so guard against any misunderstanding of the jury, His Honor added that the jury could not give a verdict against the defendant for any of the articles furnished to Walter Clark or to any other person except the defendant.

Under these directions the jury were surely guided to make a separation between the purchases for David Clark

and those for Walter Clark, and definitely directed not to find against the defendant any article that was bought for Walter Clark or any other person. If the defendant desired any more definite or particular instruction on the distinction between the obligation of parol promises for one's own debt, and parol promises to pay the debt of another, he should have made the request, but he did not. In fact, the charge as given as much protected the defendant against liability for the items furnished to Walter Clark as if the distinction between the two kinds of promises had been called to the attention of the jury, and instruction given in relation thereto with the greatest technical precision.

It is the duty of the appellant on his appeal to point out and maintain some error of law to his injury, and none such being made to appear, the rule is that all uncertainties and omissions are to be taken most strongly against him. *Utley* v. *Foy*, 70 N. C., 303; *Rush* v. *Steamboat Co.*, 67 N. C., 47.

No error. Affirmed.

R. W. WHARTON, Administrator, v. COMMISSIONERS OF CURRITUCK.

Nonsuit—Retraxit—Limitations—Demand.

1. Plaintiff's intestate brought suit against a county and afterwards, on his own motion, had the following entry made on the docket: "Plaintiff takes a nonsuit, judgment against the plaintiff for costs;" *Held*, not to constitute a *retraxit* in form or substance.

2. An act of assembly provided that all claims against certain municipal corporations should be presented within two years, or else the holders should be forever barred from recovering thereon, and directed that all claims so presented should be entered in a book to be kept for that

purpose, but said act was declared inapplicable to debts "already ascertained and audited;" *Held*,

(1) That such act was substantially a statute of limitations, and that one who began suit within the time prescribed, took a nonsuit and began a second action within one year after the nonsuit, but more than two years after the maturity of the claims, was not barred.

(2) That the object of the act being to enable the municipal bodies mentioned, to make a record of their valid outstanding obligations, and to separate them from the spurious and illegal, it did not apply to a valid debt of the existence and character of which the corporate authorities had actual notice.

(3) That the summons and complaint in the first action constituted a sufficient demand.

(*Skillington* v. *Allison*, 2 Hawks, 347; *Morrison* v. *Conelly*, 2 Dev., 233; *Freshwater* v. *Baker*, 7 Jones, 255; *Straus* v. *Beardsley*, 79 N. C., 59; *Worke* v. *Byers*, 3 Hawks, 228; *Pescud* v. *Hawkins*, 71 N. C., 299; *Graham* v. *Tate*, 77 N. C., 120; *Tate* v. *Phillips*, 77 N. C., 126; *McKesson* v. *Mendenhall*, 64 N. C., 502, cited and approved.)

CIVIL ACTION tried at Fall Term, 1879, of CURRITUCK Superior Court, before *Gudger, J.*

The case is stated in the opinion. Judgment for plaintiff, appeal by defendants.

Messrs. Gilliam & Gatling, for plaintiff.
Messrs. Pruden & Shaw and *Whedbee*, for defendants.

SMITH, C. J. On the 13th day of June, 1878, the plaintiffs' intestate, David M. Carter, instituted his action against the defendant corporation in the superior court of Hyde to recover the value of certain bonds issued by the county of Currituck, and then held by him. The plaintiff filed his complaint on the 11th day of November, and at fall term the following entry is made on the docket: "Plaintiff takes a nonsuit. Judgment against the plaintiff for costs."

No demand was made of the defendant before the suit was brought. After the intestate's death the plaintiff, his administrator, sued out a summons from the superior court

of Currituck, on the 15th day of February, 1879, for the same cause of action, and on the same day the defendant acknowledged service and waived a demand of payment in writing endorsed upon the summons. The indebtedness set out in the complaint consists of nine bonds, each in the sum of one thousand dollars, and all maturing on the first day of July, 1876, and of detached coupons in the aggregate sum of nine hundred and thirty dollars, each for the sum of thirty dollars, and successively falling due on the first days of January and July in the year 1861, and thereafter up to the date when the principal became due. The debt was incurred for a work of internal improvement, constructed partly in the county and under the authority of an act of the general assembly, ratified February 8th, 1855, entitled "an act to incorporate a company to construct a ship canal to unite the waters of Albemarle, Currituck and Pamlico Sounds with the Chesapeake Bay and for other purposes." Act 1854–'55, ch. 93.

The defendants deny that any legal and sufficient demand of payment was made before the commencement of the action, and set up the defence that no recovery can be had because of the plaintiff's failure to comply with the requirements of the act of March 22d, 1875. Acts of 1874–'75, ch. 243.

The act, section one, provides that all claims against the several counties, cities and towns of this state, whether by bond or otherwise, shall be presented to the chairman of the board of county commissioners, or to the chief officer of said cities and towns, as the case may be, within two years after the maturity of such claim or claims, or the holders of such claim or claims shall be forever barred from a recovery thereof. Section two directs to be entered in a book to be called "the registry of claims," the nature, amount, date and time of maturity of all claims so presented, and section

four declares the act not applicable to a county whose debt is "already audited and ascertained."

The trial was, by consent, referred to the court, and the following additional facts found are deemed material to the solution of the questions presented in the appeal: Before the commencement of suit by the intestate, the corporate authorities of Currituck had full knowledge of the existence, nature, amount, date and time of maturity of the outstanding debt of the county, contracted for internal improvements, of which the bonds and coupons sought to be recovered form a part, and caused a record thereof to be made. The amount thus ascertained had been apportioned between the county and that part of Dare detached from it, in an action of the former against the latter county, and in conformity with the judgment rendered therein. Upon these facts the court was of opinion that the plaintiff was entitled to recover the whole of his debt, and gave judgment accordingly, the correctness of which ruling is the point presented for our review.

It will be observed that the statute relied on is not in strict terms an act limiting the time in which the action may be prosecuted, but it imposes upon the creditor the duty of presenting his claim within a defined period of time, and upon his failure to do so, forbids a recovery in any suit thereafter brought. If the claim is presented and the commands of the statute complied with, no bar or obstruction is interposed in the way of its successful prosecution. Under this operation and requirement of the enactment, it may admit of question whether this new condition engrafted upon the contract, as affecting the pre-existing rights of the creditor, does not impair its obligation within the prohibition of the federal constitution. But waiving the point and treating the act as a restricted and conditional limitation upon the right to sue and governed by the rules applicable to its exercise, it is plain, as the first action is exempt

from its operation, and the present has been commenced within a year after its termination by a nonsuit, the case is within the saving of section eight of chapter sixty-five Revised Code, as construed in numerous cases before this court. *Skillington* v. *Allison*, 2 Hawks, 347; *Morrison* v. *Conelly*, 2 Dev., 233; *Freshwater* v. *Baker*, 7 Jones, 255; *Straus* v. *Beardsley*, 79 N. C., 59.

We do not concur in the argument of defendants' counsel, based upon what is said in *Worke* v. *Byers*, 3 Hawks, 228, that the entry upon the docket of Hyde superior court is in substance a *retraxit*. In our opinion both in form and effect it is what it purports to be, a nonsuit, as if drawn out in full, and no parol evidence is admissible to contradict or explain the record.

"The ancient rules," says BYNUM, J., delivering the opinion in *Pescud* v. *Hawkins*, 71 N. C., 299, "in regard to nonsuit, which were founded on technical reasons, having no existence now, have given way to the more reasonable one which now prevails, to wit, that if it be clear that in point of law the action will not lie, the judge at *nisi prius* will nonsuit the plaintiff, although the objection appear on the record and might be taken advantage of by motion in arrest of judgment. 2 Tidd Pr., 867; 1 Com., 256. And so it is held that *whenever in the progress of a cause* the plaintiff perceives that the judge or the jury is decidedly against him, or *that he will, on a future occasion*, be able to establish a better cause, *he may elect to be nonsuited.*"

In *Graham* v. *Tate*, 77 N. C., 120, PEARSON, C. J., says: "A plaintiff can, at any time before verdict, withdraw his suit, or, as it is termed, *take a nonsuit*, by absenting himself at the trial," * * * "even when the plaintiff appears at the trial, takes a part in it by challenging jurors, examining and cross-examining witnesses, and (after) the argument of his counsel, if he finds from an intimation of the court that the charge will be against him, he may submit

a nonsuit and appeal. This is every day's practice." To the same effect are *Tate* v. *Phillips*, 77 N. C., 126, and *McKesson* v. *Mendenhall*, 64 N. C., 502.

But there is another aspect of the case which may be considered in connection with the construction of the act and the objects aimed at in its passage, even if the bonds are not "debts already audited and ascertained," to which, as declared in section four, the enactment was not intended to apply. The obvious purpose of the law is to enable those municipal bodies mentioned in it, to ascertain and make a record of its valid outstanding obligations, and to separate them from such as are spurious or tainted with illegality and denounced in the constitution.

And if as the facts found show this information, full and accurate, was already in possession of the corporate authorities of the county and spread upon its records, and the nature, amount, date and time of maturity of its indebtedness determined and made the basis of an apportionment between the counties, for what end was it needful to have a new presentation of the claims and another record of the same import? We are not disposed to give so strict an interpretation to the requirement of the act, which, as all its useful purposes are met, would be to sacrifice substance to form and convert a judicious measure of legislation into an instrument of injustice and wrong. But if a precedent demand be necessary, was it not sufficiently made in the service of the first summons, followed by a description of the debt in the complaint filed at the term of the court to which it was returnable? and is not this a substantial compliance with the demands of the act? We are, therefore, of opinion that the defence is unavailable to defeat the recovery of the plaintiff, and the judge was correct in so holding.

No error. Affirmed.

J. W. WATSON and others v. COMMISSIONERS OF PAMLICO.

Annexing Territory to Old County—Taxation.

Where a county is enlarged by the annexation of new territory, the property thus brought within the corporate limits will be subject to taxation to discharge the pre-existing indebtedness of the old corporation.

(*Currituck* v. *Dare*, 79 N. C., 565, *Manly* v. *Raleigh*, 4 Jones Eq., 370, cited and approved.)

APPLICATION for an Injunction heard at Chambers, Fall Term, 1879, of PAMLICO Superior Court, before *Gudger, J.*

Upon the hearing the court granted an order that the defendants be perpetually enjoined from levying and collecting taxes to pay certain debts, mentioned in the opinion, and the defendants appealed.

Messrs. Caho, Manly and *Gilliam & Gatling,* for plaintiffs.

In the absence of legislative provision, the annexed territory is not liable for the old debt of the county. Dill. Mun. Corp., § 128; *Currituck* v. *Dare,* 79 N. C., 565. Defendants have no power to levy the tax unless the same had been conferred by statute. *Com'rs* v. *Clarke,* 73 N. C., 255; *Wade* v. *Com'rs,* 74 N. C., 81; Cooley Const. Lim., 487. Plaintiffs had no voice in creating this debt and are therefore not liable. *Draining Co.* v. *Hooper,* 2 Metc., 350; Cooley, 493.

Messrs. Grainger & Bryan, for defendants:

Where territory is annexed to a county, it becomes a part of it for all purposes, and the rule of absolute uniformity in taxation is applicable. Cooley on Taxation, 180; Burroughs, 51; and where territory is taken from an indebted county it is relieved of the debts of such county in the absence of legislative provision to the contrary, Dill. Mun. Corp., §

128; 92 U. S. Rep., 307; *Currituck* v. *Dare*, 79 N. C., 565. And the converse must be true on principle. *Manly* v. *Raleigh*, 4 Jones Eq., 370; Dillon, § 126; 8 Ohio, 285; 13 Mo., 400. Legislature has absolute control of corporations. 11 Ired., 558; Cooley, 231; Dillon, § 126.

SMITH, C. J. The county of Pamlico, as laid off and defined by the act of February 8th, 1872, was constituted out of detached portions of Craven and Beaufort counties, and when formed was "invested with all the rights, privileges and immunities of other counties in the state." There are two provisos contained in section two as follows: "That this bill for the formation of said county, together with the obligation to pay its proportionate share of the debt of Craven and Beaufort counties, shall be submitted to the qualified voters of the territory to be formed into a new county for adoption or rejection," and again "that if a majority of the votes cast in that portion of Beaufort county, proposed to be cut off, shall be against the new county, it shall not form a part of the same."

The popular vote given in the territory detached from Beaufort was against annexation, and the county was consequently formed entirely from the territory severed from Craven. Upon its organization, the stock in the Atlantic and North Carolina railroad company held by Craven, and its public debt, as required by section ten of the supplementary act of February 10th, 1872, were apportioned between those counties. Acts 1871–'72, chaps. 132 and 182. Subsequently, on application of the inhabitants of Goose Creek Island township, (a portion of the part of Beaufort which had rejected annexation) the general assembly passed the act of February 16th, 1874, and authorized the separation and transfer when ratified by the qualified voters resident on the island, and provided for an election to be held to determine the popular will. Acts 1873–'74, ch. 152.

The election was held, and the proposed transfer to Pamlico was approved and ratified. The act contains no provision in reference to the assumed indebtedness of the county of Pamlico, and its corporate authorities have proceeded to levy a tax upon the newly acquired territory as upon the rest of the county to meet its general liabilities. The action is brought on behalf of the tax-payers of Goose Creek Island to restrain the collection of any taxes levied upon them or their property therein, to meet other than the current and ordinary expense of county government, and especially the indebtedness transferred from Craven.

It is manifest that the adverse vote of the electors, in that part of Beaufort originally included in the boundaries of the proposed new county, finally disposed of the question of its severance and transfer and rendered the act in this regard nugatory and inoperative for any future purpose without the aid of further legislation. It is equally clear that the transfer of Goose Creek Island made dependent on, and being approved by, the inhabitants entitled to vote, in the absence of any authoritative declaration of the legislative will on the subject, must be determined upon general principles and well settled usages prevailing in such cases.

In the case of *Com'rs of Currituck* v. *Com'rs of Dare*, 79 N. C., 565, the court cites with approval the doctrine laid down in 1 Dill. Mun. Corp., §123, and in support of which many authorities are referred to in these words: "So in Massachusetts it has been held that if a new corporation is created out of the territory of an old corporation, or if *part of its territory or inhabitants is annexed to another corporation*, unless some provision is made in the act respecting the property and existing liabilities of the old corporation, the latter will be entitled to all the property and be solely answerable for all the liabilities."

Thus as the transferred territory loses all claim to share in the property belonging to the corporation from which it

is taken, and is relieved of the indebtedness resting upon the latter, so it incurs the liabilities and shares in the property of the corporation to which it is attached, and is equally subject to assessment and taxation for that purpose. Nor is the validity of legislation followed by such consequences dependent upon the will and assent of any of the people to be affected by it, but rests in the sound discretion of the law making power.

"Not only (we quote from the same author) may the legislature originally fix the limits of the corporation, but it may, unless specially restrained in the constitution, subsequently annex, or authorize the annexation of, contiguous or other territory, and this without the consent, and even against the remonstrance of the majority of the persons residing in the corporation or on the annexed territory. And it is no constitutional objection to the exercise of this power of compulsory annexation, that the *property thus brought within the corporate limits will be subject to taxation to discharge a pre-existing indebtedness*, since this is a matter which, in the absence of special constitutional restriction, belongs wholly to the legislature to determine."

So in *Manly* v. *City of Raleigh*, 4 Jones Eq., 370, the plaintiffs residing in the territory embraced in the act enlarging the boundaries of the city, sought relief from the "burdens which had accumulated in the shape of a debt and to the onerous taxes" incident to the city government, which they would incur by the annexation, and it was declared that the bill showed no equity and it was dismissed. "To establish a county or incorporate a town is a legislative act," say the court, and "consequently the general assembly may exercise this power whenever and in such manner, as in its opinion the public good will thereby be promoted, unless the time, manner or other circumstances of the act violates some provision of the constitution." And again: "The general assembly has power to incorporate a town, or to *ex-*

tend or contract the limits of one already incorporated, whenever, in its opinion, public policy requires it to be done."

If the personal property removed from one county to another by the owner, or territory withdrawn from the jurisdiction of one taxing power and placed under that of another with defined territorial limits in which they are included, does not become liable to the burdens of its public indebtedness and to an assessment therefor, it would escape the obligations of both—a result neither in itself equitable, nor just to others, nor permitted by the law. The plaintiffs can derive no support to their claim of exemption from the decision in *Currituck* v. *Dare, supra*, since the liability of all the taxable property in the county of Dare, as constituted, to assessment to meet its obligations is recognized, while so much as is taken from Currituck by the express terms of the enactment is additionally charged with its ratable share of the debt of the latter incurred for internal improvement.

If no direct equivalent or consideration of pecuniary value was received by the inhabitants of Goose Creek Island for this legal assumption of the debt of Pamlico, it would in no manner change the consequences of its becoming part of the county, and yet those inhabitants acquire the advantages and privileges possessed by others resident in the county, and among them the use of the public buildings, perhaps erected from the proceeds of former tax-levies, and whatever may be the value of the assigned railroad stock, a participation in the benefits of that fund. The liability, however, as we have said, does not spring from considerations of this kind, but is the natural and legal result of annexation itself. The plaintiffs have no equity in their claim for exemption from taxes properly imposed upon others, and the injunction ought to have been refused. There was error in the order for its issue and it must be reversed. Let this be certified.

Error. Reversed.

ISAAC B. HAWLEY, Trustee v. THE MAYOR AND COMMISSIONERS OF FAYETTEVILLE.

Demand of Payment—Parties.

1. The presentation of a claim against a municipal corporation to its officers and fiscal agents is, substantially, a demand upon them to do what they rightfully can to provide the means of payment.
2. It is not the duty of a creditor of such a corporation to ask that a tax be levied to satisfy his claim. Payment of what is due him is all that he can properly ask.
3. Under the act of 1879, ch. 66, § 2, the finance committee of the town of Fayetteville is not a necessary party to a suit against such corporation on bonds of its issue.

(*Gooch* v. *Gregory*, 65 N. C., 142; *Lutterloh* v. *Com'rs of Cumberland*, *Ib.*, 403; *Alexander* v. *Com'rs of McDowell*, 67 N. C., 330; *McLendon* v. *Com'rs of Anson*, 71 N. C., 38, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1879, of CUMBERLAND Superior Court, before *Seymour*, *J.*

This action was brought to recover the amount of certain bonds issued by the defendant corporation. Judgment was rendered in favor of the plaintiff, and a writ of *mandamus* ordered to issue commanding defendants to levy a sufficient tax at the time allowed by law for the purpose of paying the debt, and the defendants appealed. The exceptions are embodied in the opinion.

Messrs. B. Fuller and *W. W. Fuller*, for plaintiff:

As to the demand, see *Alexander* v. *Com'rs*, 67 N. C., 330; *McLendon* v. *Com'rs*, 71 N. C., 38; *Wharton* v. *Com'rs*, at this term. As to objection that bonds should have been presented to the commissioners for auditing, *Walker* v. *Whitehead*, 16 Wall, 314; *White* v. *Hart*, 13 Wall., 646; 8 Wheat., 76. Finance committee not a necessary party. The *levying*

of taxes need not be sanctioned by such committee. *Weinstein* v. *Com'rs*, 71 N. C., 535.

Mr. N. W. Ray, for defendants:

The manner of proceeding in the collection of debts against a municipal corporation is plainly laid down in *Jones* v. *Com'rs*, 73 N. C., 182, and cases there cited. There must be a demand of the board that they audit the claim, then upon treasurer for payment. No such demand made in our case. Finance committee a necessary party. Act 1879, ch. 66, p. 674.

SMITH, C. J. The plaintiff holds four bonds executed by the defendant corporation, on the 25th day of February, 1856, and maturing at twenty years, each in the sum of five hundred dollars with eight unpaid coupons belonging thereto, of fifteen dollars each, for semi-annual interest, and seeks in this action to recover judgment thereon and enforce payment by the levy of a sufficient tax for that purpose. After the maturity of the bonds, they were presented and payment demanded both of the treasurer of the town and of the mayor and commissioners, and upon their refusal the suit was instituted. The defendant resists the recovery upon several grounds:

1. It is not averred in the complaint, nor shown at the trial, that the claims were presented to the mayor as directed by the act of March 22d, 1875, and the auditing thereof refused.

It is only necessary to say in answer to this objection that the presentation of the bonds and coupons both to the debtor corporation and the treasurer, was in legal effect a demand of what either could rightfully do in providing the means of payment, and was a substantial compliance with the law. The act requires claims already due to be presented before the first day of January, 1877, and those which are not due,

within two years after maturity, or they "shall be forever barred from recovery," and the present action instituted on the 10th of May, 1876, is entirely outside of its penal operation.

2. The second objection is, that there was no express requirement of the debtor to levy the tax. The objection is without force. Payment of what was due him was all the creditor could properly ask, and in case of default, the writ of *mandamus* is his appropriate and only remedy. *Gooch* v. *Gregory*, 65 N. C., 142; *Lutterloh* v. *Com'rs of Cumberland*, *Ibid.*, 403; *Alexander* v. *Com'rs of McDowell*, 67 N. C., 330; *McLendon* v. *Com'rs of Anson*, 71 N. C., 38.

3. The last objection is, that the finance committee are a necessary party in order to the plaintiff's relief, inasmuch as under the act of March 10th, 1879, amending the charter of the town, their concurrence is required in any taxation imposed by the corporate authorities. Acts 1879, ch. 66, § 2.

The right to levy taxes resides in the defendant, the mayor and commissioners only, although any measure of assessment adopted must be sanctioned and approved by this committee before it can be enforced. The mandate should, therefore, be directed to the defendant and be executed independently of the restriction upon its former powers, if necessary to meet the debt. It must be, moreover, assumed that the committee will not withhold its assent to any just and reasonable scheme of taxation to discharge a public obligation, prepared in compliance with a judicial order. The defendant must obey the command and exercise the authority conferred by law upon it, and hence is the proper party to whom the writ should be addressed.

No error. Affirmed.

JOHN TAYLOR v. GEORGE HARRIS.

Service of Summons—Computation of Time.

In computing the ten days before the beginning of a term required for the service of a summons, it is a rule, settled by long practice, to include the day of service and exclude the return day, or *e converso.*

(*Drake* v. *Fletcher*, 5 Jones, 410, cited and approved.)

CIVIL ACTION, tried at Spring Term, 1879, of NEW HANOVER Superior Court, before *Seymour, J.*

The action was brought to fall term, 1878, which began on Monday the 2d day of December, 1878. The summons was served on Thursday the 21st day of November, 1878; and the defendant contended that the summons was not served ten days before said term, and that the spring term was therefore the appearance term. The court held that the service was in time for fall term, 1878, and ruled the defendant to trial, to which he excepted. The jury returned a verdict for plaintiff, upon which judgment was rendered, and the defendant appealed.

Messrs. Junius Davis and *A. T. & J. London*, for plaintiff.
Mr. J. D. Bellamy, jr., for defendant.

ASHE, J. In computing the time required by law for a summons to be served before the beginning of a term of the superior court, we must be governed not by the Code of Civil Procedure, whose provisions in regard to the service and return of summons are not now in force, but by the act of 1870–'71, ch. 42, by which the Code has been suspended in these and other particulars.

That act provides that "the officer to whom the summons is addressed, shall note on it the day of delivery to him and shall execute it at least ten days before the beginning of the

term to which it is returnable, and shall return it on the first day of the term." This language, it will be seen, is substantially the same with that of section 50, chapter 31, of the Revised Code, which reads, "all writs, &c., shall, unless otherwise directed, be returned the first day of the term to which the same shall be returnable, and shall be executed at least ten days before the beginning of the term when returnable to the superior court, and at least five days when returnable to the county court." So far as relates to writs returnable to the county courts, this court in construing the last mentioned act held that the service of a writ returnable to the county court, on the Wednesday preceding the beginning of a court, would be in time for that term. *Drake* v. *Fletcher*, 5 Jones, 410. Applying the same principle to writs returnable to superior courts, their service on Friday, the tenth day before court, would be in apt time for the next court, and the two acts being so similar in language must bear the same construction.

It has been the uniform construction, so far as we are informed, put upon the act of 1777, ch. 115, which is the same as section 50, chapter 31 of the Revised Code, requiring writs to be issued ten days before the beginning of a term of court, that the one day is inclusive and the other exclusive; and it has long been the practice to issue writs returnable to the superior courts and have them served as late as Friday the tenth day before court, and the fact that no appeal has heretofore been brought to this court, founded on an objection to such a practice, is proof of the concurrence of the profession in the construction given to the act in *Drake* v. *Fletcher, supra.*

No error. Affirmed.

J. F. BOGGS v. JOHN D. DAVIS, Sheriff.

Justice's Process—Failure to Return—Amercement.

Under the act of 1874–'75, ch. 33, a justice of the peace has no power to amerce the sheriff of a county other than that in which he hold his court, for failure to make due return to process issued by such justice. He can only amerce the sheriff of his county when he fails to perform the duties imposed by that act.

MOTION for a Judgment *nisi* against a sheriff for failing to execute and make due return of a summons, heard on appeal at Fall Term, 1879, of ONSLOW Superior Court, before *Eure, J.*

The facts necessary to an understanding of the opinion are as follows: The plaintiff brought an action in a justice's court against two defendants, one living in Onslow and the other in Carteret county. It was alleged that the summons sent by registered letter to the defendant sheriff of Carteret (with his fee which was received) to be served on the party residing in his county, was not served and returned in due time, to the justice of the peace in Onslow who issued the process. Thereupon a motion was made before the justice for judgment *nisi*, and on notice to show cause, &c., the judgment was made absolute, and the defendant appealed to the superior court. Upon the hearing, His Honor reversed the judgment of the justice and the plaintiff appealed.

Messrs. Green & Stevenson, for plaintiff.
Mr. A. G. Hubbard, for defendant.

ASHE, J. Before the act of 1874–'75, ch. 33, no court had the authority to amerce a sheriff except a court of record. A justice of the peace had no such power. By reference to

section 15 of chapter 106 of Battle's Revisal, which before the act 1874–'75, was the only authority for imposing a penalty on a sheriff for not making due return of process, it will be seen that the penalty of one hundred dollars is given to the party aggrieved by order of the court, upon motion and proof of delivery of the process, unless such sheriff can show sufficient cause to the court at the next succeeding term after the order. The act refers to courts having regular terms, prescribed by law, and cannot be construed to embrace the courts of justices which have no regular terms. Such a power has never been claimed by or accorded to justices of the peace until the act of 1874–'75. Before that act the sheriff who failed to execute and make due return of process issued to him by a justice of the peace might have been sued by the party aggrieved if he had sustained any special damage in consequence of his default, or perhaps he might have subjected himself to a criminal prosecution for a neglect of duty. But he could not be amerced by a justice whose authority was often defied and sometimes treated with contempt by sheriffs who were hard to understand, why it was that they were called upon to discharge duties that peculiarly belonged to the constables. In consequence, the processes issued by justices were often neither served nor returned, and to remedy this mischief the act of 1874–'75 was passed, which provides "that any sheriff by himself or his lawful deputies, and every constable shall execute all writs and other process, to him legally issued or directed from a justice's court *within* his county and make due return thereof under the penalty of forfeiting one hundred dollars for each neglect or refusal, when such process shall be delivered to him, ten days before the return thereof, to be paid to the party aggrieved by the order of said court, upon motion and proof of delivery, unless such sheriff or constable can show sufficient cause to the court at a day within

three months from the date of the entry of judgment *nisi*, of which the said officer shall be duly notified."

But our case does not fall within the purview of this act. It says "shall execute all writs and other process to him legally issued and directed from a *justice's court within his county.*" Whether these words italicised were put into the act by design or inadvertence it is needless to inquire. It is so written, and being a penal statute it must be strictly construed and cannot be enlarged by implication. A justice has no power by virtue of the act to amerce the sheriff of a county, different from that in which he holds his court. He can only amerce the sheriff of his own county when he fails to perform the duties imposed by the act.

No error. Affirmed.

MARY E. ROBERTS v. W. P. ROBERTS and others.

Confirmatory Evidence—Declarations of deceased persons.

1. Proof that a witness made a statement in regard to the matter in dispute consistent with that testified to on the trial, is admissible as confirmatory evidence.
2. Upon an issue relating to the contents of a lost or destroyed deed, the acts and declarations of a deceased person tending to show the extent of his title under the deed and that by it an estate of inheritance passed, are inadmissible in evidence; but may be received when they qualify the possession, or are explanatory thereof.
3. Such declarations merely narrative of a past occurrence cannot be received as proof of the existence of such occurrence.

(*Johnson* v. *Patterson*, 2 Hawks, 183; *Jones* v. *Jones*, 80 N. C., 246; *Bullinger* v. *Marshall*, 70 N. C., 520; *McRae* v. *Lawrence*, 75 N. C., 289; *Hilliard* v. *Phillips*, 81 N. C., 99, cited and approved.)

SPECIAL PROCEEDINGS for Dower commenced in the Pro-

bate Court, and tried at Fall Term, 1879, of CHOWAN Superior Court, before *Gudger, J.*

The facts appear in the opinion. The court below rendered judgment for the plaintiff and the defendants appealed.

Mr. W. A. Moore, for plaintiff.

Messrs. Pruden & Shaw, Whedbee and *E G. Haywood,* for defendants.

SMITH, C. J. John Roberts in his life-time was in possession of a tract of land lying in Chowan county, conveyed to him by his deceased father, Mills Roberts, and died in March, 1878, without issue, and leaving a will in which his personal property only is disposed of. The plaintiff, his widow having dissented from the will brings this action against the defendants, who are the mother and sisters and the issue of a deceased sister of the testator, and also the children and grand-children of the said Mills Roberts, and as such the heirs-at-law of both, the husbands of such as are married being also parties, to obtain an allotment of dower in her husband's lands and among them, the Long Lane farm, alleging a seizin of an estate in fee in him. The defendants controvert this allegation and say that the deed from his father conveyed to said John a life estate only in said farm, and that the reversion descended from the said Mills to them. The deed was never registered and has been destroyed or lost, and the sole issue extracted from the pleadings and submitted to the jury related to its contents and was in these words: "Was John Roberts seized in fee simple of the Long Lane farm and fishery during coverture with the plaintiff?"

At the trial, H. A. Gilliam, a witness for the plaintiff, testified that he examined a deed from Mills to John Roberts

for this land, dated, according to his recollection, in 1867, and that in terms it conveyed an estate in fee.

In answer to this evidence, M. L. Eure, the father of the infant defendants, was introduced by the defendants and stated that he examined a deed from Mills to John Roberts, exhibited to him by the latter shortly after his father's death, and who said it had been shown to the witness Gilliam also, dated as he remembers in 1857, and that the deed had no words of inheritance and vested in the said John only an estate for his life.

In this conflict of evidence between the two witnesses as to the terms of the deed and its legal operation and effect, and to sustain the credit of the latter, the defendants proposed to prove by another person that on the day when the witness, Eure, saw the deed, he made a statement of its provisions conforming to his testimony now given. The evidence was not admitted, and to this ruling the defendants make their first exception.

While the witnesses assign different dates to the deed exhibited to them, and if there were two different instruments no repugnancy in their statements would exist, yet if the deed shown to Eure by the testator was, as he then declared, the same seen by Gilliam, in the absence of any evidence that the latter had seen but one deed, the jury might well infer the execution of a single conveyance by the original owner, and hence the conflict in the evidence would arise. This was a matter for the jury to pass on, and is sufficient to let in the confirmatory evidence, if competent to be heard, in support of the credit of the witness.

The admissibility of similar and concurring statements previously made by a witness to sustain his assailed testimony and strengthen confidence in the accuracy of his memory and the truthfulness of his evidence, has been so often declared in numerous cases before the court from *Johnson* v. *Patterson*, 2 Hawks, 183, decided in 1822, down to the

recent case of *Jones* v. *Jones*, 80 N. C., 246, and the rule so thoroughly settled and so often recognized and acted on, as to make a citation of authorities entirely needless. We do not propose now to review them because in England and in New York, and perhaps in other states this species of evidence is received under restrictions and modifications not recognized in this state. We will only say that in *Bullinger* v. *Marshall*, 70 N. C., 520, as in our case, the testimony of the respective parties was in direct conflict, and to corroborate that of the plaintiff, he was allowed to show correspondent representations made shortly after the facts occurred, and PEARSON, C. J., says: "We concur with His Honor in the opinion that this testimony was admissible. Before the late statute by which parties to an action are made competent as witnesses, it was a *settled rule of evidence that when a witness was impeached, he might be corroborated by proving that soon after the matter occurred, he made the same statement in regard to it.* See also *McRae* v. *Lawrence*, 75 N. C., 289, and *Jones* v. *Jones*, *supra*. There is, therefore, error in the rejection of this evidence, which entitles the defendants to a *venire de novo*.

The second exception of the defendants is to the receiving in evidence the acts and declarations of the testator while in possession of the land, tending to show the nature and extent of his title under the deed, and that by it an estate in fee passed. The exception must be sustained. The acts and declarations accompanying possession in disparagement of the declarant's title or otherwise qualifying his possession are received as part of the *res gestæ*. But when declarations, offered in evidence, are merely *narrative of a past* occurrence, they cannot be received as proof of the existence of such occurrence." 1 Greenl. Ev., §§ 109, 110.

The conduct and declarations of the testator were offered, upon an issue relating solely *to the contents of a lost or destroyed deed*, and in enlargement of his own estate, and to

this end in proof of a pre-existing fact not connected with or explanatory of his possession. Moreover they tend to show not so much the words contained in the conveying instruments, as his own conception of their legal effect. The evidence was incompetent for any such purpose.

In the recent case of *Hilliard* v. *Phillips*, 81 N.C., 99, the declarations of the bargainor who remained in possession after executing a deed absolute in form to his brother, exercising acts of ownership as before, that the deed was fraudulent were held competent to prove fraud in the making of the deed, and a *continuous fraudulent possession* under it. The doctrine thus declared does not embrace such evidence as was admitted in the present case. There is error also in receiving it. We therefore declare there is error, and there must be another trial, and it is so ordered. This will be certified.

Error. *Venire de novo.*

IRVIN MELVIN and others v. J. J. BULLARD and wife.

Evidence—Declarations—Advancement—Estoppel.

1. The declarations of a deceased ancestor made after the execution of a deed and while his son, the grantee, was in possession of the land conveyed, are not admissible to prove the consideration of the deed. They are competent only when in explanation of the act of possession or in disparagement of the declarant's title.
2. Whether a donation by a parent to a child is an advancement, depends upon the *intention* of the donor, as shown by the instrument of transfer or other proof.
3. In a partition proceeding between heirs at law, the plaintiff claimed a share as tenant in common, and defendants deny the same, alleging that he had been " advanced in land " equal in value to their respect-

ive interests; and it appeared that the ancestor during his life time had conveyed to plaintiff, his son, a tract of land by deed of bargain and sale (reciting a consideration of $400) and accepted from the son a note in payment of a full consideration therefor, the transaction being in pursuance of an arrangement between the parties to free the son from liability to account for the land in estimating his share of the estate; *Held*, not to be an advancement.

4. *Held further*, that the subsequent surrender of the note by the parent to the son, with a view to carry out the original understanding, was not an advancement of the value of the note.

5. Verbal statements made by a tenant in common that he will claim no part of the land in controversy, do not operate an estoppel against a subsequent assertion of his right.

(*James* v. *James*, 76 N. C., 331; *Bradsher* v. *Cannady*, *Id.*, 445; *Bridgers* v. *Hutchings*, 11 Ired., 68, *Hanner* v. *Winburn*, 7 Ired. Eq., 142; *Holmes* v. *Crowell*, 73 N. C., 613; *Exum* v. *Cogdell*, 74 N. C., 139; *Mason* v. *Williams*, 66 N. C., 564, cited, commented on and approved.)

SPECIAL PROCEEDING for Partition of Land commenced in the probate court, and tried at Fall Term, 1879, of CUMBERLAND Superior Court, before *Seymour, J.*

The facts appear in the opinion. Verdict for plaintiffs, judgment, appeal by defendants.

Mr. B. Fuller, for plaintiffs:

Cited and commented on *James* v. *James*, 76 N. C., 331; *Bradsher* v. *Cannady*, *Id.*, 445; *Wilkinson* v. *Wilkinson*, 2 Dev., Eq., 376.

Messrs. Guthrie & Carr, for defendants:

Whether a gift is an advancement or not, depends upon the intention of the parent at the very time the gift is made. *Osgood* v. *Breed's Heirs*, 17 Mass., 357; *Riddle's Estate*, 19 Penn., 431. Every gift of a substantial character (education and maintenance excepted) is by Rule 3, chapter 36, of Battle's Revisal, an advancement, unless it appears at the time of making it, the parent intended it should *not* be such. The

controlling idea in Rule 3 is to secure equality. *Johnston* v. *Johnston*, 4 Ired. Eq., 9; *Headen* v. *Headen*, 7 Ired. Eq., 159. See also especially *Bridgers* v. *Hutchings*, 11 Ired., 68; *Hanner* v. *Winburn*, 7 Ired. Eq., 142. And as to the question of estoppel *in pais*, see Bigelow on Estoppel 480.

SMITH, C. J. The plaintiffs allege that they are tenants in common with the feme defendant, their sister, of the four several parcels of land descended from their intestate father, Robert Melvin, and described in their complaint, each being entitled to one-fourth part thereof, and they demand partition and an assignment of their respective shares in severalty. The defendants deny the tenancy of the plaintiff, Irvin Melvin, and aver that he was advanced by a conveyance made by the intestate in his life time of real estate equal in value to one-third of that proposed to be divided, and is thereby excluded from any share in the said inherited lands, and has waived all right thereto. To determine the matters of defence, certain issues were framed and transmitted to the superior court for trial, the substance of which, without needless verbiage, is embodied in the following:

1. Is the plaintiff, Irvin, a tenant in common with the others, his sisters, in the said descended lands?

2. Did Robert Melvin, their father, in his life time, settle upon or advance to said Irvin the real estate described in the answer?

3. Has the said Irvin waived or abandoned all claim to share with the other heirs in the descended lands aforesaid?

Upon the trial the defendants introduced a deed from the intestate to said Irvin, reciting a consideration of four hundred dollars paid by the latter and conveying the tract of land set out in the answer, and to show this to be a gift and an advancement, proved by a witness, Howard Smith, that he was consulted by said Irvin previous to the making the conveyance as to the effects of a deed in form, a gift, or a

bargain and sale, and advised said Irvin that land conveyed by bargain and sale would not have to be accounted for, while as a gift it would; and suggested to him that money should pass between them as the consideration, or a note given for the amount, and either could be afterwards returned to him.

The defendants offered to prove declarations of the intestate, subsequent to the execution of the deed and while his son was in possession, as to the consideration of it, and this evidence on objection was ruled out.

It was proved that at a division among the three sisters the said Irvin was present, made no objection, and said he should claim no part of the land. Similar and repeated declarations of said Irvin, to the same import, were proved by different witnesses for the defendant.

The plaintiffs offered testimony tending to prove the payment of a full consideration for the land, and a witness present at the delivery of the deed saw a note therefor passed from the son to the father.

Upon this showing His Honor intimated an opinion that the defendants' evidence tended to prove that if no consideration of value passed between the parties it was in consequence of an arrangement between them by which the transaction was to be treated, as in form it was, a bargain and sale and not a gift; and in such event the land would not have to be accounted for.

The defendants' counsel then insisted that, in that aspect of the case, the surrendered note would be an advancement in personalty. To this suggestion His Honor replied that if the return of his note to the son was part of the arrangement by which the land was to be given, so that in form the deed would upon its face purport to be for a valuable consideration, while in truth it was a gift, the return of the note to the maker, in pursuance of the common understanding, would not be in law an advancement. The jury under

these instructions found the issues for the plaintiffs. The several exceptions presented on the record will in their order be considered and disposed of:

1. The defendants except to the rejection of the declarations of the intestate as to the consideration of the deed, made after its execution. The reasons assigned for the exclusion by the court are two-fold: first, because they are offered "as a narrative of a past fact," and are hearsay merely; secondly, they do not proceed from a person in possession, and are not therefore connected with a possession to qualify or explain it. The ruling of the court is correct, and there is no ground upon which the evidence could be admitted. The incompetency of a party who has conveyed property and delivered the possession to impeach his own deed or to impair its force and efficiency by his own subsequent words or acts, is a rule of evidence too well established to need argument or authority in its support. When they accompany a retained possession, they are admitted only as explanatory of the act of possession or in disparagement of the defendant's title and not to prove the existence of an antecedent occurrence, as is pointed out in the opinion in *Roberts* v. *Roberts*, *ante* 29.

2. The defendants object to the instruction given to the jury, upon the supposed findings of fact by them, as to the operation of the deed as a gift and an advancement. We see no error in this statement of the law. While a gift in form raises the presumption of an intent that the donee of any considerable portion of the parent's estate shall account therefor in a settlement with the heirs and distributees after his death, while a bargain and sale does not, it is clear that if at the time of the conveyance by either mode the parent did not intend it should operate as an advancement, and this intent appears in the instrument by which the transfer is effected, or from the facts of the transaction, or is shown by other proof, the property so conveyed is not an advance-

ment, nor its value to be accounted for afterwards. The intention of the donor controls and gives character to his donation, and it is his indisputable right in his life time as well as at his death, to dispose of his estate among his children and to bestow it in unequal proportions among them or to exclude them altogether, if he shall so elect.

In *James* v. *James*, 76 N. C., 331, the intestate had conveyed certain personal property by deed of gift to a child, declaring therein that it was intended to be an absolute gift and not an advancement; it was held that the donee was not required to account, and PEARSON, C. J., uses this language: "The doctrine of advancements is based on the idea that parents are presumed to intend, in the absence of a will, an equality of partition among the children; hence a gift of property or money to a child is *prima facie* an advancement, that is, property or money paid in anticipation of distribution of his estate; but surely this presumption may be rebutted by an express declaration in the deed of gift, that it is not intended to be an advancement, but is intended to be an absolute gift." So in the case of *Bradsher* v. *Cannady*, *Ibid.*, 445, RODMAN, J., says: "A parent may give his child property instead of advancing it to him. Whether a gift is an advancement or not depends on the *intention* of the parent at the time the gift is made." And he proceeds: "In the absence of direct evidence of the intention at that time, it must be inferred from the *nature of the gift* and the circumstances under which it was made." It is thus manifest that the intestate's intention impresses upon the transaction its true legal character, and the jury were well warranted in finding that intention in the form of the conveyance and in the facts preceding and attending its execution, as disclosed by the defendants' own witnesses, under the directions of the court as to the law applicable thereto.

3. The counsel further insisted, and presses the argument before us, that the transaction is in form and effect a sale, and that the surrender of the note is an advancement of its value as personalty, and relies upon *Bridgers* v. *Hutchings*, 11 Ired., 68, and *Hanner* v. *Winburn*, 7 Ired., Eq., 142. The principle decided in those cases does not apply to the facts of this, nor to the ruling of the court thereon. The instruction is in effect this: If the original understanding of the parties contemplated the giving and subsequent surrender of the note as the consummation of the matter and as a means of freeing the donee from liability to account for the land, it would not be an advancement of the value of the note. We fully concur in the correctness of this ruling and the ground on which it is placed. But a sufficient answer to the objection is that the defendants allege an advancement in *land* and no other, and the issue is confined to that inquiry alone. No amendment was asked to present the question of an advancement of personal estate, nor issue to correspond with it, and hence the matter was wholly outside the controversy. Furthermore, the condition of the intestate's personal estate is not ascertained, and it is only when the gift to a child exceeds his share in that fund that the excess is transferred and its value charged in the division of the real estate among the heirs. Bat. Rev., ch. 36, rule 2.

4. The defendants urge also that the conduct and repeated disclaimers of the plaintiff, Irvin Melvin, are an estoppel, and forbid his assertion to any right or interest in the inheritance. This evidence was received and may have been admissible as bearing upon the question of the donor's intent and the character impressed upon his conveyance. It certainly was incompetent to create an estoppel and transfer an estate in the land. There is no element of an estoppel in the facts testified to as defined by READE, J., in *Holmes* v. *Crowell*, 73 N. C., 613, and approved in *Exum* v.

Cogdell, 74 N. C., 139. See also *Mason* v. *Williams*, 66 N. C., 564.

Mere words, however often uttered, do not convey an interest in land or extinguish a legal right thereto, unless when another, acting upon the representations, has been induced to part with something of value, or assumed obligations, and it would be a fraud upon him to allow the party afterwards to assert a claim or title to his injury. Such is not the present case.

No error. Affirmed.

JEMIMA MASON v. J. J. PELLETIER.

Rescinding Deed—Evidence—Practice.

1. Where an act is performed, even though it be not tainted with illegality or fraud, in ignorance or mistake of facts material to its operation, such act will be set aside in equity, *a fortiori* should such relief be afforded where one who was a near neighbor and regarded as a particular friend to the grantor obtained from an old, infirm and ignorant widow a deed for a tract of land by *untruly* stating to her that the supreme court had decided adversely to her interest an action for such land.

2. It is improper to read to the jury, as evidence on the trial of a cause, a statement of the facts of another case between privies in estate of the litigants, as found in the reports of the supreme court; but where such impropriety is promptly checked and reprobated by the judge, the party cast will not be entitled to a new trial, unless he can show that he was prejudiced by such incipient wrong before the interposition by the court. The same observations will apply to an unsuccessful attempt to put in evidence a plat of the land of which a reconveyance is sought.

(*Utley* v. *Foy*, 70 N. C., 303; *Rush* v. *Steamboat Co.*, 67 N. C., 47, cited and approved.)

MASON *v.* PELLETIER.

CIVIL ACTION for Cancellation of a Deed, tried at Fall Term, 1876, of CARTERET Superior Court, before *McKoy, J.*

The facts are reported in *Hill* v. *Mason*, 7 Jones, 551; *Mason* v. *Pelletier*, 77 N. C., 52, and 80 N. C., 66. Judgment below in favor of the plaintiff, from which the defendant appealed.

Messrs. Green & Stevenson and *Gilliam & Gatling*, for plaintiff.

Messrs. H. R. Bryan and *A. G. Hubbard*, for defendant.

DILLARD, J. This was an action for the cancellation of a deed made by the plaintiff to defendant, and for a reconveyance of the land therein described on the ground of its procurement by the false and fraudulent representations by the defendant of a fact in regard to the final result of a suit by Edward Hill under whom defendant claims against Matthew Mason under whom the plaintiff claims. From the judgment in the superior court, an appeal was taken to this court, and on consideration of the same here, the judgment of the court below was reversed and a new trial ordered as reported in 77 N. C., 52.

Subsequently to the reversal of the judgment aforesaid, a petition was presented to rehear the judgment of this court on the error assigned that the new trial was granted because there was no proof of the falsity of the representations made by the defendant, whereas the decision of the case of *Hill* v. *Mason* was averred in the complaint and admitted in the answer to have been in favor of Mason, and on the hearing of said petition the judgment of this court was set aside and the cause ordered to be reinstated on the docket of this court to be heard as on the original appeal. See *Mason* v. *Pelletier*, 80 N. C., 66. And now the cause comes on to be heard on the error assigned on the record proper and the accompanying case sent up to this court.

The case made by the complaint filed is that many years ago Edward Hill sued Matthew Mason for a tract of land, of which that in controversy in the present action is a part, and at or just before the final determination of the suit they both died, the said Mason having devised the land in litigation to the plaintiff who was his widow, and the said Hill having contracted to convey the same tract to the defendant in case he should establish his title. That the suit was prosecuted to a final decision in the supreme court, wherein it was settled that the land in dispute was the property of Matthew Mason. See *Hill* v. *Mason*, 7 Jones, 551. That after the determination in this court and when both Mason and Hill were dead, the defendant falsely and fraudulently represented to the plaintiff that the result of the action was in favor of Hill, and that he was entitled to the land under him, and threatened her with a suit to turn her out, but would compromise and finally adjust the whole matter by conveying to plaintiff and thereby confirming her title to a part of the tract provided she would convey to him a certain other prescribed part of the same land.

The complaint avers that the plaintiff being old and infirm and ignorant of any decision made of the suit between Hill and her husband, and confiding in the truth of the representations of the defendant, who was a near neighbor and regarded as a friend of the family, assented to the proposition made to her, and she accordingly accepted a deed from the defendant for that part of her own land called the Marsh Lands, and conveyed to defendant her right and title to another part of her own lands which forms the subject matter of the present action.

Upon the trial in the court below, His Honor submitted to the jury the issue,—"was the deed, executed by Jemima Mason to J. J. Pelletier on the 1st day of January, 1869, procured by fraud and by fraudulent representations made by the defendant," and the jury, on the evidence introduced,

and under the charge of the court as to the law, responded in the affirmative, and from the judgment on the verdict and the other facts admitted and not denied in the answer, providing for a cancellation of the deed of plaintiff to defendant and a reconveyance of the title, the appeal is taken.

It is a general rule that equity never takes jurisdiction to grant relief against a transaction or contract executed, except on the ground of accident, mistake or fraud. 1 Story Eq., §§ 161, 439. Under the head of a mistake of fact, the rule is that an act done or carried on, though not tainted with illegality or fraud, in ignorance or mistake of facts material to its operation will be set aside in a court of equity. Adams Eq. 188, and 1 Story Eq. § 140 *et seq.*

In this case the ignorance of the plaintiff of how the suit of *Hill* v. *Mason* had been decided is alleged and not denied by the defendant, and besides is self-evident from the nature of the transaction itself. It is impossible to believe that plaintiff knew that the decision of the suit had been in favor of Mason, her husband. If she had known that the settlement of the suit had been favorable to her husband, and that her title to the land under the will of her husband was thereby established, she never would have been guilty of the folly of accepting a deed from defendant and making one to defendant, under defendant's proposed compromise, for portions of the tract of land which by the decision of the court was all her own.

Besides the ignorance of the plaintiff of the true situation of the case of *Hill* v. *Mason*, the defendant denies in his answer that he ever told plaintiff that the action had been decided against Mason, and the jury, in their response to the issue submitted to them, in effect find that he did tell her so, and that by his fraudulent representations defendant had procured the plaintiff to execute the deed to him, and that defendant knew that his representation as to the result of the suit between *Hill* and *Mason* was false, is shown forth by the

admission in defendant's answer of the first and second allegations of the complaint, wherein the plaintiff alleges the true result of the suit to have been in favor of *Mason* and not of *Hill.*

Applying the principle of law above stated under the facts as found by the jury and not denied, and admitted in the pleadings, this case is entitled to relief on the ground of both mistake and fraud, and warranted the judgment of rescission and reconveyance pronounced by the court below, unless there be error in the exceptions taken in the progress of the trial, of which we will now consider in their order:

1. It is complained that in the course of the trial, plaintiff's counsel read in the hearing of the jury a portion of the case of *Hill* v. *Mason*, as reported in 7 Jones 551, and that defendant thereby was prejudiced. From the statement of the appeal, it appears that on objection by defendant the court interposed and told the counsel that the book was not evidence in the cause and was not relevant to the cause on trial, and by these remarks of His Honor, then and there made, the jury were sufficiently guarded against the consideration of the book as evidence, and it is not seen how the defendant in anywise suffered any injury. If defendant was in any manner prejudiced by the reading from the printed report of the decision before it was stopped by His Honor, it was the duty of the defendant in the making out of the case of appeal to have pointed out, and wherein he was injured, and it not appearing how or in what manner the defendant was or could have been prejudiced, it is to be intended in support of the verdict and judgment that he was not prejudiced. *Utley* v. *Foy*, 70 N. C., 303; *Rush* v. *Steamboat Co.*, 67 N. C., 47.

2. During the trial the plaintiff's counsel handed to the jury a copy of the plat used in the case of *Hill* v. *Mason*, and on objection by defendant His Honor remarked that the plat was immaterial to the issue, and the case of appeal states

that nothing more was said about it until after verdict. The plat was evidently immaterial as remarked by His Honor. The only issue then being tried was as to certain false and fraudulent representations by defendant, and the plat had no connection whatever with the investigation and decision the jury were to make.

From the interposition and remark of the judge as to the immateriality of the plat and from the statement in the case of appeal that nothing more was said about it, it is to be intended that no further use was made of it and regard had to it by the jury, and if such intendment was not true, it was the duty of the appellant to bring up his case so as to show some probable injury to his cause. *Utley* v. *Foy*, and cases *supra*.

It is therefore our opinion that the deed of the plaintiff to the defendant as adjudged in the court below, was obtained by fraud, and that the same be surrendered and canceled, and as the same may have been registered and therefore operative to have passed the title, the defendant will reconvey to the plaintiff the title to the land in said deed contained. On application the plaintiff may have process for the delivery of possession of the land, and on service on defendant of the process in this cause the defendant will reconvey the land as ordered, or in default thereof leave will be given the plaintiff to compel the same by the proper proceedings in contempt.

No error. Affirmed.

J. O. NELSON and others v. GEORGE WHITFIELD and others.

Evidence—Presumption of Regularity—Relevancy—Declarations against Interest—Hearsay—Demurrer to Evidence.

1. The fact that a will was found in a book kept by the clerk of the court of pleas and quarter sessions, as required by law, is proper evidence to go to the jury of the existence of the will of the supposed testator and of its due probate and registration, (where the original will and court records have been destroyed by fire).
2. On the trial of an ifsue as to the existence of a will, it is competent to show that a paper purporting to be such was publicly read at the funeral of the alleged testator, in the presence of the heirs at law, who afterwards assert that their ancestor died intestate.
3. Declarations of persons in possession of land, characterizing their possession, are admissible in evidence, when made in disparagement of their title.
4. It is admissible to prove, as against an heir denying the existence of a will, that a writing alleged to be such, was taken by one of the devisees in the presence of the heir, from a tin box containing other valuables, and read over in the presence of the heir.
5. The foregoing testimony is not obnoxious to the objections which apply to "hearsay."
6. Upon a demurrer to parol evidence, when the same is loose and indeterminate, or circumstantial, the court will not compel the adverse party to join in the demurrer, unless the other party will distinctly admit upon the record every fact and conclusion which the evidence offered conduces to prove.

(*Yates* v. *Yates*, 76 N. C., 142; *Kirby* v. *Mastin*, 70 N. C., 540; *Harrell* v. *Hare*, *Id.*, 658; *Mercer* v. *Wiggins*, 74 N. C., 48, cited and approved.)

SPECIAL PROCEEDING heard on appeal at Fall Term, 1878 of PITT Superior Court, before *McKoy, J.*

This is a petition for partition commenced before the clerk of Pitt superior court. The plaintiffs allege that the *feme* plaintiff and the defendants, George Whitfield and Mary the wife of Robert Whitehurst, and some others, are the heirs at law of one Benjamin Whitfield, who died intestate in Pitt

county in the year 1840, seized and possessed of the land in controversy; that they are tenants in common, and they pray that partition may be made of said land.

The defendants on the contrary say it is not true that Benjamin Whitfield died intestate, but that he left a last will and testament which was duly admitted to probate in the court of pleas and quarter sessions of Pitt county soon after his death, and was recorded in said court; that the original will with the records of said court was destroyed by fire, when the court house was burned in the year 1858; and that the testator devised the one half of said land in dispute to his wife, Temperance Whitfield, until his son, Jesse T. Whitfield, should come of age, and then to the said Jesse in fee; and the other half of said land to the said Temperance during her life, and upon her death, to the said Jesse in fee.

The issue raised by the pleadings in the proceeding before the clerk was transmitted to the superior court to be tried by a jury, when the jury were impaneled and the following issue submitted to them—"Did Benjamin Whitfield, deceased, die leaving a last will and testament, and was the same duly admitted to probate, by which will he devised one half of the land whereof he died seized, to his wife, Temperance, until Jesse T. Whitfield, his son, should come of age, and the other half to his wife, Temperance, for life and after her death to his son, Jesse T. Whitfield."

There is no direct proof in the case that the court house, with the records of the courts of the county, was burned.

On the part of the defendant, evidence was given by the testimony of one Cherry, that he was present at the burial of Benjamin Whitfield in the year 1840, being then twelve or thirteen years old, and heard a paper twice publicly read in the presence of the crowd there assembled, as the last will and testament of Benjamin Whitfield, which gave one-half of his land to his wife until his son Jesse arrived at twenty-one years of age, and then to Jesse in fee, and the other half

to his wife during her life and then to the said Jesse in fee; that the plaintiffs, Elizabeth and Artemisia, were present in the crowd, but did not know whether they heard the will read or not; that he did not read the paper and knew nothing of its contents except as he heard it read; that he had heard Temperance, the widow of Benjamin Whitfield, while in the possession of the land, say that she held under the will of her husband. This portion of the witness's testimony was objected to, and the objection overruled. He further testified that Jesse Whitfield became of age and married in 1853, and took possession of and cultivated one-half of the land until he died, and his widow lived there until her marriage; that then the guardian of the defendants, the children of Jesse, in 1859 took possession of that part and rented it out until the death of Temperance, when he took possession of the whole and rented it out until the children became of age, and they have held the possession ever since; that Elizabeth lived with her mother until her marriage with the plaintiff, Nelson, and Artemisia lived with her until her death.

Henry Sheppard was next examined as a witness on the part of the defendants, and testified that about the year 1857, or 1858, (but was not certain) while clerk of the county court of Pitt county he copied the will of Benjamin Whitfield from the will-book, but did not remember for whom it was ...d, nor did he recollect anything of its contents.

The defendants then proved by Patience Manning, the widow of Jesse Whitfield and mother of the defendants, that she married Jesse Whitfield in December, 1853, and they lived with Benjamin Whitfield's widow until the following July; that Jesse built a house on a part of the land, and they lived there; that in 1854, she heard what purported to be Benjamin Whitfield's will read by one Hopkins, and that Temperance requested her to get the will from a tin box where she found it among other papers and carried it to

Hopkins who read it aloud in the presence of Temperance, Artemisia and herself; that she has no knowledge of the contents of the will, nor whether it had witnesses, nor by whom it was signed, but she remembers that as she heard it read, it disposed of the land as testified to by the witness Cherry. This evidence was objected to, and objection overruled.

One Gray Manning was then introduced and testified that in February, 1877, he heard Artemisia, one of the plaintiffs, tell his wife that it was reported that Elizabeth carried the will away, but that it was not so, for she had carried it away herself and had put it in a trunk from which it was stolen; that Elizabeth had administered upon the estate of her mother, Temperance, and that Artemisia could neither read nor write.

One Fred Bryan testified that he heard the paper read in 1853, and his recollection of its contents is substantially the same as that of the witnesses, Cherry and Patience Manning. This evidence was objected to, and objection overruled.

Defendants then proved by one Lee, that he became the guardian of Jesse Whitfield's children in the year 1859; the land was then in two lots, having been divided between Temperance and Jesse; that in 1866, Temperance died, and witness then took possession of the other part and rented it out. The "division papers" having been spoken of, the record of the partition between Temperance and Jesse was introduced, but no objection made, further than that the plaintiffs were not parties to the petition.

The plaintiffs then demurred *ore tenus* to the evidence that had been adduced on the part of the defendants, and the court declined to compel the defendants to join in the demurrer without their consent, which was not given. The jury found the issue submitted to them in the affirmative. The plaintiffs then moved for a writ of *procedendo, non ob-*

stante veredicto, which was refused and the plaintiffs appealed.

Messrs. Gilliam & Gatling, for plaintiffs.
Mr. W. B. Rodman, for defendants.

ASHE, J. This case has been imperfectly made up. It is remarkable that as all the evidence in the case is based upon the fact that the records of Pitt county were destroyed by fire, there is not a word of proof in the whole case that the court house with the records had been destroyed by fire in the year 1858. But from the pleadings, the character of the exceptions to evidence, and the argument of counsel, we must conclude that that fact was conceded.

At the date of the alleged execution of the will, the courts of pleas and quarter sessions had jurisdiction of the probate of wills, and were directed to order them to be recorded in proper books kept for that purpose. Rev. Stat., ch. 123, § 4. They were to be recorded in these books after probate had. The fact then that a will of Benjamin Whitfield was found in a book kept by the clerk of the court of pleas and quarter sessions in accordance with the requirements of law, is *prima facie* evidence of the probate of the will. *Omnia presumuntur rite acta esse.* There was evidence then to go to the jury of the existence of the will of Benjamin Whitfield, and that it had been duly proved and recorded. What were its contents? The original having been destroyed admits secondary evidence of its contents. And where secondary evidence may be resorted to, it is a rule that the next best evidence of which the subject is capable shall be adduced. Greenl. Ev., §§ 82, 84 and notes.

The plaintiffs excepted to the evidence offered by defendants as to the contents of the paper read at the burial of the testator. As no copy of the will is shown to be in existence we think there was no error in admitting that evidence.

The paper was twice publicly read in the presence of the crowd assembled to perform the last rites to the remains of the deceased. It was read as the last will and testament of the deceased. His daughters, Elizabeth and Artemisia, both being in the crowd and being his heirs, must have felt some curiosity to know what disposition their father had made of his property, and would reasonably be expected to give their attention to the reading of an instrument in which they were so deeply interested. It was just the occasion in some sections of the country which the family of the deceased and the neighbors impelled by curiosity embrace to ascertain whether the deceased left a will, and if so, what disposition he has made of the estate. It may be that the person who read the paper was the custodian of the will, and read it on the occasion to give information to all who might feel an interest in its contents. It was publicly read where the family of the deceased might have heard it, as *his will*, and soon thereafter *his will* was admitted to probate. It was some evidence, we think, fit to be left to the jury, whether it was not the will which was admitted to probate.

The next exception taken by the plaintiffs to the evidence was to the admissibility of the declarations of Temperance Whitfield while in the possession of the land. There was no error in the ruling of the court upon this exception. It is well settled that the declarations of persons in possession of land, explanatory of the character of the possession, are admissible in evidence, when in disparagement of their title. 1 Greenl. Ev., § 109; *Yates* v. *Yates*, 76 N. C., 142; *Kirby* v. *Mastin*, 70 N. C., 540. The evidence was pertinent as a circumstance tending to show a possession in conformity with the provisions of the will as contended for by the defendants.

The plaintiffs next excepted to the evidence offered by the testimony of Patience Manning. She was directed in 1854 by Temperance Whitfield, after some conversation among

the persons present, most reasonably to be supposed about the will, to bring it from a tin box where it was found among other papers, and it was read in the presence of Temperance, Artemisia and herself. It was read as the will of Benjamin Whitfield, and it contained a devise as alleged by the defendants. This exception was properly overruled. Temperance Whitfield being a devisee under the will of her husband would be most likely to keep by her a copy of the will as a muniment of her title, and its most natural place of deposit for safe keeping would be a trunk or box with her other valuable papers. It is reasonable to suppose that this was a copy, as the original must be presumed to have been filed with the clerk and destroyed by the fire. But it is objected that there is no evidence of any but one copy, that made by Sheppard. There may have been several copies taken in the lapse of years intervening between the probate of the will and the date mentioned by Sheppard. And it is usual for an executor to procure a copy of the will of his testator, at the time of proving the will, for reference and guidance in the discharge of his duties under the will. It is reasonable to conclude that Temperance knew the contents of her husband's will that had been admitted to probate, but it is not reasonable to suppose that claiming the possession of the land under that will, she should preserve among her papers an instrument purporting to be his will which she knew was not his will. This most probably was the copy referred to by Artemisia in 1877 in conversation with the wife of the witness Gray Manning, which she said had not been carried away by Elizabeth, but by herself, and put in a trunk from which it was stolen. She was living with her mother when she died, and Elizabeth administered upon her estate, and they both must have had access to her papers. It was not error in His Honor to overrule this exception. There was some evidence to go to the jury that this paper called the will of Benjamin Whitfield was a copy of that instrument.

There was also an exception to the testimony of Fred Bryan, which was properly overruled. His testimony evidently must have reference to the same paper as that testified to by Patience Manning.

It was objected in the argument that the defendants' testimony in regard to the contents of the will, was hearsay. But we do not think it is obnoxious to that objection, any more than is the proof of an examined copy of the record in the usual way, by producing a witness who has compared it with the original, or with what the officer or some other person read as the contents of the record. It is not necessary for the persons examining to exchange papers and read them alternately both ways. Greenl. Ev., § 508.

The plaintiffs' counsel referred to several authorities upon the point of the competency of the evidence of the defendants, to wit, Redfield on Wills, 348; *Chisholm's Heirs* v. *Bem*, 7 Barr.; *Davis* v. *Segourny*, 8 Metc., and other decisions of that class; but on examination of them they were cases where lost wills were propounded for probate or sought to be established in chancery for the purpose of making records of the lost documents, and thereby perpetuating the evidence of their contents. In those cases the courts hold that they should act with great caution, and the proof must be strong, positive, and free from all doubt. But ours is a case not for probate, but to prove the contents of a lost record where secondary evidence is competent, and the best evidence is admitted that is within the power of the party offering the proof. Greene Ev., *supra*, and cases cited in note. *Harrell* v. *Hare*, 70 N. C., 658; *Mercer* v. *Wiggins*, 74 N. C., 48; *Gage* v. *Schroder*, 73 Ill., 44.

After the court had overruled the exceptions taken by the plaintiffs to the evidence offered by the defendants, they demurred *ore tenus* to the evidence adduced on the part of the defence, and asked the judgment of the court upon the demurrer. His Honor refused to require the defendants to

join in the demurrer and thereby withdraw the case from the consideration of the jury, without their consent. A demurrer to evidence withdraws a case from the jury, and it is laid down in Tidd's Practice, 865, that when the evidence is in writing, or if parol, is certain, the adverse party will be required to join in the demurrer; but when the parol evidence is loose and indeterminate or is circumstantial, he will not be required so to do, unless the party demurring will distinctly admit upon the record every fact and every conclusion which the evidence offered conduces to prove. This the plaintiffs declined to do, and there was no waiver of the objection on the part of the defendants.

We admit the evidence offered on the part of the defendants relating to the contents of the paper purporting to be the will was slight, and taken by itself might not have been sufficient to satisfy the jury of the contents; but it was some evidence, and when taken in connection with the facts proved, the long possession of the defendants and their ancestor in conformity with the alleged provisions of the will, and the long acquiescence of the plaintiffs in the exclusive possession of the land by defendants, it makes a very strong case for them.

There was no error in the ruling of the court below upon the demurrer and in the refusal to order a writ of *procedendo, non obstante veredicto.* Let this be certified to the superior court of Pitt county that a *procedendo* may be issued in accordance with this opinion.

No error. Affirmed.

S. W. LATHAM *v.* VINSON DIXON and another.

Evidence—Transaction with Person Deceased.

The prohibition in C. C. P., § 343, against the testimony of interested parties, applies only to witnesses examined on commission, or on the trial or hearing of an action or special proceeding, and has no reference to such affidavits as may be needed in the progress of a cause;

Hence, it is competent for the assignee of a judgment against one deceased, on which execution has not issued within three years, to prove by his own oath, in support of a motion to issue an *alias* execution, that such judgment has not been paid by the deceased defendant.

(*Ritter* v. *Stutts*, 8 Ired. Eq., 240, cited and approved.)

MOTION for leave to issue Execution heard on appeal at Fall Term, 1879, of CRAVEN Superior Court, before *Avery, J.*

This was a motion made before the clerk of the superior court of Craven county for leave to issue execution after the lapse of three years. The judgment was rendered in the superior court at spring term, 1870. Not long after its rendition, David Wharton, one of the defendants, died, and notice of the motion was served on his executor and the other defendant. The evidence offered by the plaintiff was the docket and the affidavit of E. G. Wise, who was assignee of the judgment, to show that the judgment had not been paid and more than three years had elapsed since the issuing of an execution. The defendants objected on the ground that Wise, being a party in interest and the defendant Wharton being dead, was disqualified by section 343 of the code. The clerk overruled the objection and allowed the motion, and the defendants appealed to the superior court, and at fall term, 1879, the judge affirmed the clerk's decision, from which the defendants appealed to this court.

Mr. H. R. Bryan, for plaintiff.

Mr. W. W. Clark, for defendants.

ASHE, J. The provisions of section 343 of the code of civil procedure do not apply to this case. The prohibition in that section applies only to the testimony of a witness examined on commission, or on trial, or hearing of an action or special proceeding, and has no reference to the affidavits that may be required to be made in the progress of a cause. It has always been the practice of the courts to receive the affidavit of parties to a suit who were incompetent, on the trial, on account of interest, infamy, or other cause, on questions connected with the progress of the action which did not involve the matters in controversy, but matter which was auxiliary thereto, and which was always addressed to the court; as for instance, the affidavit of a party to a suit as to the materiality of a witness, diligent search made for a witness or a paper, the death of a subscribing witness, the continuance of a cause, or the loss of an instrument which is the foundation of an action. 1 Greenl. Ev., 401.

The same doctrine has been uniformly recognized and practiced in this state. In the case of *Ritter* v. *Stutts*, 8 Ired. Eq., 240, it is held: "If in the institution of a suit, or in its progress, the course of the court requires a party to make an affidavit, the fact of his being infamous does not make him incompetent to do so," for said Chief Justice PEARSON, who delivered the opinion of the court, "if an affidavit be required, and at the same time the party is held to be incompetent to make it, he cannot pursue his right, and there will be in effect a denial of justice. The principle is settled as well upon the reason of the thing as by authority." In that case the plaintiff in the cause, though interested and infamous, was allowed to prove the loss of his bond upon which the suit was brought.

But section 256 of the code of civil procedure, which provides that no execution shall be issued upon a judgment after the lapse of three years without leave of the court, ex-

pressly admits the oath of the party to establish the fact that the judgment in some part thereof remains unsatisfied. If this were not so, it would often happen when a defendant dies after judgment, that the plaintiff would be unable to prove the non-payment of the judgment by any one else, and it would often amount to a denial of justice, for it is a fact that lies most generally in the exclusive knowledge of the plaintiff.

No error. Affirmed.

A. BRASWELL v. KINDRED POPE.

Evidence—Contract—Pleading.

1. Parol evidence is admissible to establish an original contract which is verbal and entire, where only a part of it is reduced to writing; *Hence* where notes were given for money and the payee at the time agreed to surrender them upon the maker's assigning a judgment and a certain mortgage for its security to the payee, the rejection of parol evidence of such agreement is error. It does not contradict the terms of the writing, the notes being an execution of one part of the agreement, the other having been left in parol.
2. When there are mutual dependent stipulations to be performed under a contract, neither party can maintain an action against the other without averring performance or an offer to perform on his part.

(*Twidy* v. *Saunderson*, 9 Ired., 5; *Manning* v. *Jones*, Busb., 368; *Daughtry* v. *Boothe*, 4 Jones, 87; *Perry* v. *Hill*, 68 N. C., 417; *Kerchner* v. *McRae*, 80 N. C., 219, cited and approved.)

CIVIL ACTION tried at Spring Term, 1879, of EDGECOMBE Superior Court, before *Eure, J.*

It was admitted in the pleadings that the defendant held two notes against the plaintiff amounting to about eighteen hundred dollars, but the plaintiff in this action avers that

he owes the defendant nothing, and brings this suit to recover an amount alleged to be due upon a parol agreement entered into between the parties and relating to the manner in which said notes were to be discharged. The evidence in regard to this agreement (set out in the opinion) was objected to on the ground that it contradicted the terms of the contract as contained in said notes. The court sustained the objection. Judgment, appeal by plaintiff.

Messrs. Howard & Nash and *J. L. Bridgers, jr.*, for plaintiff.
Messrs. W. B. Rodman and *Fred. Philips*, for defendant.

DILLARD, J. In this action and another between the same parties with the names reversed, a trial by jury was waived and by consent of parties the judge found the facts and decided the questions of law arising, with the right of appeal reserved as to any exceptions to the evidence, and as to His Honor's conclusions of law, and with an agreement that the two actions should be heard together as if constituting but one case, and that the cause of action of the plaintiff in each case should be considered a counter-claim to the suit of the other.

At the trial the plaintiff, Braswell, in order to prove the the contract set up in the complaint, introduced John Norfleet, who testified that the parties came to his office on the 4th of July, 1874, and stated that they had made a contract of which they desired to make him a witness; that they stated to him that Pope had agreed if Braswell would give his note for the amount of a judgment and several notes he held on one Odom, he Pope, would lend him $500 in money and take his note therefor, and would hold both notes until the termination of a suit Braswell then had against one Carter Pope, and as soon as he recovered judgment he and the plaintiff would exchange said two notes for the judgment which might be recovered against Carter Pope and a mort-

gage held by the plaintiff for its security; and it was further proved by this witness that plaintiff executed in his presence the two notes agreed on, and the defendant then and there agreed that he would accept an assignment of the judgment when recovered and the mortgage for its security, and surrender to plaintiff his notes, and pay the difference, if any, in money.

The testimony of Norfleet was objected to as inadmissible on the ground that it varied or contradicted the contract as expressed in the notes executed by Braswell to the defendant, but the judge reserved the question made and proceeded to hear the evidence of the witness, and upon his and the other evidence adduced, to find the facts. Upon the facts being found, each party moved for judgment,—Braswell that his judgment and mortgage on Carter Pope, credited by what he had received of the mortgage fund, be applied in extinction of his two notes in the hands of the defendant with a judgment for the difference in his favor and for other alternative relief; and defendant Pope, that His Honor, on the question reserved as to the competency of the witness, Norfleet, hold him incompetent and grant him judgment for the entire amount of his two notes in suit.

On consideration of the respective motions His Honor ruled the testimony of Norfleet inadmissible, and overruling plaintiff's motion dismissed his action with cost and pronounced judgment for the defendant for the amount of the two notes sued on against the plaintiff.

On the argument of the appeal in this court it is assigned for error that His Honor, on the question reserved, ruled the evidence of Norfleet inadmissible on the ground of its being contradictory to the contract expressed in the two notes of Braswell to the defendant. We think the evidence was not liable to the objection urged against it, and the same should have been received and considered. The two notes were for money, and proof by Norfleet of an agree-

ment on the part of Kindred Pope, as soon as Braswell could reduce his claims on Carter Pope to judgment, to become the owner of the judgment and an existing mortgage for its security by assignment, and to surrender to plaintiff his two notes, does not, as it seems to us, vary or contradict the terms of the contract as expressed in said notes. The proof excepted to did not show, nor tend to show, that the notes were not for money, but its effect and purpose were to establish merely that they should be surrendered by defendant and accepted by plaintiff as so much money in part payment for the judgment on Carter Pope when one should be recovered.

Besides the ground of admissibility in the fact of the evidence not varying or contradicting the terms expressed in the notes, it is a rule in the law of evidence that where the original contract is verbal and entire, and a part only of it is reduced to writing, the other parts of it may be established by parol evidence, and under this rule the evidence of the witness was admissible. This rule is laid down in 1 Greenl., § 284, and the same has been recognized and applied in divers cases by our courts, prominent among which are *Twidy* v. *Saunderson*, 9 Ire., 5; *Manning* v. *Jones*, Busb., 368; *Daughtry* v. *Boothe*, 4 Jones, 87; *Perry* v. *Hill*, 68 N. C., 417, and *Kerchner* v. *McRae*, 80 N. C., 219. The proof offered was proof of a witness called by the parties to witness their contract, and after proving that the agreement on the part of Braswell was reduced to writing in the two notes, he knew that there were stipulations on the part of Pope which rested in parol, and he was introduced to prove their existence and the terms thereof. And we hold that his testimony within the principle of the decisions cited and the rule of evidence from Greenleaf was admissible to show such stipulations. It is our opinion, therefore, that His Honor erred in his ruling as to the competency of the evidence of Norfleet and that he should not have discarded the facts

found on his evidence, but proceeded on that basis and adjudged between the parties according to the conclusion of law thereon.

Having determined that the evidence of Norfleet was admissible, it remains now to consider what were the rights and liabilities of the parties upon the facts found by His Honor. His Honor, after finding the terms of the contract to be as testified to by Norfleet, found these additional facts:

1. That plaintiff in a reasonable time after the making of the contract recovered judgment in his action against Carter Pope for $2,666.66, and soon thereafter tendered an assignment of the same together with his mortgage for its security to the defendant, and he refused to accept the same, and therefor to surrender plaintiff's notes and pay to him the difference in money.

2. That after the contract and before the recovery of the plaintiff against Carter Pope, Carter Pope received from one Armstrong's administrator, of the proceeds of sale of a tract of land after payment of debts, several sums of money, amounting in all to $470.38, which was a part of the security to plaintiff's debt, and this he did upon the advice and suggestion of Kindred Pope, who well knew it was covered by the mortgage, and was a fund contracted to come to him with the judgment that might be recovered.

3. That after the refusal of the defendant to accept an assignment of plaintiff's judgment and mortgage, the plaintiff received the residue of the proceeds of sale of land in the hands of Armstrong's administrator, amounting to $351, and therefor gave his receipt, and at the same time executed a release of the administrator from all liability to him on account of the payment made to Carter Pope, which was required of him as a condition precedent before he would pay him the $351, and plaintiff offered for sale the mill tract conveyed in the mortgage and caused the same to be bid off at $310.

Upon the facts found it is insisted by defendant that the contract is one of mutual dependent stipulations to be performed at one and the same time, the contract on each side forming the consideration on the other side, and that Braswell's right to performance by Pope was dependent on his own performance; so that if he could not perform or had disabled himself to perform his part of the mutual contract, he could not require Pope to perform his.

This position of defendant is believed to be correct and supported by the authorities. In *Pordage* v. *Cole*, 1 William Saunders, note 320, it is said that the question whether the stipulations of a contract be concurrent, or whether performance or readiness to perform be or be not a condition precedent to the right to enforce performance by the other, is to be determined by the intention of the parties; and for the discovery of such intention certain rules were laid down which have ever been and are now followed in the interpretation of contracts. Among the rules so laid down is this: "When two acts are to be done at the same time, as when A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay A a sum of money on the same day, neither can maintain an action against the other without averring performance or an offer to perform on his part." See notes by Williams to 1 Wm. Saunders, 320, and 2 Smith's Leading Cases, notes to *Cutter* v. *Powell*, 26.

Tested by this rule, it will appear that the stipulation to assign the judgment on Carter Pope, with the mortgage, to the defendant, was the consideration on which defendant was to surrender Braswell's notes in payment, and pay him the difference in money, and were to be performed at one and the same time, so that neither could sue the other without performance or an offer to perform on his part. The question now arises, has Braswell performed or offered to perform, and is he still able to perform his agreement to assign

his judgment and mortgage on Carter Pope substantially in the condition it was in at the date of the contract? It seems to us that he both offered to perform and is still able to perform the stipulation on his part. He offered to do so just after the recovery of judgment, and then there was no difficulty except in the fact that pending the litigation and after the contract with defendant, Carter Pope drew out of the hands of Armstrong's administrator $470.38 of the proceeds of sale of one of the tracts of land conveyed in the mortgage. This money was drawn at the suggestion and advice of defendant, well knowing it was covered by the mortgage and was a part of the security to the judgment which he was under contract to take, and the same under the circumstances ought to be regarded as so much money received by the defendant under the mortgage, and defendant should not be allowed to take advantage of his own wrong by urging the payment of the same to Carter Pope as a disability in Braswell to assign the security in the condition it was in at the date of the contract.

As to the amount ($351) received by the plaintiff from Armstrong's administrator and the release of the administrator, this was received after the tender and refusal of performance by the plaintiff, and the sum so received may in effect go to defendant's benefit by way of a credit on the difference between the judgment on Carter Pope and plaintiff's notes, or by charging the same with its interest to Braswell in stating the account between him and defendant, which plaintiffs offer and submits to do. And as to the objection of the release executed to the administrator, the value of the security was not thereby impaired to the defendant. If no release had been executed, the defendant could not have compelled Armstrong's administrator to pay a second time to him a sum of money which he had paid over to Carter Pope at his own suggestion, and so the release complained

of worked no greater disability to defendant to recover this money than he was already in by his own act.

As to the disability alleged to exist in the fact of plaintiff's having sold the mill tract, it is to be remembered that this was done after defendant's refusal to accept an assignment of the mortgage, and in fact no difficulty exists as the plaintiff had it bought in at the sale and he now offers to assign the mortgage passing the tract, or at the option of the defendant to account for and pay to him the price at which it was knocked off, with interest thereon.

After a full consideration of the alleged grounds of disability in the plaintiff to perform his part of the contract, we are of opinion he was and still is able to assign his judgment and mortgage, giving the defendant all the benefit he was ever entitled to receive, save in reference to the payments made to Carter Pope by Armstrong's administrator, and as to those it ought to be taken that defendant has already received so much of the security provided for in the mortgage.

We therefore hold upon the facts found by His Honor, that the plaintiff is entitled to have the amount of his judgment on Carter Pope with the mortgage incident credited by the $351 received by him, applied as a counter-claim to the extinction of the two notes given to defendant, and to have judgment for the difference. And to the end that such difference may be ascertained, it is referred to the clerk of this court to compute the claim of the plaintiff under his judgment credited as aforesaid and the amount of the two notes of plaintiff to defendant, and report the difference if any between them, and this case is continued for further orders and directions until the coming in of the report.

Error. Judgment accordingly.

HETTRICK & BROTHER v. H. H. PAGE.

Injunction—Fisheries in Albemarle Sound.

1. In injunction proceedings where the allegations are not controverted in the answer, it is not error in the judge to refuse to place the cause on the docket for a jury trial.
2. A restraining order will not be granted when adequate compensation can be had in a proper action for the alleged injury.
3. The act of 1875, ch. 115, (and ch. 183) regulates the exercise of a common right of fishing in the waters of Albemarle Sound and imposes limitations upon the pod-net mode in favoring seine-fisheries on its shore. One engaged in the latter, has the right to remove stakes put up to operate the former, when his seine-fishery is interfered with by them.

(Remarks of Smith, C. J., upon the right to remove obstructions from a highway without incurring personal liability.)

(*Jones* v. *Boyd*, 80 N. C., 253; *Collins* v. *Benbury*, 3 Ired 279 and 5 Ired., 118; *Skinner* v. *Hettrick*, 73 N. C. 53, cited and approved.)

APPLICATION for an Injunction heard at Chambers in Elizabeth City on the 1st day of November, 1879, before *Gudger, J.*

Upon the facts set out in the opinion of this court, His Honor refused the plaintiffs' motion for an injunction and dissolved the restraining order theretofore granted, and the plaintiffs appealed.

Messrs. W. A. Moore and *A. M. Moore*, for plaintiffs:

This is not the case of an ordinary injunction in aid of and secondary to another equity. It is to prevent irreparable injury. *Purcell* v. *Daniel*, 8 Ired. Eq., 9. The relief here sought is to stay waste and destructive trespass, 6 Jones Eq., 83. See also 4 Jones Eq., 29; *Eborn* v. *Waldo*, 6 Jones Eq., 112.

Messrs. Pruden & Shaw and *Gilliam & Gatling*, for defendant:

Any exclusive appropriation of these waters for the purpose of fishing is unlawful, and is a nuisance which may be abated by any one interested. *Collins* v. *Benbury*, 3 Ired., 279 and 5 Ired., 118; *Skinner* v. *Hettrick*, 73 N. C., 53. There is no repugnancy between the act of 1875 and the former law—both had the same general purpose, the protection of the common right. Upon the nuisance created by plaintiffs driving down stakes, see *State* v. *Parrott*, 71 N. C., 311; *State* v. *Dibble*, 4 Jones, 107.

SMITH, C. J. This action was commenced on the 12th day of September, 1879, and its object is to restrain the defendant by injunction from removing or interfering with certain stakes put up in the waters of Albemarle sound upon which the plaintiffs propose to hang their pod and pound-nets to catch fish. The stakes commencing opposite the plaintiffs' shore and extending about one thousand yards out into the water, are about three by six inches in size, and separated from each other by short intervals, in a line, are driven some four or more feet into the bottom or bed of the sound, and the net is stretched out and fastened to them, with several pounds or enclosures into which the fish, arrested in their migratory movement up the waters, and seeking an outlet, enter; and being unable to find their way out are taken up with dip-nets. The defendant has purchased the shore on which an old but long disused seine fishery was operated and purposes to re-open it. Preparatory to commencing his fishing operations, the defendant finds it necessary to clear out the obstructions, among which are the plaintiffs' stakes, in the adjacent waters through which his seine must be drawn, and threatens and has directed his servants to take up the stakes and carry them away from his seine-ground. The stakes were placed in

their present position several years ago by the plaintiffs, and have since remained and been used to stretch their nets upon, and are necessary for that purpose. The defendant has only recently become the owner of the land, of which the beach forms a part, on which the fishery is to be operated. The aim and scope of the suit is to forbid and prevent the removal of the stakes, or any interruption of the plaintiffs in their use, and the aid of the court is asked upon the ground that the consequence of the threatened act, if done, would be an irreparable mischief to them.

These are substantially the facts presented in the complaint, answer and replication, so far as deemed material to the proper understanding of the action of the court in vacating the temporary restraining order previously issued, and denying the motion for an injunction, pending the suit.

The appellant's first exception is to the refusal of His Honor to place the cause on the summons docket, in order to a jury trial of disputed facts, and his proceeding, himself, to pass upon the evidence. The essential averments in the complaint upon which the equitable claim to relief depends, are not controverted in the answer, and there is no such repugnancy in the allegations of the parties as requires the elimination of issues and the intervention of a jury, at least in this preliminary stage of the proceeding, and it was entirely proper for the court to act upon the case presented in the complaint and to refuse the interlocutory order. But were it otherwise, the action of the court is sustained by the decision in *Jones* v. *Boyd*, 80 N. C., 258. In that case the defendant appealed from an interlocutory judgment, awarding an injunction and appointing a receiver to take possession of the property in dispute, and the court discussing the effect of the late constitutional amendment enlarging its jurisdiction, say: "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 examine the evidence and to determine the facts, as well as the law arising thereon, in revising the subject matter of the appeal." The decree was accordingly reviewed and reversed.

The plaintiffs' second and principal exception involving the merits of their application, is to the refusal of the court to continue in force the restraining order until the final hearing of the cause.

It does not appear that the plaintiffs were engaged in catching fish when they began the action, or then had any immediate need of the stakes for spreading their nets, and that they could not replace any which should be removed, in ample time for the fishing season, and at a price easily ascertained and measurable in damages, and if so, they could in a proper action for the injury recover full and adequate compensation. Without, therefore, conceding the plaintiffs' right to the remedy sought, even upon the assumption of the truth of the matters set out in their complaint, or that they show a case of irreparable injury, entitling them to the exercise of the preventive power of the court, according to the usages of equity practice, we proceed to consider their claim to protection upon its merits.

Since the decision in the two appeals in *Collins* v. *Benbury*, 3 Ired., 277, and 5 Ired., 118, the law has been considered settled in regard to the right of fishing in the navigable waters of the state, and the results are summarized and approved in *Skinner* v. *Hettrick*, 73 N. C., 53, in these words:

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

2. "At common law there could not be a several fishery in a navigable stream."

3. "Every citizen of the state has the liberty and privilege of fishing" in the waters of Albemarle sound.

4. "The regulation of the right of fishing in navigable streams is a proper subject of legislation."

These propositions are sustained by the courts of New York and Pennsylvania in the cases cited in the argument for defendant. *Lowndes* v. *Dickenson*, 34 Barb., 586; *Fishing Co.* v. *Carter*, 61 Penn., 21.

The general assembly has undertaken, in a degree, by the act of March 28, 1875, entitled "an act in relation to fishing in Albemarle sound and certain rivers," to prescribe the terms and conditions under which pod-nets, requiring stationary posts, may be used, and makes the rights of this class of fishermen subservient to those who operate their seines from the shore, in the manner intended by the defendant. The provisions of the act are in substance, as follows:

Section two makes it unlawful for any person to set or fish with a dutch or pod-net within half a mile to the eastward or westward of the outside windlasses or watch-blocks of *any seine-fishery* on said sound, and section three requires the removal of all stakes "by the first day of June next succeeding the fishing season."

Section four declares that "if any person shall set or fish any dutch-net or pod-net in said sound in violation of this act, he shall be guilty of a misdemeanor," punishable with fine or imprisonment, and be "subject to a further penalty of three hundred dollars, recoverable by suit in the superior court of the county wherein the offence shall have been committed." It also provides that the sheriff "shall, when requested, remove any portion of such nets set or fished in violation of this act, at the cost of the offender, except those stakes heretofore driven down, which shall be removed by such sheriff at the costs of the person requesting it. Acts 1874–'75, ch. 115.

The act does not in terms profess to confer special or peculiar privileges upon those who employ pod-nets in fishing

nor is such its legal effect. On the contrary it imposes limitations upon this mode of exercising a common right, and forbids interference with "*any seine-fishery in operation on said sound*," and this applies not only to fisheries worked at the date of the passage of the act, but to all that should be thereafter opened and operated on its shores. The manifest purpose of the legislation is to regulate the use of a common right among those two classes of fishermen, and to encourage the development of a great industry from which such large supplies of food are attained, and to protect it from needless molestation during the season for taking fish. The preference given to seine-fisheries, whether because of their greater value and importance or that this mode of using the waters is not inconsistent with the common right in others, while the use of pod-nets is, is recognized in the opinion declared in *Skinner* v. *Hettrick*, already referred to. In that case the plaintiff sought to restrain the defendant from putting down and maintaining a line of stakes used for their pod-nets which obstructed the plaintiff's seine in the waters adjacent to his beach, and SETTLE, J., says: "The defendant by driving stakes for a mile and a quarter into the sound, made an *exclusive appropriation to his own use* of that portion of the sound, embraced within his pond, and materially interfered with the common right of fishing as it had been enjoyed by all those operating the Long Beach fishery for many years." * * * "We are of the opinion that the plaintiff is entitled to have the defendant enjoined from appropriating *exclusively to his own use* any portion of the waters of the sound, without calling to his aid the act of 1874–'75, which has already been referred to. We will remark, however, that we think the legislature had the right to pass the act under its power to regulate the right of fishing."

In this connection and as further evidence of the favoring disposition of the general assembly towards the seine-fisheries and of the public policy in fostering and protecting them,

we refer to the act of March 17th, 1875, by the provisions of which lands covered by navigable waters may be entered, and a preferable right acquired to the use of its waters for "drawing or hauling nets or seines therein for the purpose of catching or taking fish," by those who may make the entry and by clearing out and removing "logs, roots, stumps or other obstructions," prepare and fit them to be fished. Acts 1874-'75, ch. 183.

If then the defendant may require his seine-ground, under the decision of the court and the act of March 2d, 1875, to be freed from the interfering stakes of the pod-nets while in actual use, his right is not less clear to have them removed, and to remove them himself, when necessary to put his fishery in operation and in making immediate preparation therefor. This is all that the defendant intended to do, and this constitutes the gravamen of the plaintiffs' complaint.

The act requires that the stakes put up by the pod-net fisherman shall be moved by the first of June next after the fishing season, and his failure to do so subjects him to a criminal prosecution and penalty. The presence of them in the sound after that date is a public nuisance, and this court is asked to assist him in maintaining it in violation of his duty under the law and to prevent its being abated. The proposition is a novel one and no court will listen to such an application.

While it is true as insisted for the plaintiffs that an action will not lie against a person unlawfully obstructing a highway, at the instance of one who has sustained *no special damage*, and redress must be sought for the public wrong on behalf of the public, it by no means follows that a person obstructed, or indeed any one else, may not himself remove the impediment to his passing without incurring personal liability to the owner of the property removed. Certainly no court would entertain a claim for compensation for an

act abating a public nuisance, when no unnecessary damage is done to the property removed.

We think the court properly refused to make the restraining order, and there is no error therein.

No error. Affirmed.

JAMES W. GRANT Adm'r v. WILLIAM A. REESE Adm'r.

Consent Reference—Right to Jury Trial.

A reference by consent is a waiver of the right to a trial by jury; and after the filing of the referee's report, it is *error* to continue the cause in order to allow time for a jury trial.

(*State* v. *Lindsey*, 78 N. C., 499; *Isler* v. *Dewey*, 79 N. C., 1; *Klutts* v. *McKenzie*, 65 N. C., 102, *Overby* v. *B. & L. A.*, 81 N. C., 56; *Jones* v. *Boyd*, 80 N. C., 258; *Armfield* v. *Brown*, 70 N. C., 27; *Green* v. *Castlebury*, *Id.*, 20; *Atkinson* v. *Whitehead*, 77 N. C., 418, cited and approved)

APPEAL from an Order made at Fall Term, 1879, of NORTHAMPTON Superior Court, by *Avery, J.*

The facts constituting the basis of the decision in this court are stated in its opinion. The plaintiff appealed from the judgment of the court below.

Mr. R. B. Peebles, for plaintiff.

Messrs. Gilliam & Gatling, for defendant.

SMITH, C. J. This action is brought on the bond executed by the defendants on the appointment of the defendant, William A. Reese, as administrator *de bonis non*, with the will annexed of Martha Parker, by the plaintiff as administrator *de bonis non* of Sterling Smith, sole devisee and

legatee under her will, and charges negligence in the management of the estate and a waste and misapplication of assets. The answer denies the allegations of mismanagement and waste, and at the return term an order was entered in the cause in the following terms: "Referred to Wm. H. Hughes to state an account and report." The cause was continued without any report from the referee until fall term, 1878, when the following order was made: "This cause coming on to be heard and no report having been made by the referee, *it is now agreed*, that the former reference be, and the same is hereby stricken out, and *it is further agreed*, that the cause be referred to T. W. Mason, Esq., to take and state the account between the estate of Martha Parker and W. A. Reese, her administrator, and it appearing that, to ascertain how said account stands, it is necessary to take an account between said estate of W. J. Harrell, her former administrator, the said T. W. Mason will take the same also and report to the next term of this court."

In accordance with this direction the referee stated the account and made report to fall term, 1879, separating and distinguishing his findings of fact from his findings of law, with exhibits and testimony taken before himself and the former referee, not necessary to be more particularly set out. Numerous exceptions were filed by the defendants and a few by the plaintiff. Before the hearing of the exceptions the following order was entered in the cause: "It appearing to the court that counsel for defendants demands a trial by a jury upon the issue raised upon the exceptions to the referee's report, it is ordered by the court, the cause be continued to the next term of this court to the end that issues may be framed and that the trial by jury may be had." From the ruling of the court that defendants are entitled to a jury trial upon the issues raised, the plaintiff appeals.

In considering the import of the record which directs a continuance to the end that a jury trial may be had, we

have had some hesitancy in sustaining the appeal, certainly none lies from an order of continuance, and the purpose for which it is made does not change its character as a simple adjournment of the further hearing to another term. *State* v. *Lindsey*, 78 N. C., 499; *Isler* v. *Dewey*, 79 N. C., 1. But upon a fair and reasonable construction of the record, we think it must be understood to mean that the defendants' motion was allowed and the continuance follows as necessary to give effect to the ruling. The point then presented is the right of the defendants to demand a jury trial of disputed facts arising out of exceptions to the referee's report.

"In a case involving complicated accounts," says PEARSON, C. J., delivering the opinion of the court in *Klutts* v. *McKenzie*, 65 N. C., 102, "the mode of trial under C. C. P. *is by reference* and the proceeding is in analogy to a reference to the clerk and master in the old mode of equity procedure, and his report is to be *finally disposed of on exceptions*," and a jury trial could not be demanded. Aside from the force of this authority, we have already intimated that the effect of the recent constitutional changes may be to restore the power exercised by the courts of equity under the former system of disposing of exceptions to a referee's report without the intervention of a jury. *Overby* v. *B. & L. Association*, 81 N. C., 56; *Jones* v. *Boyd*, 80 N. C., 258, and *Hettrick* v. *Page*, *ante* 65.

But the reference here is by an agreement of the parties expressed upon its face, and the right to have a jury pass upon the facts, if otherwise it could have been claimed, has been waived. *Armfield* v. *Brown*, 70 N. C., 27; *Green* v. *Castlebury*, *Ibid.*, 20; *Atkinson* v. *Whitehead*, 77 N. C., 418, and *Overby* v. *B. & L. Association*, *supra*.

It must therefore be declared there is error in the order allowing the defendants' demand for a jury, and it is reversed. The record is very voluminous and much of it

wholly unnecessary in elucidating the point presented in the appeal. In accordance with Rule 4, *Costs of Appeal*, the clerk will not tax the appellee with the cost of that part of the transcript sent up which consists of the referee's report and the exhibits and evidence accompanying it.

Error. Reversed.

W. J. JONES and others v. ADOLPH COHEN and wife.

Deed of Infant Feme Covert—Pleading—Practice—Judgment—Mesne Profits—Improvements—Courtesy—Tenants in Common—Ouster.

1. Since the enactment of section 8, chapter 37, of the Revised Code, the deed and privy examination of a feme covert has no longer the effect of an assurance of record, like a fine in England, but may be collaterally impeached on the ground of infancy or other disability.
2. In ejectment, any deed produced as a link in the chain of title may be attacked and invalidated by showing incapacity in the maker; and this without specially pleading the impeaching facts.
3. Where husband and wife disaffirm a deed of the wife's land made by them, before the constitution of 1868 and during the coverture, on the ground of the wife's infancy, and recover the land conveyed, judgment should be in favor of the husband for the rents and profits, with interest from the time the annual rents fell due, less the purchase money (which should be restored to the defendant) and the value of the permanent improvements made by the defendant.
4. One tenant in common cannot sue another for taking possession of property to which each has the same and an equal right, when there has been no ouster.

(*Woodburne* v. *Gorrel*, 66 N. C., 82; *Wright* v. *Player*, 72 N. C., 94; *Paul* v. *Carpenter*, 70 N. C., 502; *Vick* v. *Pope*, 81 N. C., 22; *Houston* v. *Brown*, 7 Jones, 161; *Wilson* v. *Arentz*, 70 N. C., 670; *Jones* v. *Carter*, 73 N. C., 148; *Neely* v. *Neely*, 79 N. C., 478, cited, commented on and approved.)

JONES *v.* COHEN.

CIVIL ACTION tried at Fall Term, 1878, of CRAVEN Superior Court, before *Seymour, J.*

The plaintiffs are W. J. Jones and wife Clara and Freeman S. Ernell, and the defendants are Adolph Cohen and wife Sally. The complaint alleges that plaintiffs are the owners in fee of a tract of land in Craven county, which descended to them from their grandfather, Moses Ernell, and known as lot No. 2 in the partition of his real estate, and that defendants withhold possession of the same. The defendants deny the allegation, and say that Adolph Cohen is the owner in fee of one-half of the land, to wit, that claimed by Jones and wife, having bought it from them in the year 1866, and received a deed in fee with the privy examination of the feme plaintiff. And that by said purchase, Adolph became tenant in common with the other plaintiff, Ernell, and in 1867, filed a petition against Ernell in the court of equity for a sale of the land; that a guardian *ad litem* was appointed to protect the interest of Ernell, then a minor, and a report being submitted that it would be to the interest of the minor to sell, an order of sale was accordingly made, and the land sold for five hundred dollars on the 7th of February, 1870, on a credit of six and twelve months; that Ernell became of age on the 14th of August, 1870, and filed an affidavit in the cause on the 7th of February, 1873, opposing the confirmation of the sale, and admitting his cotenancy with Cohen; and the defendants therefore allege that plaintiffs are not entitled to the possession. The issues and finding of the jury are embodied in the opinion. Judgment for plaintiffs, appeal by defendants.

Messrs. Green & Stevenson and *W. W. Clark*, for plaintiffs.

Messrs. Manly & Son and *Reade, Busbee & Busbee*, for defendants.

SMITH, C. J. The plaintiffs, claiming to be tenants in common of the land described in their complaint, sue the defendants to recover possession and damages, as such, during their occupancy. The defendants, admitting the plaintiff, Freeman S. Ernell, to be the owner of one moiety of the land, deny the title of the other plaintiff to the other moiety, and assert that they, by their deed executed in 1866 and duly proved and registered with the proper privy examination of the wife, conveyed their estate and interest to the defendant, Adolph Cohen. The answer further alleges that the next year after the making of the deed, the said Adolph filed his bill in the court of equity of Craven against the said Ernell, then an infant, for partition and sale of the property so held by them in common, and that pursuant to a decree rendered therein, the same was sold, the sale reported, and a motion to confirm was still pending in the cause undetermined. Upon the trial four issues were submitted to the jury, and their findings are as follows: 1. The feme bargainor, Clara, was under twenty-one years of age when she executed the deed. 2. The defendant is entitled to the sum of five hundred dollars, paid by him to the plaintiff, W. J. Jones, at the time of the purchase. 3. The damages sustained by the plaintiff for the withholding of possession are fifty dollars per annum from the date of the conveyance. 4. The value of the permanent improvements to the land is two hundred and eighty dollars.

Upon this verdict the court adjudged that the plaintiffs are entitled to the real estate described in their complaint in fee simple, "and that they recover possession thereof," and also one hundred and thirty-two dollars and fifty cents for the detention, and from this judgment the defendants appeal.

Numerous points were made by the appellant's counsel in the course of the argument before us, of which such as are deemed material will be noticed:

1. It is insisted that the deed executed by the plaintiffs, Jones and wife, cannot be collaterally impeached by proof of unsoundness of mind or the infancy of the wife, and the cases of *Woodburne* v. *Gorrel*, 66 N. C., 82, and *Wright* v. *Player*, 72 N. C., 94, are cited and relied on. These cases do sustain the proposition contended for, and in the last the defence of the infancy of the wife at the time of making the deed and the taking her privy examination was set up to defeat its operation and disallowed. The decisions proceed upon a construction of the words of the enactment in force when the deeds were proved and the wife's examination had, declaring that such deeds, after registration, "shall be as valid in law, to convey all the estate and title which such wife may or shall have in any lands, tenements and hereditaments so conveyed, whether in fee simple, right of dower or other estate, *as if done by fine and recovery*, or any other means whatsoever." Rev. Stat., ch. 37, § 9. The force and effect of these latter words, it was held, gave to the privy examination the sanctity and conclusiveness of a judicial determination which could only be reversed by some direct mode of impeachment. If the deed under review had been authenticated under the provisions of the same statute, the authorities would be decisive. But, in fact, the probate, examination and registration were in 1866, when the statute had been superseded by section 8, chapter 37 of the Revised Code, in which the operative words that controlled the interpretation of the former law are entirely omitted, and the substituted section, after prescribing how the real estate of married women may be conveyed, declares that such deeds "shall be valid in law to convey all the estate, right and title, which such wife may have in the said lands, tenements and hereditaments." These words are nearly identical with those contained in section one, in which it is provided that all deeds, proved and registered as therein directed, "shall be valid and pass estates in land without livery of seizin,

attornment or other ceremony whatever." We are not at liberty to suppose this changed phraseology was aimless or accidental, and its only apparent purpose seems to be to place all deeds, by whomsoever made, upon the same footing and open to like defences. This intent is plainly manifest in the present law which only prescribes the forms to be observed in conveying the estates of married women, and leaves the effect of their deeds to be governed by the law applicable to the deeds of persons who are not under disability. Bat. Rev., ch. 35, § 14. Thus annulling a discrimination against those who are peculiarly entitled to its protection in their person and property. It is true, *Woodburne* v. *Gorrel* was decided in January, 1872, after the amendatory acts were passed, and of course could not have been in contemplation of the law-making power, but in ascertaining its will from an examination of its enactments and the language employed to express it, our deduction of an intent to do away with an unreasonable discrimination seems logical and just.

In *Paul* v. *Carpenter*, 70 N. C., 502, also cited, the deed was made in 1864, subject to the provisions of the Revised Code, and RODMAN J. delivering the opinion, speaks of the acknowledgment and examination as "a judicial act" and that such deed when duly taken is "an assurance of record, like a fine in England"—citing *Woodburne* v. *Gorrel*. But his attention seems not to have been called to the change in the phraseology of the statute applicable to that deed and the total absence of all reference to a "fine and recovery" in determining its character and effect. Besides, this was not a point in the cause, the sole question being whether the appointee of the military authorities of the United States, then in possession of the locality where the act was done, was legally competent to take and certify the acknowledgment and privy examination. We cannot, therefore, regard the *dictum* as binding upon us.

2 It is next insisted that infancy, if available, cannot be set up to defeat the deed unless specially brought forward and relied on in a replication, and then only by the feme herself. In *Vick* v. *Pope*, 81 N. C., 22, it is said "that to her husband's management and protection are entrusted the interests of the wife in an adversary suit and in the absence of collusion or fraud on his part with the plaintiff, the judgment must be conclusive as to antecedent matters and as effectual as in other cases. More especially must this be so, since the law dispenses with a guardian or *prochein ami* and now leaves to *them alone to set up and establish* any defence that either may have against the plaintiff's demand.

The learning on the subject of pleading derived from the old practice is inapplicable to the present system. The answer denies title in Jones and wife to one-half of the land and alleges an assignment of their estate to one of the defendants. The defence is somewhat analogous to the old pleas of the general issue and *liberum tenementum*, the averment being that though a moiety of the estate once belonged to the feme plaintiff, it passed by the deed of herself and husband to the defendant Adolph. It is in the nature of a confession and avoidance, and by C. C. P., § 105, no replication is necessary, unless the court on the defendant's motion shall so order. The deed is unnecessarily set out in the answer, instead of being offered in evidence on the trial of the controverted allegation of the complaint, but this specific recital does not change the proofs which may be offered in either case. The rule itself which required infancy to be specially pleaded under the former practice, applies to executory contracts whose obligations are sought to be enforced by action, but not to executed instruments when the enquiry is as to their operation and effect. In ejectment, any deed produced as a link in the chain of title may be attacked and invalidated by showing incapacity in the maker; and this, without any record specification of the

nature of the obligation. This objection is therefore untenable.

3. The next question to be considered is as to the judgment which should have been rendered on the facts found by the jury. It is not disputed that the defendants are entitled to have the assessed damages reduced by the value of the permanent improvements. We think also the defendant Adolph, as he loses the land by the election of the feme grantor to avoid her deed, has a right to the return of the purchase money he has paid. This sum after extinguishing the excess of one-half of the damages above one-half the value of the improvements, is the individual debt of the plaintiff W. J. Jones, for which the said Adolph is entitled to judgment against him, and interest should be allowed on the purchase money from the time of payment and on the several annual rents, as each becomes due. The application of the money received by said W. J. Jones is applied to half the annual rents because those rents, as the value of the use and occupation, belong to him as husband. The act of 1848 (Rev. Code, ch. 50 § 1) does not deprive the husband of his estate by the courtesy initiate or consummate of his wife's lands, nor take away his right to the rents and profits during the marriage. *Houston* v. *Brown*, 7 Jones, 161; *Wilson* v. *Arentz*, 70 N. C., 670; *Jones* v. *Carter*, 73 N. C., 148.

The plaintiff Ernell cannot recover in this action for a tortious possession and withholding, because the facts do not support the allegations as to him made in the complaint. He has not been ousted, nor his title denied. The defendant Adolph entered into possession under a deed, operative until avoided, conveying an undivided half-part, not as sole owner, but as a co-tenant with him, and without some act of ouster or exclusion, one tenant in common cannot sue another for taking possession of property to which each has the same and an equal right, and his only remedy is for an

account and division of the profits. *Neely* v. *Neely*, 79 N. C., 478.

It will be referred to the clerk of this court to state the accounts between Jones and wife and Adolph Cohen, and report to the court upon the basis herein indicated, to the end that judgment final may be rendered.

Error. Judgment modified.

JOHN C. WITHROW v. AARON V. BIGGERSTAFF and others.

Tenants in Common—Ouster—Title—Pleading.

1. Where one tenant in common sues his co-tenant to recover land, if the defendant controvert the plaintiff's title, he thereby admits the ouster. If he does not dispute the title, he should admit it in the pleadings and deny the ouster.

2. If the title be admitted in such controversy and can be seen with reasonable certainty, the verdict should set forth the undivided share to which the title is apparent, and the effect of a judgment thereon would be to put plaintiff in possession with defendant.

(*Pierce* v. *Wanett*, 10 Ired., 446; *Lenoir* v. *South*, *Id.*, 237; *Shaw* v. *Shepard*, 6 Ired., 361; *Cloud* v. *Webb*, 4 Dev., 290; *Thomas* v. *Garvan*, *Id.*, 223; *Covington* v. *Stewart*, 77 N. C., 148; *Halford* v. *Tetherow*, 2 Jones, 393; *Hargrove* v. *Powell*, 2 Dev. & Bat., 97; *Parsley* v. *Nicholson*, 65 N. C., 207, cited, distinguished and approved)

CIVIL ACTION to recover possession of Land tried at August Special Term, 1879, of RUTHERFORD Superior Court, before *Buxton, J.*

The land claimed in the complaint consists of six adjoining tracts containing in all three hundred and eighty-two and a half acres, and once belonged to James Withrow who by deed dated January 24th, 1863, conveyed an undivided

one-half in the whole to his son Jason H. Withrow, and by deed dated February 19th, 1875, conveyed the remaining undivided one-half interest to another son, Thomas J. Withrow. Jason and Thomas by parol agreement ran a provisional line across the land from east to west, and Jason occupied the part lying south of the line, and Thomas, the other part on the north of the line.

The plaintiff in support of his title offered in evidence a deed to himself from Jason H. Withrow, dated June 15th, 1871, for one undivided one-half interest in said three hundred and eighty-two and a half acres, and then with a view to estop the defendant read in evidence a deed to defendant dated December 7th, 1872, from said Jason for a similar interest in the same land, and proved that defendant was in possession and had been ever since the date of his deed—on that side of the line previously occupied by Jason, that is, on the south side of the line.

The defendant in defence offered in evidence a deed of release and quit claim dated January 21st, 1876, from Thos. J. Withrow and wife, which covered by proper metes and bounds that part of said land on the south side of the line, and now occupied and claimed by the defendant, who after obtaining his deed from said Thomas and wife and before the institution of this action reconveyed eighteen and three-quarter acres of the same land to Thos. J. Withrow. It was agreed that the plaintiff has never been in the actual possession of any part of the land.

Upon this state of proof and admissions of the parties, His Honor intimated an opinion that the plaintiff could not recover in this action because the defendant had connected himself with the other co-tenant, Thomas J. Withrow; and so, was not a trespasser. In deference thereto the plaintiff submitted to a nonsuit and appealed.

Messrs. Hoke & Hoke, for plaintiff.

Messrs. W. J. Montgomery and *Reade, Busbee & Busbee*, for defendants:

The parties are tenants in common, the division of the land by parol being void. *Medlin* v. *Steele*, 75 N. C., 154; *Anders* v. *Anders*, 2 Dev., 529. It is familiar learning that one tenant in common cannot sue the other for possession unless there is an actual ouster or some act of exclusion.

ASHE, J. It is conceded in the argument of this case that the plaintiff and defendants are tenants in common of the land in controversy. The possession of one tenant in common is the possession of the other. And it is therefore held that one tenant in common cannot sue another unless there is an actual ouster. By an actual ouster is not meant the expulsion from or keeping out of the possession by real force, but it may be inferred from circumstances; which circumstances are matter of evidence to be left to the jury, as for instance, the entry of one tenant claiming the land as his own and continuing in the sole possession for twenty years or more, without any entry, claim, or assertion of right to any part of it by his co-tenant. *Cloud* v. *Webb*, 4 Dev., 290; *Thomas* v. *Garvan, Id.*, 223; *Covington* v. *Stewart*, 77 N. C., 148. So, a demand to be let into possession and refusal or any hindrance by the one tenant in possession to the entry of the other. But that one tenant in common may maintain an action against another, an ouster must either be proved or admitted by the pleadings. *Halford* v. *Tetherow*, 2 Jones, 393. The defendant in our case says the action cannot be sustained because the plaintiff has made no demand to be let into possession and there is no evidence of an ouster. The plaintiff replies, it is true he has made no demand for the possession and has proved no actual ouster, but defendant has made that unnecessary by admitting an

actual ouster in his pleading, which answers his purpose in this action.

According to the practice under our former system, when one tenant in common sued another for possession of land held in common, if he meant to dispute the title of the plaintiff's lessor, he was required as in other cases to enter into the common rule and confess lease, entry and ouster; but when he did not dispute the title of the lessor of plaintiff as his co-tenant, he might obtain upon affidavit leave of the court to enter specially into the common rule, stipulating to confess lease and entry only, not ouster, unless an actual ouster should be proved on the trial. Adams on Ejectment, 56; *Hargrove* v. *Powell*, 2 Dev. & Bat., 97. If the defendant enter into the special rule, then it was incumbent on the plaintiff before he could effect a recovery to prove on the trial an actual ouster, or circumstances from which one might be presumed. But if he enter into the general consent rule, then he confessed the ouster, and it was unnecessary for the plaintiff to prove it; it was admitted by the pleadings. And although the old action of ejectment with its fictions is abolished and one form of action adopted for all cases, the essential principles of pleading at common law have not been abrogated by the code of civil procedure, but still remain and have only been modified as to technicalities and matters of form. See *Parsley* v. *Nicholson*, 65 N. C., 207. Therefore, in actions to recover land, in analogy to ejectment under the former system, where one tenant in common is sued by his co-tenant, if he does not dispute the title of the plaintiff, he should in his answer admit the title and deny the ouster; but if he only controverts the title, that must be taken as an admission of the ouster.

The case of *Halford* v. *Tetherow*, *supra*, may seem to militate against this position, but we think that case is distinguishable from ours on that point. There, the defendant pleaded not guilty, and his entering into the consent rule was

not set out in the record; and the court held it was not at liberty to assume that he admitted an "actual ouster." The plea of not guilty did not necessarily deny the title of plaintiff. It only denied that the defendant was a trespasser and that the plaintiff had a right to the possession. There are many cases where the plea of "not guilty" did not put the title in issue—as for instance, where no demand was made for possession before action brought, when one was necessary or when the lease under which the defendant claimed was unexpired, &c. But in our case the title of the plaintiff is expressly denied in the answer.

It was objected on the argument that as the plaintiff sues for the *whole* of the land within the boundaries of his deed, the effect of the judgment will be to dispossess the defendant of that part. But not so; for being a tenant in common with the defendant, though he may declare for the whole and not for an undivided moiety, he has not an absolute right to have a verdict for the whole, but the jury may render such a verdict, and leave the plaintiff to proceed at his peril under the writ of possession. The more correct course is said to be, when the extent of the title can be seen with reasonable certainty, to set forth in the verdict the undivided share to which the title is apparent, and to enter the judgment accordingly, the effect of which will be to put him in possession with the defendant. *Pierce* v. *Wanett*, 10 Ired., 446; *Shaw* v. *Shepard*, 6 Ired., 361; *Lenoir* v. *South*, 10 Ired., 237.

There is error in the opinion intimated by His Honor. The nonsuit must be set aside and a new trial had. Let this be certified.

Error. *Venire de novo.*

C. C. DURHAM v. P. L. SPEEKE.

Landlord and Tenant—Crop Lien—Personal Property Exemption.

1. Under the landlord and tenant act, Bat. Rev., ch. 64, § 13, a contract of lease for five years was entered into, and the lessor in default of payment of the rent proceeded to secure the same under the amendatory act of 1877, ch. 283; *Held*, that the latter act only changed the lessor's *remedy* and does not affect the substantial rights of the parties.
2. Where by an agreement in writing under the former act (as here) or in parol under the latter act, a lien is created on the crop to secure rent, the crop is deemed to vest in the possession of the lessor until payment of the rent.
3. And the right to enforce this lien cannot be defeated by the lessee's claiming the crop as a part of his personal property exemption. (Whether the claim to such exemption would prevent the lessor from retaining the crop for damages for a breach of condition in the contract—*Quære?*)

(*Hinton* v. *Hinton*, Phil., 410, cited and approved.)

CIVIL ACTION tried at Fall Term, 1878, of CLEAVELAND Superior Court, before *Schenck, J.*

The plaintiff and defendant, on the 15th of December, 1874, entered into a written contract whereby the plaintiff leased a tract of land to defendant for five years, beginning on the first day of January next thereafter, at a rent of one-third of all the crops raised on the land to be delivered to plaintiff at Shelby, with other covenants on the part of defendant for cultivation of the land to the best advantage, and for certain work and reparations to be done on the premises.

At the end of 1877, the plaintiff, on the allegation of the non-payment of the rent for that year, and the non-performance of some of the stipulations in the lease, brought an action in a justice's court to recover the rent claimed, and

for damages by reason of the alleged breach of the stipulations; and on affidavit of the plaintiff of removal of the crops raised from the premises, the justice of the peace issued an order for the seizure of the same. Afterwards, on motion of defendant, the said order, under which the officer had taken the crops into his possession, was vacated and the plaintiff took an appeal to the superior court.

In the superior court the record states, it was admitted that only eleven dollars and seventy-nine cents of the judgment in the justice's court was for rent, and that the balance was for damages for non-compliance with the terms of the lease, and that defendant did not have five hundred dollars worth of personal property, inclusive of his portion of he crops grown on the lands. On these admissions the court held that defendant was entitled to his exemptions, and that the statute passed since the making of the contract, in so far as it authorized a seizure of the crops for the damages due plaintiff for breach of the stipulations in the lease, was unconstitutional, but was valid in respect of the rent. And accordingly it was adjudged that the sheriff retain and apply enough of the property seized to pay the sum of eleven dollars and seventy-nine cents, admitted to be due for rent and the costs, and return the surplus to the defendant, and from this ruling the defendant alone appeals.

Mr. W. J. Montgomery, for plaintiff.
Messrs. Hoke & Hoke and *A. Burwell*, for defendant.

DILLARD, J. The plaintiff not having appealed, no question is or can be made in this court as to the correctness of the ruling in respect of the unconstitutionality of the statutes allowing the crops to be seized for the damages assessed and included in the judgment, and therefore it is not necessary that we should consider and pass upon the opinion of His Honor adjudging the crops to that extent exempt.

But the defendant having appealed, it is claimed on his behalf that the court erred in adjudging the crops raised to be liable to seizure for the rent due for 1877, clear of his right of personal property exemptions.

The solution of the question presented involves an inquiry into the rights of the parties under the statutes upon the subject of rents applicable at the time of the seizure under their contract.

By the act of 1868–'69 to be found in Bat. Rev., ch. 64, § 13, it is enacted that any lessee of land may agree in writing to pay the lessor a share of the crop to be grown on the land during the term, as rent; or to give him a lien on the whole crop or any part thereof as a security for the performance of any stipulation in the lease. And when the lessee so agrees it is enacted that such charge or such crop shall be deemed and held to be vested in possession of the lessor and his assigns, at all times until such lien shall be satisfied or discharged, and the remedy of claim and delivery is given the lessor to recover the possession against the lessee if any part of the crop is removed from the premises without the consent of the lessor.

The contract between these parties was made in December, 1874, for the term of five years, and the agreement to pay one-third of the crops as rent, together with other stipulations, was set forth and expressed in a writing executed at the time, and by force thereof, under said act of assembly, the crops were deemed to be in the plaintiff's possession and he had the right by action to be put in possession of such part as was removed without his consent until the rent was satisfied; and the defendant had the right to have the residue returned to him after the payment of the rent reserved. By the statute aforesaid under the contract one-third of the crop belonged to the plaintiff with a lien on all until paid, and two-thirds belonged to defendant to become clear of the lien on the payment of the rent. That part of the crop re-

quisite to pay the rent, by the law in force at the time the contract was made, was not and never could be the property of the defendant, and be subject to be claimed as an exemption against the rent.

Such being the rights of the parties respectively under said chapter sixty-four, section thirteen, in force at the date of the contract, we will now inquire what alteration, if any, was made in reference to the contract of the parties by the acts of 1876-'77, ch. 283, which was the act in force at the time the order of seizure complained of was issued.

This act had no effect to impair or injuriously alter any substantial right of the defendant in that portion of the crop which belonged to the plaintiff as rent. That much was not defendant's property and could never be, and the whole was under lien under Bat. Rev., ch. 64, § 13, until plaintiff's rent was paid as we have seen. And the rights of defendant and the liability of the crops were precisely the same in this respect under the act of 1876-'77 as under the act in Bat. Rev., ch. 64, § 13; except that rent agreed to be paid verbally was put on the same footing with a written agreement. The only alteration with the exception aforesaid effected by the last act was in the remedy. That act provided a remedy for the lessee, in case the lessor takes possession of the crops, to get back his portion of the same, and in case of controversy as to the claim of rent and the amount thereof, it provides the mode and form in which that matter may be determined, with a provision for an order of seizure of the crops during the litigation, in case neither of the parties gives bond conditioned for the forthcoming of the same at the end of the proceeding.

Whatever belongs to the remedy may be modified or altered at the pleasure of the legislature, if the obligation of the contract is not thereby impaired, nor any substantial right affected; provided a sufficient remedy is left to the parties according to the course of justice, as it existed at the

time the contract was made. Cooley Const. Lim., 287 and 288; *Hinton* v. *Hinton*, Phil., 410.

In the case before us, the additional, more efficient and speedy remedy provided by the act of 1876-'77 had no effect to alter or change the lien created by the law in force at the date of the lease, and deprived the defendant of no advantage or right. And it seems to us that the order of seizure, issued to the sheriff in the course of the remedy provided, gives the defendant no just cause of complaint, and is not obnoxious to the objection of being unconstitution in respect of any effect it had on his contract of December, 1874.

We hold, therefore, that His Honor was not in error in holding that defendant's right of exemptions did not include so much of the crops as was required to pay the rent, and in holding that the act authorizing the seizure as a part of the remedy in the enforcement of plaintiffs's lien was not unconstitutional. There is no error. Let this be certified.

No error. Affirmed.

RALPH P. BUXTON v. THE COMMISSIONERS OF RUTHERFORD.

Salaries of Judges.

The constitution provides that the salaries of the judges shall not be diminished during their continuance in office. The additional compensation of one hundred dollars given to a superior court judge by the act of 1869 for services in holding a special term, is a part of his salary; *Hence* section four of the act of 1879, ch. 240, which provides for a reduction thereof, considered separately, is unconstitutional; but taken in connection with section seventeen of same chapter, its operation is postponed until such time as the constitution ceases to give protection.

CONTROVERSY submitted without action under the Code, § 315, and heard at Chambers on the 29th of December, 1879, before *Schenck, J.*

The following facts are set out in the case agreed:

That the plaintiff is a judge of the superior court, resident in the fourth judicial district, duly elected and commissioned and qualified in 1874. The defendants are the board of commissioners of Rutherford county in this state, duly elected and qualified. That upon application of the defendants a special term of the superior court for the county of Rutherford was called, and his excellency, the governor of the state, by authority of law, did issue a commission to the plaintiff, to open and hold a special term of said court on Monday, the 4th day of August, 1879, and to continue the same until the business of said court should be disposed of. That the plaintiff by virtue of said commission did on the 4th of August, 1879, open the special term of said court for said county, and continue for one week and four days, until all the business was dispatched, and took the clerk's certificate in due form to that effect. And that the plaintiff has made all necessary and proper demands upon the proper county officers of Rutherford county, for legal compensation for his services in holding said special court, which demand has been refused by the defendants, upon the ground that no compensation was due him for such services from the county of Rutherford.

The question submitted to the decision of His Honor was "Is Judge Buxton entitled to pay from the county of Rutherford for holding said special court?" It was agreed that if His Honor should be of opinion with the plaintiff, then he should render judgment for the plaintiff for one hundred and sixty-six and two-third dollars and five dollars costs, with *mandamus* to defendants to pay said judgment and costs; and if with the defendants, then he should render judgment against the plaintiff for the costs, viz: five dollars.

His Honor rendered judgment in behalf of the plaintiff against the defendants for the sum of one hundred and sixty-six and two-thirds dollars, and three dollars costs, from which the defendants appealed.

Messrs. Batchelor, Reade and *Merrimon*, for plaintiff.
No counsel for defendants.

ASHE, J. Was this judgment erroneous? We think it was not; and in considering the case we will first address ourselves to the inquiry—what was the compensation allowed by law to the judges of the superior courts? The first act on the subject is that of 1868, ch. 46, § 6, which fixed the salaries of the judges of the superior courts at twenty-five hundred dollars a year, in full compensation for all judicial duties which are now or may hereafter be assigned to them by the general assembly; and for holding a special term of the superior court the judge shall receive ninety dollars for each week, to be paid by the county in which the special term is held, on the production of the certificate of the clerk of said court; so that the compensation or salary fixed by that act was twenty-five hundred dollars a year and in addition thereto ninety dollars for each week in holding the special courts. The fifth section of chapter 273, of the acts of 1868–'69, provided that for holding a special court the judge should be entitled to receive from the commissioners of the county in which the court is held, his expenses at the rate of one hundred dollars per week, as his compensation for holding said term. We do not think it was the purpose of the legislature to make the compensation cumulative, and the act being in conflict with the latter clause of the sixth section of the act of 1868, repeals it, making the compensation of the judges of the superior courts twenty-five hundred dollars a year for all judicial services, except for holding special courts,

and for that service one hundred dollars per week in addition to the regular salary. This was the compensation established by law for the judges of the superior courts when the plaintiff was elected judge in 1874.

But it is contended on the part of the defendants that the fifth section of chapter 273 of the acts of 1868–'69, was repealed by the act of 1879, ch. 240, § 4, which provides: "That the judges of the superior courts shall each have an annual salary of two thousand five hundred dollars, payable quarterly, viz: on the first days of April, July, October, and January in every year in full compensation for all judicial duties which are now or may hereafter be assigned to them by the general assembly. The governor in assigning the judges of superior courts to hold extra and special terms thereof, shall observe as near as may be an equal division of labor among the several judges." But we do not think it was the intention of the legislature that that act should apply to those officers whose compensation was protected by the constitution, for in section seventeen of the act, it is provided that "this act shall be in force from and after its ratification, or as soon thereafter as the constitution and the laws passed in pursuance thereof will permit." The legislature evidently had in view when they enacted that section, that the compensation of the judges could not be diminished during their continuance in office, and therefore the operation of the act as to them, was postponed until such time as the constitution should cease to give them protection.

If this be not the proper construction of that section, then the fourth section of that act is unconstitutional so far as it relates to the term of office of those judges then in office, because it contravenes that provision of the constitution contained in the twenty-third section of the fourth article of the constitution of 1868, and in section eighteen of that of 1875, which declares "that the salaries of the judges shall

not be diminished during their continuance in office." But here the question occurs, does the term "salary" include the compensation given to the judges for holding special terms of the court? If it does the section is unconstitutional.

Tomlinson in his law dictionary defines salary to be "a recompense or consideration made to a person for his pains and industry in another man's business." According then to this definition of the term, the compensation of one hundred dollars given to the judges of the superior courts for their services in holding the special courts, to be paid by the commissioners of the county in which the courts are held, is a part of their salary. In this view of the case, we hold there was no error in the judgment of the court below.

Let this be certified to the superior court of Rutherford county, that judgment may be entered for the plaintiff, and that a writ of *mandamus* may be issued to the defendants according to the case agreed and in conformity to this opinion.

No error. Affirmed.

In the matter of WILSON WALKER.

Contempt—"Purging."

1. It is unlawful to imprison for more than thirty days for a contempt of court. Bat. Rev., ch. 24, § 2.

2. Where the answer to a rule to show cause why one should not be attached for contempt negatives under oath any intentional disrespect to the court or purpose to obstruct its process, the rule should be discharged.

(*Ex Parte Moore*, 63 N. C., 397; *Bond* v. *Bond*, 69 N. C., 97, cited and approved.)

In re WALKER.

PROCEEDING for Contempt, heard at Chambers, Spring Term, 1879, of PASQUOTANK Superior Court, before *Avery, J.*

Upon the hearing the court adjudged that Walker was guilty and ordered him to be imprisoned, from which judgment he appealed.

Messrs. A. M. Moore and *Gilliam & Gatling*, for Walker.
Messrs. Pruden & Shaw and *J. P. Whedbee, contra.*

DILLARD, J. On the petition of Quentin F. Simpson for a writ of *habeas corpus* to get his daughter, Eliza Simpson, a writ was issued directed to Emily Corbet and Wilson Walker, commanding them to produce the body of the child, with the cause of her caption and detention, before the judge of the superior court on the first day of April, 1879, at chambers in the town of Edenton, which writ was returned executed on Walker and not found as to Corbet. At the return day Walker appeared before His Honor without the child, and on that day another writ was directed to issue to the same persons returnable at chambers on the 16th of April, together with a rule to show cause why they should not be fined for a contempt in disobeying and avoiding the former writ, and this writ was duly served on both of the parties.

On the next day, to wit, on the 2nd of April, Walker made affidavit of the willingness and purpose of himself and Emily Corbet to surrender the child, and offered to do so if an order of the court to that effect were made, and thereupon the court ordered that they deliver the child to one Jackson, the agent of the father, and pay him twenty dollars, and also pay the other costs on or before the 17th day of April, and in default thereof, that they appear before him at a time and place named and show cause against being attached under the rule which had already been served on them.

Under this order Walker and Corbet waited upon the agent of the father and paid him the money required, and

Walker delivered the child to Jackson, and the child being frightened and clinging to Mrs. Corbet, her grandmother, Mrs. Corbet refused to let him take the child but offered to go to Norfolk where the father was and deliver the child to him. This was assented to by the agent and also by the father by telegraph, and accordingly on the 10th of April Jackson, the agent, and Mrs. Corbet took the boat and went to Norfolk, and on their arrival Mrs. Corbet retained counsel and took out legal proceedings against the father to recover compensation for raising the child.

After these proceedings, notice was given to Walker that the rule for contempt which had been served on him would be insisted on, and pursuant thereto Walker attended before His Honor on the return day and filed an answer to the rule, and on the hearing His Honor found as facts that Walker, on the service of the writ of *habeas corpus* on him, caused notice of such service to be sent to Emily Corbet, in whose possession the child was, in order to enable her to avoid service on herself, and that Walker since he was put under the rule to answer for an alleged contempt, aided in sending Emily Corbet to Virginia, and in there instituting legal proceedings with intent to hinder, delay or prevent the execution of the orders of the court. Upon these facts it was adjudged by the court that Walker was guilty of contempt and he was sentenced to imprisonment in the jail for ninety days, from which judgment the appeal is taken.

In cases of alleged contempt out of the presence of the court, the practice is to have a foundation laid by facts shown forth by affidavit or otherwise, constituting a *prima facie* case, and then by a rule to put the accused to show cause against the attachment by an answer denying the alleged facts, of which he had notice in the rule or on the record, or excusing his conduct; or where the gravamen of the charge rested on intention, by a disavowal of the imputed purpose. 4 Blk., 286; 3 Whar. Cr. Law, 3449, 50; *Ex parte Moore*, 63

N. C., 397. According to the answer filed, Walker acquitted himself from any charge of wilful disobedience to the writ in the non-production of the child before His Honor on the 1st day of April, by the fact that he had never had the possession and control of her, and of this opinion was His Honor, as he found no fact to the contrary in his judgment, and hence as to this point it is to be taken that Walker personally was guilty of no contempt. But it is found by the court below that Walker, on the service of the writ on him caused notice of such service to be sent to Emily Corbet who had the custody and control of the child, in order that she might avoid the service of the writ on her, and that he, since the service of the rule to show cause, aided in sending Emily Corbet to Virginia and in the institution of legal proceedings in that state, with the intent to hinder, delay or prevent the execution of the orders of the court, and herein it is claimed that Walker was constructively guilty of a disobedience of the writ.

Manifestly as to both these grounds of contempt the existence of an intention to hinder and obstruct the service of the writ on Emily Corbet was requisite. Walker may have given notice of the service of the writ on him with no intent thereby to aid or encourage Corbet to get out of the way of the sheriff. And as to the aid given in sending her to Virginia with the child, and in the institution of suit there, it had been agreed on by the father and his agent, Jackson, that Mrs. Corbet should go with the child to Norfolk, Virginia, and deliver her to the father, and it may be that the aid given was upon the humane intent to deliver the child to the father rather than to a stranger with whom she was unwilling to go, and not upon any intent to obstruct or evade the order of the judge.

How this essential fact of intention in the constitution of the contempt was, was a matter within the breast of Walker, and one to which he should have been required to purge

himself in answer to the rule, or on special interrogations put to him by the court; and if he was not so required, then His Honor should not have proceeded to adjudge the contempt unless on refusal to respond by Walker. But as we understand the rule and the answer thereto the said Walker fully acquitted himself by averring on his oath that if his course in the matter was wrong, it was through ignorance and with no disrespect to the court nor disposition to disobey His Honor's orders and decrees.

The judgment pronounced was certainly erroneous (if otherwise correct) in that it subjected Walker to imprisonment for ninety days instead of thirty days as limited by act of assembly. But all intentional disrespect to the court and purpose of hindrance or obstruction to the process of the court having been negatived by the answer, in our opinion the court should have discharged the rule and not proceeded to find intents contrary to the answer and adjudged any imprisonment at all. *Ex parte Moore, supra; Bond* v. *Bond*, 69 N. C., 97.

Error. Reversed.

R. O. BURTON, Administrator, v. FANNIE CONIGLAND and others.

Construction of Devise—Defeasible Estate, when it becomes absolute.

A testator devised certain land to A subject to an usufructuary interest in one B until the said A should reach the age of twenty-one years; and if A should die leaving no child, then over; *Held*,

(1) That the effect of the will is to vest the estate *at once* in A.

(2) That the contingent limitation over in the event of the death of A

he leaving no child, must be restricted to a death occurring during the testator's life-time or the devisee's minority.

(3) That in either event the result is the same, vesting an absolute estate in A.

(*Hilliard* v. *Kearney*, Bus. Eq., 221; *Davis* v. *Parker*, 69 N. C., 271; *Baker* v. *Pender*, 5 Jones, 351; *Fuller* v. *Fuller*, 5 Jones Eq., 223; *Webb* v. *Weeks*, 3 Jones, 279; *Vass* v. *Freeman*, 3 Jones Eq., 221; *McDaniel* v. *McDaniel*, 5 Jones Eq., 351, cited and approved)

SPECIAL PROCEEDING to sell land for assets commenced in the Probate Court of HALIFAX County, and heard on appeal at Chambers on the 12th of December, 1879, before *Seymour, J.*

After proceedings were had according to law, the plaintiff as administrator of Edward Conigland, deceased, sold the land and Robert P. Hervey became the purchaser, but refused to comply with the terms of sale upon the ground set out in the opinion, to wit, that a good title could not be made by the administrator. Thereupon a rule was served on the purchaser to show cause why he should not pay the amount bid, and upon the hearing the probate judge held that a good title could be made, and ordered Hervey to comply with the terms of sale. He appealed from this order to the judge of the district who affirmed the judgment, and he then appealed to this court.

Mr. Thos. N. Hill, for the plaintiff.
Messrs. Day & Zollicoffer, for the respondent.

SMITH, C. J. The plaintiff, administrator of Edward Conigland, filed his petition in the probate court against the heirs at law for license to sell the lands of the intestate, and under a decree therefor, sold a tract known as the "Pope Place," and estimated to contain four hundred and fifty-two acres, to Robert P. Hervey, at the price of two thousand dollars. The latter refused to comply with the terms of

sale, alleging that the intestate did not have an estate in fee in the premises. The plaintiff reported the sale and the failure of Hervey, and thereupon the court declaring its willingness to confirm the sale when the conditions were complied with, directed a rule to be served on the purchaser, requiring him to show cause why he had failed to do so. In answer to the rule, Hervey showed that the land formerly belonged to one William Doggett, who died in 1835, leaving a will in which he devises the same as follows: "I give and bequeath to my nephew John H. Ponton, my tract of land on Quankey known as "Longs," and which I purchased at the sale of the clerk and master in equity. My friend Mungo T. Ponton is to have the use and benefit of said tract of land until he, the said John H. Ponton, arrives to the years of twenty-one. If he dies leaving no child, I give it to his brother William Ponton, Mariah and Mary Ponton. Should they die leaving no child, I give it to brother Henry Doggett."

The devisee, John H. Ponton, who at the time of the testator's death was but eight years of age, on attaining his majority came into possession under the will, and by his deed of August 15th, 1856, purporting to pass the entire estate in fee, with full warranty, conveyed the land to William B. Pope, and on the same day Mungo T. Ponton released to him all his interest therein. Subsequently Pope conveyed to the intestate the land now in controversy, parcel of that devised by the testator William Doggett and conveyed as aforesaid.

The only question presented by the respondent is as to the sufficiency of the title derived under the will and thence transmitted to the intestate. The probate judge decided that the devisee took an estate in fee and overruled the defence. On appeal the judgment was affirmed by the judge of the superior court, and from this ruling the respondent appeals to this court.

The argument for the plaintiff and the numerous authorities upon which it rests, are conclusive of the question and render it needless for us to pursue the subject in detail. The effect of the clause is most clearly to vest the estate in the devisee, John H. Ponton, at once, deferring however his enjoyment of its profits, which are meanwhile given to another, until he reaches the age of twenty-one years. The contingent limitation over, "if he dies leaving no issue," must be restricted to a death occurring during the testator's life-time or his own minority, and in either event, the result is the same, vesting an absolute estate in John H. Ponton. The opinion of the late B. F. Moore, a most learned and accurate lawyer, given in reply to an inquiry of the intestate as to the construction of the clause, some years since, and read in the argument of plaintiff's counsel, limits the contingency "to his dying and leaving no issue before he arrives at full age." The subject is most elaborately and ably discussed by the late Chief Justice, with his usual force and clearness in *Hilliard* v. *Kearney,* Busb. Eq., 221, and the following conclusions reached: "When the estate is defeasible and no time is fixed on at which it is to become absolute, and the property itself is given and not the mere use of it, if *there be any intermediate* period between the death of the testator and the death of the legatee, at which the estate may fairly be considered absolute, *that time will be adopted;*" *e. g.*, a gift to A if he arrives at the age of twenty-one, but if he dies without leaving a child, the property is to go to B, the intermediate period is adopted, and the gift is absolute at his age of twenty-one," quoting from *Horne* v. *Pillans,* 2 M. & K., 22. And again, "if there be no intermediate period and the alternative is either to adopt the time of the testator's death or the death of the legatee generally, at some time or other whenever it may happen, as the period at which the estate is to become absolute, the former will be adopted unless there be words to forbid it, or some consider-

ation to turn the scale in favor of the latter, *e. g.* a gift to A but in case of his death to B, the time of the testator's death is adopted as the period at which the bequest to A becomes absolute," referring to several cases to sustain the doctrine.

The same principle is affirmed and applied alike to real and personal estate in *Davis* v. *Parker*, 69 N. C., 271. See also the other cases cited for the plaintiff—*Baker* v. *Pender*, 5 Jones 351; *Fuller* v. *Fuller*, 5 Jones Eq., 223; *Webb* v. *Weeks*, 3 Jones, 279; *Vass* v. *Freeman*, 3 Jones Eq., 221; *McDaniel* v. *McDaniel*, 5 Jones Eq., 351; 2 Fearne on Rem., 339; *Horne* v. *Pillaus*, 7 Con. Eng. Ch. Rep., 238.

It must be declared there is no error in the ruling in the superior court and this will be certified that the cause may be proceeded with according to law.

No error. Affirmed.

THOMAS J MERONY v. M. L. MCINTYRE and another.

New Trial—Issues.

It is error to limit a new trial to a single issue, where all the issues are essential and each touches the merits of the controversy. In such case the new trial granted should be general.

(*Holmes* v. *Godwin*, 71 N. C., 306, cited and approved.)

CIVIL ACTION tried at Fall Term, 1879, of ROWAN Superior Court, before *Gilmer, J.*

It is alleged in the complaint that plaintiff recovered several justice's judgments against the defendant, McIntyre, amounting in all to $558.75, principal money, and caused executions to be issued thereon which were returned *nulla*

bona; that McIntyre, after becoming thus indebted to plaintiff, purchased of one West a house and lot for five hundred dollars, and paid the money and procured the deed to be made to his co defendant, Jennie Finger, without any valuable consideration moving from her, and that McIntyre was insolvent at the time.

The action is brought on the idea, (the judgment debtor having no estate or right in the land affected by a lien under the judgment or capable of being reached by execution) that he has the right of action in the nature of a bill in equity to follow the money of his debtor which has been converted into the land as a gift to Jennie Finger.

The defendants filed separate answers, and the facts necessary to constitute the plaintiff's cause of action being denied, His Honor submitted the following issues to the jury:

1. Was the defendant McIntyre indebted to the plaintiff in judgments on claims contracted prior to May, 1876, and only $12.08 paid thereon?

2. Did McIntyre have West to execute a deed for said land to defendant Jennie without consideration on her part?

3. Was McIntyre insolvent at the time of the execution of the deed from West to Finger?

The jury being out considering of their verdict when His Honor left the bench late in the evening, it was agreed that the clerk might take the verdict, and they having agreed came before the clerk and responded to the first issue, "yes," to the second, "no," and to the third, "yes," and were discharged, some remaining in the court room and others going out into the street. Just after the discharge of the jury, one of them in conversation with plaintiff's counsel remarked that the jury were satisfied that no consideration had been paid by Finger, when the counsel told the juror, if that was so, they should not have responded "no" to the second issue, and suggested to the clerk and to said juror and some five others still in the court room, that the jury ought to be

got together that they might correct their finding. Thereupon the jury were assembled, and after retiring for some minutes returned and delivered a verdict in the affirmative on the second issue. The judge was sent for, and after examining the jury touching their finding, directed the last verdict to be recorded. Defendants moved to set aside the verdict and award a new trial, and upon hearing affidavits and finding the facts as above stated, the court refused to set aside the entire verdict, but set aside the finding on the second issue, and ordered a new trial as to the same, and the defendants appealed.

Mr. J. M. McCorkle, for plaintiff.
Mr. Kerr Craige, for defendants.

DILLARD, J., after stating the case. The error assigned questions the right of the court below under the established rules and practice of the courts to grant a new trial as to one of the issues, leaving the verdict to stand as to the others.

It is not necessary that we go into the inquiry whether the change of the finding from a negative to an affirmative response on the second issue by the jury in consequence of the conversation of one of the jurors with the plaintiff's counsel, and on suggestion to that effect, vitiated the verdict and required the court as a matter of law to set it aside *in toto*, or was a matter of such weight merely as His Honor might give to it in the exercise of his discretion in passing on the motion for a new trial. We are of the opinion, whether the change of the verdict under the circumstances vitiated it or not, His Honor, as he decided to set it aside, should have done so and granted a new trial generally, and not restricted it to the second issue only.

It is settled that a court may in some cases grant a partial new trial, and the rule on the subject as established by the

decisions of this court, is, "that if the jury omit to find a matter which goes to the point of the issue, the new trial must be *in toto*, but when all the material issues are found correctly and the error does not touch the merits, the court may award a writ of inquiry or a restricted new trial to correct the error." *Holmes* v. *Godwin*, 71 N. C., 306, and the authorities there cited.

In this action there were three essential facts in the plaintiff's cause of action, to wit, the purchase and payment for the land by McIntyre out of his own means, the procurement of title to be made by West to Finger without valuable consideration proceeding from her, and the insolvency of McIntyre at the time of the conveyance. It took all three to constitute a case for the plaintiff, and the non-existence of either one of the facts, if so found, was fatal to the action. The absence of a consideration paid by Finger was essential to plaintiff, equally with and not more than the other facts; and the jury as to this important fact involved in the second issue in their first verdict in effect found that there was a consideration, which entitled Finger to judgment; and in their second verdict they found in substance that there was no consideration, and on this and the other findings the plaintiff was entitled to judgment. Evidently, then, the new trial granted of the second issue was on a point which not merely touched the merits of the action, but was its central point, without which and the other facts in his favor the plaintiff could not recover. Applying the rule established in *Holmes* v. *Godwin*, the new trial granted should have been entire and not limited to this single issue.

According to the case of appeal the court found as facts that the jury in their first verdict delivered to the clerk by consent of parties found the second issue in favor of the defendant, Finger, and were discharged and dispersed, and that in consequence of a conversation of a juror with the plaintiff's counsel, the jury were got together and again re-

tired upon the issues, and on their second verdict found the same issue differently. Upon these facts His Honor, from a suspicion that the changed verdict on the second issue was influenced, or may have been, by the conversation of the juror with the plaintiff's counsel, awarded the new trial to the extent of that issue; but the jury in their second verdict responded on the other issues as well, and if in preservation of the purity of jury trials it was proper to set aside the verdict at all, it should have extended to the whole case.

We declare our opinion to be that the court was in error in granting a new trial restricted to the second issue merely, and that it should have been of all the issues. The judgment is therefore affirmed as to the grant of a new trial of the second issue, and reversed in so far as it refused a new trial of the other issues in the cause. Let this be certified.

Error. Reversed.

PEOPLES NATIONAL BANK v. JOHN D. MCARTHUR and others.

Amendment of Record—Appeal.

1. A court has power to amend its record by inserting what has been omitted to make it speak the truth.
2. Where an action was brought in a justice's court against A and B and an appeal taken from the judgment recovered, but no memorandum thereof entered on the justice's docket, it is competent to the superior court upon proof to amend the record to show that in fact only one of the defendants appealed.

(*Phillipse* v. *Higdon*, Busb. 380; *Ashe* v. *Streator*, 8 Jones, 256; *Thomas* v. *Womack*, 64 N. C., 657; *Cheatham* v. *Crews*, 81 N. C., 343; *Brown* v. *Hawkins*, 65 N. C., 645; *State* v. *Cauble*, 70 N. C., 62; *Wolfe* v. *Davis*, 74 N. C., 597, cited and approved.)

BANK *v.* MCARTHUR.

CIVIL ACTION commenced before a justice of the peace and tried on appeal at Spring Term, 1879, of CUMBERLAND Superior Court, before *McKoy, J.*

The plaintiff endorsee brought this action before a justice of the peace against the defendant, John D. McArthur, the acceptor, and the other defendants composing the partnership firm of W. D. Smith & Co., as endorsers, to recover the amount due on a draft of one E. Page for one hundred and thirty-five dollars, on which a payment of twenty-five dollars had been made and credited. The plaintiff entered a *nolle prosequi*, as to E. J. Hardin, one of the alleged copartners, and recovered judgment against the other defendants. From the judgment an appeal was taken, and an undertaking entered into by the individual members of the firm and the said Hardin in the sum of two hundred dollars, to pay such sum as the plaintiff might recover in the superior court according to the provisions of the code § 542.

On the trial in the superior court the plaintiff recovered judgment against the defendant, McArthur alone, and thereupon moved for judgment against the surety to the undertaking on the appeal. This was resisted on the ground that the defendants W. D. Smith & Co., were the only appellant, and the appeal had been prosecuted with success. There was no memorandum of the appeal entered on the justice's docket. The counsel for defendants moved to amend the record so as to show that W. D. Smith & Co. alone appealed, and offered the affidavits of the justice and of McArthur and others in proof of the fact. The plaintiff opposed the introduction of the evidence for incompetence, and insisted that the justice's return was conclusive and could not be corrected or contradicted. The court heard the testimony and found as a fact that McArthur did not appeal, and ordered the amendment and refused to give judgment on the undertaking, and the plaintiff appealed.

Mr. B. Fuller, for plaintiff:

As to changing the proceedings by parol proof, *Long* v. *Weaver*, 7 Jones, 626; *Wade* v. *Odeneal*, 3 Dev., 423. The revision in superior court is only of *judicial* proceedings, *Com'rs* v. *Kane*, 2 Jones, 291; and an undertaking on appeal is not a judicial proceeding, the clerk might take it, Bat. Rev.; *Weaver* v. *Hamilton*, 2 Jones, 348. Any correction must be by direct proceeding for that purpose, *Doyle* v. *Brown*, 72 N. C., 395; and even if it could be upon motion, the issues of fact are triable by jury. *Murrill* v. *Humphrey*, 76 N. C., 414.

Mr. N. W. Ray, for defendants.

SMITH, C. J. The undertaking is executed by W. D. Smith and J. M. Smith (who constitute the firm) and E. J. Hardin, and is so drawn as to apply to the appellants as such whether a part or all of them appealed; and with the explanatory amendment, is discharged by the plaintiff's failure to obtain judgment against the principals in the superior court. It is not denied that the court possesses no power to alter the provisions of the contract or relax any one of its obligations; and while abstaining from this, it is not less a duty to make the record a truthful narrative of what occurred and to correct an inadvertent error. The duty is imperative, and it would be most unjust by a false speaking of the record to enlarge the liability into which, with the understanding of all the parties, the surety has entered, because of an erroneous recital in the statement of facts by the justice who first tried the cause. The only question then is as to the right of the judge to make the amendment, and of this there can be no doubt, as a few references will be sufficient to show. The general doctrine with its limitations is stated in *Phillipse* v. *Higdon*, Busb. 380, and *Ashe* v. *Streator*, 8 Jones, 256.

A summons returnable before the clerk may be made returnable before the court in term time and thus give juris-

diction. *Thomas* v. *Womack*, 64 N. C., 657; *Cheatham* v. *Crews*, 81 N. C., 343, and cases cited in the opinion.

An insufficient affidavit on which an attachment has issued may be amended. *Brown* v. *Hawkins*, 65 N. C., 645.

A change may be made in the plaintiff in the warrant tried before a justice and removed to the superior court on appeal, by the substitution of the state in place of the overseer of the road in the latter court. *State* v. *Cauble*, 70, N. C., 62.

But the correction of false recitals of facts should be in conformity to the truth. *Wolfe* v. *Davis*, 74 N. C. 597.

The cases cited by the plaintiff's counsel are not in point. It is not proposed to contradict a record by parol evidence but to correct a false recital in the record itself. Thus amended, there was no breach in the contract of the surety and the court properly declined to render judgment against him. There is no error.

No error. Affirmed.

JOHN D. WILLIAMS and others v. DAVID KIVETT.

Practice—Parol Evidence—Boundary.

1. This court will consider on appeal only such exceptions as were made on the trial.
2. In locating a grant where the description of the land is indefinite, parol testimony that "a pine stump ninety yards below a bridge on Little river" was the beginning of the first line and "an old marked corner" (though no natural object is called for at that point) was the end, is competent to be considered by the jury in fixing the *termini* of the first line and its correspondence with the course and distance called for in the deed.

3. Where the grant in such case described land as adjoining a river and beginning on the river bank, below a bridge on the river, and the court below excluded the above evidence, this court intimate upon the authority of *Becton* v. *Chesnut*, 4 Dev. & Bat., 335, that if the evidence had been properly ruled out, the legal effect of the descriptive words would be to fix the beginning at and immediately below the bridge.

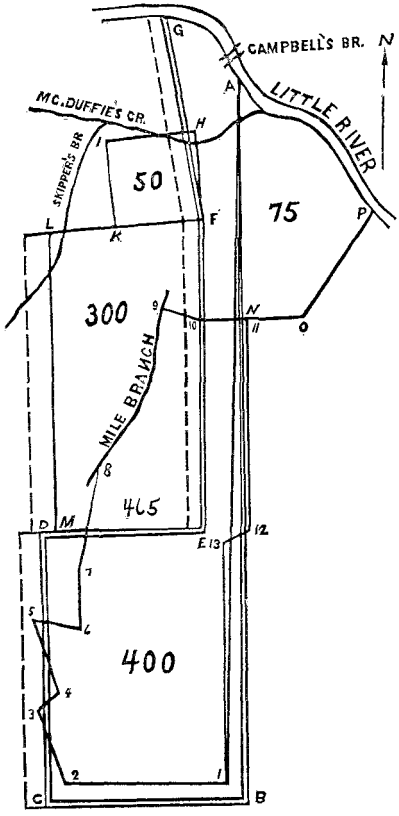
(*Bridgers* v. *Bridgers*, 69 N. C., 451; *Addington* v. *Jones*, 7 Jones, 582; *Safret* v. *Hartman*, 5 Jones, 185; *Topping* v. *Sadler*, *Id.*, 357; *McDonald* v. *McCaskill*, 8 Jones, 158; *Becton* v. *Chesnut*, 4 Dev. & Bat., 335, cited and approved)

CIVIL ACTION to recover possession of Land, tried at Fall Term, 1879, of CUMBERLAND Superior Court, before *Seymour, J.*

The facts material to the points decided are set out in the opinion of this court. Verdict for defendant, judgment, appeal by plaintiffs.

Messrs. N. W. Ray and *B. Fuller*, for plaintiffs.
Messrs. Guthrie & Carr, for defendant.

SMITH, C. J. The plaintiffs' claim title to the land in dispute under a grant from the state to James Campbell for four hundred acres, issued on the 14th day of May, 1800, and thence by successive mesne conveyances to themselves. The land is described in the grant as "adjoining the river and James Campbell's survey, Alexander Campbell and Wm. Crawford's, beginning on Little river bank, below his bridge on said river, thence south 35° east 187 chains; thence south 55° west 52 chains; thence north 35° west 64 chains to a stake; thence with his own 300 acre survey north 55° east 42 chains to the third corner of said survey; thence with his other line north 35° west 77 chains to the corner of a 50 acre survey, patented by Walter Gibson, thence north 45° west 48 chains to a stake on Little river bank above his bridge; thence down the meanders of the river to the beginning."



Plaintiff's claim—400 acres granted to James Campbell—A, B, C, D, E, F, G down the river to A.

" " 300 acres granted to James Campbell—F, L. D, E, to F.

" " 50 acres granted to Walter Gibson—F, K, I, H, to F.

Defendant's claim—465 acres granted to David Kivett—1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 to 1.

" " 75 acres granted to Hugh McCormick—A, N, O, P up the river to A.

In order to locate the grant, the plaintiffs proposed to show that a pine stump, ninety yards below Campbell's bridge on the river bank, represented by A on the plat, was

the beginning of the boundary and had been pointed out as such by old persons. The evidence was excluded on the ground that the description of the corner in the grant was too indefinite to admit of location by parol.

The plaintiffs further offered to show by similar testimony, an old marked corner at B, the termination of the first line, and was refused because there was no natural object at that point called for in the grant, and to be identified as such.

The plaintiffs then insisted that upon a proper construction of the descriptive words of the grant, the beginning was fixed at and immediately below the bridge and thence the lines were to be run by course and distance until the river was reached, and down it to the first station. The court not concurring in this interpretation of the deed, refused to instruct the jury that such was its legal effect. Starting from either point and running according to its calls, the land in dispute is within the plaintiffs' boundaries.

There were other exceptions to rulings made during the trial which according to the view we have taken are not necessary to be considered.

The beginning point is on Little river bank and below the bridge which crosses it, and if capable of location must be fixed by competent parol testimony as to its position, or must be below and at the bridge itself. This evidence was offered and rejected, not because of an inherent defect or any objection to the source from which it comes, but for the assigned reason that no evidence can aid the vagueness and uncertainty of the descriptive words of the grant. Hence it must be assumed that the witnesses were old persons, disinterested and now dead, and were competent to testify, if the testimony itself was proper to be heard. No enquiry is made as to their competency, and the exclusion of the evidence rendered the enquiry wholly immaterial. The question presented by the plaintiffs' exception is as to the cor-

rectness of the ruling of the court in refusing to receive any evidence of the true locality of the beginning of the boundary "on the river bank" and "below the bridge," and it cannot *here* be defended on the ground that it does not appear that the witnesses are dead and were not interested in the subject matter of the controversy. This rests upon the established rule that this court on appeal will only consider such exceptions as ought to have been made and were made in the court below. But the point is decided in *Bridgers* v. *Bridgers*, 69 N. C., 451. A witness, a justice of the peace, before whom a warrant has been tried, was asked if its subject matter was within his jurisdiction, and the objection was interposed that the evidence was secondary and the original should be produced. In delivering the opinion, READE, J., uses this language: "He (His Honor) certainly ought not to have rejected it (the evidence) if it was not objected to by the defendant. Nor ought he to have *rejected it although objected to by the defendant unless the objection was put upon proper ground.* This is based upon the well established practice to consider only such exceptions as are taken in the court below and are brought up by the appeal for revision.

The point then is as to the competency of any evidence to ascertain and fix the beginning of the boundary lines, and in our opinion the ruling of His Honor is erroneous.

"It is settled," says PEARSON, C. J., "that a line of marked trees, or a *tree marked as a corner* although not called for in the grant, or any natural object called for in the grant, which can be identified, and has sufficient certainty to furnish of itself a description in place of the course and distance set out in the grant, will be allowed the effect of contradicting the course and distance so as to make the line longer or shorter; or even to locate the land north of the beginning instead of south of it." *Addington* v. *Jones*, 7 Jones, 582. And in *Safret* v. *Hartman*, 5 Jones, 185, it is held that testimony is receivable to fix a corner though not

called for in the grant, which was adopted and acted on in making the grant. To the same effect is *Topping* v. *Sadler*, *Ibid.*, 357. So an unmarked pine called for in the grant in the midst of a pine growth between objects, eight or ten miles apart, was allowed to be pointed out and identified. *McDonald* v. *McCaskill*, 8 Jones, 158.

These cases cited by the plaintiffs' counsel sustain the exception and show that the evidence tendered ought to have been submitted to the jury to assist them in finding the place where the survey commenced. The proposition was to show the *termini* of the first line, and its correspondence with the course and distance called for in the deed. But if the evidence had been properly ruled out, for the reason that it does not fit the description of the thing described, we are not prepared to say the plaintiffs were not entitled to the instruction as to the force and effect of the words of the deed. The construction derives support from the decision in *Becton* v. *Chestnut*, 4 Dev. and Bat., 335. In that case the land is described in the patent as "lying on Neuse river, and bounded as follows: Beginning at a hickory below the mouth of Beaver Dam branch and runs up the pocosin and branch north 71 west 45 poles; thence still along said branch and joining Keiths' land, north 15 west 98 poles," &c., "to a red oak by the river side; thence up the river to the beginning." In determing the legal import of these words RUFFIN, C. J., says: "We think it clear that the patent begins at K, or, in other words, on the river and *immediately below the mouth of the branch mentioned.*" * * * "The last line but one goes to a red oak by the river side, and thence up the river to the beginning. These *termini*, independent of the calls for the branch on the first and second lines, clearly fix the beginning of the survey on the river, and consequently by the admission of the plaintiff himself, the survey made from that point would not include the land claimed by the defendant."

But we put our decision upon the ground that it is competent, by proper and sufficient testimony, to ascertain the position of the starting point of the survey on the river and below the bridge, and this is not prohibited by the absence of a call for any natural object at that point, nor by any indefiniteness in the description contained in the grant.

As this disposes of the appeal, and the same exceptions may not be presented on another trial, it is unnecessary to consider the others. There is error, and a *venire de novo* is awarded. Let this be certified.

Error. *Venire de novo.*

WITTKOWSKY & RINTELS v. S. W. REID.

Application of payment to open account and note—Judge's Charges.

In an action on a note, where defendant owed notes and accounts to plaintiff (a creditor firm), the following issues were submitted to the jury: first, Did defendant make the cash payment on general account, or did he reserve the right to apply it afterwards; second, If the right was reserved were any directions given to apply the money first to the open accounts and the balance on one of the notes.

The evidence was that defendant left the money with the book-keeper at plaintiff's store with a request to get up his papers by the afternoon when he would call and arrange the matter; one of the firm had agreed that the payment should be applied to the accounts and the balance to the note first falling due; but upon subsequent disagreement between debtor and the other member of the firm, it was applied to the notes, thereby reducing their sums so as to be cognizable before a justice.

Thereupon defendant asked the court to charge the jury: first, that if they believed there had been a previous agreement with one of the firm about the application of the cash payment (as above stated) then he had a right on his return in the afternoon to have it so applied; second, if they believed he paid the money as aforesaid, reserving the right to di-

rect its location, he had that right at the time of his return. The first was refused, the second given, and the jury found that it was paid on general account.

Held, the refusal of the first instruction was error. The jury should have been aided by the consideration of the conversations between defendant and both members of the firm, in passing upon the second issue. The charge given had the effect of restricting them to the evidence as to the application *at the time* the money was delivered to the book-keeper.

CIVIL ACTION tried at Fall Term, 1879, of MECKLENBURG Superior Court, before *Buxton, J.*

Verdict for plaintiffs, judgment, appeal by defendant.

Messrs. Dowd & Walker, for plaintiffs.

Messrs. W. P. Bynum and *Jones & Johnston*, for defendant:

As to application of money where creditor holds more than one debt, and where payment will affect jurisdiction. *Wheeler* v. *House*, 27 Vt., 735; *U. S.* v. *Kirkpatrick*, 9 Wheaton, 720. The creditor having once made application cannot afterwards change it without debtor's consent, 7 How., 691; 5 Pet., 69. Express declaration at time of payment as to which debt money is to be applied, is not essential; intention may be proved by previous or subsequent instructions. 2 Chitty on Contracts, 1,112; 74 Ill., 238; 12 N. J. Eq., 233. See also *Hawkins* v. *Long*, 74 N. C., 781. Where there are two demands, money will be considered as having been paid in discharge of the one which the amount will satisfy. *Caldwell* v. *Wentworth*, 14 N. H., 431. Cannot apply half to each. *Wheeler* v. *House*, *supra.*

DILLARD, J. The defendant was indebted to the plaintiffs in two small sums by account, and by two bonds, both dated the same day, and each for the sum of two hundred and seventy-five dollars, one falling due at thirty days after date, and the other at forty-five days, and the action was begun

in a justice's court on the bond last falling due, to-wit: on the one executed at forty-five days, credited by one hundred and twenty-five dollars endorsed as paid on the 27th of January, 1876. The defence made in the justice's court, and relied upon on appeal in the superior court, was that defendant had paid plaintiffs, at the time of the credit on the bond in suit, the sum of two hundred and fifty dollars and had directed the application thereof to the payment of the open accounts, and the balance as far as it would go, on the bond falling due at thirty days. And it was claimed that instead of applying the sum paid as directed, which would have left only the last bond unpaid, which is for a sum beyond the jurisdiction of a justice's court, the plaintiffs have credited the sum paid in equal parts on the two bonds, and this in effect kept on foot four causes of action against him within a justice's cognizance, two on the accounts and two for the balance on the two bonds.

On the trial in the superior court, His Honor, with a view to have the controverted fact of application settled, framed and submitted to the jury two issues:

1. Did defendant on the morning of the 27th of January, 1876, pay the two hundred and fifty dollars on general account, or did he when he parted with the money reserve the right to make the application in the afternoon? [Ans. Money paid on general account.]

2. If the right was reserved, were any directions given by the defendant to apply the money first in settling the two accounts and the balance to go on one of the notes?

The evidence adduced so far as it is material to understand the point of error assigned in the refusal of His Honor to give one of the special instructions requested by defendant, was, that on the morning of the 27th of January, the defendant went to the store of the plaintiffs and handed the money to the book-keeper of the firm, stating to him at the time to have his papers arranged, and that he would call

again that afternoon and arrange the matter. The partner, Rintels, having died, the defendant was not allowed to state the terms of an agreement claimed to have been made with him as to the application of the payment, but was permitted to tell what he told Wittkowsky in relation thereto, and Wittkowsky's reply; and thereupon defendant testified that on the day of the payment of the money he told Wittkowsky that Rintels had agreed with him that the payment should be applied first to the open accounts and then to the note first falling due, and that Wittkowsky replied he preferred to apply the money on general account and to have new notes each for half of the balance; and he said that he and Wittkowsky disagreeing as to the application, they broke up, and soon thereafter the sum paid was applied one-half on one note and the other half on the other, and the present action was brought.

In view of this evidence defendant requested His Honor to instruct the jury, first, that if they believed that there had been a previous agreement with Rintels as to the manner in which the cash payment should be applied and that defendant paid the money to the book-keeper in the manner described by him, then that defendant had the right on his return in the afternoon to have the application made according to the arrangement with Rintels; and secondly, that if they believed that defendant paid the money to plaintiffs' book-keeper, reserving the right to make the application, he had the right to direct the application at the time of his return in the afternoon.

His Honor refused the first, but gave the second instruction, and then went on and instructed the jury that if defendant made no application, the creditor might apply as he saw proper, the payment under such circumstances being regarded in law as made on general account and applicable at the will of the creditor.

It is claimed by the defendant that he was entitled to his

first instruction and that the refusal of His Honor to give it was error. Assuming that an agreement had been made by Rintels for the application of the payment as contended for defendant, the arrangement was on the behalf of the firm and within the scope of his powers as agent of the firm and as such bound both partners. And the payment of the money thereafter was in law located and applied at the instant of delivery to the book-keeper, or at least was a deposit subject to such arrangements as might be made on the defendant's promised return in the afternoon. The defendant was not allowed to testify directly to the agreement of Rintels as to how the money was to be applied, but was allowed to speak of the terms thereof communicated by him to Wittkowsky while the controversy was going on in the afternoon with him, and of the reply of Wittkowsky, not denying the same but expressing a preference to have it applied differently.

To what end was the recital of the agreement with Rintels made by defendant to Wittkowsky and the conversation between them on that subject admitted in evidence to the jury? It was received without objection so far as the record discloses. It must have been received for the reason that it bore upon the question in dispute, and was fit to be considered by the jury in connection with the arrangements to be made on the return of the defendant in the afternoon, in finding whether any and what destination was given or to be given to the money.

We think the visit of Rintels to defendant on the subject of the claims a few days before the payment, the payment on the morning of the 27th of January to the book-keeper with direction to arrange the papers by the afternoon, the return of the defendant as promised and the arrangement then requested, together with the recital of Wittkowsky of the location agreed to be given to the money by his partner, followed by no denial of the agreement of Rintels, but merely

by a declaration of a preference to apply the money otherwise, was some evidence, the weight of which should have been left to the jury, of the understanding claimed to be had with Rintels; and if so believed by the jury, then on defendant's call in the afternoon, he would have the right to make the application as claimed in his first instruction, and this should have been submitted to the jury under the first request of the defendant. His Honor did not submit the evidence to the jury at all, neither under the first instruction to which it was in terms pertinent, nor in connection with the other instruction which was asked and given.

The instruction asked and given as to a reservation of right to make application of the payment, in express terms confined the inquiry of the jury to a reservation *at the delivery of the money* to the book-keeper; and what the defendant said at that time about returning in the afternoon and then arranging the matter being in itself equivocal, it would most likely have aided the jury if the evidence on which the first instruction was asked had been left to them in passing on the second issue.

In our opinion, the refusal of the first instruction asked by the defendant, and the giving the one that was given, deprived the defendant of all consideration by the jury of so much of the evidence as related to the agreement with Rintels and the conversation in regard thereto between defendant and Wittkowsky, and therein just ground existed for complaint by the defendant.

There is error. The judgment of the court below is reversed, and this will be certified to the end that a new trial may be had.

Error. *Venire de novo.*

POLLY HODGES v. JOSEPH HODGES.

Where alimony alone is sought, no decree before final hearing.

The statutes upon the subject of divorce do not authorize an allowance of alimony *pendente lite* unless the petitioner seeks a dissolution of the marriage relation or a separation from bed and board. When the application is for alimony alone, it cannot be decreed before the final hearing, and the amount or specific property to be assigned is left to the discretion of the court, regard being had to the husband's condition and means wherever situate in determining its value.

Wilson v. *Wilson*, 2 Dev. & Bat., 377, cited and approved.)

PETITION for Divorce tried at Spring Term, 1879, of HALIFAX Superior Court, before *Eure, J.*

The plaintiff at spring term, 1876, of Halifax superior court, by her petition duly verified and charging the defendant, her husband, with desertion and adultery, applied for a decree of divorce from the bonds of matrimony, and if not entitled thereto, from bed and board and for alimony. At the same term the prayer for divorce or separation was withdrawn, and a motion was made, upon the allegations contained in her petition, for an allowance for her reasonable support pending the application. The judge thereupon in an interlocutory order, caused to be set apart for her use a small lot in the town of Weldon belonging to the defendant, subject to an unexpired lease at a monthly rent of ten dollars, and the unpaid rent-money due and to become due, and directed a writ to issue at the termination of the lease to put her in possession. The defendant had not then been served with process, but became a party to the proceeding at spring term, 1877. The plaintiff was put in possession of the lot by the sheriff on the 18th day of February, 1877, the lease having expired nine days previous, but she has re-

ceived none of the rent-money. At spring term, 1879, the counsel of defendant, on affidavit, moved for a rescission of so much of the order for alimony as assigns his real estate, which was refused and thereupon the clerk was directed to enquire and report at the succeeding term the value of the defendant's annual income, and the annual rental value of the assigned lot, which is the only property the defendant possesses in this state. From the denial of his motion to rescind, the defendant appealed.

Mr. R. O. Burton, Jr., for plaintiff.
Messrs. Day & Zollicoffer, Hill and *Batchelor*, for defendant.

SMITH, C. J. After the decision in *Wilson* v. *Wilson*, 2 Dev. & Bat., 377, (at June term, 1837,) declaring that the "courts are not authorized to make allowances for alimony before the complaint of the wife shall be finally tried," the act of 1852, ch. 53, was passed conferring the power in express terms. Revised Code, ch. 39, § 15. This act provides that "in all petitions for divorce and alimony, *or for alimony*, when the matter set forth in such petition shall be sufficient to entitle the petitioner to a decree for alimony, the court may, in its discretion, at any time pending the suit, decree such reasonable alimony for the support and sustenance of the petitioner and her family as shall seem just under all the circumstances of the case," including as well those cases in which alimony alone, as the final object of the suit, is sought, as those in which both separation and support are demanded.

But in the revising and superseding enactment of February 12th, 1872, entitled "An act concerning marriages, marriage settlements, and the contracts of married women," which went into effect on the first day of July following, (section 38, relating to alimony *pendente lite* and which corresponds to and is substituted for section 15 of chapter 39 of

the Revised Code,) there is a material modification, and the language is: "If any married woman shall apply to a court for a divorce from the *bonds of matrimony*, or from *bed and board*, and shall," &c., omitting therefrom the words "*or for alimony*" found in the pre-existing law. Bat. Rev., ch. 37, § 10.

The succeeding section 39 (section 11 in the Revisal) is as follows: "If any husband shall separate himself from his wife and fail to provide her with the necessary subsistence, according to his means and condition in life, or if he shall be a drunkard or spendthrift, the wife may apply for a special proceeding to the judge of the superior court for the county in which he resides, to have a reasonable subsistence secured to her and the children of the marriage from the estate of her husband; and it shall be lawful for such judge to cause the husband to secure so much of his estate as may be proper according to his estate and circumstances, for the benefit of his said wife and children, having regard also to the separate estate of the wife." This looks to a final decree, and leaves to judicial discretion the sum or specific property to be assigned and set apart to the complaining wife, regarding not only the property which the process and power of the court can reach and appropriate, but the husband's condition and means, wherever situate, in determining the amount and value of the allowance. The alimony is not restricted to a *maximum* "of one-third part of the net annual income from the estate, occupation or labor of the party," as provided in cases of divorce from bed and board in section 37. Bat. Rev., ch. 37, § 9.

An examination and comparison of the legislation on the subject bring us to the conclusion that when alimony alone is demanded (and this application becomes such by the withdrawal of the prayer for other relief,) the court can only decree it upon the final hearing, and its allowance *pendente*

lite can only be made when the petitioner seeks to dissolve the marriage relation or a separation from bed and board.

The order of spring term, 1876, was improvidently made, and should have been annulled on the defendant's motion. There is error in the refusal of the judge to do so. This will be certified to the court below, that further proceedings may be had therein in accordance with this opinion.

Error. Reversed.

JOHN S. MANIX, Adm'r, *v.* THOMAS S. HOWARD.

Claim and Delivery—Judgment therein.

1. In an action of claim and delivery, it is not competent to the plaintiff, after the property is put into his possession by process of law, to move to dismiss the action and fail to file a complaint, thereby raising no issue and depriving the defendant of an opportunity to assert his right.
2. In the progress of such action an inquiry was instituted to assess defendant's damages for the wrongful taking, the jury rendered a verdict for the value of the property, and on plaintiff's motion the court set aside the verdict, dismissed the action and made an order of restitution; *Held* to be error. The judgment in such case should have been upon the verdict and in the alternative—for re-delivery of the specific articles if to be had; and if not, for their value as assessed by the jury.

(*Perry* v. *Tupper*, 70 N. C., 538; *Dulin* v. *Howard*, 66 N. C., 433, cited and approved.)

CIVIL ACTION for Claim and Delivery, tried at Spring Term, 1879, of CRAVEN Superior Court, before *Eure, J.*

The summons in this action was returnable to fall term, 1874, when defendant moved to dismiss on the ground that the summons was void. The motion was overruled, and upon defendant's appeal the judgment was reversed. *Folk* v. *Howard*, 72 N. C., 527. Subsequently, at spring term,

1878, a jury were impaneled to assess the damages of the defendant by reason of the wrongful taking of certain mules, the property in dispute; the defendant offered evidence as to the value of the property; the plaintiff was allowed to prove title on objection by defendant to the evidence; and under the instructions of the court the jury rendered a verdict for defendant and assessed his damage at six-pence, and on defendant's appeal the judgment was reversed and the case remanded. *Manix* v. *Howard*, 79 N. C., 553. And at spring term, 1879, a jury were again impaneled to assess defendant's damages, and they returned a verdict fixing the value of the mules at three hundred dollars. Thereupon the plaintiff moved to set the verdict aside and dismiss the action, the motion was allowed, but the court made an order of restitution of the property to the defendant, from which both plaintiff and defendant appealed.

No counsel for plaintiff.

Messrs. Green & Stevenson, for defendant.

DILLARD, J. This action of claim and delivery was heretofore in this court, and the error then assigned was that His Honor allowed the plaintiff on the execution of a writ of inquiry to fix the value of the mules and the damages for detention, to make proof of title in himself, and it was held, no pleadings being filed, that no issue was or could be made as to the right of property in the mules, and so the evidence of title in plaintiff was irrelevant to the controversy in the existing condition of the case, and the judgment of the court below was reversed and the cause remanded to be proceeded in according to law. See case reported in 79 N. C., 553.

The case of appeal states that at spring term, 1879, a jury were again impaneled to inquire of and assess the damages sustained by the defendant by reason of the taking of the

mules out of his possession, and that the jury returned a verdict for the full value of the property, to wit: for the sum of three hundred dollars, and thereupon His Honor, on motion of the plaintiff, set aside the verdict and allowed him to dismiss his action, but made an order of restitution to defendant, from which order both sides appeal.

This court on the former appeal having reversed the ruling of the court below for the erroneous admission of evidence of title in the plaintiff on the writ of inquiry, and remanded the cause for further proceedings, we assume the cause, when sent back, to have stood for execution of the writ of inquiry as before, and so it is necessary for us on this appeal only to consider of the errors assigned in the orders of the judge after the rendition of the verdict of the jury. The question is, can the plaintiff bring his action of claim and delivery and procure the property to be taken out of the possession of the defendant and delivered to him by the process of the law, and then omit to file his complaint, so that no issue can be made or tried as to the right of possession between him and the defendant, and at length, on his motion, dismiss his action and thereby acquit and discharge himself from all relief or assertion of right in the action on the part of the defendant.

In putting this provisional remedy of claim and delivery in motion, it was requisite that the plaintiff, after getting an order for the taking and delivering of the mules to him, should execute an undertaking with surety in double the value of the property, conditioned for the prosecution of his suit, for return of the property if so adjudged, and for the payment of such sum of money as might from any cause be recovered against him. Bat. Rev., ch. 17, § 177, *et seq.* And the suit being thus instituted, it was incumbent on the plaintiff to follow it up and file his complaint within the first three days of the return term, setting forth the facts constituting his right, or in default thereof, be exposed to

have his action dismissed. Bat. Rev., ch. 18, § 2, and C. C. P., § 78.

From the case of appeal signed by the counsel, and the record proper, it is to be taken that the plaintiff never filed any complaint at all, but was content, having had possession delivered to him, to let the matter hang. The former appeal was without pleadings as reported in 79 N. C., 553, and the record and case of appeal to this term not disclosing the existence of any, we are to take it that none have been filed, and we are fortified in this conclusion by the fact that if pleadings had been filed and issues joined, the jury, instead of being sworn to inquire and assess damages to defendant, would have been charged to pass on the issues as to the right of possession, and at the same time to ascertain the value of the property, if the right were found in defendant. We conclude, therefore, that the plaintiff omitted altogether to file a complaint on which the defendant might make issue and have the right of property settled by a jury. And in that case what course was open to the parties respectively to take? Could the plaintiff elect to dismiss or discontinue the action, or neglect to proceed to issue, and by this means force the defendant to sue him in a separate action, or to submit to be kept out of the possession indefinitely? or did the defendant in such contingencies have the right to be put back into the possession by orders in the cause?

The proper proceeding to be had in the state of things which occurred in the court below is not specifically pointed out in the code of civil procedure, (and we could not expect it to go into all the details of practice). But it seems to us, a judgment for the defendant for restitution of the property, if to be had, and if not, for its value, was just in itself, and the only course that could be adopted to prevent the plaintiff from using the process of the law for his personal advantage merely, instead of as a means of a due and orderly assertion of his right by a trial thereon.

It is settled that whenever a party is deprived of the possession of property by the process of the law in proceedings adjudged void, an order for restitution will be made as a part of the judgment. *Perry* v. *Tupper*, 70 N. C., 538; *Dulin* v. *Howard*, 66 N. C., 433. Upon the same reason, if a plaintiff, in the action of claim and delivery, in which action both parties are actors, procured property to be taken out of the hands of the defendant and put into his possession and then dismiss his action, it ought to be a part of the judgment to put the parties *in statu quo*.

Such a course of proceeding seems to be neeessary, otherwise the plaintiff, under color of legal process, will perpetrate a fraud on the law and be allowed to keep property, the title to which was *prima facie* in the defendant from whom it was taken at the beginning of the suit. In all cases where issue is joined on pleadings filed, the defendant on the trial may have a verdict on the right, and fixing the value; or if plaintiff neglect or refuse to come to trial of the issue joined, the defendant may have judgment as of nonsuit for the property, with an assessment of value on a writ of inquiry, followed by a judgment in either case in the alternative, that is to say, for the property if to be had, and if not, then for the value. And it is equally necessary, in all cases, whether issue be joined or not, in prevention of fraud, to provide, on plaintiff's motion to dismiss or discontinue, for a like judgment in the alternative.

This conclusion as to the proper course to be pursued in this and similar cases, is sanctioned by the practice under the New York Code, of which our Code on this subject is a copy, and is authorized by the practice in actions of replevin of which our action of claim and delivery is a substitute. 1 Whit. Pr., 448; *Wilson* v. *Wheeler*, 6 H. Prac. Rep., 59; 1 Chitty Pl., 164.

Seeing, then, that the defendant was entitled to be put back in his former position by a judgment in the alterna-

tive, how and by what means was that to be effected? A judgment for restitution merely would not, or might not be effectual, for if the sheriff should be unable on the execution to find the goods, or if the plaintiff has disabled himself to surrender the property, then the order of restitution becomes fruitless. The only judgment to meet such a possible state of things, it seems to us, would be a judgment to have the specific articles returned if to be had, and if not, the assessed value thereof. With a view to a judgment in this form it was necessary, on the plaintiff's motion to dismiss the suit, to have had the value fixed by the jury as was done in this case on a writ of inquiry.

Instead of proceeding to judgment in the alternative His Honor set aside the verdict on the writ of inquiry fixing the value, and ordered a writ of restitution to issue, which, of course, would omit any valuation of the mules sued for, and such a judgment, we have seen, would or might be ineffectual to put defendant in his former position.

We declare our opinion, therefore, to be, that His Honor erred in setting aside the verdict of the jury, and that his judgment, retaining the verdict, should have been for a return of the mules, if to be had, and if not, then for the payment of the value as fixed by the jury. This is error. Let this be certified.

Error. Reversed.

NOTE.—IN SAME CASE ON PLAINTIFF'S APPEAL.

DILLARD, J. The error complained of by plaintiff is that after setting aside the verdict of the jury on the writ of inquiry and allowing him to dismiss his action, His Honor, as a part of his judgment, ordered restitution to be made of the mules which had been taken from defendant, and put into his possession under the process of the law.

We held in the appeal of the defendant, and for the rea-

sons expressed in the opinion filed in that case, that it was an abuse of the process of the law to take the mules out of the defendant's possession and then dismiss the action without putting the defendant *in statu quo*, and that in such case it was proper to order restitution as a part of the judgment. There is no error therefore in the order of restitution of which the plaintiff has a right to complain, and the judgment of the court below on the point excepted to on the part of the plaintiff is affirmed.

No error. Affirmed.

JOHN J. ROWLAND to use of B. F. Havens v. GEORGE L. WINDLEY, Administrator.

Pleading—Statute of Limitations.

An administrator was sued upon a note under seal executed by his intestate and another in 1854, and pleaded the statute of limitations, and also "that the note was not presented for payment in due time as required by law." Defendant admitted non-payment, and upon the judge's intimation that plaintiff could not recover in the absence of proof that defendant's intestate or his co-obligor had not paid it, he took a nonsuit and appealed;

Held, that the plea of the statute not being applicable to notes under seal should have been stricken out, and the trial had upon the issue raised by the other plea, and defendant allowed the opportunity of showing whether he had advertised, paid over the surplus, and taken refunding bonds.

(*Oates* v. *Gray*, 66 N. C., 442; *Cooper* v. *Cherry*, 8 Jones, 323, cited and approved.)

CIVIL ACTION tried at Spring Term, 1879, of BEAUFORT Superior Court, before *Avery, J.*

This action was brought upon a note under seal executed

by James S. Campbell (defendant's intestate) and Samuel B. Latham. The facts appear in the opinion. Upon an intimation of the court that the plaintiff could not recover, he took a nonsuit and appealed.

Mr. James E. Shepherd for the plaintiff.

The defence of payment may be made under general issue in assumpsit, but specially pleaded in action of debt on a specialty. 2 Greenl. Ev., title "payment." No plea of statute of limitations to debt on specialty. 3 Chitty Pleading; 1 Tidd Pr. Payment must be pleaded. 7 Wait Act. and Def., 422.

Messrs. W. B. Rodman and *George H. Brown, Jr.*, for defendants.

ASHE, J. This is an action on a note under seal for two hundred dollars, dated October 10th, 1854, and due one day after date, tried before a justice of the peace in the county of Beaufort. Judgment was rendered by the justice in favor of the plaintiff, and the defendant appealed to the superior court. The defence set up by the defendant before the justice was:

1. "That the note was not presented for payment in due time as required by law.

2. "That the said promissory note was out of date by the statute of limitations."

The pleading was not amended in the superior court, and the case thus stood upon the answer and defences as before the justice.

The case was submitted to the jury upon the same defences set up before the justice, when the plaintiff suggested to the court that the statute of limitations was not a proper plea to an action upon a sealed instrument, and would not be available to the defendant. Thereupon His Honor stated that he would permit the defendant to amend if he should

choose so to do, which offer the defendant declined. Some evidence was offered by the defendant tending to show that Windley, the defendant (administrator of Campbell one of the obligors of the bond, who died in 1859) in the year 1879 admitted that he had not paid the note; and after the admission of this evidence the court intimated an opinion that the plaintiff could not recover because he had not offered evidence tending to show that Campbell or the other party to the bond had not paid the same from the date of its execution in 1854. Upon which intimation the plaintiff submitted to a nonsuit and appealed to this court.

The construction to be put upon the defences set by the defendant, is, first, that the plaintiff had not presented the bond for payment within two years after the administration according to the act of 1789, and secondly, that the plaintiff's cause of action did not accrue within three years before the commencement of the action.

While the code of civil procedure has abolished the subtle niceties and technicalities of the pleading at common law, it did not dispense with that certainty and regularity in pleading which is essential to every system adopted for the administration of justice. The plaintiff must state his cause of action with the same substantial certainty as was formerly required in a declaration, and the defendant must controvert the allegations of the complaint, or they will be taken as true for the purposes of the action. *Oates* v. *Gray*, 66 N. C., 442. There is no rule of pleading better settled than that the statute of limitations does not apply to bonds or notes under seal. Payment was formerly the only plea to raise a bar to an action on such instruments from the lapse of time, and we take it that it must still be substantially pleaded in a case like this.

The defence of the statute of limitations in this action is irrelevant, and raises an immaterial issue. And if this had been the only issue and the jury should have found a ver-

dict for defendant, it would have been the duty of the court to render a judgment in behalf of the plaintiff *non obstante veredicto.* Tidd Pr., 291. The defence of the statute being irrelevant, it should have been stricken out upon the defendant's refusal to accept the leave offered by the court, and judgment by *nil dicit* given the plaintiff. Tourgee's Code, § 104, and the authorities there cited.

But as there was another defence set up by defendant, the court, instead of intimating an opinion to the plaintiff which drove him to a nonsuit, after striking out the irrelevant plea, should have permitted the trial to proceed upon the issue raised by the other defence under the act of 1789, which might have availed the defendant if he could have shown that he had advertised, paid over the surplus, and taken refunding bonds in compliance with the provisions of that statute. *Cooper* v. *Cherry,* 8 Jones, 323.

There is error. The nonsuit is set aside. Let this be certified to the superior court of Beaufort that further proceedings may be had in accordance with this opinion and the law.

Error. Reversed.

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

Usury, relief against.

Equity will relieve against usury only upon the borrower's paying the principal sum loaned and legal interest.

(*Ballinger* v. *Edwards,* 4 Ired. Eq., 449; *Beard* v. *Bingham,* 76 N. C., 285; *Simonton* v. *Lanier,* 71 N. C., 498, cited and approved.)

PURNELL *v.* VAUGHAN.

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

The facts are reported in same case 77 N. C., 268, and 80 N. C., 46. Upon the coming in of the report of a referee, the court intimated that the plaintiff could not maintain his action without submitting to a judgment against him for the amount actually due the defendants with six per cent interest thereon. Whereupon the plaintiff took a nonsuit and appealed.

Messrs. R. B. Peebles, Day & Zollicoffer and *J. B. Batchelor* for plaintiff.

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

SMITH, C. J. At June term, 1877, this case was before the court upon the plaintiff's appeal from an interlocutory judgment granted "on the condition that the plaintiff agree in writing to forego and release all claim for forfeiture and penalty on account of usury," and submit "to pay the balance if any found against him, with six per cent interest thereon from the time it falls due." The exception was to the judgment imposing the condition, and this court declared that there was no error therein. At the hearing of the cause in the superior court at spring term, 1878, upon the coming in of the report of the referee, the court expressed the opinion "that the plaintiff could not maintain his action without submitting to a judgment against him for the amount actually due to the defendants with six per cent interest thereon," and thereupon the plaintiff was allowed to dismiss his bill.

We have already decided upon the defendants' appeal (80 N. C., 46,) that the order of dismissal on the plaintiff's motion was erroneous, and that the cause must proceed to a final disposition of the matters in controversy. It is needless to repeat the reasons which led to that conclusion.

The present appeal presents for review the correctness of the ruling of the court, in deference to which the plaintiff attempted to put an end to the proceeding. In our opinion, the principle involved in the present, is settled by the decision in the plaintiff's former appeal from an order essentially the same, and the question cannot now be made. If it were otherwise, the decisions are numerous and uniform in this state, as elsewhere, that a debtor seeking the aid of a court will be relieved of the usurious element in his debt, only upon his payment of what is really due. "If indeed the borrower," says RUFFIN, C. J., "asks for assistance from equity, it may be refused unless he deal equitably by paying the principal money loaned and legal interest." *Ballinger* v. *Edwards*, 4 Ired. Eq., 449; *Beard* v. *Bingham*, 76 N. C., 285.

The present system of practice has not changed the rule upon which relief is afforded an applicant debtor. In *Simonton* v. *Lanier*, 71 N. C., 498, the defendants against whom judgment by default had been taken for their failure to answer, for a debt containing usurious interest, moved to set aside the judgment, and if this was disallowed to correct and reform it by striking out the usurious interest. The court refused the first and granted the second motion, and BYNUM, J., delivering the opinion, says: "As the defendants came into this court *to ask favors* and this is a court of equity as well as law, they will be required to do equity, that is, *to pay the debt and legal interest thereon* for the loan of money, to-wit, eight per cent." The plaintiff having invoked and received the aid of the court, must submit to conditions upon which, according to the settled practice of the courts it is rendered, and has no just grounds of complaint of the order requiring him to do so. There is no error and this will be certified.

No error. Affirmed.

W. H. & J. G. SHIELDS, Executors, v. W. O. MCDOWELL and others.

Petition to Sell Land for Assets—Necessary Averments.

On petition to sell land of a decedent to pay debts, the administrator must satisfy the court, *either* that the personal estate has been exhausted and other debts are due, *or* that it will be clearly insufficient for that purpose.

(*Wiley* v. *Wiley*, 63 N. C., 182; *Bland* v. *Harstoe*, 65 N. C., 204; *Finger* v. *Finger*, 64 N. C., 183 cited, distinguished and approved.)

SPECIAL PROCEEDING commenced in the Probate Court of HALIFAX and heard on appeal on the 12th of December, 1879, before *Seymour, J.*

The plaintiff executors seek to subject the land of their testator to the payment of debts. The defendants demurred. Demurrer sustained by the clerk, but overruled by the judge, and the defendants appealed.

Mr. Thomas N. Hill, for the plaintiffs.

No counsel for the defendants.

DILLARD, J. The plaintiffs, as executors of Chas. C. Shields and part of the devisees of the testator, filed their petition in the probate court against the defendants who are co-devisees with the plaintiffs, for a license to sell the land devised for assets to pay the debts of the testator.

The defendants demur to the petition, and specially assign as the ground thereof that the plaintiffs do not allege that they have exhausted the personalty of their testator. The demurrer was sustained by the judge of probate, and on appeal to the superior court his judgment was reversed and an order made that the probate judge proceed to decree a sale of the land according to the prayer of the petition, and

from this judgment of the superior court the appeal is taken.

The facts stated in the petition are, that the outstanding unpaid debts against the estate are $2,500, the personal estate $1,000, and of this last sum $400 has been applied in a due course of administration. The legal effect of the demurrer is to admit these facts and the insufficiency, thereon apparent, of the personal estate, when it is all applied, to pay the debts. But the special ground of demurrer assigned tenders the legal proposition that upon the case as set forth in the petition, the petitioners have no authority to ask, nor the probate court any jurisdiction to grant a license for the sale of the land for assets until the personal estate has been exhausted, that is to say, until the application of the $600, which is stated in the petition to be still on hand.

The statute on the subject of the sale of land for assets provides, that "when the personal estate of a deceased is *insufficient* to pay all his debts, including the charges of administration, the executor, administrator or collector may, *at any time after* the grant of letters, apply to the superior court of the county where the land lies, by petition, to sell the real property for the payment of the debts of such decedent." And the petition filed for the purpose is required to set forth: 1. The amount of debts outstanding against the estate. 2. The value of the personal estate and the application thereof. 3. A description of the real estate and estimated value, together with the names, ages and residences of the devisees and heirs-at-law. Bat. Rev., ch. 45, §§ 61, 62.

The personal estate in law is the primary fund and land is the secondary fund for the payment of debts, and the design of the act giving authority to the personal representative to sell and administer on the proceeds of lands in the requisites prescribed to a petition for a license to sell, evidently is to inform the court of the condition of the estate

with reference to its debts and the value and application of the personal estate, so that it may be seen that the personal estate is insufficient to pay the debts. If a petition be drawn in accordance with these requirements so as to show the insufficiency of the personal fund, the necessity to resort to the real estate to supply the deficiency will then be apparent, and in such case it would seem that such petition was legally sufficient.

The act in requiring a statement of the value and application of the personal estate does not require that the *whole* shall be applied before the application for license is made. Its terms will be complied with by an averment, as in this case of the amount and of the application of the assets so far as made, and then by easy computation it can definitely be seen what is on hand unapplied, and what the deficiency will be to meet the outstanding debts, and this is all that is needed to enable the court to pass on the necessity to sell the land.

The insufficiency of the personal estate of a decedent to pay his debts is the essential fact that originates the duty in the personal representative to apply for a license to sell land for assets, and it equally gives rise to the jurisdiction and power in the probate court to grant it, and if such insufficiency exist, it matters not whether it is made to appear before or after an application of the whole fund. In the case of insufficiency, the statute provides in so many words that the personal representative *may at any time after the grant of letters apply* for the license. Bat. Rev., ch. 45, § 61. Construing this section in connection with the clause of the section requiring a statement in the petition of the amount of the personalty and its application, we think the meaning of the statute is that the power and duty to apply for a license exist whenever such insufficiency occurs and can be shown forth in the petition, whether presently or remotely

after the grant of letters, or before or after a full application of the personal assets.

This construction of the statute accords with the practice and general understanding in the legal profession, and leads to an early settlement of administrators, which is so much favored in the law, and subjects creditors to no unjust delay in the collection of their claims, and no decisions can be found to the contrary. In some of the cases, for example, in *Wiley* v. *Wiley*, 63 N. C., 182, and *Bland* v. *Hartsoe*, 65 N. C., 204, the expression is used that no authority exists to decree a sale of land for assets until the personal estate is exhausted, but on examination that language was aptly used, as the petition disclosed that assets came or ought to have come to hand sufficient to pay the debts, but were diverted by *devastavit*, or distribution, to the next of kin. The true rule, in our opinion, is laid down in the case of *Finger* v. *Finger*, 64 N. C., 183, wherein the court say: "On a petition to sell lands of a deceased person the administrator must satisfy the court either that the personal estate has been exhausted in the payment of debts and that others are due, or that it will be clearly insufficient for that purpose."

In our opinion the insufficiency of the personal assets to pay the debts of plaintiffs' testator and the extent thereof, being made clearly to appear in the allegations of the petition, a case was made authorizing the license prayed for, notwithstanding a portion of the assets was still in the hands of the executors not applied to the debts, and that His Honor's judgment reversing the action of the probate judge was correct.

Let this be certified to the superior court to the end that a *procedendo* as ordered may issue to the probate court to proceed upon the petition to order the sale as prayed for.

No error. Affirmed.

ATLANTIC, TENNESSEE & OHIO RAILROAD COMPANY v. E. F. MORRISON and others.

Account—Issue involving final settlement, when submitted.

1. An account will be ordered as of course where defendant admits he is an accounting party. But if the liability to account is denied (as here by former settlement) no order of reference or other issue can be had until the alleged bar is passed upon; *Therefore* in an action on the bond of a railway treasurer where the defendant's accounting character is admitted in the answer but a settlement with the company pleaded in bar of an account, the court did not err in submitting an issue to the jury in relation to the settlement, as a preliminary matter.
2. On the trial of such issue the proof was that defendant had turned over the assets enumerated in a certain receipt and had had other moneys not embraced therein, and that the party giving the receipt refused to execute it as in full. Upon this proof the judge properly told the jury there was no evidence of a final settlement.

(*Dozier* v. *Sprouse*, 1 Jones Eq., 152; *Douglas* v. *Caldwell*, 64 N. C., 372; *Costin* v. *Baxter*, 6 Ired. Eq., 197; *Mebane* v. *Mebane*, 1 Ired. Eq., 403; *State* v. *Patterson*, 78 N. C., 470, cited and approved.)

CIVIL ACTION on a Bond tried at Fall Term, 1879, of MECKLENBURG Superior Court, before *Buxton, J.*

Verdict and judgment for plaintiff, appeal by defendants.

Messrs. Jones & Johnston, for plaintiffs.
Messrs. Wilson & Son, for defendants.

DILLARD, J. The bond declared on in this action was executed by defendant Morrison with the other defendants his sureties, conditioned for the safe keeping and proper disbursement by said Morrison, as treasurer of the plaintiff company, of the money and effects which might come into his hands belonging to the company, and for the performance of his duty as such treasurer in all other respects. A

breach of said bond is alleged, in that, the defendant Morrison received a large sum of money, the amount not known, and contrary to the conditions of his bond he paid out some of it to persons not entitled to receive it, and without authority, appropriated a part to his own use, and has still in his hands a considerable amount not accounted for.

The defendants in their answer, admitting the appointment and acting of Morrison in the position of treasurer and the execution of the bond declared on, deny any breach of the conditions of the bond, and aver full performance of his duty in all things. And they specially set up and rely on, as a bar to any further accountability, a settlement had with a finance committee of the company covering all matters of account of the first fiscal year ending the 31st of May, 1873, and also an account and settlement with one Springs, receiver, on the 21st of April, 1874, in respect of the money and effects of the company which came to the treasurer's hands after the settlement with the finance company, as a bar to any opening of the accounts for that year.

On the opening of the cause for trial the defendants insisted on an issue to be submitted to the jury on the question of breach or no breach, but His Honor was of opinion that inasmuch as the accounting character of defendant as treasurer was admitted in the answer, the plaintiff would have a right to an order of account as of course, if it were not that the defendant had set up and pleaded settlements had with the company in bar of an account, and that therefore the proper preliminary issue was as to the existence and sufficiency of the alleged settlements to bar the further investigation of the accounts of the treasurer. To this refusal of the issue desired on the part of the defendants and the submission of one instead as to the existence and sufficiency of the settlements pleaded in bar, the defendants excepted; and therein it is claimed that His Honor erred.

Under our new system the courts being required to recog-

nize the legal and equitable rights of the parties in the same action, it is proper that the action of the court and the practice should be framed so as to give in effect such remedy and work such determination of the rights involved as were formerly attainable in either a court of law or equity, or both, and therefore His Honor, having regard to the object of the action and the facts stated and put in issue, should have regarded the action, although instituted on the official bond of the treasurer, as substantially a suit for an account. It is alleged in the complaint that Morrison had a large sum to come to and pass from his hands as treasurer, some of it without authority to persons not entitled to receive it, some to his own use, and a large sum still in his hands; and while the defendants in the answer deny all misapplication, yet it is admitted the treasurer had received a large sum of money, and thereby admitting his former liability to account, it is sought to defeat any further account by a plea in bar of two settlements alleged in the answer. Whenever a person admits himself to be an accounting party, it is usual to order an account as of course, but if the liability to account is denied as by release or former settlement, no order of reference can be had until the alleged bar is passed upon. *Dozier* v. *Sprouse*, 1 Jones Eq., 152; *Douglas* v. *Caldwell*, 64 N. C., 372. That was precisely the case in this action. The accounting character of the treasurer is admitted but two settlements are relied on as barring the plaintiff's right to an account, and if they be full and fair they are a bar as well in a court of law as in a court of equity. *Costin* v. *Baxter*, 6 Ired. Eq., 197; *Mebane* v. *Mebane*, 1 Ired. Eq., 403; 1 Story Eq., § 590.

It would seem then upon authority that the issue as to the matters relied on in bar was a preliminary issue and should be settled before any other progress was made. And apart from authority the course pursued by His Honor was well justified by the reason of the thing. Evidently no good

could come from the expense and labor of an investigation of the accounts under an order of reference, or by a trial before a jury on the issue insisted on by defendants on the question of breach, if the alleged settlements, already had, concluded the parties. Why take an account in either mode, if the accounts settled were sufficient in law to protect defendant against liability to account again. We hold, therefore, as to this exception, that the court was not in error in the refusal of the issue requested by defendants and in the submission of one as to the existence of the settlements alleged by defendants.

On this decision of His Honor as to the issue proper to be submitted, the plaintiff conceded a full and final settlement for the first fiscal year ending the 31st of May, 1873, but claiming that there was no full and final account of the agency of defendant Morrison after that date, His Honor framed and submitted to the jury an issue as to the fact of a full and final accounting for the last year. In support of the affirmative of the issue, Morrison introduced a receipt of Springs as receiver, dated 10th of April, 1874, giving an itemized statement of the assets of the company consisting of bonds and notes turned over to him, and testified in his own behalf, that no examination of his books, accounts and vouchers was made, but expressly declined, and that Springs refused to give a receipt to operate to any further extent than to the assets turned over to him. He further stated that Springs also said that during his last year's agency, he carried forward upwards of one thousand dollars on hand at the close of his accounts settled before the finance committee for the year before; that he (witness) had received from Gormsley, a temporary receiver, a sum of money, and during the year had received thousands of dollars, as much as twenty thousand, and he had paid a ll of it out under advice of counsel; but no estimate of the accounts in re-

gard thereto was made by Springs, and no statement thereof was contained in the receipt exhibited.

This being all the evidence in support of the fullness and finality of the settlement alleged by defendants, His Honor held that it amounted to no evidence and directed the jury to find the issue in favor of the plaintiff and defendants excepted.

Upon this exception the question is, did the testimony offered amount to no evidence of the full and final account alleged? If it was of this import, or not such as reasonably to warrant a finding of the fact under investigation it is settled that in such case the court should not have allowed the jury to pass on the issue at all, but have directed them to find against the party on whom rested the burden of proof. *State* v. *Patterson*, 78 N. C., 470, and cases therein cited.

What is a full and final account? An account can not be said to be full which does not embrace all the items of charge and discharge, nor can it be said to be final, if as made it is contemplated that a future reckoning is or may be had. Here upon the treasurer's own statements, the receipt embraced nothing more than an enumeration of the assets turned over, and no estimate was then made of the thousands of dollars which he had received during the year, and as to the finality of the settlement made, it was expressly refused to give a receipt of any operation except to the extent of the articles therein mentioned and turned over at the time. The alleged settlement was not full, in that it omitted any account of the money received and claimed to be disbursed; and it lacked finality, in that the restricted receipt that was given in effect left the treasurer exposed to accountability as to all things not itemized therein.

It is our opinion therefore that His Honor did not err in his ruling and directions to the jury upon the question of the evidence adduced as to the alleged settlement between the treasurer and Springs, the receiver.

There is no error, judgment of the court below is affirmed and this will be certified.

No error. Affirmed.

J. L. RAY v. JAMES W. GARDNER and WILLIAM GARDNER.

Estoppel—Paramount Title.

1. In an action to recover land it is a general rule of law, where both parties claim under the same person they are estopped to deny his title. But it is competent for the defendant to show a paramount title in himself or in some other person with whom he can connect himself
2. Estoppels must be mutual and bind only parties and privies. One who is not bound by an estoppel cannot take advantage of it. (The rule in *Griffin* v. *Richardson*, 11 Ired., 439, approved).

(*Newlin* v. *Osborne*, 2 Jones, 163; *Love* v. *Gates*, 4 Dev. & Bat., 363; *Copeland* v. *Sauls*, 1 Jones, 70; *Caldwell* v. *Neely*, 81 N. C., 114; *Griffin* v. *Richardson*, 11 Ired., 329, cited and approved.)

CIVIL ACTION to recover Possession of Land, tried at Fall Term, 1879, of YANCEY Superior Court, before *Schenck, J.*

The complaint alleges that the plaintiff was seized in fee of the land in dispute, that he was entitled to the possession, and that the defendants unlawfully withhold the possession from him. The answer denies the allegations of the complaint. The case was submitted to a jury who found all the issues in favor of the plaintiff. Judgment, appeal by defendants.

Mr J. L. Henry, for plaintiff.
Mr. J. M. Gudger, for defendants.

ASHE, J. The plaintiff in support of his title offered in

evidence a deed in trust, dated the 30th of August, 1866, for the land in controversy, from J. B. Gardner to N. M. Wilson, and a deed from Wilson to himself. He then offered in evidence, as an estoppel to the defendants, a deed from William Gardner, administrator of J. B Gardner, to James W. Gardner, dated the 31st of August, 1875, made in pursuance of a regular order of court to sell the land for the purpose of making assets, on a petition filed by the said administrator, in which the land is described as belonging to the late J. B. Gardner. Proof was also made that William Gardner at the time of the commencement of this action was living with his family on the land, and James W. Gardner, who was his son and unmarried, lived with him.

The defendants then proposed to introduce as evidence in defence, a grant from the state to John Gray Blount, covering the land in dispute, and a regular chain of title from him to William Gardner. The court excluded the evidence on the ground of an estoppel upon the defendants.

Did His Honor commit error in refusing to receive this evidence? Admitting, as contended for by the plaintiff, that both he and the defendants claim title to the land from the same person and are all estopped to deny title to the land in him from whom they claim, still it was competent for the defendants to show a better title in themselves or in some other person with whom they can connect themselves, as by showing that they held possession from him or under him. *Newlin* v. *Osborne*, 2 Jones, 163; *Love* v. *Gates*, 4 Dev. & Bat., 363; *Copeland* v. *Sauls*, 1 Jones, 70; *Caldwell* v. *Neely*, 81 N. C., 114.

According to these authorities, although the defendants might claim from J. B. Gardner and would be estopped to deny his title, yet it was competent for them to show a grant from the state to Blount, and an unbroken succession of mesne conveyances from him to William Gardner, and that is what they proposed to do. And if upon the introduction

of such testimony it should be made to appear that William Gardner had the paramount title, the plaintiff could not recover against him.

William Gardner, however, did not claim any title to the land from J. B. Gardner, and is therefore not estopped to deny his title; nor is he so estopped by anything stated in his petition for the sale of the land or his deed to James W. Gardner, so as to help the title of the plaintiff; for the plaintiff being neither party nor privy to the petition or deed, he cannot take any advantage of any estoppel that may rest upon William Gardner by reason of his having been a party to them. "Estoppels must be mutual and bind only parties and privies. One who is not bound by an estoppel cannot take advantage of it." *Griffin* v. *Richardson*, 11 Ired., 439. William Gardner, if sued by James W. Gardner or any one claiming under him for the land, would be estopped to deny his title, because they were both parties to the proceeding and the deed.

Having disposed of the case as to William Gardner, we will now see how the exclusion of the evidence may affect the other defendant, James W. Gardner. He does claim under J. B. Gardner and is estopped to deny his title. But if His Honor had received the evidence of title offered to be introduced by the defendants, and it had established a better title than that of the plaintiff or J. B. Gardner, in William Gardner, and James W. Gardner had proved that he was in possession of the land under William Gardner, then the plaintiff's recovery might have been defeated as to him.

We are of opinion the evidence was not only competent but very important to the defence, and that there was error in excluding it. Let this be certified to the superior court of Yancey county, that a *venire de novo* may be awarded the defendants.

Error. *Venire de novo.*

E. PASOUR v. JONATHAN RHYNE.

Judgment Lien—Statute of Limitations.

1. A lien acquired by the levy of a writ of *fiere facias* upon land is lost by the issuing of an alias *fi. fa.*, and a writ of *venditioni exponas* thereafter issued has no effect to continue or revive the lien of the first *fi. fa.*

2. Under section 259 of the code, it is the judgment alone which creates a lien on land, and the sole office of the execution is to enforce the lien by the sale of the land upon which it has attached.

3. The lien of a judgment docketed under this section is lost by the lapse of ten years from the date of the docketing of the judgment; and this is so notwithstanding execution has issued within the ten years.

(*Yarborough* v. *State Bank*, 2 Dev., 23; *Ross* v. *Alexander*, 65 N. C., 576; *James* v. *West*, 76 N. C , 290, cited and approved.)

MOTION for leave to issue Execution heard on appeal at Fall Term, 1879, of GASTON Superior Court, before *Buxton, J.*

This was a motion before the clerk of the superior court of Gaston county for leave to issue execution on a judgment rendered in behalf of the plaintiff against the defendant at May term, 1867, of the superior court of said county. The defendant exhibited his discharge in bankruptcy, dated the 2d of June, 1873; whereupon the motion was overruled by the clerk and the plaintiff appealed to the superior court, and at said fall term the judgment of the clerk was affirmed and the plaintiff appealed to this court.

Messrs. Merrimon, Fuller & Fuller, for plaintiff.
Messrs. Wilson & Son, for defendant.

ASHE, J. The record shows that at the February term, 1868, of said court, a *fieri facias* was issued on the judgment upon which the sheriff of Gaston county made return that he had levied on a tract of land as Jonathan Rhyne's prop-

erty, lying on Long creek adjoining the lands of William Ray and others, containing three hundred and fifty-three acres, more or less; also on his interest in one other tract known as the "Rhyne & Hoffman" land, lying at and around Spencer's ford on the south fork of the Catawba river, of six hundred and twenty-two acres, more or less; and that there was no sale because it was an old debt.

On the 10th of December, 1868, an *alias* execution was issued returnable to spring term, 1869, with an endorsement of sixteen dollars and forty cents collected from the plaintiff, and the sale of Jonathan Rhyne's interest in the "Rhyne & Hoffman" tract on the 6th of March, 1869, for fifteen hundred dollars "for Clemmer's claim by consent of E. Pasour." Writs of *venditioni exponas* were regularly issued thereafter to sell the land levied on up to fall term, 1872, without any sale being had.

A lien upon the land of the defendant was acquired by the levy of the first *fieri facias* issued from the February term, 1868, but the plaintiff then sued out an *alias* execution, by which must be understood an *alias fi. fa.*, for the term *alias* imports another writ of like kind. And by issuing the *alias fi. fa.*, the benefit of the levy was lost. The levy was waived. *Yarborough* v. *State Bank*, 2 Dev., 23; *Ross* v. *Alexander*, 65 N. C., 576; *James* v. *West*, 76 N. C., 290.

The levy having been lost by the issuing of the *alias fi. fa.*, the writ of *venditioni exponas* afterwards issued had no effect to continue or revive the lien acquired by the first *fi. fa.*, and was as inoperative for that purpose as though no levy had ever been made. So that, there was no lien upon the land of the defendant after the fall term, 1868, unless it was obtained by docketing the judgment.

But was the judgment docketed? if so, when was it done? The record states it was docketed on the 23d of May, 1867; but a judgment docketed before the adoption of the code of civil procedure could not create a lien; and it does not ap-

pear that it has been docketed since, which was necessary to invest it with the new quality of creating the lien which has been attached to it by the code. By C. C. P., § 400, it is provided that "the clerks of the superior courts at the request of a party thereto and on the payment of the fee of one dollar, shall enter on a separate docket all suits which at the ratification aforesaid shall have been commenced, and in which final judgment has not been rendered in the late county courts, superior courts of law and courts of equity of their respective counties;" and by section 403, "existing judgments and decrees not dormant may in like manner be entered on the execution docket," &c.

Taking it for granted, however, that the judgment was docketed as soon as the new system went into operation, for instance, when the first execution issued thereafter, viz: Dec. 10, 1868, and by that means secured a lien upon all the real property of the defendant, how will that avail the plaintiff? Under the present system it is the judgment and that only which creates a lien on real property by virtue of section 259 of the code. None is acquired by the execution except upon personal property, and then only from the levy as against purchasers; but when real property is in question, its sole office is to enforce the lien of the judgment by the sale of the land upon which it has attached. No execution could be issued to subject the personal property of the defendant to this judgment, because he had been relieved from all liability on the judgment by his discharge in bankruptcy. As to him personally it was satisfied—dead. And conceding that a lien on the real property of a bankrupt may be enforced in the courts of the state after his discharge, it is only by virtue of the lien that an execution could be issued. But where there is no lien in existence to be enforced, there is no authority to issue an execution.

In this case there was no lien on the land of the defendant at the time of the application for leave to issue the exe-

cution, for more than ten years had elapsed since the docketing of the judgment, if it had ever been docketed. And it is provided by section 254 of the code that a docketed judgment shall be "a lien upon the real property in the county where the same is docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of docketing thereof in the county in which such real property is situated, or which he shall acquire at any time for *ten years* from the time of docketing the same in the county where the judgment roll was filed." So that, the lien of the plaintiff's judgment on the real property of the defendant had been lost by the lapse of time, and, as in this case, the execution was sought to enforce it. There was no ground for the application and no power in the clerk to issue it.

In this view of the case it is needless to enquire whether the land had passed by operation of the bankrupt law into the hands of the assignee or remained with the bankrupt in right of his exemption. We are of opinion there is no error in the judgment of the court below. Let this be certified to the superior court of Gaston county.

No error. Affirmed.

JAMES D. FARMER and wife v. WILLIE DANIEL.

Proceedings for Partition—Equitable Rights of Purchaser—Pleading—Feme Covert—Statute of Presumptions.

1. Where the purchaser at a sale under decree in proceedings for partition of land (confirmed by the court) performs his part of the contract by paying the purchase money into court, he and his assignees have a

complete equity to have title made; and under the code such equity can be set up against an action of ejectment brought by one of the tenants in common claiming a legal title to part of the land on account of the failure of the purchaser to obtain a deed.

2. In such case the equitable right of the defendant will prevent a recovery by the plaintiff although not specifically pleaded in the answer.

3. Also, such equitable right can be enforced against a claim of title by one of the tenants in common who was a minor at the time of the partition proceedings and who afterwards, when a *feme covert*, received her share of the proceeds of sale without a privy examination.

4. Also, the lapse of twenty years will not raise a presumption of the abandonment of such equity, the defendant and those under whom he claimed having been in continuous possession of the land.

(*Ex Parte Yates*, 6 Jones Eq., 306; *Edney* v. *Edney*, 80 N. C., 81; *Pritchard* v. *Askew*, *Id.*, 86; *Stith* v. *Lookabill*, 76 N. C., 465; *Ten Broeck* v. *Orchard*, 74 N. C., 409; *Turner* v. *Lowe*, 66 N. C., 413; *Bank* v. *Glenn*, 68 N. C., 35; *McRae* v. *Battle*, 69 N. C., 98, cited and approved.)

CIVIL ACTION to recover Possession of Land, tried at Fall Term, 1879, of WILSON Superior Court, before *Eure, J.*

Case Agreed: This action was brought on the first day of February, 1869, for the recovery of a lot in the town of Wilson, which is part of a tract of land formerly owned by one William Farmer and upon whose death descended to his heirs at law, situate at that time in the county of Edgecombe, but is now and was at the commencement of this action embraced in the county of Wilson (formed in part from Edgecombe). In 1837 the said heirs filed a petition for partition of said land, in the court of equity of Edgecombe, the feme plaintiff in this action being a plaintiff in that proceeding, and a minor represented by a guardian *ad litem;* and before she arrived at the age of twenty-one, she married the plaintiff, James D. Farmer. Service of process was made upon the defendants, resident and non-resident, and in 1838 the prayer of the petitioners was granted and the land sold by the clerk and master in equity to one Arthur

D. Farmer, who paid the purchase money into court. The sale was confirmed in 1839 and an order for the distribution of the fund made, also for the execution of a deed to the purchaser. After which final decree the case was dropped from the docket and never afterwards brought forward until spring term, 1873, upon due notice given.

The defendant deduces his title to the lot in controversy from the said Arthur D. Farmer by a regular chain of conveyances. The share to which the feme plaintiff was entitled in said land was an undivided one one-hundred-and-eighth part. After her arrival at the age of twenty-one years but during her coverture, she received from the clerk and master her share of the proceeds of sale of said land, but without any privy examination. No deed executed by the master to said purchaser according to the order of the said court of equity can be found by the defendant.

The notice above referred to was served upon the plaintiffs at the instance of the defendant informing them that the defendant would apply to the superior court of Edgecombe at the spring term, 1873, for an order directing its clerk to execute a deed for the land sold as aforesaid, in lieu of the deed made by the former clerk and master, which has been lost. The clerk was thereupon ordered to execute the conveyance, and it was further adjudged that the effect of the decree should be to transfer to said Arthur D. Farmer or his assigns the title to said land. The cause coming on to be heard on the case agreed, the court gave judgment for the defendant and the plaintiffs appealed.

Mr. George V. Strong, for plaintiffs.
Messrs Connor & Woodard, for defendant.

DILLARD, J. This was an action to recover real property and after issue joined on the pleadings, the parties made a case agreed setting out all the facts and submitted the con-

clusions of law thereon to the judgment of the court. His Honor being of opinion that the plaintiffs on the facts agreed were not entitled to recover, adjudged that they take nothing by their suit, and that the defendant recover his costs, and from this judgment of the court below the appeal is taken.

The facts, to be gathered from the case agreed, material to the decision of the question presented for our consideration and determination, are these: On the death of William Farmer, the land sought to be recovered in this action descended to his surviving brothers and sisters, and the issue of such as were dead. And some of the heirs-at-law, among whom was the feme plaintiff, then an infant, filed their petition in the court of equity against the other heirs, praying a decree of sale and a partition of the proceeds among them according to their respective rights. Guardians *ad litem* were duly appointed by the court for the feme plaintiff and all others under twenty-one years of age, and after orderly constitution of the cause in court by the service of process on the home defendants and publication made as to non-residents, a decree of sale on a credit of six and twelve months was made in the cause.

At fall term, 1838, the master having reported a sale to Arthur D. Farmer, and the price fair, an order of confirmation of the sale and for collection was made, and afterwards, to-wit, in the year 1839, the master having reported the purchase money collected, an order of distribution and for title to the purchaser was regularly entered in the cause, and from and after that time the cause was dropped from the docket.

At spring term, 1873, of the superior court, pursuant to notice, the cause was brought forward and entered on the docket, and on motion, the judge finding the facts to be as above stated and the further fact that no deed had ever been executed by the clerk and master to the purchaser,

ordered the clerk of his court to execute a deed to Arthur D. Farmer or his assigns, with a declaration in the decree that the decree should have the effect to transfer the title to said Arthur D. Farmer, or in case he had assigned his interest, to his assignee, in the same plight and condition as though the conveyance ordered were made.

In the case agreed, it is stated that the present defendant connects himself by a chain of mesne conveyances with the purchaser at the clerk and master's sale, and in case His Honor should decide in favor of the plaintiffs, judgment is to be entered for one one-hundred-and-eighth part of the land described in the complaint, otherwise for the defendant with costs of suit.

We concur in the opinion and judgment of the court below, that the plaintiffs upon the facts presented are not entitled to recover. Upon the argument before us it is contended by plaintiffs that on the death of Wm. Farmer, the legal title to one one-hundred-and-eighth part of the land sold by the decree of the court of equity descended on the feme plaintiff, and no deed having been executed by the clerk and master to Arthur D. Farmer, the, purchaser, the legal estate is still in her, and has not been divested by the decree for title in the superior court in the year 1873, passed in the petition-cause, for the reason that the case stood abated, and there being no act of assembly authorizing it to be brought forward at that time, the decree for title was *coram non judice* and therefore inoperative to pass the title. The defendant contends that the deed executed under the decree of the superior court in 1873 or the decree of itself availed in law to pass the estate to him, or if not, then that he claiming under Arthur D. Farmer, the original purchaser, has a complete equity to have the title, and that in any aspect of the case he is entitled to defeat the plaintiffs' present action and be left in the possession.

Upon this contention of the parties it is not necessary to

the decision of this case, that we should consider or express an opinion on the question made, as to the due constitution of the original suit on the docket of the superior court in 1873, and the efficacy of the decree therein made for title, being of opinion that the perfect equity of Arthur D. Farmer to have the legal title, which is agreed to have come to the defendant by a regular chain of mesne conveyance, is sufficient to defeat the plaintiffs' action.

The plaintiffs are not entitled to recover the possession of of the whole, nor indeed the undivided share of the feme plaintiff, if the proceedings for sale and partition in the court of equity had the legal effect to pass the legal estate to the purchaser or his assignee, or only the effect to pass a clear equitable right to have a deed. The confirmation of the report of sale to Arthur D. Farmer was an acceptance of him as a purchaser, and in legal effect the bargain was thereby struck, and gave to the heirs-at-law of William Farmer, and to the purchaser or his assignee, the reciprocal right to have a specific performance of the contract against each other. *Ex parte Yates*, 6 Jones Eq., 306; *Edney*, v. *Edney*, 80 N. C., 81; *Pritchard* v. *Askew*, *Ibid*, 86; Rorer on Judl. Sales.

In this case it appears as a fact in the case agreed that the purchaser specifically performed the contract on his part by paying into the office of the clerk and master the purchase money, and thereupon the right arose to have performance on the part of the heirs acting through the agency of the court. And the court of equity, on report of full payment by the master, in recognition of this right, ordered that the title of the heirs be conveyed by the master to the purchaser. In this state of things even if the decree of the superior court in 1873 for the execution of title was ineffectual to pass the legal title of the feme plaintiff as insisted on by them, still the defendant assignee of the original purchaser

succeeded to his complete equity to have title and may yet have the conveyance made to him. See the cases cited.

Seeing that the defendant by assignment from the original purchaser has such a perfect equitable right to have a deed passing the title, if he has not already one, it remains to inquire whether such an equity can be set up so as to defeat the action of the plaintiffs. Formerly if no title had passed to the purchaser by an actual deed or by the operation of the decree *per se* under the act of assembly in such case made and provided, the plaintiffs would have been entitled in a court of law to recover, and the defendant would have been forced to go into a court of equity by an independent suit or by motion in the original cause and have the recovery enjoined. But now under our new system of courts such circuity is avoided and the defendant is entitled to set up his equitable title in defence of the plaintiffs' legal title which they claim to have, and in the superior court the defendant is entitled to the same relief as formerly he was compelled to seek in the courts of equity. This right of defendant to set up his equitable right, and the sufficiency thereof to defeat the legal title of the plaintiffs, if such they have, is adjudged and established by several decisions of this court, to some of which we will refer.

In the case of *Stith* v. *Lookabill*, 76 N. C., 465, the plaintiff, Stith, claimed as purchaser under an execution against one Camman holding in trust for certain persons, and the defendant defended as tenant to one Sturges who was the owner by assignment of the equitable interests of the *cestuis que trust*, and the court held that although the sheriff's deed passed the legal title to Stith, he was not entitled to recover against the owner of the equitable estate in possession. In *Ten Broeck* v. *Orchard*, 74 N. C., 409, it was held that in an action to recover land on the legal title, the defendant might set up an equitable claim in defence of the action,

And to the same effect are the cases of *Turner* v. *Lowe*, 66 N. C., 413, and *Bank* v. *Glenn*, 68 N. C., 35.

It is urged by plaintiffs that however sufficient in general the right in equity to have the legal title may be, to bar the action of the holder of the legal title, yet such an assertion of equitable defence cannot avail the defendant in this case for several reasons: 1. Because such equitable right is not set up in the answer. 2. Because the sum of money admitted in the case agreed to have been paid to the feme plaintiff was paid without her privy examination, and by reason thereof no equity could arise against her. 3. Because the equity of defendant to have a title was presumed abandoned, released, or satisfied either under the common law upon a lapse of twenty years, or under the shorter period under our statute of presumptions.

Neither of these objections to the sufficiency of the equitable title as a defence against the plaintiffs' recovery is in our opinion tenable.

As to the first objection: The plaintiffs in their complaint put their case on the averment of a right of possession in themselves and the defendant denies a right of possession in the plaintiffs and avers a right of possession in himself, and upon the issue thus made, the parties treated the issue as embracing an equitable defence. Accordingly in the case agreed, they set forth facts constituting such defence and leave the legal inference therefrom to be made by the court. In such case we will treat the defence set up in the case agreed as authorized by and within the scope of the pleadings just as the parties considered it. *McRae* v. *Battle*, 69 N. C., 98.

As to the second objection: The equity of Arthur D. Farmer, under whom the defendant claims to have a deed, vested on the confirmation of the sale and the payment of the purchase money into the office of the clerk and master, and it is not perceived how that equity could be affected by

the payment to the feme plaintiff of her share without privy examination. That was a matter between the plaintiff and the clerk and master, and in no manner concerned the purchaser or his assignee.

As to the third objection: The defendant has now and had at the institution of the action, the possession of the land, and it is to be taken, nothing being shown to the contrary, that defendant and those under whom he claims, including Arthur D. Farmer, have had a continuous possession consistent with the equitable title ever since it arose by the order of confirmation and payment of the money into office. Under these circumstances no presumption of abandonment, satisfaction or release of the equity can arise against the purchaser or his assigns. No presumption of abandonment or release can arise from lapse of time against parties who all the time stand upon their equitable title, and possess and use the property as their own. It is impossible that the equity to call for the title which became complete on paying the money into office, could have been weakened and extinguished by a possession on a claim of ownership by defendant and those under whom he claims for a period of twenty years or any other lapse of time.

The equity of defendant, if affected at all, is rather strengthened than destroyed by such long possession consistent therewith.

No error. Affirmed.

CAROLINE HALSO by her Guardian J. J. Halso v. JOSHUA COLE.

Practice—Proceedings in Partition—Charge for Equality in Partition—Revival of Judgment—Notice.

1. Where in a partition of land, one share is charged with the payment of a certain sum to another share for equality of partition a *venditioni exponas* can issue upon the decree; and it is not admissible for the creditor to obtain a personal judgment against the debtor for the sum so charged.

2. Where, in such case, the creditor did obtain a personal judgment against the debtor and after his death had the judgment revived, execution issued thereon and a part of the land in the possession of one of the heirs of the deceased debtor (the same having been partitioned(sold, but without notice to his heirs or personal representatives; *Held*, that the purchaser at such sale acquired no title.

3. In such case, even if the execution had been a *ven. ex.* issued upon the decree in the original partition suit, a sale under it would have passed no title to the purchaser. there being no notice to the heir in possession of the part sold; she was entitled to notice and an opportunity to show payment or to defend herself against the placing of the entire sum due on her portion of the land.

(*Young* v. *Trustees*, Phil. Eq., 261; *Wynne* v. *Tunstall*, 1 Dev. Eq., 23; *Aycock* v. *Harrison*, 65 N. C., 8; *McCarson* v. *Richardson*, 1 Dev. & Bat., 561; *Samuel* v. *Zachery*, 4 Ired., 377, cited and approved.)

CIVIL ACTION to recover Possession of Land, tried at Spring Term, 1879, of DUPLIN Superior Court, before *Seymour, J.*

The facts material to the question decided are embodied in the opinion. Verdict for plaintiff, judgment, appeal by defendant.

Mr. H. R. Kornegay, for plaintiff.
Messrs. W. A. Allen & Son, for defendant.

DILLARD, J. This was an action to recover real estate and the pleadings disclose none of the facts material to the decision of the points made and discussed before us, as they consist merely of complaint and answer, putting the controversy on the title in general terms, and without exhibits showing the claim of title or other facts relied on to support their claims respectively, and therefore it is that we will have to take the facts from the statement of the case of appeal of the judge, which itself is less full than is desirable.

The material facts, as we can best gather them, are as follows: On the death of Robert Cole his lands were divided by due course of law, in the year 1854, among his heirs-at-law, of whom David Cole was one, and in the partition a share was allotted to said David, charged with fifteen dollars to be paid to the share of Basil Cole, and the same amount to be paid to Jesse Cole. In 1856 Basil Cole, having acquired a title to the share of Jesse Cole according to the judge's statement, obtained a *judgment against David Cole* upon the judgment for partition of 1854 for the said two sums charged upon the land for equality of partition, and thereafter David Cole died without issue but leaving the same persons his heirs-at-law who had shared in the partition of Robert Cole's lands, and among them the share allotted to David from Robert Cole's estate was divided by regular proceedings for that purpose. In the partition of the lands of David Cole charged as aforesaid, Kissy Cole, a sister, afterwards the wife of J. G. Halso, acquired one-sixth of the tract and died leaving the infant plaintiff her only heir-at-law. In 1867 after the death of Kissy Cole and when her title had descended to the plaintiff, then and now an infant without guardian, Basil Cole sued out an execution on his said judgment without any notice to the plaintiff, and had the lands described in the complaint sold, when the defendant, Joshua Cole, became the purchaser, and took the sheriff's deed and entered into the possession.

Upon these facts His Honor held that no title passed to the defendant under the sale and sheriff's deed, and we concur in that opinion. The two sums charged on the share assigned to David Cole on the partition of Robert Cole's lands, were a lien thereon, and were capable of collection by a *venditioni exponas* on the decree entered in the suit in which the partition was made, and as often held in this court, the land was the debtor, and not David Cole personally. *Young* v. *Trustees of Davidson College*, Phil. Eq., 261; *Wynne* v. *Tunstall*, 1 Dev. Eq., 23. The decree in this suit, nothing having been shown to the contrary (and we are to assume every thing done therein which ought to have been done) adjudged a confirmation of the report of the commissioners, and declared and established a lien on the share of David Cole for the sums assessed for equality, and thereby Basil Cole, for the sum due his share as well as for the like sum acquired by him from Jesse Cole, had the right to enforce payment either by *venditioni exponas* as authorized by our statute, or by attachment for not complying with the decree or any other step as in equity. So it is seen that Basil Cole already had a decree for the sum charged on David Cole's lot of land, and he needed to have; and indeed it was inadmissible for him to have any separate personal judgment against David Cole, yet the case, as made out by His Honor, shows that in 1856, shortly after the confirmation of the partition, Basil Cole obtained a *judgment against David Cole upon the judgment for partition of* 1854 *for the sums charged for equality,* and on this judgment was sued the execution under which the defendant purchased.

Upon this personal judgment against David Cole, Basil Cole issued no execution before the death of David which occurred prior to 1864, nor afterwards, until January, 1876, and then it was done and levied on the piece of land claimed by the plaintiff without notice to her or revival of the judgment against David Cole's personal representative.

The execution issued, we are to assume, was issued on *this judgment* according to the import of the language used in the case of appeal, and if so it was not merely voidable for irregularity, but void, and clothed the sheriff with no power by his sale thereunder to divest the title of the plaintiff. If the execution had been sued in the life-time of David Cole, or after his death, but with a teste antedating his death, the sale might have been made under its mandate, and the title would have passed, as the law in such cases, regarding an execution as entire, considers the same as begun at the teste; and therefore it may be proceeded on after the death. But if it is sued out, tested after the death of the judgment debtor and without revival, there is no basis to support it, and it invests the sheriff with no power to levy and sell the lands of the debtor, which, by this time, have descended to his heirs. *Aycock* v. *Harrison*, 65 N. C., 8; 2 Tidd Pr., 1,000; *McCarson* v. *Richardson*, 1 Dev. & Bat., 561; 2 Raymond, 808; *Bragner* v. *Langmead*, 7 Term Rep., 20.

Even if the execution, under which the sale was had, was a *venditioni exponas*, issued on the decree in the suit for partition among the heirs of Robert Cole, still we think the issue of it without notice or *sci. fa.* to the plaintiff, one of the heirs of David Cole by representation, was void; she was entitled to a day in court to show the payment of the sum charged, by David Cole in his lifetime or by his administrator, or to defend herself against the placing of the burden of the sums charged on her fragment of the lands of David Cole, when the execution creditor and the purchaser and others in respect to their shares in the lands of David Cole ought to contribute with plaintiff, each one-sixth towards the assessed sum for equality. *Samuel* v. *Zachery*, 4 Ired., 377.

It is our opinion therefore that no title passed to the defendant by the sale of the sheriff and his deed, and His Honor's ruling to this effect was in law correct.

No error. Affirmed.

ARNOLD PARKER and others *v.* T. D. PARKER and others.

Injunction—Receiver—Mining Interests.

In this state an injunction will not be granted to stop the working of a gold mine, but where it appears that the party in possession is of doubtful ability to respond in damages if he be cast in the action, a receiver should be appointed to secure the profits.

(*Baldwin* v. *York*, 71 N. C., 463; *Bell* v. *Chadwick*, *Id.*, 329; *Falls* v. *McAfee*, 2 Ired., 236; *Deep River Gold Mining Co.* v. *Fox*, 4 Ired. Eq., 61; *Gause* v. *Perkins*, 3 Jones Eq., 177, cited and approved.)

MOTION to dissolve an Injunction heard at Fall Term, 1879, of STANLY Superior Court, before *Buxton*, *J.*

It appearing that the real estate in controversy is a mining interest, and the court being of opinion that it is against public policy to obstruct the working of mines and the development of the resources of the state, ordered the injunction theretofore granted to be dissolved, and appointed a receiver, to the end that the property in litigation be secured until the rights of the parties are determined in the action. From this judgment the plaintiff appealed.

Mr. W. J. Montgomery, for plaintiffs:

Cited *Miller* v. *Washburne*, 3 Ired. Eq., 161; *Troy* v. *Norment*, 2 Jones Eq., 318; *James* v. *Norris*, 4 Jones Eq., 225; 3 Jones Eq., 177; 2 Ired., 239

Mr. J. W. Mauney, for defendants:

Cited *Falls* v. *McAfee*, 2 Ired., 236; 4 Ired. Eq., 61; 3 Jones Eq., 177; 71 N. C., 463 and 329.

DILLARD, J. The plaintiffs commenced action by summons for the recovery of a tract of land on which was a gold mine, and simultaneously therewith, or soon thereafter,

applied for and obtained an injunction, upon the claim as disclosed by their affidavits, that they were sole owners in fee and had had a possession themselves and under their father for sixty years, and that defendants had unlawfully and forcibly entered upon said land and were irreparably injuring them by digging for and taking away the gold, to pay for which they were utterly unable by reason of their insolvency.

The defendants subsequently, on their motion to dissolve by affidavit in reply to affidavit of plaintiffs on which the injunction was obtained, denied that plaintiffs were sole owners in fee of the mines, ores and minerals in said land contained, but alleged that the heirs at law of James Parker, John Parker and William Parker were tenants in common with the plaintiffs therein, and as such had the right to make and had made to them a lease for their interest, in virtue of which they had entered on the land and were digging for gold. And they averred that they had not ousted the plaintiffs or any tenant of theirs from the land, nor excluded or claimed to exclude the plaintiffs from digging for gold also. They offered to give account of the gold they had found, and represented themselves able, though of small means, to respond in damages for any recovery that plaintiffs might effect against them.

On consideration of the motion to dissolve the injunction in connection with the affidavits of the parties and others in support on each side, His Honor, finding the real estate in controversy to be a mining interest, ordered the dissolution prayed for. But on the admission by defendants in their affidavit of a right in the plaintiffs as tenants in common in the said mining interest with their lessors, and of a doubtful ability on their part to respond for the value of the gold they might find and appropriate to their own use, the court adjudged it a proper case for a receiver, and ap-

pointed one. And this action of the judge is the ground of plaintiffs' complaint.

His Honor found the subject of the controversy to be a mineral interest, and the fact found seems to be justified by the affidavits filed. That fact and the others found by him would seem to authorize the judgment, which is claimed by plaintiffs to be erroneous.

In controversies concerning the right of property in land between two persons claiming by separate and distinct titles, the court will not interfere, by way of injunction or the appointment of a receiver, with the free use and enjoyment of the party in possession unless it appear that the plaintiff will lose the rents and profits to which he will be entitled in case he establish his title. *Baldwin* v. *York*, 71 N. C., 463; *Bell* v. *Chadwick*, *Id.*, 329. Equally averse is the court to interfere between tenants in common in dispute over the question of connection in ownership between them. And in such case it is laid down as the rule that no interference will be made as against the party in possession, unless he absolutely exclude the other from all enjoyment; or, the property being of such nature as not to admit of user by hostile claimants, (as here a mine) there shall be a reasonable fear that accountability will be unavailing by reason of the insolvency in the perception of the rents and profits. High on Receivers, § 603, *et seq.*

Applying these principles to the case under consideration, it would seem that in accordance therewith the jurisdiction of the courts might be invoked, and in the case of co-tenancies generally, the power would exist and might be exercised in the discretion of the judge either in granting an injunction or in the appointment of a receiver. But the case of mines is in our state an exception to the general rule, and in regard to that kind of property it is the settled doctrine that the working of mines ought not to be stopped, from consideration of public policy and in justice to the private

party who might in the end be adjudged to be the owner or part owner, and therefore an order of injunction ought not to be issued in such cases, but rather the method adopted of having the issues and profits secured through a receiver, ready for delivery to the party who should be decided to be owner.

In *Falls* v. *McAfee*, 2 Ired., 236, the court enunciate the rule as above stated, and then say: "It is indeed surprising that the plaintiff (Falls) had not at the first opportunity moved to discharge the injunction by submitting to an order for a receiver." And in this language of the court there is express sanction of the course of His Honor in the case here. The principle of the case of *Falls* v. *McAfee* has been referred to and approved since and may be taken as the rule with us. See *Deep River Gold Mining Co.* v. *Fox*, 4 Ired. Eq., 61; *Gause* v. *Perkins*, 3 Jones Eq., 177.

On the application for the injunction, therefore, the order allowing it was improvidently made, and in place thereof a receiver should have been appointed, thus saving plaintiffs against any loss from the continued working of the mine, and just to the defendants in case at the end of the law their lessors were found interested in the property as co-tenants. By the appointment of a receiver the plaintiffs are effectually secure against loss in the diminution of the value of the mine; and at the same time public policy interested in the development of the resources of the country as well as private justice are all cared for and protected.

We think that which should have been done under the authority of the decisions of our state on the original application for the injunction, might be done afterwards on the motion of defendant for the dissolution of the injunction which was granted, although a receiver was not asked for by plaintiffs. *Falls* v. *McAfee, supra;* High on Receivers, §§ 98, 743.

The dissolution of the injunction and the appointment of

a receiver by His Honor in the court below was, in our opinion, in accordance with law, and the judgment is therefore affirmed. Let this be certified.

No error. Affirmed.

F. W. KERCHNER v. MARCUS A. BAKER.

Excusable Negligence under section 133.

1. A party seeking to vacate a judgment under section 133 of the code is always at default, and the *onus* is upon him to show facts which would make the refusal to vacate appear to be an abuse of discretion.
2. Defendant resident in Fayetteville was sued in the superior court of New Hanover in 1870 and filed an answer by attorney who also lived in Fayetteville, but did not practice in the courts of Wilmington; in 1874 an understanding was had between the counsel of the parties that no further step would be taken without notice; in 1877 the plaintiff's attorney died, and he employed other counsel and recovered judgment in 1879; the plaintiff or his counsel did not know of the arrangement made by his former attorney, and no notice was given pursuant thereto, nor did the defendant make any inquiry about the case; *Held*, on a motion to set aside the judgment, that the negligence is inexcusable and defendant entitled to no relief.

(*Sluder* v. *Rollins*, 76 N. C., 271; *Bank* v. *Foote*, 77 N. C., 131, cited and approved.)

MOTION to set aside a Judgment heard at Fall Term, 1879, of NEW HANOVER Superior Court, before *Eure, J.*

The court refused to grant the motion and the defendant appealed.

Mr. D. J. Devane, for plaintiff.

Mr. B. Fuller, for defendant.

DILLARD, J. This is an appeal from the judgment of the superior court refusing the motion of defendant to set aside a judgment on the ground of excusable neglect under section 133 of the code, and the material facts found by His Honor are these:

The plaintiff through the late Adam Empie as his counsel sued the defendant residing in Fayetteville to spring term, 1870, of New Hanover superior court, and at the return term complaint was filed and the names of attorneys residing in Fayetteville were entered on the docket as counsel for defendant, and an answer was filed for him. The attorneys marked for defendant did not practice in the court of New Hanover and were not in attendance at any court up to and including the term at which judgment was obtained, but their names were kept up on the trial docket the whole time.

Mr. Empie was the only counsel of plaintiff and acted as such until his death on the 10th of July, 1877, and soon thereafter D. J. Devane was retained as counsel to the plaintiff and his name was marked as such on the docket, and he continued to represent plaintiff until judgment was obtained at June term, 1879.

His Honor further finds that in 1873 or 1874, it was understood and agreed between Adam Empie the counsel of the plaintiff and the defendant's counsel that he, Empie, would take no further steps in the cause, and no further proceedings should be taken without notice to them, and of this arrangement the defendant was informed through his counsel, but the plaintiff knew nothing of, nor had ever authorized such an arrangement; and both he and Mr. Devane the counsel retained at the death of Empie were ignorant of any claim of such arrangement on the part of defendant until after judgment. No notice was ever given by plaintiff or Empie before his death, nor by plaintiff or Devane since he became counsel, of an intention to proceed in the cause,

and neither the defendant nor his counsel had any knowledge of the trial until after judgment was taken.

Upon the facts found His Honor was of opinion that the neglect of defendant was not excusable, and he overruled defendant's motion to set aside judgment, and we concur in his conclusion.

Every person against whom a suit is brought ought to come into court and be attendant at its terms throughout the litigation, by an attorney at law for the performance of matters peculiarly within his sphere, and in person or by an attorney in fact, so as to look after and follow up his defence, and to do and have done all things pertaining to him personally in the course of the proceedings. If he fail to do so, it is negligence and concludes him in any judgment that may be entered against him unless he shall be able, as allowed by section 133 of the code, to be relieved by facts sufficient in law to excuse his neglect. In all applications to vacate judgments under this section the party is always at default, and the burden is on him, and he must show facts not barely sufficient in law to excuse the neglect, but so clearly sufficient as to call for the exercise of the discretion of the judge and to make the refusal to vacate appear to be an abuse of his discretion. *Sluder* v. *Rollins*, 76 N. C., 271; *Bank* v. *Foote*, 77 N. C., 131.

In this view of the liberty to have the judgment set aside in the exercise of the judge's discretion, and of facts to be shown by defendant to induce a favorable exercise of that discretion, how stands the case with the defendant? He appeared at spring term, 1870, and put in a general denial to the complaint, by counsel entered on the docket, resident like himself in Fayetteville, and who did not practice in the courts of Wilmington, and an understanding was had through his counsel with Mr. Empie, plaintiff's counsel, that no proceedings would be taken in the action without notice, and according to this arrangement no step was taken

in the cause until after the death of Mr. Empie, which occurred in July, 1877. Defendant admits, and it is found as a fact, that he knew of this arrangement with Empie, and Empie's death being known to him as we must assume to be the fact, (inasmuch as it lay on him to show forth matters in excuse of his neglect) and he does not deny it, it then concerned the defendant, as a matter of interest to himself, as well as in the orderly conduct of the action according to the course of the court, in person or otherwise to inquire and know whether the arrangement with Empie would be continued and carried out. But he gave no attendance at the terms of the court and made no enquiry of the plaintiff or Mr. Devane retained as counsel in place of Mr. Empie, as to the progress that would be made, until after the rendition of judgment in June, 1879, which occurred nearly two years after Empie's death.

Was such omission on the part of the defendant prudent? Would not a man of ordinary care in his defence, if he had merits, have looked into the matter on the death of Empie and not relied on an arrangement made with him through a period of two years without any attention whatever to the case? Such a course was not the care of an ordinarily prudent man in reference to his own personal interests, nor was it consistent with a proper deference and attention due from defendant and every suitor to the known and orderly course and practice of the courts in the administration of the law. The court say in the case of *Sluder* v. *Rollins, supra,* that the least that can be expected of a person having a suit in court is that he shall give it that amount of attention which a man of ordinary prudence usually gives to his important business, and applying this rule as we have done above, the facts shown forth by the defendant not only do not excuse the neglect of the defendant but leave it confirmed and strengthened.

The facts of the case failing to show any abuse of His

Honor's discretion in refusing to vacate the judgment on the defendant's motion, the judgment is affirmed and this will be certified.

No error. Affirmed.

J. A. HIATT, Assignee, &c., v. A. S. & GEORGE WAGGONER.

Excusable Negligence under section 133.

Upon service of notice of a motion for leave to issue execution, the defendant informed the sheriff he had his discharge in bankruptcy, and after the sheriff told him to attend to the matter, he requested the sheriff to write to the plaintiff about it (they both thinking that sufficient) but took no further steps in relation thereto, and execution subsequently issued in pursuance of an order of the clerk; *Held*, on a motion to vacate the order under section 133 of the code, that the defendant is not entitled to relief.

(*Burke* v. *Stokely*, 65 N. C., 569, cited and approved.)

MOTION to vacate an Order under C. C. P., § 133, heard at January Special Term, 1880, of DAVIDSON Superior Court, before *Schenck, J.*

This was originally a motion before the clerk of the superior court for leave to issue execution on a judgment obtained by plaintiff against the defendants at spring term, 1868, for the sum of one hundred and fifty dollars, with interest and cost. The clerk gave the order and execution was issued to the sheriff of Forsyth county, who levied on a tract of land as the property of the defendant, A. S. Waggoner, and was proceeding to sell the same when the defendant obtained an order from the judge restraining the plaintiff and sheriff from further proceedings on the execution

until the 10th of May, 1879. The case was then continued until said special term

Upon the application for the restraining order, it was agreed between the parties that it should be treated as a motion to vacate the order under section 133 of the code.

In addition to the facts already stated, His Honor found the following: That the defendant, A. S. Waggoner, was discharged in bankruptcy on the 9th of October, 1873; the notice of motion was served on the 27th of April, 1878, and the order made by the clerk on the 15th of May, 1878; that when the sheriff read the notice to the defendant, he informed him that he had his discharge in bankruptcy; the sheriff then told him that he would have to go to Lexington or write to the plaintiff; that at defendant's request, the sheriff promised that he would write, they both thinking that that would do; that the defendant had no further notice of the order until March or April, 1879, when execution was issued against him, and shortly thereafter he served a notice on the plaintiff that he would move to set aside the order upon the ground of excusable neglect, &c.

At the said special term, His Honor ordered and adjudged that the order of the clerk was not made through the mistake, surprise, inadvertence, or excusable neglect of the defendant, A. S. Waggoner, that the motion to set aside the same be not allowed; and that the restraining order theretofore granted be vacated. From which judgment the defendant appealed.

Mr. W. H. Bailey, for plaintiff.
Messrs. Watson & Glenn and *J. C. Buxton*, for defendant.

ASHE, J. We concur with His Honor that the defendant has failed to make out a case of mistake, surprise, inadvertence, or excusable negligence under section 133 of the code. In the case of *Burke* v. *Stokely*, 65 N. C., 569, which was a

much stronger case for the defendant than this, the defendants in that case wrote to an attorney residing in the town where the court was held, and employed him to plead to the suit, stating that they had a meritorious defence. There was no evidence whether he received the letter, but he entered no appearance for defendants; and it was held that the negligence was not excusable. In our case no attorney was employed or written to. The defendant requested the sheriff to write to the plaintiff, but whether he did so does not appear. But even if he did, that would not excuse him. He was so indifferent to the proceeding taken against him that he never even inquired of the sheriff if he had written, and gave himself no concern about the matter, until he found the execution in the hands of the sheriff. There was very gross negligence on the part of the defendant.

There are other views of this case that might have been considered by the court but for the agreement of counsel that the case "should be treated as a motion to vacate the order under section 133 of the code." Under that view of the case there was no error. Let this be certified to the superior court of Davidson county.

No error. Affirmed.

GEORGE MOWERY v. TOWN OF SALISBURY.

Town tax on Dogs.

The statute empowering town authorities to require the payment of a tax on dogs is constitutional. It is not an *ad valorem* but a specific tax for the privilege of keeping a dog within the town, and if not paid by the owner, the dog may be treated as a nuisance and killed.

(*Dodson* v. *Mock*, 4 Dev. & Bat., 146; *Perry* v. *Phipps*, 10 Ired., 259; *State* v. *Holder*, 81 N. C., 527, cited and approved.)

MOWERY *v.* SALISBURY.

CIVIL ACTION for Damages commenced before a justice of the peace and tried on appeal at Fall Term, 1879, of ROWAN Superior Court, before *Gilmer, J.*

An ordinance of defendant corporation imposed a tax of one dollar upon all dogs running at large on the streets, and required the owners to put collars and badges on their dogs as evidence of the payment of the tax. The plaintiff's dog was found running at large without a badge and was shot and killed by an officer of the town in pursuance of the requirements of the ordinance. And thereupon the plaintiff brought this suit against the town commissioners to recover damages. The court being of opinion that the action of defendant in killing the dog was warranted by the charter and ordinances of the town, gave judgment accordingly and the plaintiff appealed.

Mr. Kerr Craige, for plaintiff.
Mr. J. M. McCorkle, for defendant.

SMITH, C. J. The act incorporating "the commissioners of the town of Salisbury" confers upon the commissioners in express terms authority "to regulate the manner in which dogs may be kept in said town." In the exercise of this power the following ordinance was passed:

"The chief of police shall have badges prepared which must be placed upon the collars of all dogs running upon the streets: the owners of dogs shall register the same with the clerk, and upon the payment to the clerk of one dollar for each dog, and two dollars for each bitch, shall be furnished with a properly numbered badge; and after the 15th day of July of each and every year, all dogs or bitches found running at large in the streets without the proper badge shall be killed."

The plaintiff's dog was found running at large in violation of the ordinance and was shot and killed. The only

point presented in the appeal and argued before us is the validity of the ordinance.

Property in dogs is recognized by the law and protected against wanton and needless injury, and a civil action for damages may be maintained by the owner. *Dodson* v. *Mock*, 4 Dev. & Bat., 146; *Perry* v. *Phipps*, 10 Ired., 259. Yet they are not the subject of larceny. *State* v. *Holder*, 81 N. C., 527.

They may become nuisances in cities and populous towns if permitted without restraint to roam about the streets, and dangerous even during the summer months when *rabies* prevails. Accordingly, by a general law for the government of towns, it is enacted that "if any person residing in town shall have therein any dog and shall not return it for taxation, and shall fail to pay the tax according to law, the commissioners, at their option, may fine the person so failing double the tax, or may treat such dog as a *nuisance* and order his destruction." Bat. Rev., ch. 111, § 27. Again, as indicating a public policy in regard to this class of domestic animals, it is made the duty of any owner of a dog which he knows or has reason to believe has been bitten by a mad dog, or of a sheep-killing dog on proof thereof before a justice and notice to such owner, to kill him immediately; and a refusal or failure subjects the offender to penal action and indictment. Bat. Rev., ch. 38, and the amendatory act of 1874–'75, ch. 108.

The plaintiff's contention is that as dogs are property, the power of this municipal body is limited by the constitution to the imposition of an *ad valorem* tax, and that for its non-payment the destruction of the animal is not an authorized remedy. It is difficult to apply the rule to animals that have no standard value and are not the subject of sale and traffic in order to put upon them a share of the public burdens. But the sum required to be paid by the owner is not an *ad valorem* but a specific tax for the privilege of keeping the dog within the town with the annexed penalty if he is

found running at large without the required badge, the evidence of its payment and of the ownership of the dog. But the very question has been elaborately considered and discussed in a recent case before the supreme court of Massachusetts, *Blair* v. *Ferchand*, 100 Mass., 136, and the principle upon which life may be taken fully indicated. We reproduce some extracts from the opinion of GRAY, J., who after referring to successive statutes on the subject, says: "These statutes have been administered by the courts according to the fair construction of their terms and *without a doubt of their constitutionality.*" Again speaking of an enactment very similar to the ordinance which required the owner of a dog to put a collar about its neck, to be constantly worn with the name and residence of the owner marked thereon, and authorized any person to kill a dog without such collar when it had been decided that no action would lie for such killing, he adds: "Similar statutes have been held in other states to be reasonable and constitutional regulations of police." *Hurd* v. *Chesley*, 55 N. H., 21.

We concur in the view of that court that such provisions of law do not invade private rights nor disregard constitutional guaranties, but in populous communities may be and often are necessary precautions against what in their absence would become a public grievance. The court properly ruled that the action could not be sustained. There is no error and the judgment is affirmed.

No error. Affirmed.

D. A. SPIVEY v. JAMES F. JONES and Benjamin W. Taylor.

Ejectment—Common Grantor—Failure to Answer.

1. In an action of ejectment, when both parties claim title from the same source, all that the plaintiff has to do in order to recover, is to show that he has a better title from the common grantor than the defendant.
2. In such action where plaintiff claims title obtained at execution sale, and it appears that between the date of the judgment and the date of the sale, the judgment debtor went into bankruptcy: *Held*, That the failure of the assignee in bankruptcy (who was made a party defendant) to answer, established the title of the plaintiff as against him.

(*Ives* v. *Sawyer*, 4 Dev. & Bat., 51; *Murphy* v. *Barnet*, 1 Car. L. R., 106; *Copeland* v. *Sauls*, 1 Jones, 70; *Newlin* v. *Osborne*, 2 Jones, 163; *Love* v. *Gates*, 4 Dev. & Bat., 363; *Norwood* v. *Morrow*, *Id.*, 442; *Donnell* v. *Cooke*, 63 N. C., 227, cited and approved.)

CIVIL ACTION to recover possession of Land, tried at Fall Term, 1879, of GREENE Superior Court, before *Eure, J.*

The cause was heard upon the pleadings and a case agreed which are sufficiently set out in the opinion. Judgment in favor of defendants, and plaintiff appealed.

Messrs. Grainger & Bryan, for plaintiff.

Messrs. Geo. V. Strong, A. K. Smedes and *G. M. Smedes*, for defendants.

ASHE, J. This was an action for the recovery of land in nature of an action of ejectment, tried at fall term, 1879, of Greene superior court, upon the pleadings and a case agreed.

The plaintiff alleges in his complaint that he was the owner in fee simple of the land in controversy, and entitled to the immediate possession thereof, which was unlawfully withheld from him by the defendants. The defendants, Jones and Taylor, deny the allegations of the plaintiff as to the ownership and also that they unlawfully withhold the

possession, but admit that they are in possession. John Hutchinson, the assignee in bankruptcy of one W. H. B. Taylor, was regularly made a party defendant but failed to file an answer.

The plaintiff, in support of his title, offered in evidence three judgments rendered in the superior court of Greene county, in favor of different plaintiffs against said W. H. B. Taylor and others, as follows: A judgment dated October 10th, 1867, docketed April 23d, 1870; one of same date, docketed March 10th, 1870, and another dated April 15th, 1869, and docketed the same day in the superior court of Greene county; then the executions on these judgments and the levy upon and sale of the land in controversy, by virtue thereof, and the sheriff's deed for the same, bearing date the 10th day of March, 1871.

The defendants exhibited as a part of their case a judgment of Wayne county court dated November, 1867, (the court was held on the 11th of November), against W. H. B. Taylor and the defendant James F. Jones, execution thereon and of same date issued to the sheriff of Greene county, a sale and sheriff's deed for the land in dispute, bearing date the 12th of February, 1868. In the case agreed it is admitted that the money due on this judgment was paid by the defendant, Jones, to the sheriff of Greene county, while the execution was in his hands, and that he afterwards sold the land under the execution, and the said Jones became the purchaser and received the sheriff's deed as above stated. It was further admitted that at the date of the sheriff's deed to Jones, W. H. B. Taylor was the owner of the land, and that he was declared a bankrupt on the 18th day of May, 1868, and duly discharged as a bankrupt on the 4th day of November, 1869.

It is the universal rule in actions of this nature that the plaintiff must recover, if at all, upon the strength of his own title and not on the defects in that of his adversary. But

to this rule there are two exceptions: 1. "When the plaintiff is a purchaser at sheriff's sale and the defendant is the defendant in the execution. 2. When both parties claim under the same person neither shall deny the title of the person under whom both claim." *Ives* v. *Sawyer*, 4 Dev. & Bat., 51; *Murphy* v. *Barnet*, 1 Car. L. R., 106. But this last rule must give way when the defendant can show a better title in himself or in a third person with whose title he can connect himself. *Copeland* v. *Sauls*, 1 Jones, 70; *Newlin* v. *Osborne*, 2 Jones, 163; *Love* v. *Gates*, 4 Dev. & Bat., 363; *Norwood* v. *Morrow*, *Ibid*, 442.

Let us see how these principles apply to the facts of our case. Both parties claim under W. H. B. Taylor, and neither can dispute his title. The plaintiff claims as purchaser at a sheriff's sale by virtue of executions against W. H. B. Taylor and a sheriff's deed for the land in pursuance thereof. He shows a judgment and execution, a sale and sheriff's deed. By this purchase he acquired whatever interest the said W. H. B. Taylor had in the land at the time of the sale. This gives the plaintiff a *prima facie* title against the said Taylor and all claiming under him. But the defendants Jones and B. W. Taylor claim under him and it is incumbent on them, in order to defeat the plaintiff's recovery, to show a better title in themselves than that of the plaintiff. This they have failed to do. It is true W. H. B. Taylor went into bankruptcy and one Hutchinson was appointed his assignee soon after his being declared a bankrupt in May, 1868, but it is not shown that Taylor was the owner of the land at that time and that it passed into the hands of the assignee, and it may be presumed it did not, as he has never asserted any claim to it as the property of the bankrupt, and it does not appear that the judgments on the land have ever been before the bankrupt court for adjudication. *Donnell* v. *Cooke*, 63 N. C., 227. But however that may be, he was made a party defendant to the action,

and failing to answer the complaint, must be taken to admit all its allegations to be true. What is the extent of that admission? It is that the plaintiff was the owner of the land in dispute and was entitled to the possession. For the purposes then of this action the title of the plaintiff is established against Hutchinson the assignee, and so far as concerns the other two defendants, Taylor and Jones, who set up no title as derived from W. H. B. Taylor except a sheriff's deed that is void, and admitted in the urgument to be void, it is immaterial whether the title had vested in Hutchinson the assignee or not, for they by the authorities above cited are precluded from showing a title in him or any one else unless they can connect themselves with such title. They have not shown any connection or privity with Hutchinson or his title. And it is a rule that obtains in ejectment suits when both parties claim title from the same source, that he must prevail who has the best title, "and all that the plaintiff needs to do to recover is to show that he has a better title from the common grantor than has the defendant." Wait's Actions and Defences, § 3.

We are of the opinion that the plaintiff upon the state of facts disclosed by the pleadings and case agreed has a better title than the defendants, and is therefore entitled to recover. Let this be certified to the superior court of Greene county that the damages may be assessed by a jury according to the case agreed and that judgment may be rendered agreeably to this opinion.

Error. Reversed.

JAMES E. MCNEELY and others v. ROBERT H. MCNEELY.

Construction of Will—Vested Remainder.

A testator after devising to his wife for life, gave "all the lands that I have to my son, Billy, at the death of his mother, by him seeing to her"; *Held*, a vested remainder in the son. The words "by him seeing to her" do not operate as a condition to terminate or impair his estate, but a wish is thereby expressed that he should take care of his mother as provision was made for him at her death.

(*Leffter* v. *Rowland*, Phil. Eq., 143; *Nunnery* v. *Carter*, 5 Jones Eq., 370, cited, distinguished and approved)

SPECIAL PROCEEDING for Partition of Land commenced in the probate Court and heard on appeal at Special Fall Term, 1879, of IREDELL Superior Court, before *Gudger, J.*

This proceeding involved the construction of a will, and the plaintiffs appealed from the ruling of the court below.

Messrs. Reade, Busbee & Busbee, for plaintiffs.
Messrs. J. M. Clement and *J. M. McCorkle*, for defendants.

SMITH, C. J. The plaintiffs allege that they and the defendant, the only child and heir of his deceased father, Billy McNeely, are tenants in common of the land described in their complaint which formerly belonged to David McNeely who devised it to his wife for life, and that the reversion descended to the plaintiffs and the intestate, his heirs-at-law. The object of the action is to obtain partition. The defendant answers, denying the tenancy in common and averring a sole seizin in himself, and he demands from the plaintiffs damages as rent for their use and occupation of the premises. The issue thus raised was transmitted to the superior court and the facts and law by consent found by the judge. His Honor found the following facts:

David McNeely, the owner of the land, died in the year 1852 leaving a will in which he devises the same as follows: "I give and bequeath unto Elizabeth my wife, her liking of the land I now own, and I give her all the household and kitchen furniture, to be divided among my children as she may think proper, with her horse and saddle; and I give her the use of all my negroes during her life, and then to be divided as follows: To my son James Ephraim I give my black boy Lewis, at the death of his mother, and what is called the meadow," &c., and at the death of her (a daughter just before named) mother "I give all the lands that I have to my son Billy, and my black woman Liza," and other slaves mentioned, "at the death of his mother, by him seeing to her."

The testator left four children, the plaintiffs and the devisee, Billy, who remained on the plantation with his mother, superintending and working until his death in 1861. The defendant, then between five and six years of age, is his only child. Elizabeth, the testator's widow, died in 1877, having been "bountifully supplied" while living from the proceeds of her farm. Her family consisted of herself, a daughter and her son Billy until his death; and since, she has not been assisted by any one on his behalf.

His Honor declared the law governing the case upon the facts found to be this: The intestate Billy, by virtue of the devise, had a vested estate in remainder in the land to take effect in possession at the death of his mother, the life tenant; and this remainder at his death descended to the defendant, his son, and only heir-at-law. The words annexed to the devise, "by him seeing to her," his mother, were not operative as a condition, precedent or continuing, to terminate or impair his estate, but was the expression of a wish that Billy would look after and take care of his mother and her interests in view of the provision made for

him at her death. The sole seizin is therefore in the defendant.

The only question before us on the appeal is as to the construction of the clause, giving the remainder to the son Billy, and the force and effect of the superadded words upon the estate devised to him.

There is scarcely any labor imposed upon the judicial mind more difficult and less satisfactorily performed than that employed in interpreting wills and ascertaining therefrom their legal operative effect. Without any prescribed form (except in the manner of execution) they are often prepared by testators themselves or by others not accustomed to the careful and accurate use of words, and there are few precedents found in the reports, in most cases, to guide in resolving the perplexing enquiry into their meaning and effect. Each case must be determined by an examination of the testator's language contained in the will itself, in the light of the facts attending its execution and to which it has reference, in arriving at the intent of the instrument as a whole and of its several provisions. The rules laid down by VICE CHANCELLOR WIGRAM in his useful treatise on Wills, are the proper basis upon which to undertake the task of construction, and they are frequently, as in the present case, of little service to the court.

In the will now under consideration the words which give rise to the controversy—"*by him seeing to her*"—are in themselves vague and indeterminate, and if an essential and defeating condition of the gift, would be very difficult of application. What is meant by a "seeing to" the widow, and what neglects fall short of that duty? How much of personal care and attention in the son to the mother is requisite? and how is the dividing line to be run between such omissions as are, and such as are not fatal to the devise? This perplexity is manifest in the facts found by His Honor, and titles would be rendered very precarious and

uncertain if such matters *in pais* were allowed to defeat a vested estate.

There have been several cases called to our attention in the argument, but they do not aid in the present enquiry, as a brief reference will show:

In *Leffter* v. *Rowland*, Phil: Eq., 143, the question was, whether the legacy to a son dying before the testator was transmitted to the issue of the son under section 25, chapter 119 of the Revised Code, and it was determined that the services required to be rendered to the testator during his life and in the payment of his debts, were the controlling motives of the testator, and a condition of the gift which failed by reason of the death of the intended legatee.

In *Nunnery* v. *Carter*, 5 Jones Eq., 370, the bequest was to the wife for life, of certain personal property and then to be James Carter's "provided he take care of his mother; if not, to be whose that does take care of her." The wife died before the testator, and the condition becoming impossible it was held that the legacy vested absolutely.

An important criterion by which to determine the testator's purpose is the absence of a limitation over in case of defeasance, and words are often construed not to defeat the gift, when no provision for such contingency is made. Thus when the testator devised to his wife during widowhood and in case of her marriage "that she must quit the plantation," and no devise over is made, it was declared that the estate was not fettered by those words, and the preceding restriction upon the personal, was applied to the real estate. This conclusion was arrived at because there was no subsequent contingent disposition of the land. We therefore concur with His Honor in opinion that the sole seizin in the land proposed to be divided is in the defendant. There is no error and the judgment is affirmed. This will be certified, &c.

No error. Affirmed.

THOMAS GRIER, Adm'r, v. L. A. MCAFEE and others.

Construction of Will—Vested Remainder—Proceeds of land sale, realty.

A testator devised a plantation to his son, Caleb, and directed other property to be sold and proceeds divided among his three children and twenty-two grandchildren. He further provided that if his son died without issue, the property willed to him should be divided among his grandchildren "living at his death" and his two daughters, three shares each to the daughters and one share to the grandchildren. Caleb died without issue, the two daughters died in his life time, and there were twelve grandchildren living at his death; *Held*,

(1) The legacies in remainder to the daughters were unconditional and at their death vested in their respective representatives; and only those grandchildren "living at his death" share in said remainder.

(2) The land (which was sold under decree) retains the same characteristics after as before the sale and descends to the heirs of those who possessed vested estates therein; and the fund arising therefrom must be divided into eighteen parts, of which the respective representatives of the daughters will take three each, and the twelve grandchildren one each.

(*Bateman* v. *Latham*, 3 Jones Eq., 35; *Wood* v. *Reeves*, 5 Jones Eq., 271, cited and approved.)

CIVIL ACTION for Construction of a Will heard at Fall Term, 1879, of MECKLENBURG Superior Court, before *Buxton, J.*

The plaintiff appealed from the judgment of the court below.

Mr. W. P. Bynum, for plaintiff:

Cited and commented on *Jones* v. *Posten*, 1 Ired., 166; *Pruden* v. *Paxton*, 79 N. C., 446; *Lassiter* v. *Wood*, 63 N. C., 360; *Macon* v. *Macon*, 75 N. C., 376.

Mr. A. Burwell, for defendants.

SMITH, C. J. The testator, Andrew Hoyle, died in the year 1858 leaving a will in which the following dispositions of his estate are made. In the first clause he devises and bequeathes to his deaf mute son, Caleb W. Hoyle, the plantation whereon he resided, and much other property real and personal; and after the payment of his debts and the deduction of other devises and legacies, directs the residue of his visible property to be sold and the proceeds with such debts as may be collected to be equally divided between his three children, the said Caleb, Elizabeth L. Stowe and Margaret Tompkins, and his twenty-two grandchildren, who are specifically mentioned by name, as follows: Three children of the said Elizabeth; five children of the said Margaret Tompkins; seven children of Mary Fullenwider, a deceased daughter; two children of Sarah Grier, another deceased daughter; and five children of Eli Hoyle, a deceased son.

In the sixth clause the testator declares that "if my son Caleb should die without a child or children, the property herein willed to him shall be equally divided among the grandchildren before named, *living at his death*, and my two daughters Elizabeth and Margaret Tompkins, my said two daughters having three shares each, and my said grandchildren having one share each," and further, "should my son Caleb die leaving a wife, that then she should have such part of his real and personal estate as the law gives to the wife of a husband dying without a will."

In the seventh clause the testator appoints three trustees and vests in them the legal estate in the property given to his son Caleb, to be held and managed in trust for his use and benefit during life, and at his death for "his children if he leave any, and if not to go as hereinbefore directed and subject to the provisions before made." Of the trustees nominated, two only accepted the trust, one of whom died in the year 1875 and the other was removed by a decree of the court of equity in 1867 and the plaintiff appointed in

his place. Caleb W. Hoyle died in February, 1879, without issue and unmarried, and the plaintiff has taken out letters of administration on his estate.

Of the grandchildren named in the will, twelve were living at the death of said Caleb, to-wit: Fannie A, wife of L. A. McAfee; Sallie, wife of Monroe Forney; Elizabeth, wife of W. A. T. Miller; Sarah C., wife of H. W. Burton; Mary A. Barrett, L. A. Hoyle, L L. Tompkins, C. E. Beard; Mary, wife of — Ballou; William Stowe, and Margaret C., wife of the plaintiff Thomas Grier, and Thomas Grier.

Two of these children of the testator's daughter, Elizabeth L., died in the life-time of their mother, and the latter also before the death of her brother, Caleb, and a son, William survives.

Margaret, one of the deceased daughters of the said Elizabeth L., died without issue before her sister Catharine, and the latter left surviving her three children, Susan E., wife of B. Lecraft, James L. Lebanch, and Lucius L. Stowe. Margaret M Tompkins, the other daughter of the testator, also died before the said Caleb, leaving four children, Maria Lusk, L. L. Tompkins, C. E. Beard and Mary B., wife of — Ballou. And intermediate between the death of her mother and Caleb, the said Maria died leaving seven children, Albert A., Flora G., Ellen M., James F., Percy B., Grafton B., and Kate B. Lusk.

In 1871 the plaintiff, trustee of said Caleb, with the consent of all those entitled in remainder, made application to the court for a decree for the sale of the lands, and the investment of the proceeds upon the same trusts in a more profitable security, and in 1872 by virtue of such decree the lands were sold as well as the personal estate and the moneys received loaned out and the securities therefor are now held by the plaintiff.

The object of the present suit is to obtain an authoritative

interpretation of certain provisions of the testator's will, to have the rights of the several devisees and legatees interested therein ascertained, declared and adjusted, and the funds in the hands of the plaintiff paid over to the parties entitled; and in order thereto the following questions are propounded:

1. Do the legacies in remainder to the daughters, Elizabeth and Margaret, lapse at their several deaths in the lifetime of Caleb?

2. Do all the grandchildren named, twenty-two in number, take vested estates in remainder in the property given to Caleb for life, or only such as were living at the time of his decease?

3. If the legacies to the testator's daughters are vested, how is their share of the fund to be apportioned among their personal representatives and the grandchildren?

4. Are the proceeds of the lands sold under the decree of the court to be deemed realty still and descendible as such, or are they to be distributed as personal estate among the representatives of such as are deceased?

The solution of these enquiries disposes of the controversy between the contending claimants, and we respond to them in the order in which they are presented:

First. The legacies in remainder on the death of the life tenant, Caleb, given to the testator's two daughters, Elizabeth and Margaret, are unconditional, and at his death vested in their respective representatives.

Second. Only those of the grand children, who were alive at the time of the death of Caleb, share in the said remainder by force of the qualifying words of the gift, "among my grandchildren living at his death," which render it contingent upon such survivorship. This effect is the obvious intent of the testator as well as the proper construction of the words employed to convey that intention.

Third. As twelve of the grandchildren were alive when the legacies vested at the death of Caleb, this fund must be divided into eighteen parts, of which the respective representatives of the daughters will take three each and the grandchildren one each.

Fourth. The remaining question is more difficult of definite and satisfactory solution in consequence of an insufficient statement of facts. The transcript of the proceedings for the sale of the property, though referred to as an annexed exhibit, is not among the papers and we cannot see precisely what was done and who are affected thereby. The complaint says that with the consent of all the contingent remaindermen, the complainant as trustee with others of the remaindermen, as plaintiffs, instituted the action, for the sale and conversion, from which it must be inferred that a part of the grandchildren living, when the application was made and when all the remainders were contingent and uncertain, were parties, while others gave a verbal assent thereto.

The sale could only pass the legal estate of the trustee and the interests of those who are associated with him (as plaintiffs) in the land; and the shares of such of those as were femes-covert or infants, would remain unchanged as realty, while the conversion would be effectual as to the others. The survivors of the grandchildren, who were not parties to the proceeding, would be unaffected by the sale until they elect to ratify it and take their shares in the substituted fund; and this they may do in the present action. The verbal assent, unless operating as an estoppel against the assertion of the claim in favor of the purchaser, would not have the effect to convey an estate in the land. In this view of the case the land retaining the same characteristics after as before the sale, as we have explained, will descend to the heirs of such intestates as possessed vested estates

therein at the date of their several deaths. *Bateman* v. *Latham*, 3 Jones Eq., 35; *Wood* v. *Reeves*, 5 Jones Eq., 271.

The ruling of the court below being in accord with our opinion, the judgment must be affirmed.

As in order to a final settlement a reference and account of the trust fund may become necessary and can be more conveniently taken in that court, a decree may be entered declaring the rights of the parties, as herein defined and set out, and remanding the cause for further proceedings in the said superior court.

No error. Affirmed and remanded.

JOHN MILLER and others v. LEONARD FEEZOR and others.

Judicial Sale—Purchaser—Title.

1. The highest bidder at a judicial sale acquires no independent right, but is regarded as a preferred proposer. Neither payment of the purchase money nor title to the property will be decreed until the sale is confirmed by the court. And then, he will not be compelled to pay the price unless a good title can be made.

2. Where a slave was sold in 1863 under decree in partition proceedings and delivered to the purchaser, but no confirmation of the sale had before the emancipation in 1865; *Held*, in an action for the price that the title became extinct and the court will not enforce payment. The plaintiff is only entitled to the hire from the day of sale to the date of emancipation.

(*Shields* v. *Allen*, 77 N. C., 375; *Batchelor* v. *Macon*, 67 N. C., 181; *Cox* v. *Jerman*, 6 Ired Eq., 526, cited and approved.)

MILLER *v.* FEEZOR.

MOTION for Judgment in a proceeding heard at January Special Term, 1880, of DAVIDSON Superior Court, before *Schenck, J.*

Upon the facts set out in the opinion judgment was rendered against the defendant John H. Peebles, from which he appealed.

Mr. J. M. McCorkle, for plaintiffs.

Messrs. Clement, Bailey and *Hinsdale & Devereux* for defendant.

ASHE, J. A petition was filed in the court of pleas and quarter sessions for the county of Davidson in 18..., by Miller and others against Feezor and others, as tenants in common for the sale of a number of negro slaves for the purpose of division. At May term, 1863, of said court the order was made for the sale as prayed for, and C. T. Lowe was appointed the commissioner to effect the sale; and he reported to the August term, 1863, that he had sold the slaves on the 6th day of June, 1863, on a credit of six months with interest from the day of sale, and had taken bonds with good security from the purchasers. Among the purchasers at the sale was John H. Peebles who bought a slave named Eliza, and at the price of eighteen hundred dollars and gave his sealed note for the same, with one Eli Perry as surety. The cause was continued until February term, 1864, and no further action taken therein until the fall term, 1871, of the superior court of Davidson county, when on motion it was ordered that the case be brought forward and reinstated on the docket of that court, and that the clerk of the court proceed to collect the remaining debts due for said slaves; and this order was renewed at fall term, 1871, with the modification that C. T. Lowe was ordered to collect the debts instead of the clerk. Next, a notice was

served on John H. Peebles and Eli Perry that a summary judgment would be moved for against them on the bond for eighteen hundred dollars at fall term, 1873, of said court. At the spring term, 1873, a complaint was filed by C. T. Lowe alleging the facts substantially as above stated and asking for judgment on the bond. The defendants answered setting up several defences, the most important of which to be considered was the failure to obtain title to the slave. Several issues were submitted to the jury, the findings on which it is unnecessary to consider in the view we take of the case. At the special term of the superior court held for the county of Davidson on the 5th day of January, 1880, judgment was rendered by His Honor against the defendants for two hundred and seventy-six dollars, with interest from the 7th day of August, 1872.

The question now presented is, was that judgment erroneous? The sale had by commissioner Lowe was a judicial sale, and until confirmed by the court conferred no right. Confirmation is the judicial sanction of the court; until then the bargain is incomplete. The highest bidder at such a sale acquires by the acceptance of his bid no independent right, but is regarded as a mere preferred proposer, until the confirmation of the sale by the court. In this respect it differs from the ordinary sale by one individual to another, for there the sale is complete as soon as the agreement is signed or the price paid and property delivered. But in judicial sales the purchaser is not considered as entitled to the benefit of his contract till the master's or commissioner's report of the purchaser's bidding is absolutely confirmed. Rorer on Judicial Sales, §§ 122, 124; *Williamson* v. *Bray*, 8 Howard, 496; *Chedress* v. *Hurst*, 2 Swann, (Tenn Rep.) 487.

In this case there has been no confirmation of the sale, unless the judgment rendered against the defendants in 1880, sixteen years after the sale, shall be so regarded or it shall be presumed after the lapse of so long a time. But

will the court, as in this case, exercising an equitable jurisdiction, confirm a sale so as to make a purchaser liable for the price of property bid off by him at a sale had under its direction and authority, when before such confirmation the title to the property has entirely failed, and when the court being the vendor is bound to see that the purchaser gets a good title before he pays the price? The obligation is stronger on the court than on an individual.

We are aware there is authority for holding that the purchaser, in buying at a judicial sale, runs the risk of the title and that the maxim of *caveat emptor* applies to him, but in this state it is ruled otherwise.

In the case of *Shields* v. *Allen*, 77 N. C., 375, it is held that "where a particular piece of land is sold under an order of court, a good title is deemed to be offered, and a purchaser will not be compelled to complete his purchase by payment of the price if it appear that a good title cannot be made." This principle has been established by several decisions in this state. See *Batchelor* v. *Macon*, 67 N. C., 181, in which it was decided "that a purchaser of land is never required to accept a doubtful title. He is not required to do so, although the fullest indemnity may be tendered." And in the case of *Cox* v. *Jerman*, 6 Ired. Eq., 526, Chief Justice PEARSON uses this language: "It is clearly against equity to compel the purchaser to pay the price before he has obtained a title, and when it may be he never will be able to get one." Besides these there are numerous decisions of this court to the same effect in suits brought for the specific performance of contracts. It is true these are cases where land was the subject of the contract of sale, but there can be no good reason assigned why the same principle should not apply to the sale of personal property.

In our case the title to the slave, Eliza, became extinct by her emancipation in 1865, at a time when the suit was still depending and while the court had the absolute power to

confirm or set aside the sale at its discretion; for we think up to the time of the emancipation, the court had the power to exercise that discretion in this case, and this is a fair criterion for determining whether a confirmation of the sale should be presumed from the possession of the slave by the defendant, Peebles, and the lapse of time, for as long as the court could exercise that discretion, no confirmation can be presumed, for confirmation is the final consent of the court.

We do not put our decision upon the ground of want of consideration, but upon the ground that it was against equity and good conscience to compel the defendant Peebles to pay for property sold under the authority of a court when it is obviously impossible for him ever to obtain the title.

We are of opinion there was error, and while we reverse the judgment rendered in the superior court we hold that the plaintiff is entitled to recover the hire of the slave from the day of sale until the date of her emancipation, and that it should be submitted to a jury or to a referee to ascertain the value of her services.

Let this be certified to the superior court of Davidson county that further proceedings may be had in conformity to this opinion.

Error. Reversed.

ROBERT H. BURGIN and others v. JOHN D. BURGIN and others.

Judicial Sale—Purchaser—Husband and Wife—Account.

1. Where a purchaser of land under decree of court fails to pay the price, the title will not be made even although there be a confirmation of the

sale. And if the land in such case be sold under an execution against said purchaser, the purchaser thereof takes subject to the equities against the defendant in the execution.

2. Upon partition proceedings to sell land which descended to a feme covert (and others) it appeared that a note for the wife's share of the purchase money was given to the husband who consented to a credit for the amount of said note to be placed upon the original bond of the purchaser to the clerk; *Held*, that the share of the wife was realty, and the act of the husband in taking the note and consenting to the credit did not amount to a payment to the wife.

3. In such case it is proper to order an account of the unpaid purchase money with a view to a specific performance of the contract.

(*Ex Parte Yates*, 6 Jones Eq., 306; *Edney* v. *Edney*, 80 N. C., 81; *Etheridge* v. *Vernoy*, *Id.*, 78; *Dozier's Heirs*, 1 Dev. Eq., 118; *Bryan* v. *Bryan*, *Id.*, 47; *Oliver* v. *Dix*, 1 Dev. & Bat. Eq., 605; *Scarlett* v. *Hunter*, 3 Jones Eq., 84; *Hicks* v. *Skinner*, 71 N. C., 539; *Johnson* v. *Lee*, Busb. Eq., 43, cited and approved.)

PETITION to sell land for assets (transferred from the late court of equity) heard at Fall Term, 1879, of MCDOWELL Superior Court, before *Schenck, J.*

This was a bill filed in the court of equity to sell land for partition between plaintiffs and defendants as heirs at law of James Burgin, deceased, and one other claiming the share of one of the heirs by assignment, and at the sale under a decree in the cause, defendants L. E. Burgin and John D. Burgin became purchasers of one of the tracts at eighteen hundred and sixty-eight dollars and secured the same by their bond with surety to the clerk and master, and on report filed, the sale was confirmed by the court.

On the organization under the constitution of 1868, the said cause was transferred to the docket of the superior court, (made successor to the courts of equity in causes therein pending,) and an order was made referring it to a referee to ascertain and report the distributive shares of each person entitled, how much received by each, and how much

still due, and whether the purchasers had paid the purchase money, and if so, to whom, and how much.

The referee reported that the purchasers had paid up in full the shares of all the heirs, as appeared by their respective receipts for the same, and that all the purchase money had been paid except a balance of sixty-three dollars and thirty-two cents, which was still due and owing, and on the filing of the report, the same was confirmed by the court.

While matters stood in this situation and without any title having been conveyed to said purchasers, a notice was served on them by the plaintiff in the suit through their attorneys of a motion to be made in the cause at fall term, 1879, to have the lands purchased by them sold by decree of the court to satisfy the purchase money, and at the hearing of the motion, R. H. Burgin by affidavit showed that about 1866 the purchasers executed their note to him for his wife's share in the proceeds of sale, for which he gave receipt, and so likewise to some others of the heirs, and that the notes so given had never been paid.

In opposition to this motion, Thomas Y. Lytle and B. F. Bynum, by leave of the court, were received upon their affidavit to show that they were the owners of the land (now sought to be sold) as purchasers at a sale by the sheriff of McDowell county, under an execution against John D. Burgin. Besides the facts deposed to by these affidavits, His Honor found that at the time the note of the purchasers was executed to R. H. Burgin a credit for the amount, by consent of said R. H. Burgin, was entered on the original bond of the purchasers to the clerk and master, and that John D. Burgin is insolvent, and no part of said note has been paid.

Upon these facts R. H. Burgin, by counsel, moved His Honor for an order of account to ascertain the unpaid purchase money, and of the transactions with the clerk and

master in regard to the fund, with a view to subject the land to the payment of the note given to him, and for such orders as were necessary to enforce the same, but His Honor disallowed the motion, and the plaintiffs appealed.

Mr. W. H. Malone, for plaintiffs.
Mr. D. G. Fowle, for defendants.

DILLARD, J., after stating the case. We think His Honor, upon the affidavits in support of the motion and in opposition thereto, and on the facts found by himself, was in error in disallowing the motion to ascertain the unpaid purchase money, with a view to a specific performance of the contract by the purchasers under the orders of the court.

By the confirmation of the sale, the heirs, selling through the agency of the court, had the right to have a specific execution of the contract by payment of the purchase money on the part of the purchasers, and were themselves under obligation to perform their part of the contract by executing title simultaneously, or having it done through a commissioner appointed for that purpose. *Ex Parte Yates*, 6 Jones Eq., 306; *Edney* v. *Edney*, 80 N. C., 81; *Etheridge* v. *Vernoy*, 80 N. C., 78; Rorer on Judicial Sales, § § 152, 153; *Miller* v. *Feezor*, *ante* 192.

Here, it appeared from the bill in equity, and by the affidavit of R. H. Burgin, to whom the purchasers gave their bond for two hundred and forty dollars, and from whom they took receipt, and by whose consent a credit was entered on their bond to the clerk and master, that said R. H. Burgin was not an heir of James Burgin, but that his wife was the heir. And this being so, the share of the wife was in law realty to be invested and settled under the orders of the court, so as to be secure unto her or her real representatives. Bat. Rev., ch. 84, § 17, same as in Revised Code, ch. 82, § 7.

The husband, even if the money had been paid into the office, could not have received it and given a good acquittance to the clerk and master therefor. The only way in which he could make the money his own, or exercise any control of it, would have been in some mode upon privy examination of the wife as in conveyances of land itself. *In re Dozier's Heirs*, 1 Dev. Eq., 118; *Bryan* v. *Bryan*, 1 Dev. Eq., 47. The husband's act in securing the note of the purchasers, and consenting to the entry of a credit on their bond to the master, was equally beyond his power to do, and the arrangement that was made amounted to nothing as a payment on the purchase money, and left the purchasers liable as before, to pay the money before they could be in a position to ask for title.

The case of a judicial sale on confirmation is attended with the same reciprocal rights as between the parties asking the sale and the purchaser, as exists in a contract of private sale between vendor and vendee under articles. And in each case, the title being retained, no decree of specific performance, consistently with the rules which regulate the discretion of the chancellor, will be made for either party without a valuable consideration paid or offered to be paid at or before the time of the decree. Adams Eq., 78; 1 Story Eq., §§ 750, 769, 787; *Oliver* v. *Dix*, 1 Dev. and Bat. Eq., 605.

The bond that was given to R. H. Burgin was unauthorized and no payment, as we have seen. Even if the power existed in the husband thus to arrange with the purchaser, the bond has not been paid, and the purchasers are insolvent and unable to pay, and in such case, no court will declare a trust of the retained legal title and compel its conveyance to the purchaser. The giving the bond of the purchaser is not a payment, but at most only an attempted substitution of one security for another, and the same not being paid, the parties' equities existed as before, that is to

say, the heirs held the legal title in trust to secure the purchase money, and then for the purchasers, and the purchasers had the equity on payment of the purchase money to call for the title. 1 Story Eq., § 789; *Scarlett* v. *Hunter*, 3 Jones Eq., 84.

Such being the rights of the heirs and the purchasers as between themselves, how stands the case with respect to Lytle and Bynum claiming by purchase at sheriff's sale under execution against the purchasers?

It is the established doctrine under many decisions of this court that a purchaser at sheriff's sale only acquires such right in land as the judgment debtor was competent to convey, and that he takes the same subject to any equities or legal rights existing against the judgment debtor in relation thereto. *Hicks* v. *Skinner*, 71 N. C., 539; *Johnson* v. *Lee*, Busb. Eq., 43. Lytle and Bynum then, if indeed any title passed to them under the sale at which they bought, can only claim to hold just as the judgment debtor held and to have their equity for title in the same manner as he had it. The purchasers, under whom they claim, we have seen, could not ask for and compel by decree of court an execution of title to them without payment of the money, and so neither can they (claiming by act of law) have the title except on payment of the purchase money.

We hold, therefore, that notwithstanding the opposition of Lytle and Bynum, His Honor on the showing made should have instituted the proposed inquiry as to the payment of the purchase money as preliminary to ulterior orders for the reciprocal performance in specie of the contract of purchase, and the judgment of the court below disallowing the motion of plaintiff is reversed. This will be certified that further proceedings may be had in conformity to this opinion.

Error. Reversed.

A. J. CORPENING *v* ARCHIBALD KINCAID and others.

Specific Lien—Purchaser—Homestead.

1. Where land sued for has been adjudged in a previous suit to be subject to a specific lien before the adoption of the constitution of '68 and to be sold, such judgment is one *in rem* directly affecting the land itself, and a party to the suit cannot, in a subsequent action by the purchaser to recover the land, collaterally attack the judgment and claim the *res* as a homestead exemption.
2. And the plaintiff here by his purchase has title running back to the lien to which the land was subject, and is entitled to recover the *present possession* as against the defendant homesteader.

CIVIL ACTION to recover possession of Land tried at Spring Term, 1878, of BURKE Superior Court, before *Cloud, J.*

Judgment for plaintiff, appeal by defendants.

Plaintiff was not represented in this court.

Mr. Johnstone Jones, for defendants.

DILLARD J. This was an action to recover four tracts of land, separately described by metes and bounds, on a claim of title by plaintiff, under an execution sale and deed by the sheriff, by authority of the judgment of the superior court of Caldwell county, at spring term, 1873, in a cause where the present plaintiff and others were plaintiffs, and the defendant, Archibald Kincaid and others, were defendants.

The defendants disclaiming as to the last two tracts described in the complaint, rely on the defence, as to the first two tracts, that they were duly assigned and set apart to Archibald Kincaid on his own petition as a homestead on the 13th day of November, 1869, and the reversionary interest therein was levied upon on the 11th of February,

1870, before but sold after the passage of the act forbidding the sale of such interests, and bought by the other defendants, J. S. Kincaid and Laura Fox, who received a deed from the sheriff for the same. Upon this title it is claimed by defendants that the lands sued for are protected from recovery as against Archibald Kincaid by his homestead, and as to the other two defendants by a title to the reversionary interest by a sale and deed of the sheriff under execution.

Were the said two tracts exempt from sale under the execution under which the plaintiff purchased? and was the sheriff's deed unavailing to pass the title to him? The homestead assigned to Archibald Kincaid in 1869 under our constitution and laws was not liable to levy and sale under execution for any debt not excepted, contracted since the adoption of the constitution of 1868, and if the sale at which the plaintiff purchased was under execution for such a debt the sale and sheriff's deed, if not void, was inoperative to pass to plaintiff any present right of possession. But plaintiff insists his title does not depend on an execution against which the homestead laid off to Archibald Kincaid could be maintained.

The legatees of Robert Kincaid sued John Kincaid and Archibald Kincaid, the executors to his will, and procured a decree for the sums severally due to them in the supreme court as reported in Winston's Eq., 44, and executions issued therefor were levied on the personal and real estate of the said executors, and among the tracts so levied on were the two tracts now claimed by defendants as exempt. The executors, in order to restrain a sale under said levy, filed a bill in equity in the court of equity, of Burke county, to fall term, 1866, and therein obtained an injunction, on the execution of a proper bond conditioned according to law with the plaintiff, A. J. Corpening, as surety thereto, and this suit was prosecuted to final decree on appeal to the supreme court at January term, 1870, as reported in 64 N.

C., 387, and therein the distributive shares of the legatees and next of kin were definitely settled and fixed and the amounts decreed to the several parties were all paid out of the assets of the estate of John Kincaid, (who by this time had died), except two thousand and fifty dollars which remained to be paid and was paid by the plaintiff as surety on the injunction bond in the suit last mentioned.

The said Corpening having paid said sum as surety, and the assets of John Kincaid being already applied, and Archibald Kincaid having covered himself by having his homestead laid off, thereupon instituted an action in Caldwell superior court in 1871, against Archibald Kincaid, (the defendant in this action) on whose lands the executions on the supreme court decree of 1864 had been levied, praying to be substituted to the lien of those executions by virtue of the levies that had been made thereunder, to the extent of the sum he had been compelled to pay as surety on the injunction bond of John and Archibald Kincaid, executors of Robert Kincaid. And this action was proceeded in to judgment at fall term of 1873, and therein it was declared that the said executions levied on Archibald Kincaid's lands in 1866 created a vested right in favor of the plaintiffs, and that Corpening, the surety, was entitled to be substituted to and have the benefit of the levies made, for reimbursement to him of the money he had paid in satisfaction thereof, and it was adjudged that unless Archibald Kincaid paid the two thousand and fifty dollars on or before a day named, a *venditioni exponas* should be issued to the sheriff commanding him to expose to sale so much of the lands of Archibald Kincaid levied on in 1866 as would suffice to repay to Corpening the sum paid by him as surety on the injunction bond, with interest and costs.

According to this judgment, the money not being paid, a writ of *venditioni exponas* was issued returnable to spring term, 1875, and by virtue thereof a sale was duly made by

the sheriff of the two tracts of land covered by the homestead of Archibald Kincaid and purchased by the present plaintiff, and a deed executed to him, and it is claimed that these proceedings passed the title to the plaintiff notwithstanding the previous assignment of the same lands as a homestead.

Before the institution of the action for substitution, one Presnell having a justice's judgment docketed caused execution to be issued thereon against Archibald Kincaid on the 4th of February, 1870, which was levied on the lands in dispute on the 11th and (a homestead covering the same having been allotted to the debtor in the year 1869) a sale was made thereunder and a deed executed to the defendants J. S. Kincaid and Laura Fox and others, conveying the two tracts, subject to the homestead of Archibald Kincaid, and upon these facts the defendants rely that the homestead of Archibald Kincaid and the reversionary interest conveyed by the sale and sheriff's deed are sufficient in law to defeat plaintiff's recovery.

Upon the facts above as collected from the records referred to in the case of appeal signed by the counsel, we are of opinion that the sheriff's sale of the two tracts of land previously assigned to Archibald Kincaid for a homestead, passed to the plaintiff all the right and interest therein of the said Archibald at the time of the sale under the judgment of the court in the action brought praying substitution, and that by virtue thereof there is a right of present possession in the plaintiff entitling him to recover the possession in this action. Undoubtedly Archibald Kincaid was entitled to a homestead possession as against the payment of money by the plaintiff as surety in 1870, and a judgment obtained therefor, as established by numerous decisions of this court. But here, it was adjudged in a court having jurisdiction of the subject matter and of the person of Archibald Kincaid that a specific lien was obtained by the exe-

cutions of the legatee of Robert Kincaid levied in 1866 on the lands in controversy, and that plaintiff Corpening was entitled to be substituted to such lien, and to have the same enforced for the reimbursement of the money paid by him as surety of Archibald Kincaid in satisfaction of those executions; and to this end ordered a *ven. ex.* to issue to sell the lands levied on, which are the lands now claimed for a homestead. Whether there was such specific lien or not, and whether the judgment of the court declaring the liens to exist and enforcing the same for exoneration of the plaintiff as surety, was in law correct or erroneous, it is not for us now to inquire as those points were adjudged in a cause to which Archibald Kincaid was a party, and that judgment remains unreversed.

It is an elementary principle needing no citation of authority that the judgment and decree of a court of competent jurisdiction are conclusive as to every thing passed upon and adjudged therein and gives the right to have process to execute the same, and the court having adjudged the lands now sued for to be under a lien acquired in 1866, and still existing and to be sold for plaintiff's exoneration, it was a judgment not for a debt against which the homestead assigned was good, but a judgment *in rem* affecting the lands themselves directly, and the said Archibald Kincaid having been a party to that suit he is concluded and it is not now open to him collaterally to attack the legal propriety of that judgment on the trial of this action, or to claim the *res* as exempt, which might have been determined in that suit.

To allow the defendant now to claim his homestead in the lands which were adjudged to be affected by a specific lien anterior to the adoption of the constitution giving the exemptions, is collaterally to impeach the judgment of the court ordering the sale of the lands; and to allow him now to urge that the payment of the money by plaintiff as surety

extinguished the executions levied in 1866 is to draw into litigation again a matter which has been passed upon and adjudged in a former action.

Applying these principles to the case under consideration, it is our opinion that the sale and sheriff's deed under the judgment of the court adjudging a specific lien on the lands and a right in plaintiff to be substituted thereto, availed at least to pass to plaintiff such estate in the lands as Archibald Kincaid had at or after the institution of the action in 1871, which is but a homestead estate. A title communicated to plaintiff, to this extent only, authorizes a judgment establishing the right of possession in him as against Archibald Kincaid during the continuance of the homestead, and also as against the other defendants who in their behalf admit the homestead right, and make question with the plaintiff only as to the efficacy of his deed to deprive them of their reversionary interest after the expiration of the homestead. Upon the question whether the plaintiff's deed from the sheriff passed to him the whole fee, or only the homestead interests leaving the reversion in J. S. Kincaid, Laura Fox and others, under their deed in 1870, which seems to have been designed to be presented, we are unable to express an opinion for the reason, no facts being found by His Honor in the court below, that we cannot decide from the sheriff's deed and other exhibits whether the reversionary interest was sold before or after the act forbidding such sales, nor whether the sale was had before or after the return day of the execution. We therefore determine merely that the plaintiff has the right to judgment for possession against all the parties during the homestead right of Archibald Kincaid, and leave the question of right in the fee after the expiration of the homestead right open as between the plaintiff and the claimants of the reversionary right.

We therefore affirm the judgment of His Honor for the

recovery of the present possession of the first and second tracts of land mentioned in the complaint, leaving the question of title open between plaintiff and J. S. Kincaid and others as to the reversionary interest after the expiration of the homestead right of Archibald Kincaid. Let this be certified.

No error. Affirmed.

SUSAN JENKINS v. B. W. JENKINS and others.

Dower not assignable out of Certain Lands.

On petition for dower, it appeared that the land was acquired and the marriage took place prior to the "dower act" of 1867 (restoring the common law right of dower) and the husband conveyed the same in 1872 without the concurrence of the wife; *Held* that the husband had a vested right to sell which was not impaired by the act, and his single deed passed the title free from the claim of dower.

(*Sutton* v. *Askew*, 66 N. C., 172; *Holliday* v. *McMillan*, 79 N. C., 315; *Bruce* v. *Strickland*, 81 N. C., 267; *O'Connor* v. *Harris*, *Id.*, 279, cited and approved.)

PETITION for Dower heard at Spring Term, 1879, of YADKIN Superior Court, before *Schenck, J.*

This was a petition for the assignment of dower to the plaintiff, Susan Jenkins, a widow of Francis Jenkins, in the lands described in the petition, which came by appeal from the probate court to the superior court, and His Honor being of opinion that plaintiff was not entitled to dower in the land in controversy gave judgment accordingly and the plaintiff appealed.

Messrs. Watson & Glenn, for the plaintiff.

The defendants were not represented in this court.

DILLARD, J. From the statement of the case of appeal, we collect that the petitioner intermarried with Francis Jenkins before the passage of the act of 1867, restoring to married women their common law right of dower; that her husband owned the tract of land in which dower is claimed anterior to the marriage, and conveyed the same during the coverture (in 1873) to the defendants, B. W. Jenkins and Malinda Jenkins in fee simple without the joinder of the wife in the deed.

On these facts submitted to His Honor in the court below, he held and so adjudged that the plaintiff was not entitled to dower, and on the appeal to this court a question is made as to the correctness of the ruling.

We concur with His Honor. In *Sutton* v. *Askew,* 66 N. C., 172, it was ruled that a husband who married and owned lands before the dower act of 1867 enlarging the right of dower, had a vested right to sell and convey such lands by his single deed; and that it was incompetent to the legislature to impair that right by giving the wife a right of dower therein and making it necessary that she should be joined in the husband's deed therefor. The ruling of the court has been since referred to and approved in the cases of *Holliday* v. *McMillan,* 79 N. C., 315; *Bruce* v. *Strickland,* 81 N. C., 267; *O'Connor* v. *Harris, Id.,* 279. Upon the authority of these cases and the reasons on which they were decided, we hold that the deed of the husband executed to the defendants was effectual to pass the title free from plaintiff's claim to dower, although she was not a party to the deed.

There is no error. Judgment of the court below is affirmed, and this will be certified.

No error. Affirmed.

SARAH J. IRVIN v. W. H. HUGHES, Executor.

Widow— Year's Support.

An administrator advanced to the widow of his intestate part of the amount due her as year's support for which she had obtained judgment, and thereupon she gave him a receipt to be used as a voucher in his settlement of the estate under an agreement that she should repay the sum advanced and he would surrender the receipt; she returned the money advanced and he failed to surrender the receipt; assets came into his hands applicable to the judgment and he died without paying it; *Held*, that the widow could maintain an action against his executor to recover the sum advanced.

CIVIL ACTION commenced before a Justice of the Peace and tried on appeal at Fall Term, 1879, of NORTHAMPTON Superior Court, before *Avery, J.*

The plaintiff submitted to a nonsuit and appealed.

Messrs. R. B. Peebles and *S. J. Wright* for plaintiff.

No counsel in this court for defendant.

SMITH, C. J. Upon the death of J. B. Irvin, intestate, his administrator, W. T. Stephenson, at the instance of the plaintiff, his widow, caused her year's allowance to be set apart from the stock, crop and provisions, left by the deceased, and there not being enough for that purpose, the deficiency to be ascertained and estimated. The list containing the articles assigned and the value of the deficiency were returned to the superior court clerk's office and there filed and recorded, and judgment entered against the administrator for that sum, "to be paid when the assets shall come to his hands." Bat. Rev., ch. 17, §§ 20, 21.

The plaintiff alleges that the administrator paid her the allowance in money except the sum of fifty dollars, and this

he advanced, taking her receipt therefor to be used as a voucher in the settlement of the estate, under an agreement between them that she should repay the sum advanced, and her receipt to be then surrendered and canceled; that she had returned the money advanced and he had failed to restore her receipt; that assets of the intestate had come into the administrator's hands, applicable to said judgment and sufficient to discharge the same, and that said Stephenson being so indebted, died leaving a will and appointing the defendant his executor, against whom the action to recover the said sum of fifty dollars is brought.

The answer controverts many of these material allegations, and a jury were regularly impaneled to try the issues involved. During the trial the defendant moved to dismiss the action on the ground that the plaintiff could not maintain it, and the court so intimating its opinion, the plaintiff in submission thereto suffered a nonsuit and appealed.

The assignment of the year's provisions procured by the administrator imposed upon him the legal duty of applying the assets when received in satisfaction of the plaintiff's demand, and his failure to do so was a personal default for which he was liable. He retains an acquittance to be used upon the settlement of his administration accounts, which a recovery in this action will ratify and confirm and thus protect his estate from the demands of an administrator *de bonis non* of the intestate as a payment in a due course of administration. This personal obligation thus assumed and resting upon Stephenson, is transmitted at his death to his personal representative.

Assuming then that these facts would be shown to the jury and the possession of means which ought to have been appropriated to the judgment, the proceedings ought not to have been arrested and the case withdrawn from the jury, and in this there was error. This will be certified.

Error. Reversed.

C. A. CARLTON v. THOS. A. WATTS, Sheriff.

Personal Property Exemption—"Old Debt."

1. The personal property exemption against a debt contracted in 1860 is only such as was secured to the debtor by the law existing at the date of the contract, viz: Rev. Code, ch. 45, §§ 7, 8.
2. The exemption law as applicable to debts contracted at different times discussed and explained by ASHE, J.

(*Earle* v. *Hardie*, 80 N. C., 177; *Gamble* v. *Rhyne*, *Id.*, 183, cited and approved.)

APPLICATION for *Mandamus* heard at Spring Term, 1879, of IREDELL Superior Court, before *Graves*, *J.*

Refused and plaintiff appealed.

Messrs. J. M. McCorkle and *A. W. Haywood*, for plaintiff.

Defendant not represented in this court.

ASHE, J. At a superior court held for the county of Iredell on the first day of April, 1872, the plaintiff recovered a judgment against W. M. Campbell for the sum of one thousand and seventy-one dollars and four cents, and costs of action, and at spring term, 1879, of said court a writ of *fieri facias* was issued on the judgment to the defendant as sheriff of Iredell county, who on the 28th day of May, 1879, levied the same on two cows, one horse, one wagon, three hogs, one set of one-horse wagon harness, one buggy and harness, two ploughs, three hoes, three forks, one rake, one set of plough harness, one saddle and bridle, one watch and chain, two axes, one medical library and one medical pouch, and refused to sell the same. Whereupon this action was instituted against him to compel him by writ of *mandamus* to proceed to sell the property levied on.

The complaint sets forth the facts as above stated, and

the defendant in his answer admits the allegations of the complaint, but contends that the defendant (in the execution) claimed his exemptions and under the advice of counsel he had appraisers summoned and sworn who laid off and set apart to the defendant all the property levied on, and made report of their actings in due form.

The sheriff was misadvised. This being an old debt contracted in 1860, the defendant was not entitled to the exemption of five hundred dollars guaranteed by the constitution, but only such exemption as was secured to him by the law existing at the date of the contract. *Earle* v. *Hardie*, 80 N. C., 177; *Gamble* v. *Rhyne*, *Ibid*, 183.

The only law on that subject then existing was the act of 1848 (sections 7 and 8, of chapter 45 of the Revised Code) which exempted absolutely the wearing apparel, working tools, arms for muster, one wheel and two pair of cards, one loom, one bible and testament, one hymn book, one prayer book and all necessary school books; and in addition thereto, on debts contracted since the first day of July, 1845, the following property, provided the same shall have been set apart before seizure, to wit, one cow and calf, ten bushels of corn or wheat, fifty pounds of bacon, beef or pork, or one barrel of fish, all necessary farming tools for one laborer, one bed and bedstead and covering for every two members of the family, and such other property as the freeholders, appointed for that purpose, may deem necessary for the comfort and support of such debtor's family; such other property not to exceed in value the sum of fifty dollars at cash valuation, and whenever any such person, or his wife in his absence, may desire to have the benefit of the preceding section, he shall apply to some justice of the county in which he resides, who shall appoint three respectable freeholders disinterested and unconnected with the party to lay off and assign to such person the property to which he may be entitled under said section; and they shall immediately

make out a full and fair list thereof, and return the same to the clerk of the court of pleas and quarter sessions for that county, who shall file the same among the records of his office.

The act of 1879, (ch. 88 and ch. 256) re-enacts and amends the acts of 1848 and 1867, but blends their provisions in such manner that to determine what exemptions against an execution a defendant is entitled to, reference must be had to the original acts; for if the debt was contracted before the adoption of the constitution of 1868 and after the act of 1867, he is entitled to the exemptions under that act, but if before the act of 1867 and after the act of 1848, (Revised Code, ch. 45, §§ 7, 8,) then he has the right to claim the exemptions provided by that act. But when the legislature undertakes by the act of 1879 to give greater exemptions than is provided by the act of 1848, on a debt contracted before the act of 1867, it is to the extent of the excess in violation of article one, section ten of the constitution of the United States, which inhibits the impairing of the obligation of contracts.

We think the proper construction of the act of 1879, so far as it relates to exemptions provided by the act of 1848 against debts contracted after its date, is that they shall be laid off upon the application of the owner, his agent or attorney, or his wife in his absence, in the manner prescribed in section 12, of chapter 55, of Battle's Revisal. But as the appraisers appointed by the sheriff are restricted in their allotment to the exemptions given by the act of 1848, when the debt was created before the act of 1867, they must lay off and allot to the debtor, if the head of the family or householder, such articles as are enumerated in that act, (Revised Code, ch. 45, § 8,) and such other articles as he may possess, which they may deem necessary for the comfort and support of his family not to exceed fifty dollars in value. With the wearing apparel, working tools and other articles enumerated in section 7 of that chapter, they have nothing to do in

making the allotment. They are absolutely exempted by the act.

The sheriff in our case proceeded according to law to summon appraisers to lay off and allot to the defendant the exemption to which he was entitled, but the appraisers seem to have misunderstood their duty, and greatly exceeded their powers. Besides the wearing apparel and other articles absolutely exempted and valued by them at eighty dollars, and one cow, the only article mentioned in section eight, and valued by them at about twelve dollars, they set apart to the defendant property to the value of more than two hundred and fifty dollars, when they had no authority to exceed the value of fifty dollars. The allotment was made upon a wrong principle and was therefore void, and the sheriff should have so treated it and have summoned other appraisers to lay off and set apart the exemption according to law.

There is error in the judgment of the court below, and it must be reversed. Let this be certified to the superior court of Iredell county, that a writ of *mandamus* may be issued to Thomas A. Watts, sheriff of said county, commanding him to proceed to sell the property of W. M. Campbell levied on by him by virtue of the execution heretofore issued to him in favor of the plaintiff against the said Campbell under such writ of *venditioni exponas* as may come to his hands, or so much of said property as shall remain after the exemptions to which the defendant in the execution is entitled under the Revised Code, ch. 45, § 8, shall be set apart and allotted to him in pursuance of the provisions of section 12, chapter 55 of Battle's Revisal.

Error. Reversed.

JAMES W. GRANT, Adm'r, and others v. W. H. HUGHES, Ex'r, and others.

Widow—Year's Support—Liability to sale under Execution—Personal Property Exemptions.

1. Personal property allotted to a widow as her year's support is subject to seizure and sale under an execution issued upon a judgment recovered against her deceased husband in his life time, tested before his death but issued thereafter.
2. Only the articles enumerated in Rev. Code, ch. 45, § 7, are exempt from sale under an execution issued upon a judgment for a debt contracted prior to January, 1865, the debtor not having secured the benefit of the exemptions under the provisions of sections 8 and 9.

(*Jones* v. *Judkins*, 4 Dev. & Bat., 454; *Williamson* v. *James*, 10 Ired., 162; *McCarson* v. *Richardson*, 1 Dev. & Bat., 561; *Aycock* v. *Harrison*, 65 N. C., 8; *Alston* v. *Foster*, 1 Dev. Eq., 337; *Hostler* v. *Smith*, 2 Hay., 305; *Bayner* v. *Robertson*, 3 Dev., 437, cited, distinguished and approved.)

CIVIL ACTION, tried at Fall Term, 1879, of NORTHAMPTON Superior Court, before *Avery, J.*

Case agreed: At fall term, 1869, of said court, the defendant Hughes, as executor of William M. Crocker, obtained judgment against Lewis B. Hill, the plaintiff's intestate, for about one thousand dollars. The debt on which the judgment was based was contracted prior to January, 1865. Executions were regularly issued thereon according to law, and the same kept alive. Hill died on the 12th of November, 1878, and the plaintiff, Grant, qualified as his administrator on the 2d of December following.

On the 30th of December, 1878, execution issued on the judgment tested as of fall term, 1878, (the court being held September 30, 1878), and went into the sheriff's hands on the said 30th of December, returnable to spring term, 1879.

On or about the 2d of December, 1878, the plaintiff administrator took possession of all the personal estate of his

intestate, Hill, and advertised to sell the same on the 30th of December following.

On the 11th of December, 1878, sundry articles of personal property were set apart to the widow of the intestate, of the value of $214.06, and a deficiency in money of $185 90, amounting in the aggregate to $400.

On the 30th of December, 1878, the sheriff (who is also a defendant in this case) under the instructions of the defendant executor and by virtue of the execution issued as aforesaid, levied on, seized and sold all the personal property belonging to the plaintiff's intestate, and realized the sum of $483.25.

There were also other debts against the said intestate, Hill, and during his lifetime he did not have any of said property set apart to him under section 7, chapter 45, of the Revised Code, to exempt the same from execution.

If the court shall be of opinion that the seizure and sale by the sheriff were authorized by law, then judgment of nonsuit shall be entered against the plaintiffs; but if not, then judgment is to be entered for the plaintiff widow for the return of said property, or four hundred dollars in lieu thereof, with interest, &c. Thereupon the court gave judgment for plaintiffs and the defendants appealed.

Messrs. Thos. W. Mason and *J. B. Batchelor*, for plaintiffs.
Mr. R. B. Peebles, for defendants.

SMITH, C. J. It has been repeatedly adjudged that at common law a writ of *fieri facias* when issued bound the goods of the debtor, which were liable to seizure and sale, from its *teste*, and prevented him from selling or assigning them; while the lien attached to equitable interests only from the time of issue. *Jones* v. *Judkins*, 4 Dev. & Bat., 454; *Williamson* v. *James*, 10 Ired., 162. By statute the writ when issued

by a justice of the peace had such effect from the levy and not from the *teste*. Rev. Code, ch. 45, § 20.

In the construction of this statute it was held that, as to the defendant himself and his representatives, the common law remained unaltered, and "that the goods and chattels are as to them still bound from the *teste* of the execution," and DANIEL, J., adds: "Although the defendant in the execution died before the levy, the officer might go on notwithstanding and levy on the goods in the hands of the executor or administrator and sell, and the purchaser acquired a good title." *McCarson* v. *Richardson*, 1 Dev. & Bat., 561.

By the act of April 9th, 1868, amendatory of section 261 of the Code, a similar and more explicit restriction is put upon all writs of *fieri facias*, and it is enacted that "no execution against the property of the judgment debtor shall be a lien on the personal property of such debtor as against any *bona fide* purchaser from him for value or as against any other execution, except from its levy." Acts 1868-'69, ch. 148.

In *Aycock* v. *Harrison*, 65 N. C., 8, on a motion to set aside an execution levied on land, READE, J., thus lays down the general doctrine: "When there is a judgment, and a *fieri facias*, or *venditioni exponas* issues during the life of the defendant, the sheriff may proceed to sell, although the defendant die before the sale. And so he may when the *fieri facias or venditioni exponas issues after the death but is tested before.*"

In the case first cited the execution was in the hands of the officer during the life time of the debtor, but if it issues afterwards and its *teste* overreaches his death, it has the same effect and conveys equal authority to the officer, as a few references will show.

In *Vaughan* v. *Langmead*, 1 Bos. & Peel, 571, the facts were these: The judgment was entered May 23, and the debtor died May 29. The execution, bearing teste before the death, was issued two days thereafter and levied on the goods of

the decedent. A motion to set aside the *fieri facias* was denied, and the court said that with respect to the creditors, though the property in the hands of the deceased was not bound till the delivery of the writ to the sheriff, yet the right of the creditor to pursue that property till the delivery of the writ would not make this execution irregular.

In *Dokin* v. *Cartright*, in note at foot of page 572, same volume, it is declared that though a judgment in respect of purchasers binds only from the signing, yet as to the *party and his representatives*, it binds as it did before at common law." "Goods in the hands of an executor may be taken on a *fi. fa.* against his testator, bearing *teste* before his death." *Watson, Sh'ff*, 7 Law Lib., 175.

In *Graham* v. *Wilson*, 5 Harr., (Del.) 435, the judgment was rendered March 11, 1854, as of November Term, 1853; the intestate died March 11, 1854; and execution issued March 23, tested December 14 preceding, and was levied upon property which the administrator had taken into possession and advertised for sale. The court say: "By the common law the judgment had relation to the term and the execution to its *teste*, and it bound the goods of the defendant who died after the *teste* and before the next term, in the hands of the *executor or anybody else.*"

The two cases cited and mainly relied on in the argument of *Mr. Mason* (*Alston* v. *Foster*, 1 Dev. Eq., 337, and *Simpson* v. *Brice*, 5 Mum., (Va.) 175,) do not sustain his proposition that the attaching lien does not follow the debtor's property into the hands of his widow when assigned for her year's support. In both cases the judgments were not against the debtor but against his personal representative, and executions issued in the usual form against the goods and chattels that were of the deceased in the hands of his executor, and it is held that the officer could not seize and sell the property which had been delivered over to a legatee or person entitled, for the reason assigned by HENDERSON, C. J.,

"the negroes not being the estate of Hill *in the hands of his executor.*" See also *Hostler* v. *Smith*, 2 Hay., 305, and *Bayner* v. *Robertson*, 3 Dev., 437, to same effect.

The present case is clearly distinguishable, since here the execution issues on a personal judgment against the deceased debtor's own property, and by relation binds it from a time antecedent to his death. The widow takes the articles allotted to her as a claimant preferred by law to all creditors, but subject to the liens resting upon them as they came into possession of the administrator of her husband.

It is insisted further that the goods being less in value than five hundred dollars were exempt from execution and did not become liable until the death of Hill and then the superior right of the widow attaches and prevails.

It is true no goods of the debtor are bound by an execution under which they could not be taken, by reason of a legal exemption, and it would be an interesting inquiry, if both the claims to the year's support and to have satisfaction of the creditor's execution from the debtor's property sprang into existence at the same moment, which, if either, should have priority. But the question does not arise. The articles were not exempt. The debt was created in 1865, when only the few articles enumerated in Rev. Code, ch. 45, §§ 7 and 8, were protected, and except the few articles mentioned in section 7, none of which so far as the case discloses were among those assigned to the widow, the benefit of the exemptions contained in section 8 could be secured only by application to a justice and in the mode pointed out in section 9. The intestate in his life-time could have had these exemptions allowed him and the property placed beyond the reach of execution. But he failed to do so, and hence the property subject to sale for the plaintiff's debt during the debtor's life, continued liable after his death.

It must therefore be declared there is error in the judgment and the same is reversed, and judgment as of nonsuit

will be entered here according to the terms of the case agreed, and it is so ordered.

Error. Reversed and judgment here.

DAVID MURPHY v. AARON MCNEILL.

Homestead—Jurisdiction in foreclosure proceedings—Equity.

1. Where a marriage took place in 1852, and land acquired by the husband since the adoption of the constitution of '68 was mortgaged to secure a debt without the concurrence of the wife, it being his only real estate; *Held*, that the plaintiff in an action for that purpose is entitled to a decree of foreclosure and sale of the land charged with the homestead encumbrance.

2 The superior court has jurisdiction of an action to foreclose a mortgage although the debt secured is less than two hundred dollars. The action is not founded on the contract merely, but on an equity growing out of the relation of mortgagor and mortgagee.

(*Jenkins* v. *Bobbitt*, 77 N. C., 385; *Lambert* v. *Kinnery*, 74 N. C., 348; *Beavan* v. *Speed*, *Id.*, 544; *Bank* v. *Green*, 78 N. C., 247; *Gheen* v. *Summey*, 80 N. C., 187; *Bruce* v. *Strickland*, 81 N. C., 267, cited and approved.)

CIVIL ACTION tried at Fall Term, 1879, of CUMBERLAND Superior Court, before *Seymour, J.*

The complaint states that on the 19th of October, 1874, the defendant executed a mortgage conveying the land in dispute to the plaintiff to secure the payment of the sum of eighty-five dollars with interest from April, 1873, which he owed plaintiff; that defendant failed to pay the same according to the terms specified in the deed, except the sum of about thirty-five dollars, and that plaintiff has repeatedly demanded payment of the balance due; that plaintiff is entitled to the possession of said land, and defendant unlaw-

fully withholds the same from plaintiff. Wherefore plaintiff demands judgment for possession; that an account be taken to ascertain the sum now due from defendant; that in default of payment thereof a commissioner be appointed to sell the land under direction of the court and apply the proceeds to said debt.

The execution of the deed is admitted in the answer, and also that only thirty-five dollars has been paid on the debt, but defendant denies that plaintiff is entitled to the possession; and he alleges that he acquired the land since the adoption of the constitution of '68, viz.: on the 26th of September, 1871, and on the day when he executed the mortgage as alleged, he did not own any other real estate except that contained therein, which is not worth one thousand dollars, being valued by the tax assessor at only one hundred and fifty dollars; that he has acquired no other real estate since that date; that defendant was a married man on the day said mortgage was executed, but his wife did not sign the deed or signify her voluntary assent thereto on her privy examination according to law, and on that account he is advised that said deed does not operate to pass the title to said land so as to entitle the plaintiff to the possession or any other relief demanded in his complaint. For a further defence, the defendant says that the cause of action is founded upon a contract, to-wit, a mortgage debt, of which only fifty dollars principal money is due as claimed by the plaintiff, and he is advised that the superior court has no jurisdiction of the action.

A jury trial was waived and the court found the following facts: Defendant acquired the land in controversy in 1871, defendant and his wife were married in 1852, the mortgage was executed in 1874, the wife of the defendant is still living, and the facts set forth in the answer were admitted to be true. Whereupon the court granted a decree of foreclosure in accordance with demand of plaintiff and

the defendant appealed. The judge stated that his decision was based upon a newspaper report of the case of *Bruce* v. *Strickland*, 81 N. C., 267.

Messrs. McRae & Broadfoot, for plaintiff.
Messrs. Guthrie & Carr, for defendant.

SMITH, C. J. The defendant purchased the land described in the complaint in September, 1871, and in October, 1874, mortgaged the same to the plaintiff to secure a debt of eighty-five dollars with interest from April, 1873, on whichthe sum of twenty-five dollars has been paid. The defendant was married in the year 1852, and his wife, who is still living, did not unite with her husband in executing the deed. The relief demanded in the action is a surrender of possession, a reference to ascertain what is due the plaintiff, and a decree of foreclosure and sale. The only defences set up in the answer are: first, that the land being the only real estate owned by the defendant and of the value of one hundred and fifty dollars only, he is entitled to a homestead therein notwithstanding the conveyance; and secondly, that the subject matter of the suit is cognizable before a justice of the peace and the superior court has no jurisdiction.

1. The land having been acquired since the adoption of the constitution, (1868) and the enactment of the law to carry into effect its provisions for a limited exemption of the debtor's property, is subject to the homestead, and the deed made without the wife's assent, is inoperative to defeat th right thereto. In *Jenkins* v. *Bobbitt*, 77 N. C., 385, it is held that the husband's deed, without the wife's concurrence, is effectual in passing what is called his estate in reversion, or in other words, the land itself subject to the burden or incumbrance of the homestead, as defined in the constitution and that the title to this can only be divested in the mode

therein pointed out. *Lambert* v. *Kennery*, 74 N. C., 348; *Beavan* v. *Speed*, *Id.*, 544. The right to the homestead exists by virtue of positive law, and the laying it off by metes and bounds is only necessary in ascertaining if there be any, and the extent of the excess which may be appropriated to the demands of creditors. *Lambert* v. *Kinnery*, *supra*; *Bank* v. *Green*, 78 N. C., 247; *Gheen* v. *Summey*, 80 N. C., 187. It follows therefore that while the plaintiff cannot deprive the defendant of the possession of the land, he is entitled to a decree of foreclosure and sale of the land charged with the homestead incumbrance.

2. We are unable to see the force of the objection to the jurisdiction. The action is not founded on the contract merely, but on an equity growing out of the relation of mortgagor and mortgagee to have the mortgaged premises, in case of default, sold for the satisfaction of the secured debt. It is a novel suggestion that the enforcement of such an equity falls within the jurisdiction of a justice, because the sum secured in action on the contract to pay would be cognizable before him.

The judge who tried the cause in the court below, in rendering judgment seems to have been misled by an incorrect report of the opinion in *Bruce* v. *Strickland*, 81 N. C., 267. That case simply decides that rights of property vested in the husband previous to the homestead law could not be taken from him without his consent, and as *he had an unimpaired title* so his deed would convey it in the same plight.

There is error in the judgment of the superior court, and it must be reformed in accordance with this opinion; and this will be certified to the end that further proceedings be had therein agreeably to law.

Error. Judgment modified.

JOHN T. GREGORY Executor, v. BENJAMIN F. ELLIS and others.

Jurisdiction—Wills, probate of—Executors.

1. The rule that no judge shall exercise his powers as such in a case in which he is interested is of universal application; *Hence* where the probate judge of Halifax county undertook to pass upon a petition filed by himself as executor for license to sell land for assets, and the judge of the superior court dismissed the proceeding; *Held* to be no error.
2. Where a testator appointed the probate judge of his county his executor, and the probate of the will was had in an adjoining county by order of the judge of the superior court, the probate judge of the latter county thereby acquires jurisdiction to hear and determine all other proceedings necessary to a final administration of the estate.

(Jurisdiction of judges of probate under Bat. Rev., ch. 90, discussed by DILLARD, J.)

SPECIAL PROCEEDING to sell Land for Assets commenced in the probate court of HALIFAX on the 15th of December, 1879, and heard at Chambers before *Seymour, J.*

The plaintiff is clerk of the superior court and probate judge of Halifax county, and as executor of his testator filed a petition in said probate court to sell land for assets to pay debts. The defendants moved to dismiss the proceeding, for that, the plaintiff being the judge of the court had no jurisdiction to hear a case in which he was interested. The motion was overruled and the defendants appealed to the judge of the superior court who reversed the decision and allowed the motion, from which ruling the plaintiff appealed.

Messrs. Mullen & Moore, for plaintiff.
Mr. Thos. N. Hill, for defendants.

DILLARD, J. George W. Owens domiciled in Halifax county, left at his death a will, wherein John T. Gregory was named

the executor, and being under disqualification to act as probate judge in the matter of the proving and admitting the will to record, by order of the judge of the district the probate was had before the probate judge of the adjacent county of Northampton.

Afterwards in the course of the administration of the estate, the plaintiff as executor presented a petition for license to sell land for assets to pay debts in the probate court of Halifax of which he was the judge, and from the ruling of the plaintiff acting as probate judge on the objection to his competency to decree a sale, an appeal was taken to the superior court and from the judgment of the superior court an appeal is taken to this court.

The point presented by this appeal is as to the jurisdiction of John T. Gregory in his character as probate judge to decree upon the petition of himself as executor praying a license to sell the lands of his testator.

Under the fundamental maxim that no one ought to be judge in his own cause, if we had no statute law upon the subject, no judge whether probate or other could take jurisdiction of any cause wherein he was a party or otherwise had a pecuniary interest. This principle is of universal application as a rule of the common law and subject thereto must be the exercise of all the powers of a judge. Broom's Legal Maxims, 118; 1 Hopkins Ch. Rep., 1; 2 Strange's Rep., 1,173.

In accordance with this principle, in every grant of jurisdiction, it is always to be understood that the powers conferred are limited by the tacit exception that the judge is not to decide his own cause. This rests on the policy of having the judicial tribunals free from every temptation to wrong as far as may be possible and to have its decisions above suspicion, and such as to command respect. So sacred is this exclusion of jurisdiction in causes where the same person is suitor and judge, that by common consent no judge

can, if he would, act in a cause in which he is interested; and if he do, that his judgments ought not to stand, and any statute in terms conferring the power to act in such cases would be void. Cooley Const. Lim., 175; Hobart's Reports, 212.

In the view taken by us of the point presented for our determination, it is not necessary that we inquire and decide in this case whether this inflexible principle in its extent embraces the proposed exercise of jurisdiction by the probate judge of Halifax county, as we are of opinion that the statutes on the subject of the probate of wills in connection with others *in pari materia* settle the question as ruled by His Honor in the court below.

In Bat. Rev., ch. 90, § 2, the jurisdiction of a judge of probate is defined, and among the powers granted is the power to take proof of wills and grant letters testamentary or of administration, and in section three of the same chapter a prohibition to act as such is put on him in relation to any estate or proceeding in the following among other specified instances: He is disqualified to act if he has or claims to have an interest by distribution, by will, or as creditor or otherwise, and by the 4th sub-division of section three, he is disqualified if he or his wife is named executor or trustee in any testamentary or other paper, with a cessation of the disqualification in the case when the will or other paper is admitted to or refused probate in another probate court, or before the judge of the superior court.

Taking sub-division 4 of section three in connection with sub-division 1 of the same section, the removal of the disqualification on probate had in another probate court, or before the judge of the superior court, is to be taken as restricted and limited by the disqualifying causes of interest as distributee, legatee or *otherwise* as expressed in the 1st sub-division. It cannot be that probate of a will in another court in case the probate judge is the executor, will render

him competent to act in all proceedings ulterior to the probate of the will in case he be interested as legatee or as a creditor. If it be so held, then the probate before another probate judge will let in the executor to make and pass upon all his annual returns, on all applications for license to sell real estate, and finally to audit and settle his final account; and thus the prohibition to act as provided in the statute will be completely nullified and the executor will be at liberty to adjudicate on a matter of interest to himself contrary to the maxim of the common law and the express provision of subdivision 1 of section three.

To show that our construction of the statute in question is correct, we will call attention to the fact that in subdivision 6 of section three, it is provided that in case of the probate of a will and qualification of an executor *before his election* to the office of probate judge, all the proceedings are to be had before the judge of the superior court. And yet if the construction contended for by the plaintiff in this case be true, he having become executor *after his election* was disabled to act as probate judge only in the matter of probating the will and in no ulterior proceeding. No reason occurs to us why a disqualification for interest should exist when the probate judge became executor before his election and not when he became executor after his election. In this case it is true the plaintiff does not appear to have any interest as distributee, legatee, or as creditor, but he has the interest of commissions and also in the fact of putting on the record his accounts audited by himself, having the legal effect of *prima facie* evidence of correctness as prescribed in C. C. P., § 478. We hold therefore that by statute, the will having been probated in the probate court of Northampton by order of the judge of the superior court, the plaintiff did not thereupon become competent to decree as probate judge on his petition as executor for a license to sell land.

This construction in our opinion does not deprive the

plaintiff of all remedy to have the license prayed for. The prohibition to act as probate judge when interested extends as we have seen to any act *in relation to the estate* and by subdivision 5 of section three, chapter 90, authority is given the judge of the superior court in such cases to remove the proceedings to the probate judge of an adjoining county in the same district. The order of the judge in the case of the probate of the will of plaintiff's testator had the effect not only to remove the probate of the will to the probate court of Northampton county, but also to draw to it jurisdiction to hear and decree upon plaintiff's petition for license to sell, and also all accountings, the final settlement, and application of the estate according to the will.

There is no error. The judgment of the superior court is affirmed and this will be certified to the end that proceedings may be had for the sale of land for assets in conformity to this opinion.

No error. Affirmed.

JAMES H. WAHAB and wife v. WILLIAM B. SMITH.

Probate Court—Jurisdiction—Special Proceedings.

The probate court, and not the superior court at term, has jurisdiction under section 422 of the code to correct a mistake in partition proceedings in which there is no peculiar equitable ingredient.

(*Jarman* v. *Saunders*, 64 N. C., 367; *Hyman* v. *Jarnigan*, 65 N. C., 96; *Blythe* v. *Hoots*, 72 N. C., 575; *Shearin* v. *Hunter*, *Id.*, 493; *Lovinier* v. *Pearce*, 70 N. C., 167; *Oliver* v. *Wiley*, 75 N. C., 320; *Johnson* v. *Jones*, *Id.*, 206; *Gulley* v. *Macy*, 81 N. C., 356, cited, distinguished and approved.)

CIVIL ACTION tried at Fall Term, 1879, of HYDE Superior Court, before *Gudger, J.*

The defendant demurred to the complaint upon the ground that the superior court had no jurisdiction. The demurrer was sustained and the plaintiffs appealed.

Messrs Gilliam & Gatling, for plaintiffs.
Mr. Jas. E. Shepherd for defendant.

DILLARD, J. The feme plaintiffs, Emma, Desdemona and Laura Smith, were tenants in common with defendant of the tract of land described in the complaint; being entitled, the said Emma, Desdemona and Laura each to one-sixth, and the defendant to three-sixths or one-half; and by proceedings in the probate court, partition of said land was made and concluded according to the several interests or shares therein. After partition was fully accomplished as aforesaid, the male plaintiff acquired by purchase and conveyance the shares allotted to Desdemona and Laura, and thereby he and his wife together became entitled to one-half of the tract, and thereupon the present action was brought returnable to the superior court at term.

The case made by the complaint is, that in the proceedings for partition the commissioners appointed for that purpose made the division by carving out three separate sixth parts and assigning the same to the feme plaintiff and to Desdemona and Laura, and appropriating the residue, being one-half, to the defendant; and it is averred that the partition was by mistake made of the tract on the supposition that the area contained one hundred and twenty-six acres, whereas in point of fact it contained one hundred and and forty-five acres. That by this means the plaintiffs have failed to get their shares in the tract, and the defendant has more than his one-half interest by nineteen acres, which ought to have been taken into the estimate by the commis-

sioners, but was not. Plaintiffs allege that the surveyor and commissioners acknowledge their error and are willing to rectify it, but the defendant refuses to assent to the correction; and they conclude their complaint with the specific prayer that the mistake may be corrected and that they may be allowed one-half in value of the whole tract, and to this end, that it be referred to the former commissioners to correct the error in their report, and that the partition when corrected may be established and made final by the judgment of the court.

To the complaint, the defendant interposes a demurrer on the ground specially assigned, that the superior court has no jurisdiction of the matter, and on the argument the judge of the court below sustained the demurrer and dismissed the action, and from this judgment the appeal is taken.

On the calling of the appeal for trial in this court, we were not favored with an argument in support of the jurisdiction of the action by the superior court, but the case is submitted with an intimation of impression against the jurisdiction, and therefore it is, that we do not give to the point made such a full investigation as we otherwise might have done, but on such consideration as we have been able to give to the subject, it seems to us that the demurrer was well taken, and that there is no error in sustaining the same.

By chapter 84 of Battle's Revisal, a petition for partition is a special proceeding and is within the original jurisdiction of the probate court. Taking the facts stated in the complaint to be true, it appears that the proceedings had for partition between the plaintiffs, and those they represent, and the defendant, were had in the proper court and were regularly conducted through all the stages—of decree of partition, partition reported, and confirmation of report.

By section 422 of the code of civil procedure, in the enu-

meration of powers conferred on the probate court, power is expressly given to the probate judge " to open, vacate, modify, set aside or enter, as of a former time, decrees or orders of his court in the same manner as courts of general jurisdiction."

From these provisions of the law, if any mistake was made in the partition to the detriment of the plaintiffs as alleged, it would seem clear that there is a power of correction in the same court in which the mistake was made. To the probate judge is given power to deal with decrees and orders in a cause *"in the same manner as courts of general jurisdiction."*

Under our former system of courts of law and courts of equity, the judgment of a court of law regularly entered, was in the breast of the court, and alterable at any time during the term at which it was rendered, and if not so altered it could not be afterwards interfered with in the same court. But under our present system, the courts of probate as well as the superior courts, within the sphere of their respective powers, exercise the jurisdiction of both a court of law and a court of equity. From this union of powers, it results, that although the partition proceedings were finished, the probate court was authorized by the appropriate proceeding in the cause to hear complaint of the alleged mistake and to deal with the final and other decrees in the cause in the manner of other courts of general jurisdiction, as the justice of the cause might require. In the superior courts, being courts of general jurisdiction, after the regular rendition of judgment in a cause and the term is ended, it is competent to set aside or otherwise relieve against it at a subsequent term for any sufficient cause which by accident or fraud was not availed of before its rendition. And it is settled that the manner of the exercise of such jurisdiction is by petition in the cause and not by a new and independent suit. *Jarman* v. *Saunders*, 64 N. C., 367. In this man-

ner, power is given to the probate judges to deal with decrees and orders in their courts, and such has been uniformly the practice as will appear in divers cases: In *Hyman* v. *Jarnigan*, 65 N. C., 96, after the sale of the land for assets and the cause ended, the heirs moved in the superior court to set aside the sale on the ground of inadequacy of the price, and that court overruled the motion on the ground that the matter was cognizable in the probate court, and the ruling was affirmed in this court. In *Blythe* v. *Hoots*, 72 N. C., 575, after final decree and execution thereof, one of the executors was entertained in the probate court on petition to move to set aside the orders in the cause, and on appeal to this court it was held proper. And to the same effect are *Shearin* v. *Hunter*, 72 N. C., 493; *Lovinier* v. *Pearce*, 70 N. C., 167, and other cases.

It is true there are some cases in which the remedy, by motion in the original cause, in the probate court, was not required to be resorted to, and the actions brought to the superior court were retained and proceeded with to judgment, but such cases, on examination, will be found to contain peculiar equitable ingredients, such as the enforcement of a trust by contract, the declaring and enforcing trusts arising *ex delicto*, and relief sought by a person not a party to the special proceeding. *Oliver* v. *Wiley*, 75 N. C., 320; *Johnson* v. *Jones*, *Id.*, 206; *Gulley* v. *Macy*, 81 N. C., 356.

Manifestly, this action of the plaintiffs shows forth no special ground for jurisdiction in the superior court. Theirs is a case between the same parties in relation to the same subject matter, and the injury (if any was sustained in the partition) consisted merely in a mistake in the report of the commissioners, for the correction of which ample powers have been conferred on the probate court. We are of opinion there is no error in the judgment of the court below on the demurrer, and the same is affirmed.

No error. Affirmed.

ELIJAH HEWLETT *v.* JAMES W. SCHENCK, JR, and others.

Statute of Limitations—Action on Sheriff's Bond.

The bar of the statute of limitations (in an action upon a sheriff's bond for failure to pay over county taxes) is not removed by the fact that one of the sureties paid a part of the sum due on an agreement with the chairman of the board of commissioners that thereby he should be relieved from further liability.

(*Taylor* v. *Spivey*, 11 Ired, 427; *Brannock* v *Bushinell*, 4 Jones, 33; *Morrison* v. *Morrison*, 3 Dev. 402; *Governor* v. *Hanrahan*, 4 Hawks, 44; *McKenzie* v. *Culbreth*, 66 N. C., 534; *Bryan* v. *Foy*, 69 N. C, 45; *Mitchell* v. *Sawyer*, 71 N. C., 70; *Smith* v. *Leeper*, 10 Ired., 86, cited and approved.)

CIVIL ACTION tried at Spring Term, 1879, of NEW HANOVER Superior Court, before *Seymour, J.*

This action was brought by the state on the relation of the plaintiff, as treasurer of New Hanover county, against the defendant sheriff and the sureties upon his official bonds, to recover damages for his failure to account for and pay over certain taxes. Upon the plaintiff's own showing as evidenced by the facts set out in the opinion of this court, the judge below intimated that the plaintiff could not recover, and thereupon he took a nonsuit and appealed.

Mr. B. R. Moore, for plaintiff.

Messrs. D. J. Devane and *Stedman & Latimer*, for defendants.

SMITH, C. J. The only point presented for decision in this appeal arises on the defence under the statute of limitations. The action commenced on the 25th day of October, 1878, against the sureties to the sheriff's official bonds for the collection of county taxes, is to recover damages for his failure to pay over the taxes collected for the year 1871,

and the breach occurred on the 8th day of January 1872. The plaintiff, to repel the defence, relies on the facts set out in the evidence of the defendant, Hart. He testifies that in June, 1873, he paid to the county treasurer the sum of one thousand dollars in excess of his proportionate part of the amount of the default in an apportionment among the co-sureties in pursuance of an agreement with the chairman of the board of county commissioners, that he should be thereby released from further liability and not required to pay more. The error assigned is in the ruling of the court that the facts proved did not operate to remove the statutory bar and the plaintiff could not recover.

The action is on the several bonds set out in the complaint, executed by James W. Schenck, Jr., on his election as sheriff of New Hanover, for two successive terms, against the defendants, his sureties on one or more of them, and it is contended that the effect of the partial payment is to restore the liability on the bonds, otherwise lost by the lapse of time, against all the defendants, and at least against him who made the payment. In our opinion the proposition is not sustained by precedent or authority.

A new and distinct promise to pay a debt due on a justice's judgment does not revive the cause of action founded thereon. *Taylor* v. *Spivey*, 11 Ired., 427. Nor will it have that effect in an action of debt on an unsealed note. *Brannock* v. *Bushinell*, 4 Jones 33, following the previous case of *Morrison* v. *Morrison*, 3 Dev., 402. The principle applies with equal force to bonds, now that they are subject to the statute of limitations, and especially to official bonds. C. C. P. §§ 31, 33, 34. *Govenor* v. *Hanrahan*, 4 Hawk, 44.

So a partial payment, though the evidence need not be in writing, being *an act* and not a mere declaration revives the liability because it is deemed a recognition of it and an assumption anew of the balance due. But if at the time such payment is made the presumption arising

from the unexplained fact is disproved by the attending circumstances or other sufficient evidence of a contrary intent, the payment will not have such effect. Here not only can no inference of such intention be inferred but there was an express agreement that Hart was not to be held responsible for the residue of his principal's defalcation, and the payment is made upon that understanding. While the chairman had no authority to enter into such an engagement, and if he had, it would be inoperative for want of a consideration as is held in *McKenzie* v. *Culbreth*, 66 N. C., 534; *Bryan* v. *Foy*, 69 N. C., 45, and *Mitchell* v. *Sawyer*, 71 N. C., 70. The evidence is competent and sufficient to repel the presumption of intention to assume the entire debt. *Smith* v. *Leeper*, 10 Ired., 86; Angel on Limitations 211, *et seq.* note, and numerous other cases cited for the defendants from reports in other states.

There is no error in the ruling of the court and the judgment must be affirmed.

No error. Affirmed.

F. D. KOONCE v. J. J. PELLETIER and others.

Recordari—Appeal from Justice's Court.

1. On petition for writ of *recordari* it appeared that the petitioner was one of the defendants against whom judgment was recovered in a justice's court, and lived in a county other than that of the justice forty miles from the place of trial; that he was making preparations to attend the trial but failed to do so and lost his appeal by reason of sickness and his consequent inability to procure the services of an agent to represent him; *Held*, a proper case for the aid of remedial process and error in the judge to refuse the writ, though there be no evidence of efforts made to get an agent.

2. Under the circumstances of this case a delay of three months in ap-

plying for the writ will not deprive the petitioner of its benefit, as no damage thereby accrues to plaintiff; nor will the denial of the first application furnish ground for a refusal of the writ upon an amended affidavit containing an additional and material fact.

(*Baker* v. *Halstead*, Busb. 41; *Elliott* v. *Jordan*, *Id.*, 298; *Jones* v. *Thorne*, 80 N. C., 72; *Bond* v. *McNider*, 3 Ired., 440, cited, distinguished and approved.)

PETITION for *Recordari* heard at Chambers in ONSLOW county, on the 30th of April, 1879, before *Seymour, J.*

Defendant appealed from the ruling below.

Messrs. Green & Stevenson, for plaintiff.

Messrs. H. R. Bryan and *A. G. Hubbard*, for defendant.

SMITH, C. J. The defendant with other persons was cited by a summons issued by a justice of the peace in Onslow county to the county of Carteret, where the defendant resided, to appear before him and answer the plaintiff's complaint for money due on a note under seal. The summons was served on December 7th, 1878, and was made returnable on the 17th day of the month, and endorsed thereon by direction of the defendant were the words: "J. J. Pelletier pleads bankrupt relief." The defendant not appearing at the trial, the cause was continued as to him until December 31st, and judgment rendered against the others. The defendant also failed to appear at the postponed day of trial, and the allegation of the discharge in bankruptcy being denied, judgment was then entered against him for the amount due on the note.

On March 28th, 1879, the defendant applied to the judge of the district for a writ of *recordari* by a petition in which he sets out his discharge in bankruptcy as a defence to the action and accounts for his absence at the trial by illness which continued beyond the time allowed for an appeal, in consequence of which "it was impossible for him to attend

the trial and take the appeal." The answer controverts the allegations, denies the discharge and asserts on information and belief that the defendant was not prevented by sickness from attending to the matter from the day first appointed for the hearing until that to which it was postponed and the ten days following allowed for the appeal.

Upon the hearing of the application before the judge, at chambers, on April 30th, and after argument of counsel, the petition was dismissed, the relief sought under it denied, and as the case shows while the record does not, an appeal was taken but not prosecuted by the defendant.

On the 6th day of May a second similar petition was presented by the defendant, intended perhaps to be an amendment and substitute for the former, in which, reiterating its averments, he adds and explains that his residence is forty miles from the place of trial; that he was making preparations to attend it, and that he was taken and continued to be very ill until the time for taking the appeal had passed; that it was impossible for him to be present in person, nor could he procure any person to go and present his defence; that the weather was very bad, and that his son, the only male member of his family of any size, was required to attend to the defendant and supply the necessary fire wood. The answer also controverts these allegations, as before, on information and belief, and especially the defendant's inability to attend to his case.

It does not appear that any further evidence was offered. His Honor refused to grant the writ, declaring "that the neglect of the said defendant, either to appear at the magistrate's trial or appeal was not excusable under the circumstances set forth in his affidavit, and for want of the evidence thereof, that he made no attempt to employ any one in his place."

It will be noticed that in denying the application, His Honor assumes the facts to be as set forth in petitioner's

affidavit, and in the absence of proof of efforts made to procure an agent to attend and represent the petitioner at the trial of the warrant, he is charged with negligence that bars all claim to relief. Resting upon the statements contained in the affidavit, substantially the decision is that a disabling sickness extending over so large a space with an averment of inability to obtain the services of an agent to act in his place, was of no avail without a further showing that efforts, though unsuccessful, were in fact made to procure the services of an agent.

We can scarcely conceive a case more strongly calling for the aid of remedial process than that presented in the petition, taking all its statements to be true. The defendant intends and is making preparations to leave for the appointed place of trial, when he is stricken down with disease. His son, the only male person of the plantation competent to the transaction of business, is detained at home by duties that will not admit of absence, and no one else can he find to employ and send in his place. Averring, as he could only do from personal knowledge or reliable information, that attempts in this direction would be fruitless and unavailing, for failing to show that they were made he is declared to be without excuse and without claim to relief. We do not concur in this ruling of the court.

The delay in making the application is urged as a sufficient reason for refusing it. It is true one asking the assistance of the court should apply in a reasonable time. But it does not appear when the defendant first knew of the rendition of the judgment against him. And he may have supposed that the plaintiff, on his defence being suggested, would discontinue the action against him and proceed against the others. Nor does it appear that any damage accrues to the plaintiff from the delay.

The cases relied on for the plaintiff (*Baker* v. *Halstead* Busb., 41, and *Elliott* v. *Jordan, Id.*, 298,) are not in conflict

with the views expressed. The first was a case of faithlessness in an agent relied on to look after and protect the applicant's interests. In the other no agent was employed and no excuse for the omission, or if the acting officer to be deemed such agent, his neglect was imputed to the petitioner as his own. In our case there was no agent and none could be procured, while the defendant from sudden sickness is disabled from being present in person.

It is also contended that the first application being denied, the matter is *res adjudicata*, and is not now open to inquiry and action. If it appeared that the evidence now produced is essentially that exhibited on the former hearing or was cumulative merely, and the decision then made was upon the merits, we should be constrained to sustain the objection. *Jones* v. *Thorne*, 80 N. C. 72. But a material fact not found in the first is stated in the present amended affidavit, to wit, that no agent could be procured to go and protect the petitioner's interests at the trial, and the absence of an averment showing what efforts were made for that purpose is the ground upon which the relief is now refused. The first petition may then have been dismissed for want of an explanation, declared insufficient in the last, and leading to the same result.

The dismissal on account of its vague and unsatisfactory statements and not upon an examination into its merits is rather in the nature and of the effect of a nonsuit, as was held in *Bond* v. *McNider*, 3 Ired., 440, and is not a bar to a subsequent application. So the judge below seems to have considered since not adverting to this objection *in limine* he proceeded to pass upon the merits of the case as presented.

We therefore hold the ruling erroneous, and this will be certified for further proceedings in accordance with this opinion, and it is so ordered.

Error. Reversed.

JAMES LORD and others v. R. W. HARDIE, Sheriff.

Church property not liable for pastor's salary.

1. The trustees of a church represent a *quasi* corporation under the statutes of this state and are accountable to the congregation for the use and management of the church property.

2. The pastor of the first colored Baptist church of Fayetteville recovered judgment against the trustees of said church for an amount alleged to be due on account of salary and an execution was levied upon the communion service; *Held*, that it was not liable to seizure and sale under said execution.

(*Stith* v. *Lookabill*, 76 N. C., 465, cited and approved.)

CONTROVERSY submitted without action under C. C. P., § 315, and heard in CUMBERLAND Superior Court, on the 22d of January, 1880, before *Buxton, J.*

Judgment for plaintiffs and appeal by defendant.

Mr. T. H. Sutton, for plaintiffs.

Messrs. Guthrie & Carr, for defendant.

SMITH, C. J. This is a controversy submitted without action upon a case agreed, the facts of which are as follows:

The defendant, as sheriff, by virtue of a writ of *fieri facias* issued to him on a judgment recovered by John A. Farior, former pastor of the first Colored Baptist church of Fayetteville, against the plaintiffs, trustees of said church, for his pastoral services, seized and took into his possession, a silver pitcher, two silver plates and two silver goblets, with the box in which they are kept, used in the public worship of the church and constituting its communion service. The articles were purchased with money derived from the voluntary contributions of its members and donated to the

church. The present proceeding is to recover possession, and the only question for us to determine is whether these articles are liable to seizure and sale under an execution against the trustees.

We have been unable to find, nor have the researches of counsel furnished us with, any decided case or authority bearing upon the point, for the reason perhaps that this is the first instance that an attempt has been made to subject property, so dedicated to religious uses, to the payment of a debt. We must, therefore, determine the question upon general principles.

Under the laws of this state, every worshiping and organized body of men, constituting a religious congregation is a *quasi* corporation, with power to remove and appoint at pleasure the trustees in whom its estate, real and personal, is vested for the sole use and subject to the control and management of the congregation. The trustees are depositaries of the naked legal title, with a capacity to sue and be sued, not generally, but only "for or on account of the donations and property so held or claimed by them, and for and on account of any matter relating thereto." And they are made accountable to the congregation for the use and management of the property they hold, and to surrender it to any person authorized to demand it. Bat. Rev., ch. 101.

It is thus apparent that the trustees hold the property vested in them by law, in their corporate capacity, for the exclusive use of the congregation and under its direction and control. They do not participate in the employment of a pastor nor are they liable for his services.

If a sale under a *fieri facias* against the trustees could have the effect of transferring the legal estate, the purchaser would become a trustee and the trusts would follow and attach thereto. The result would be to substitute him in place of the trustees and defeat that provision of the law which makes the tenure of office dependent upon the will

of the congregation and to compel a reconveyance. As a court of equity would in such case interpose to prevent such a proceeding, the court as now constituted will not permit to be done that which, if done, would affect injuriously the beneficial owners and be of no practical advantage to the party.

And so it is held that the grantee of a trustee will not be allowed to recover the land from the owner of the equitable estate entitled to possession, nor from his assignee. *Stith* v. *Lookabill*, 76 N. C., 465.

We are not prepared to concede that such articles dedicated to religious use exclusively, and necessary in public worship, are not protected by law from seizure and sale under the constitutional guaranty that secures the people in the unmolested "right to worship Almighty God according to the dictates of their own consciences," to which private interests must yield. But it is not necessary to determine the point. The trustees not being endowed by law with capacity to divert the property to other and different purposes, nor, in their corporate character, to contract a debt for which they can be taken, we are of opinion that the seizure by the sheriff under the writ of the articles was unauthorized by law, and under the terms of the case agreed, must be surrendered, and it is so adjudged.

No error. Affirmed.

A. C. SANDERS v. J A. NORRIS.

New Trial—Lost Papers.

Where the papers in the case and the notes of the trial of an action have been lost or mislaid, the only mode by which justice can be had is to

grant a new trial, if it appear that the party seeking it has been guilty of no laches. (See same case, *ante*, 4.)

(*Isler* v. *Haddock*, 72 N. C., 119; *Mason* v. *Osgood*, *Id.*, 120; *Simonton* v. *Simonton*, 80 N. C., 7; *State* v. *Powers*, 3 Hawks, 376, cited and approved.)

PETITION for *Certiorari* granted at January Term, 1880, of THE SUPREME COURT.

This case was brought to this court at the present term by a writ of *certiorari* as a substitute for an appeal, and the facts as gathered from the record, the petition for the writ, and the certificate of the clerk, are fully set out in the opinion of the court.

Messrs. D. G. Fowle and *A. M. Lewis*, for plaintiff.
Messrs. W. H. Pace and *T. M. Argo*, for defendant.

ASHE, J. At the January term, 1879, of the superior court for the county of Wake, a judgment was rendered in behalf of the plaintiff against the defendant, from which judgment the defendant appealed to this court, and filed his bond. A statement of the case was made up by the counsel of the defendant and duly served on the counsel of the plaintiff, who made a counter-statement, and each was submitted to the judge presiding to make up the case, who fixed the 15th day of February, 1879, to settle the same. The papers in the case were sent by the clerk of the court, in the meantime, to the judge, but no case has ever been settled by him in consequence of the papers and notes of the trial having been lost or mislaid.

The defendant is entitled to his appeal, and has lost it by no laches on his part; and in such cases it has been the established practice of this court to order a new trial. In the cases of *Isler* v. *Haddock*, 72 N. C., 119; *Mason* v. *Osgood*, *Id.*, 120, and *Simonton* v. *Simonton*, 80 N. C., 7, where the

judge presiding went out of office before a statement of the case was made out, and without the default of the party applying, new trials were ordered as the only remedy in such cases. And so in the case of the *State* v. *Powers*, 3 Hawks, 376, where it appeared from the certificate of the presiding judge that a case presenting the points was intended to be made up, but was prevented from his having lost the notes of the trial, the court held that there was no other mode by which the justice of the case could be attained but by awarding a new trial. Upon these and other authorities that might be cited, a new trial must be awarded in this case. Let this be certified to the superior court of Wake county.

PER CURIAM. *Venire de novo.*

JAMES McDONALD and another *v.* CANNON, WADSWORTH & CO.

Action for conversion of property—Jurisdiction.

1. Where, in an action for damages in the sum of $125, for the conversion of certain cotton, the complaint alleged that plaintiffs sold to defendants two bales of cotton at a certain price per pound on the terms that the price was to be paid down and no title to pass until the price was paid, and the defendants, on getting possession of the cotton, refused to pay the price; *Held*, that the superior court had jurisdiction.
2. In such case the plaintiffs might have affirmed the contract and sued for the price agreed to be paid (less than $200) and then a justice of the peace would have had jurisdiction of the action.

(*Bullinger* v. *Marshall*, 70 N. C., 550; *Frœlich* v. *Express Co.*, 67 N. C., 1; *Wilson* v. *White*, 80 N. C., 280, cited and approved.)

CIVIL ACTION tried upon complaint and demurrer at

Spring Term, 1878, of CABARRUS Superior Court, before *Cox, J.*

The plaintiffs allege a contract of sale to defendants of two bales of cotton, at ten and a half cents for one, and ten and sixty-five-one-hundredths cents for the other, on the terms that the price was to be paid down and no title to pass until payment made, and the cotton was passed into the defendants' possession on the condition aforesaid. That immediately on the transfer of the cotton into the hands of the defendants, the plaintiffs demanded payment of the purchase money, and it being refused, they demanded a return of the cotton, and that being also refused, this action was brought.

It is charged in the complaint that the assent of defendants to the sale on the said terms was not in good faith, but was a trick or device merely to get the cotton into their possession, and then to refuse to pay for or return the same. The relief demanded is for one hundred and twenty-five dollars damages for the conversion of the cotton.

To the complaint the defendants demur and assign for cause: 1. That the superior court has not jurisdiction of the subject of the action as the same is based on a contract for a sum less than two hundred dollars. 2. For that J. W. Wadsworth, a member of the firm of Cannon, Wadsworth & Co., is not made a party to the action. 3. For that the complaint does not state facts sufficient to constitute a cause of action.

Upon the argument of the demurrer His Honor, being of opinion that the superior court had not jurisdiction, sustained the demurrer, dismissed the action, and plaintiffs appealed.

Mr. W. J. Montgomery, for plaintiffs.

Messrs. Wilson & Son and *Shipp & Bailey*, for defendants.

DILLARD, J. The jurisdiction of the action was in the superior court unless by the constitution and laws of the state exclusive jurisdiction had been given to a justice of the peace. By the constitution of 1868, jurisdiction was given to justices of the peace of all civil actions founded on contract wherein the sum demanded did not exceed two hundred dollars, and wherein the title to real estate did not come in controversy, and by the amended constitution the jurisdiction in civil actions is retained, just as it was, with power in the general assembly to extend it to other civil actions, wherein the value of the property in controversy does not exceed fifty dollars. Art. 4, § 33 of constitution of 1868, and Art. 4, § 27, of amended constitution.

Under the authority thus given to enlarge the jurisdiction of justices' courts, the legislature, by the act of 1876-'77, ch. 251, § 1, gave to them concurrent jurisdiction of civil actions not founded on contract wherein the value of the property shall not exceed fifty dollars, and no jurisdiction when the value is above fifty dollars. This action demands damages for a wrongful conversion of two bales of cotton of the goods and chattels of the plaintiffs to the sum of one hundred and twenty-five dollars, and above the actual value of fifty dollars, ascertainable by a computation on the number of pounds and the rate per pound stated in the complaint at which the incomplete sale was made to the defendants. Upon the facts stated in the complaint, the action, under our former system of procedure, would have been an action of trover, and been classed among the actions arising *ex delicto*, and of it a justice of the peace would have had no jurisdiction whatever under the constitution of 1868, and has not now, inasmuch as the value of the property, for the conversion of which the suit is brought, on the facts stated and admitted by the demurrer, is above fifty dollars. *Bullinger* v. *Marshall*, 70 N. C., 520. *Frœlich* v. *Express Co.*, 67 N. C., 1.

Here, there was no sale passing the title to the cotton. Upon the subject of sales passing the title Chancellor KENT states the rule to be that if the possession is given to the vendee upon the expectation and agreement to be paid for simultaneously with the delivery, and the vendee omits or refuses to pay for them on getting the possession, in such case the delivery is merely conditional and the non-payment is regarded as an act of fraud entering into the original agreement, which renders the contract void and authorizes the seller instantly to reclaim the goods. 2 Kent, 497. And to the same effect the law is stated in Benjamin on Sales, 342; 1 Parson on Contr., 537; Story on Sales, 457 (a) and 440; *Wilson* v. *White*, 80 N. C., 280.

In our case the contract of sale was expressly on the understanding to be paid for immediately, and no title to pass until payment of the purchase money, and so the plaintiffs had the option to disaffirm the contract on the ground of fraud, or to hold that payment of the money was a condition precedent, and on either footing they were entitled to sue for and recover the cotton in specie in an action of detinue, or recover damages for the conversion in an action which would be under our old system an action of trover.

The plaintiffs, under the authorities above cited, might have affirmed the contract and sued for the price agreed to be paid, and if they had elected so to do, the justice of the peace would have had jurisdiction, as the value of the cotton was less than two hundred dollars. But no title having passed, as we have seen, because of fraud vitiating the contract, or because of the failure of the vendee to perform the condition precedent, and the value of the cotton being above fifty dollars, the action brought for conversion was within the jurisdiction of the superior court, and could not have been maintained in the justice's court.

We hold therefore that His Honor erred in sustaining

the demurrer for want of jurisdiction and in dismissing the plaintiffs' action.

Judgment of the court below is reversed, and this will be certified to the end that further proceedings may be had in the action according to law.

Error. Reversed.

FRED. H. PENDLETON *v.* CHARLES R. JONES.

Contract, construction of.

1. The construction of a contract does not depend upon what either party *understood* but upon what both *agreed.*
2. Where the terms of a parol contract are in dispute, the jury ascertains them as a question of fact, and the court determines the legal effect.

(*Young* v. *Jeffreys*, 4 Dev. & Bat., 216; *Isley* v. *Stewart*, *Id.*, 160; *Brunhild* v. *Freeman*, 77 N. C., 128, cited and approved.)

CIVIL ACTION tried at August Special Term, 1879, of IREDELL Superior Court, before *Gudger, J.*

This action was brought to recover damages for an alleged breach of contract. Verdict and judgment for the plaintiff, and appeal by defendant.

Mr. J. M. McCorkle, for plaintiff.
Messrs. Reade, Busbee & Busbee, for defendant.

SMITH, C. J. The plaintiff sold to the defendant, Jones, his share and interest in the printing press, type and appurtenances of the *Charlotte Observer*, jointly owned by them, and received in part payment therefor, several notes of the

defendant Murchison. The notes were given for property purchased by him of Jones and Pendleton, and were drawn payable to the plaintiff. At the time of their delivery the plaintiff alleges that his copartner agreed to secure the notes by procuring a mortgage on the property sold to Murchison, and that by reason of his failure to do so, the notes had become worthless and were lost to the plaintiff. The object of the action is to recover damages for this breach of the contract.

The defendant, Jones, who alone answers the complaint, denies that he entered into any such agreement, and says that he simply proposed to use his friendly offices in obtaining the additional security, and that Murchison did give such mortgage which had become ineffectual in consequence of the plaintiff's neglect to have it registered before another assignment was made.

The controversy was as to the existence and terms of the alleged contract, and the only exception presented in the appeal is to the instruction refused and that given to the jury upon the following issue:

Was it a part of the contract that Charles R. Jones was to procure a mortgage from A. K. Murchison to secure the payment of the notes declared on? to which the jury responded in the affirmative.

The parties were examined, each on his own behalf, and the discrepancy in their testimony is the basis of the instruction asked and refused and of that given. The defendant's counsel asked His Honor to charge "that if the jury believe from all the testimony that the plaintiff, at the time of the contract, understood the contract to be that Jones agreed to procure the mortgage from Murchison, and the defendant Jones understood the contract otherwise, they should find the first issue for the defendant."

This was refused, and the jury were instructed "that a contract was the agreement of two minds, and they must be

satisfied that both the plaintiff and the defendant agreed to the contract for the procurement of the mortgage from Murchison; that if the plaintiff agreed to it, but the defendant did not, it would be no contract, and they should find the first issue for the defendant."

The instruction asked was calculated to mislead, by substituting as a test of liability the defendant's impressions as to the force and effect of his contract, for the contract itself. The proper inquiry is, what are the terms of the agreement mutually entered into, and when these are ascertained, its obligatory effect is determined by the law, and does not depend upon the uncertain and undisclosed notions in the heart of either. If it did, no contract, however clear and distinct in his provisions, could be enforced against an unexpressed misapprehension as to its operation in the mind of either one. The intention is ascertained by finding out what the contract is, and then the law affixes its meaning. *Young* v. *Jeffries*, 4 Dev. & Bat., 216. When the dispute is as to the contract itself, it must be left to the jury to determine its provisions under the advice of the court. *Isley* v. *Stewart*, *Ibid.*, 160.

The rule laid down by His Honor is in accordance with that contained in the instruction given and approved in *Brunhild* v. *Freeman*, 77 N. C., 128. In that case there was a similar dispute as to the terms of a contract attending the transfer of certain notes, and the court was requested to charge that "the question was not what the plaintiff thought, but what the defendant thought; and that if the defendant did not intend to assume the payment of the four hundred dollars save upon a delivery to him of the eight notes, the plaintiff could not recover." This was declined, and the jury directed "that it was not what either thought, but what both agreed" that constituted the contract between them. That case is not distinguishable from the one before us, and the criticism upon the words *thinking* and *understand-*

ing is unavailing to affect the application of the principle. In our opinion the law was properly laid down, and it must be declared there is no error.

No error. Affirmed.

JOHNSTONE JONES v. A. T. MIAL and others.

Action for Breach of Contract—Pleading—Complaint.

1. Where the plaintiff entered into a special contract with the defendants to publish a newspaper upon certain terms, the defendants agreeing to furnish him one thousand subscribers by a certain day, and defendants having failed to furnish the same, the plaintiff suspended the publication of the paper; *Held*, that the plaintiff was under no obligation to go on with the paper but was authorized in law to treat the contract as rescinded, and is entitled to recover for his losses sustained by the non-performance of the stipulations on the part of defendants, upon the promise or obligation implied by the law in such cases, on what are called the common counts in *assumpsit*.
2. In such case where the plaintiff's complaint set out the facts and asked relief as upon an action on the special contract; *Held*, that upon the ruling of the court below that he could not recover on the special contract, the plaintiff was entitled to proceed with the case and recover his damages as on the common counts in general *assumpsit* without any amendment of the pleadings.

(*Winstead* v. *Reid*, Busb., 76; *White* v. *Brown*, 2 Jones, 403; *Oates* v. *Kendall*, 67 N. C., 241, cited and approved.)

PETITION to Rehear filed at January Term, 1879, and heard at January Term, 1880, of THE SUPREME COURT.

The plaintiff in his petition assigns as cause of error that the court in its decision held that he could not recover on the cause of action as stated in the complaint without an amendment thereof. The action was brought to recover

damages for an alleged breach of contract in not furnishing a certain number of subscribers to sustain the publication of an *Agricultural Journal.* See same case, 79 N. C., 164.

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

DILLARD, J. On the trial of this case in the court below, after the plaintiff closed his evidence the judge ruled that the stipulations contained in the written contract were dependent, and those on his part not being performed, he could not recover on the special contract, but that the measure of his damages was the value of his services in attempting performance of the contract and the amount expended by him over and above the sum received from the list of subscribers furnished him. In submission to this opinion the plaintiff asked to be allowed to introduce further evidence as to the amount of damages. This was refused, but the court offered to allow him to amend the complaint if he thought proper, so as to declare in general *assumpsit*, which was declined by plaintiff and thereupon he took a nonsuit and appealed.

Upon the appeal, this court affirmed the ruling of the court below as to the inability of the plaintiff to recover on the special contract, and declined to express any opinion as to his right of recovery on the common counts in *assumpsit*, on the ground that that point was not presented, inasmuch as the plaintiff did not ask such relief and refused the liberty of amending his proceedings when offered him by the court, insisting, say the court, upon the damages stipulated in the special contract, or nothing.

In the judgment of this court, the plaintiff in his petition to rehear assigns error, in that, the court held that he could not recover *on the cause of action as stated in the complaint without an amendment thereof.* We do not understand from the

petition that any complaint is made of the affirmation of the ruling of His Honor as to the inability to recover on the special contract. On that part of the opinion of this court, therefore, we will bestow no consideration, but pass that point as finally adjudged. But the grievance is, that after the intimation of opinion by His Honor that plaintiff could not recover on the special contract, but might in general *assumpsit*, the plaintiff offered to introduce further evidence as to his damages in that view of the case, and the court refused it unless he would first amend his complaint so as to declare on the implied contract; whereas the plaintiff insists there were sufficient facts well pleaded to authorize a recovery without any amendment of his pleadings. Manifestly the question of the sufficiency of the facts stated in the pleadings to allow of the admission of the offered evidence and a recovery as in general *assumpsit*, was one of the questions brought up by the appeal. And yet the opinion filed, from inadvertence or a misconception of the true import of the case of appeal as it seems to us, does not consider or decide that question; but assuming an amendment to be necessary, proceeds on the idea that the plaintiff contemptuously insisted on his right to damages on the special contract or not at all, after a ruling against him on that point. So the legal question heretofore before the court and not passed on, was, and now before us on the petition to rehear, is, whether the plaintiff could, upon the facts pleaded and embraced within the issues and the evidence in support thereof, have any relief as in general *assumpsit*, for his services, expenditures and losses, so far as he went in the performance of his contract, *without* an amendment of the pleadings. The plaintiff's position is that he could recover, and that *without* amendment. The ruling of His Honor was that he could recover, but *not without* the required amendment.

The questions then for our determination are, first, was

the plaintiff in law entitled to recover at all in general *assumpsit*, the special contract with its dependent stipulations being unperformed on his part? and secondly, if so entitled to recover, was he entitled to that relief on the case made by the complaint and the facts embraced within the issue joined on the pleadings?

As to the first point: It is our opinion that the plaintiff had the right to maintain his action and succeed therein on the common counts in *assumpsit*. It is well settled upon authority and reason, that in case of a contract with dependent stipulations so long as the same are in force a party must recover on it, if at all, and no action in general *assumpsit* as upon a *quantum meruit* will lie for anything done under it. But if the contract is put an end to by mutual consent, or one of the parties has done some act inconsistent with his duty to the other, preventing or disabling him to go on in the performance of his engagements, the party not in fault may hold the special contract as abandoned or rescinded and at once proceed in general *assumpsit* upon a liability implied by the law for remuneration for what he may have done under the contract. *Winstead* v. *Reid*, Busb., 76; *White* v. *Brown*, 2 Jones, 403. See also Am. Ed., 2 Smith's Leading Cases, notes to *Cutter* v. *Powell*.

On reference to the record and accompanying case of appeal, the facts were that the plaintiff began and continued the publication of the *Agricultural Journal* from the first day of August, 1876, up to the 25th of October next after, in exact accordance with the stipulations of the special contract on his part. And that defendants, who were to have furnished one thousand paid-up subscribers at two dollars each by the first of October, failed to furnish that number, but furnished only one hundred and seventy four. That plaintiff thereupon called on defendants and requested a compliance with this engagement on their part, notifying them at the time he was out of means and would have to suspend

the publication unless they complied with this tenor of their contract, or at least furnish him so much as six hundred dollars towards the deficient subscribers. It was averred in the complaint and deposed to by plaintiff on the trial, that defendants having failed to furnish the subscribers or to advance anything on that account, the plaintiff was compelled by act of defendants to suspend; and he did suspend the issue of the paper on the 25th of October, 1876, and thereby incurred heavy loss in the particulars mentioned in the complaint.

Upon these facts under the principles of law above enunciated, the plaintiff was under no obligation to go on with the publication of the paper, but was authorized in law to suspend and hold the contract rescinded, and to recover for his losses sustained by the non-performance of stipulations on the part of defendants; and for this purpose he might maintain an action, if not on his special contract, at least upon the promise or obligation implied by the law in such cases on what are called the common counts in *assumpsit*. This is as it should be in law, and it is equally consistent with reason and justice. The plaintiff undeniably performed the undertaking on his part without complaint until after the day when defendants were to furnish the paid-up subscribers, and obviously the means thence to be derived were relied on, and in fact necessary in the carrying on of the enterprise. The defendants failing in this particular, the plaintiff was without blame in ceasing, as remarked by the Chief Justice in his dissenting opinion, (reported in 79 N. C.) from all further fruitless efforts to continue the publication of the paper. Certainly the defendants should not be allowed to create to plaintiff the necessity to discontinue the paper by their wrongful act, and then urge such discontinuance as a ground of exemption from making compensation to the plaintiff for his losses occasioned by them. The plaintiff being entitled to recover

as on the common counts in general *assumpsit*, it remains to inquire,

As to the second point: Was he entitled to make recovery on the case as it was, or only after amendment of his pleadings as ruled by the court? In our opinion there was error in the requisition of amendment by His Honor before he would admit any evidence in the view of the defendants' liability as in general *assumpsit*. The plaintiff was entitled to have had his evidence received and the case proceeded with, as it seems to us, upon the case as it was and without any amendment of the pleadings. Under our former system the practice was in declaring to proceed on the special contract and also in other counts, called the common counts, so that if unable to recover on the special *assumpsit*, relief might be had on some of the counts in general *assumpsit* on the implied promise or obligation. And it is true that if the plaintiff under that system had "counted" only on the special contract, not being able to recover on that, he would have failed in his action. But under the code all forms of pleading before then existing are abolished, and now we have only the forms of pleading and the rules by which their sufficiency is to be determined, as prescribed in section 91 of the code. The complaint is required to contain a plain and concise statement of the facts constituting a cause of action without unnecessary repetition, and a demand of the relief to which the plaintiff supposes himself entitled. C. C. P., § 93 (2 and 3). The relief, if there be no answer, shall not exceed that demanded in the complaint, but in any other case, any relief may be granted consistent with the case made by the complaint and embraced within the issue. *Id.*, § 249. The court or judge shall in every stage of the action disregard any error or defect in the pleadings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by such error or defect. *Id.*, § 135. Tested by these provisions, the com-

plaint as it seems to us was sufficient. It is true it concluded with a prayer of relief as if proceeding on the special contract, which the plaintiff could not have, as ruled below and affirmed here, but still if the facts stated in the complaint, together with those drawn into issue on the answer of defendants constituted a right to any relief whatever, the plaintiff was entitled to have it on the case as it was, without amendment, as provided in section 249 of the code. In our case the complaint, although concluding as upon the special contract, contained a statement of the contract with all the stipulations on both sides and averred performance on plaintiff's part, until the necessity to discontinue the publication of the paper was forced on him for want of means by reason of the default of defendants in not furnishing him a thousand paid up subscribers as was agreed to be done by the first of October, 1876; and it further avers that before ceasing his efforts, the plaintiff requested compliance at the hands of defendants with notice of his inability otherwise to continue the paper, and the defendants still failing in this essential duty on their part, he was disabled to continue the publication.

Upon these facts stated in the complaint the plaintiff was rendered unable to carry on his undertaking by the breach of stipulations on the part of defendants, and thereupon in law he was justified in ceasing to make further useless efforts and was authorized to seek by action to recover his damages, if not on the special contract, at least in general *assumpsit*. The relief, we think, was consistent with the case made by the complaint and embraced within the issue, and the plaintiff was entitled thereto on his case as it was. It was error in the court below to refuse to proceed in the cause unless the plaintiff would amend his complaint. *Oates* v. *Kendall*, 67 N. C., 241.

It is our opinion therefore that the judgment of this court heretofore given and reported in 79 N. C., 164, be affirmed

in so far as it holds plaintiff not entitled on the special contract, and that it be reversed in so far as it affirms the judgment of nonsuit entered in the court below. This will be certified to the end that plaintiff may have remedy on the complaint without amendment for such damages as by law he may be entitled to, unless he chooses to ask and is allowed amendment.

Error. Modified.

NORTH CAROLINA RAILROAD COMPANY v. COMMISSIONERS OF ALAMANCE.

Injunction—Collection of arrears of taxes—Constitutionality of Statute.

1. An injunction *pendente lite*, in an action to test the constitutionality of chapter 158, acts 1879, will not be granted to restrain proceedings under the provisions of the act, except to restrain the *collection of the tax*, until the merits of the controversy can be determined. The judicial authority should be reluctant to interfere and obstruct the execution of the expressed legislative will, on the ground that the end to be accomplished by the use of the prescribed means is unwarranted by the constitution, until some substantial right of the complaining party is about to be injuriously affected.

2. A law to provide for the collection of taxes for past years is not unconstitutional; and the right of the legislature to pass such law is not affected by the lapse of time.

3. Nor does such law (if the taxes imposed in the years mentioned were *then* uniform and equal) violate the provisions of article five, section three, of the constitution in regard to uniformity of taxation.

4. The general assembly, since the abrogation of article seven, section six, of the constitution of '68, can constitute other agencies to perform the duties therein imposed upon the township board of trustees.

5. It is no defence to a legal assessment and claim of taxes, that taxes under an illegal or irregular assessment have been paid.

(*R. R. Co.* v. *Com'rs of Brunswick*, 72 N. C., 10; *Bridge Co.* v. *Com'rs of New Hanover*, *Id*, 15; *R R. Co.* v. *Brogden*, 74 N. C., 707; *R. R. Co.* v. *Com'rs of Orange*, *Id.*, 506; *R. R. Co.* v. *Com'rs of Alamance*, 76 N. C., 212; and 77 N. C., 4; *King* v. *W. & W. R. R. Co.*, 66 N. C., 277; *Hinton* v. *Hinton*, Phil., 410.)

INJUNCTION heard at Fall Term, 1879, of ALAMANCE Superior Court, before *McKoy, J.*

The plaintiff, the N. C. and R. & D. railroad companies, applied for an injunction, pending the action, to restrain the defendant commissioners from proceeding under the act of 1879, ch. 158, to assess and collect the taxes alleged to be due from plaintiff. The application was refused and the plaintiff appealed.

Messrs. Graham & Ruffin, D. G. Fowle and J. E. Boyd, for plaintiff.

Messrs. Scott & Caldwell and *E. S. Parker,* for defendants.

SMITH, C. J. In the act of March 13, 1869, to provide for the collection of revenue, is the following clause:

"The value of the franchise of any railroad, canal, turnpike, plank road, navigation and banking company, shall be given by the president or chief officer of the said several corporations on the day fixed by this act for the giving in of taxable property, to the treasurer of the state, and shall be assessed and valued by the said treasurer, the auditor and governor of the state, and their valuation shall be returned to the county commissioners of any county in which any part of said road, or canals, or navigation works shall be, and the tax upon such franchise, so valued, shall be the same as upon property of equal value, and the tax collected in each county and township shall be in proportion to the length of such road, canal or works, lying in such county or township respectively, and such taxes shall be collected as other taxes are by law required to be. The rolling stock

of every railroad company, and the vessels employed by any canal or navigation company, on its canal or works shall be valued with the franchise." Acts of 1868-'69, ch. 74, § 13. A similar provision is found in the successive annual acts for the collection of revenue to, and inclusive of, that of February 14, 1874.

Under the provisions of the law, as interpreted and acted upon by the companies and the state board of valuation, the North Carolina railroad company made returns of its various kinds of rolling stock, fire wood, money on hand and other personal property, and of the valuation of each, which were assessed by the board, and the proportionate parts of the aggregate value distributed among the several counties traversed by the road and directed by the act. The returns for the years 1873 and 1874 contain additionally a statement in detail of the length of the track with its turnouts, bridges and depot buildings in the several counties through which it runs, and the valuation of the property in each, and this is enjoined in positive terms by the amendment made to a similar section in the act of March 17, 1875. Acts of 1874-'75, ch. 184, § 11.

The construction of this clause came before the court at January term, 1875, and it was declared that under the constitution (Art. VII, § 6,) the township board of trustees alone must "assess the taxable property of their townships" respectively, and no authority could be given by the legislature to the state board to make such assessment, and that the franchise mentioned in the statute should be valued for purposes of taxation apart from the property used in its enjoyment, and if this was included in the estimate of the state board, and the value of the franchise thereby enhanced, their action was based on an erroneous principle and the company was "entitled in a proper case to relief from the consequent tax." The court also held that the payment of the tax upon such illegal assessment *was no defence*

against a tax legally levied by the county authorities under the general law. *W. C. & A. R. R.* v. *Com'rs Brunswick*, 72 N. C., 10; *Bridge Co.* v. *Com'rs New Hanover*, *Ibid*, 15. See also *R. & D. R. R. Co.* v. *Brogden*, 74 N. C., 707 to the same effect.

In the *R. & R. R. Co.* v. *Com'rs of Orange*, 74 N. C., 506, it was decided that under the charter of the North Carolina railroad company to whose obligations and rights the plaintiff as lessee had succeeded, the real estate held for right of way, for station places of whatever kind and for workshop location, was exempt from taxation, as the dividend of profits of the former company had not exceeded six per centum per annum, and the same proposition is reiterated in *R. & D. R. R. Co.* v. *Com'rs of Alamance*, 76 N. C., 212.

The two companies having brought their suit against the commissioners for the county taxes exacted under the assessment of the state board and paid under protest, recovered and have been repaid the same, and it was declared that every counter-claim for taxes, which under a legal assessment ought to have been paid by the plaintiffs was wholly inadmissible. *N. C. and R. & D. R. R. Co.* v. *Com'rs of Alamance*, 77 N. C., 4.

In consequence of these decisions, the general assembly, by the act of February 23, 1877, refunded to the Richmond and Danville railroad company the state taxes levied upon the exempt real estate, the amount of which was ascertained and determined by the officers constituting the state board, according to its directions. Private acts of 1876–'77, ch. 35.

This is a brief history of the antecedent facts which led to the passage of the act of March 8, 1879, to arrest the execution of whose provisions the present action has been instituted. Act of 1879, ch. 158.

The act recites that the two companies "have failed to pay their proper state and county taxes upon a large amount of real and personal property in the county of Alamance," within the years from 1869 to 1876 inclusive, on account of

their failure to list the same or on account of illegal assessments and consequent litigations and the "said tax lists are erroneous and large amounts which ought to have been assessed in said corporations under the laws of those respective years are still unlisted and uncollected," and proceeds to provide a remedy, by directing the authorities of the county, charged with the duty of listing, assessing and revising the taxes for the current year "to revise and correct the tax lists of said corporations during the specified interval" so that said tax lists shall speak the truth, as if the lists and assessments had been made under and in accordance with the laws of the said respective years. The subsequent sections of the act direct the manner in which this shall be done, prescribes the rate of taxation to be that imposed under the assessment for the successive years for which the tax lists are to be revised and corrected, and allows, in reduction of the sums ascertained to be due for any one year, whatever amount either company may have heretofore paid for that year.

The substance of the enactment and its professed object are to have the taxable property of the companies re-assessed for the series of years mentioned, and the taxes thereon, which ought to have been levied and collected under the laws applicable thereto, now levied and collected, first deducting what may have been already paid under the illegal and erroneous assessment by the state board. The defendants were engaged in the due execution of the provisions of the law when the restraining order issued, and their further proceedings were suspended until the interlocutory judgment denying the application for an injunction *pendente lite*, which the appeal brings up for review. The question presented, then, is this: Is the enactment so palpably unconstitutional as to call for our interference at this preliminary stage, in arresting all action in the enforcement of its directions? For unless the legislation is plainly in conflict with

the constitution, the court will not so declare and especially in the revision of an interlocutory order made before the final hearing of the cause. "The power of the courts to declare statutes unconstitutional," says Dick, J., "is a high prerogative and ought to be exercised with great caution, and they should not declare a statute void unless the *nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt.* A reasonable doubt must be solved in favor of the legislative action and the act be sustained." *King* v. *W. & W. R. R. Co.*, 66 N. C., 177, with reference to Cooley Const. Lim., 102. In this connection it may be remarked that when the law-making power directs an act to be done in a specified time and manner, the judicial authority should be reluctant to interpose and obstruct the execution of the expressed legislative will, on the ground that the end to be accomplished, by the use of the prescribed means, is unwarranted by the constitution, until some substantial right of the complaining party is to be injuriously affected; since if the alleged repugnancy exists, no harm can come from non-interference, and if it does not, the process of the court will have been used to defeat a valid act of legislation. In the present case the interests of the plaintiffs would be amply protected by stopping the *collection of the tax*, after its amount was ascertained, until the merits of the controversy could be determined; and if then adjudged illegal, by a perpetual injunction. This would seem to be the full measure of the plaintiffs' relief, upon the averments contained in their complaint. It might turn out after the assessment is made, and if the plaintiffs' allegations should be correct it would so appear, that upon the adjustment provided in the act, nothing was due for omitted taxes, and there was no necessity for the suit. But as no injunction was granted and the machinery of the law left unobstructed, no inconvenience results from the action of the court.

The argument for the plaintiffs places their claim to be relieved from the provisions of the enactment upon the following grounds:

1. The time for collecting the taxes under the pre-existing law having expired, the present enactment is retroactive and at variance with the constitution.

2. The taxable property proposed to be assessed has already paid the tax levies upon it, and the proceeding will result in charging it with a double tax.

3. The right to claim and collect the taxes is lost by the lapse of time and cannot be restored by legislation.

4. The county and township assessors appointed under the first section of the act of March 13, 1879, cannot be substituted in place of the township board of trustees as constituted before the recent constitutional amendments.

5. There will be a want of uniformity in the proposed tax.

6. The suits of the plaintiffs against the defendants, the county commissioners, and the results therein determined are an estoppel in the way of the assertion of the present claim.

We are thus called on before the cause is in a condition to be tried upon its merits, to examine and pass upon the effect of *ex parte* testimony and determine provisionally the facts upon which rests the application for the exercise of the restraining power of the court. We are asked to pronounce the statute void and thus virtually to decide the cause. While in order to the proper exercise of the power we must pass upon the evidence, we only do so, so far as to see that no irreparable injury is sustained pending the litigation, and do not intend by anticipation to usurp the functions of the jury. We shall not, therefore, examine with the same fullness of detail the several propositions made and combatted in the argument, as would be necessary if the case was an appeal from the judgment on the final hearing.

The retrospective features of the act are not fatal to its validity. It does not undertake to impose new burdens or additional liabilities upon the companies, but to pursue and charge the taxable property which they possessed and which has escaped its share of the common burdens. It seeks nothing more. No vested rights are invaded; no wrong done by the means employed to correct a common error, and prevent an unjust and unintended exemption. Remedial in its scope and operation, it undertakes to provide against the consequences of the omission and neglect of public agencies and to have now done what ought to have been done before. "The power of the legislature," says Pearson, C. J., "to pass retro-active statutes affecting remedies is settled," and he declares the act of February 22, 1866, which gave widows, the wills of whose husbands had been admitted to probate since the first day of January, 1862, six months after the passage of the act to enter their dissent, to be valid, because "it affects the remedy and not the right of property." *Hinton* v. *Hinton*, Phil., 410. "A retrospective statute curing defects in legal proceedings" of which we have instances in our reports, "when they are in their nature irregularities only and do not extend to matters of jurisdiction is not void, on constitutional grounds, unless expressly forbidden. Of this class are the statutes to cure irregularities in the assessment of property for taxation and the levy of taxes thereon." Cooley Const. Lim., 371.

The state has a lien upon land for taxes actually levied and also for such as were properly put upon the land, but by reason of the neglect of the officers entrusted with the duty of assessing it, the land was omitted for a particular year." Blackwell Tax Titles, 163. "The legislative authority given to tax the property for the omitted years is not exhausted by the failure of the party or the assessor to place it on the roll, and such assessments are valid. Burroughs Taxation, § 93. There are numerous instances in our own

legislation where the time for the collection of unpaid taxes has been extended to those due for many years previous, for the indemnity and reimbursement of the collecting officer and the sureties on his official bond and their legal representatives, without question so far as we know as to the competency of the legislature to make the enactment. Thus by the act of January 11, 1877, authority was given for the collection of unpaid taxes due in 1872, and the three succeeding years, to such officers as had settled the public taxes, although under the general law the period allowed for doing so was limited to one year after the time of the required settlement. Acts 1876-'77, ch. 36. And by a subsequent amendment it was extended to the two succeeding years. Acts 1879, ch. 15. Of similar import is the act of February 8, 1879. Acts 1879, ch. 27. If a definite unpaid tax, collectible within less than two years after it is levied, may be enforced by legislative permission years afterwards, for the benefit of the collector and his sureties, it would seem that there could be no legal impediment to the state's compelling the payment of its own just demands against the delinquent tax-payer when they are ascertained in the mode prescribed by law.

The objection based upon the lapse of time is equally untenable. The tax as a specific debt does not become due until the taxable property is listed and valued, and a definite per centum affixed to such valuation. It could not therefore be sued for until this is done, nor enforced by distress, and hence no statutory bar is interposed by the delay. Nor does the state forfeit its rights by the inertness or neglect of its officers. "When property has not been assessed for taxation," says Bynum, J., in *N. C. R. R. Co.* v. *Com'rs of Alamance*, *supra*, "no taxes are due or recoverable."

We think it quite clear that the general assembly on the abrogation of section six, article seven, of the constitution, could constitute other agencies to perform the duties therein

imposed upon the township board of trustees, and no just cause of complaint is thereby furnished the plaintiffs. Nor is there any want of uniformity in enforcing the tax. The taxes imposed in the years mentioned were then uniform and equal, but uniformity in the payment has been broken by the escape of this property from the assessor's roll. The purpose and the operation of the law are to restore uniformity and make this, like other taxable property, contribute to the general fund.

The estoppel relied on is equally untenable. It is no defence to a legal assessment and claim of taxes, that taxes under an illegal or irregular assessment have been paid. It is so declared in the case last cited. But the act does in fact allow, in reduction of what may be found due, whatever sums the plaintiffs may have heretofore paid, and the adjustment is to be made and only the residue collected.

These considerations sufficiently show the correctness of the ruling of the court in refusing, before the cause is heard upon its merits, to arrest the execution of a law of even doubtful constitutionality, and to leave that point open for future determination. It must therefore be declared that there is no error in the ruling of the court, and this will be certified.

No error. Affirmed.

J. J. SIMS v. GOETTLE BROTHERS.

Attachment—Interpleader—Practice.

1. Where property seized under attachment before a justice is replevied under a decision of the justice that it is the only remedy) by A, acting

on behalf of a claimant, who gives an undertaking to pay the plaintiff such judgment as he may recover against the defendant; and afterwards the claimant is permitted to interplead and an undertaking substituted for the one originally filed stipulating to pay the plaintiff's judgment if the attached property shall be found to belong to the defendant; and on appeal to the superior court the order of the justice is affirmed and A is ordered to pay into court the proceeds of the sale of the property and an issue directed to be submitted to the jury as to its ownership; *Held*, not to be error.

2. The right of an outside claimant to intervene in such case is well settled.

(*Ins Co.* v. *Davis*, 74 N. C., 78; *Clerk* v. *Huffsteller*, 67 N. C., 449; *Toms* v. *Warson*, 66 N. C., 417; *Bruff* v. *Stern*, 81 N. C., 183; *McKesson* v. *Mendenhall*, 64 N. C., 286; *Clemmons* v. *Hampton*, 70 N. C., 534, cited and approved.)

CIVIL ACTION commenced before a justice of the peace and tried on appeal at Fall Term, 1879, of MECKLENBURG Superior Court, before *Buxton, J.*

On the 18th day of May, 1877, the plaintiff sued out a warrant from a justice of the peace against the defendants upon their liabilities as acceptors of an unpaid draft for one hundred and twenty-five dollars; and also an attachment against their goods and chattels which was levied on the same day upon six half casks of bacon, consigned to the firm of R. M. Miller & Co., and then at the depot of the carrier railroad company, undelivered.

On the 29th day of the month, J. W. Miller, a member of the firm, on behalf of the First National Bank of Cincinnati, by whom the bacon was claimed, applied to the justice to be allowed to discharge the attachment and entered into the undertaking set out in the transcript for the payment of such judgment as the plaintiff might recover of the defendants, and thereupon the bacon was by his order delivered to the said firm.

On June the 18th, the said J. W. Miller filed an affidavit, setting out in detail the manner in which the bank acquired

title, the application of the firm, as its agent, to procure the surrender of the property, and the mistake made whereby the undertaking, as shown on its face, was executed on behalf of the defendants from whom they had no authority to act, instead of the bank from whom they had such authority; and he asked to be allowed to interplead in the name of the bank to assert its claim to the bacon, and to withdraw the undertaking filed and substitute another appropriate to its relations to the cause. The affidavit was met by a counter and conflicting statement on oath from the plaintiff.

At the hearing, and on proof of service by publication, the plaintiff recovered judgment against the defendants for his demand, and the said R. W. Miller & Co. were permitted to withdraw the said undertaking and to enter into that contained in the record and in which is a stipulation for the payment of the plaintiff's judgment if the attached property shall be found to belong to the defendants. From this order the plaintiff appealed, and in the superior court the ruling of the justice was affirmed, the said R. M. Miller & Co., ordered to pay into court the proceeds of sale of the bacon, and that upon the bank's giving an indemnity against the costs, an issue be submitted to the jury as to its ownership of the property. From this judgment the plaintiff appealed.

Messrs. Dowd & Walker, for plaintiff:

After citing authorities in reference to the undertaking required by law, argued that the claimant was not obliged to interplead, but could resort to separate action for damages, *Davis* v. *Garrett*, 3 Ired., 459, or have remedy by claim and delivery. *Jones* v. *Ward*, 77 N. C., 320; *Churchill* v. *Lee*, *Id.*, 341. No provision for interpleader, C. C. P., § 197, but *defendant* may discharge property from attachment, § 212.

Messrs. Jones & Johnston, for defendants.

SMITH, C. J., after stating the case. From the sworn statement of the justice read on the hearing in the superior court, and the facts which we must assume to have been accepted and acted on by His Honor in giving judgment, it appears that the first undertaking was given in consequence of the decision of the justice that this was the only remedy for the bank, after a distinct explanation from Miller that his firm were acting only on behalf of the bank and for the protection of its interests, and had no authority from the defendants. The contract was thus entered into under a misapprehension largely due to the erroneous ruling of the justice, and it was entirely competent for him to correct the error and relieve the applicant from a liability not intended to be incurred nor authorized by the debtor, if it could be done without any impairment of any just rights of the creditor. The omission of the justice to provide for the return of the property or of its proceeds, if sold, is remedied by His Honor and every substantial right of the plaintiff protected. The judgment requires the return of the entire fund to the custody of the court, and security to be given for the costs incurred in trying the issue raised by the interplea, in addition to that for the conditional payment of the plaintiff's debt, as well as allows the substitution of one undertaking in place of the other. These are parts of one and the same comprehensive order, all of which are to be carried into effect, and they afford ample security to all the just rights of the plaintiff in the premises.

The right of an outside claimant to intervene is questioned in the brief filed by the appellant's counsel, but the practice is well settled by precedent, and if not directly authorized by statute, subserves the general policy of the new system which aims to adjust in one action, when practicable, conflicting claims to the same property. C. C. P., §§ 65 and 186. It is expressly authorized by the Revised Code, ch. 7, § 10, and PEARSON, C. J., says: "The code of civil procedure

does not repeal or suspend the Revised Code in respect to practice and proceeding, except when the provisions are inconsistent." *Insurance Co.* v. *Davis*, 74 N. C., 78; *Clerk's office* v. *Huffsteller*, 67 N. C., 449.

It has been moreover recognized in several cases in this court. In *Toms* v. *Warson*, 66 N. C., 417, in reference to an application of alleged owners to interplead and assert their title to land which had been attached in the action, RODMAN, J., says: Crawford and Murray (the claimants) might have appeared before the clerk and moved then to be allowed to be made parties *when they could have set up their title to the property*," or after the issues arising out of the attachment were sent up to the judge of the superior court for trial, they "might well apply to him to become parties to that collateral issue, *for the purpose of asserting their respective claims to the property*." In *Bruff* v. *Stern*, 81 N. C., 183, no question was made of the right to intervene and set up a claim to the attached property. See also *McKesson* v. *Mendenhall*, 64 N. C., 286; *Clemmons* v. *Hampton*, 70 N. C., 534.

The insufficiency of the last undertaking as a substantive security for the property withdrawn, affords no just ground of exception to the ruling of the court, since the order contemplates the return of the moneys arising from the sale of the property to the custody and control of the court, as concurrent with the surrender of the undertaking. The leave is granted to R M. Miller & Co. to withdraw and cancel their contract on condition that they restore what they have received upon the sale. The order is consummated when both acts are done, and the benefit is withheld until the duty is performed. This being the effect of the judgment, how can the plaintiff sustain damages from its enforcement? If the defendants have no title to the bacon, and it belongs to the bank, why should the plaintiff be permitted to appropriate another's property to the payment of his debt?

and if it belongs to the debtors and the fund is in the office to meet his demand, how is he injured?

The case then is simple. The justice led R. M. Miller & Co., the agents of the bank, into error and took from them with full knowledge of the facts, an undertaking on behalf of the defendants, which they had no authority to give, and by which no liability was imposed on the defendants. This wrong the justice proceeds to correct but fails to provide for the plaintiff's security by return of the property or of its value. The omission is remedied in the superior court and the plaintiff fully protected by the execution of the amendment of the order and the issue directed, by which the conflicting claims will be determined.

We see no error in the record and the plaintiff has no cause of complaint in the ruling of the court, and the judgment is affirmed. This will be certified for further proceedings in the court below, and it is so ordered.

No error. Affirmed.

ROBERT J. GILL, Adm'r, and others v. D. E. YOUNG and others.

Parties—Practice.

The personal representative of A (deceased) should be a party to an action brought against B to declare a trust and for other relief, when the complaint alleged among other things that A and B were co-sureties on a note due the plaintiff's intestate, and that B had induced him to surrender the note for a tract of land of less value than the amount of the note, by false representations as to the insolvency of A's estate and himself and by fraudulently concealing the fact that a certain deed

absolute on its face from C (the principal obligor on the note) to B conveying valuable real estate was in reality a trust to secure him on account of his suretyship, and that B had afterwards collected a sum of money from A's estate which was in fact solvent.

CIVIL ACTION tried on complaint and demurrer at Fall Term, 1879, of GRANVILLE Superior Court, before *McKoy, J.*

The plaintiffs are Robert J. Gill, (administrator of Robert Gill, deceased,) and Robert Gill, M. Fuller (by her next friend Robert J. Gill) and W. M. Hight. The defendants are D. E. Young, Isaac J. Young and W. H. Hughes.

Robert Gill departed this life in 1873, leaving Robert J. Gill, (who became his administrator) and M. Fuller his next of kin and heir at law.

The intestate in his life time had a large debt on W. H. Hughes and T. C. Hughes as principals, and D. E. Young, one Merriman and A. H. Alley as sureties, and the balance due thereon on the 14th of September, 1860, was thirteen hundred and fifty-nine dollars and seventy-three cents. He also had several notes on D. E. Young alone, making an aggregate of seventeen hundred and thirty-two dollars, all due before the war, and on the 22nd of September, 1863, said Young assigned a note for the last sum on one Downing to the intestate, in lieu of his own note; and in 1865 or 1866 he took up the note so assigned and transferred to the intestate several other notes in place thereof, all of which turned out to be insolvent and uncollectible. W. H. Hughes also owed W. M. Hight nine hundred dollars before the war by a bond with D. E. Young surety thereto. The complaint alleges that W. H. Hughes on the 3rd of June, 1866, conveyed a store house and lot in the town of Henderson worth four thousand dollars, to D. E. Young and his co-defendant, I. J. Young, by a deed absolute on its face, but avers the same to have been executed in trust to indemnify and secure D. E. Young as surety to the notes of W. H. and

T. C. Hughes and others, due to the intestate, and the one to W. M. Hight; and also to save harmless both D. E. Young and I. J. Young from all loss as sureties to said Hughes on his note to the bank of Cape Fear for twenty thousand dollars solvable in confederate money.

It is alleged that W. H. and and T. C. Hughes and Merriman became insolvent and have ever been so since, and that Alley died in the lifetime of the intestate of the plaintiff, and that in this position of things D. E. Young conveyed away the bulk of his estate on voluntary consideration to his sons I. J. Young and R. E. Young, conveying the store house and lot to I. J. Young who conveyed it back to him after an arrangement was affected with the plaintiff's intestate and Hight.

The plaintiffs represent that D. E. Young having conveyed most of his property to his children, sought to take up his debts to Robert Gill and Hight, and in furtherance of his scheme fraudulently represented himself and the estate of Alley, from which sources alone any payment could be expected, to be insolvent, well knowing at the time that Alley's estate was not so, and that he himself was not insolvent, except by his voluntary deeds to his children; and fraudulently concealed the fact that the store house had been conveyed on a trust for the ratable payment of the debts due to the intestate and to Hight.

That under the influence of those fraudulent representations and concealment, they were led to surrender their notes, the intestate Robert Gill his notes, amounting with interest, to a large sum, for a tract of land conveyed to him not worth more than nine hundred dollars, and the said Hight his note for a lot conveyed to him not worth more than two hundred and fifty dollars. That soon after getting up his notes as aforesaid, the said D. E. Young collected seven hundred dollars from the estate of Alley, which was in fact solvent, but had been represented by him as insol-

vent, and had I. J. Young to re-convey to him the store-house and lot.

The prayer is for relief to the intestate's estate and to Hight, on the footing of their claims as they were before the surrender of the notes, by having the store house and lot sold and the proceeds ratably applied to each one's debt, and for separate relief to Robert Gill's estate by a decree for the money received by Young from Alley's estate, both of them offering to place D. E. Young in his former position by re-conveying to him the lands they got from him, or accounting for the value thereof under the orders of the court.

To the complaint the defendants demur and assign for cause thereof, that the plaintiffs have failed to make the personal representative of A. H. Alley a party to the cause, who is resident within the jurisdiction of the court, and is a necessary party to the complete determination of the action, and from the judgment of His Honor overruling the demurrer the appeal is taken.

Messrs. Merrimon, Fuller & Fuller, for plaintiffs.

Messrs. W. H. Young and *Gilliam & Gatling,* for defendants.

DILLARD, J., after stating the facts as above. It is prescribed in the code of civil procedure that any person may be made a party defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein; and of the parties to actions, those who are united in interest must be joined as plaintiffs or defendants. C. C. P., §§ 61, 62. This is substantially the same as the rule in equity. In equity the nature or kind of interest, which makes it necessary that a person should be a party, is such an interest as may be affected by

the proposed decree, or a liability to exonerate the defendant, or contribute with him to the plaintiff's demand. Adams Eq., 312, 314.

In this case the plaintiffs allege that the storehouse and lot were conveyed by W. H. Hughes to D. E. Young and I. J. Young by a deed absolute on its face, but in fact, on the trust to indemnify and save harmless the said D. E. Young as surety to his debt to Robert Gill and to the debt due to Hight, and to indemnify and save harmless both D. E. Young and I. J. Young as sureties for him on a debt to the bank of Cape Fear; and they seek to have the trust declared, and a sale and the application of the proceeds ratably on their debts, first giving a credit for the two parcels of land conveyed to them respectively under the orders of the court; and in the case of the debt of W. H. and T. C. Hughes to Robert Gill, giving a further credit for the seven hundred dollars received by D. E. Young from Alley's estate, if the court shall decree it to be paid to Robert Gill's administrator.

Now in view of these purposes and objects of the action it seems to us that the estate of Alley had an interest making it necessary that the administrator should be joined as a party.

1. If the plaintiffs shall be able to have the relief they ask, about which we do not express any opinion, then and in that case the estate of Alley will be interested to have the tract of land conveyed to Robert Gill at the time the notes were surrendered, applied wholly to the Hughes' debt to which Young was surety; and if not, then ratably to that and to Young's individual debt, so as to make the burden to be borne by the proceeds of the storehouse and lot as small as possible; and in reference to Hight, there will be a similar interest to have a proper application of the land conveyed to him, with a view in both these respects to the exoneration of the estate of Alley.

2. If by reason of the alleged fraud and concealment of D. E. Young, the property is all sold and applied and there should be a balance still due and unpaid of the Hughes debt, to which Alley was a co-surety, and the administrator should ask a judgment for such balance, as being a relief within the facts alleged in his complaint, although not specially prayed for, then it would be of interest to the estate of Alley to be represented both as to the rendition of the judgment and the amount thereof.

3. If on the final decree the seven hundred dollars paid to D. E. Young or some part thereof should not be needed in order to equalize the burden between the co-sureties, Alley's estate should be represented to receive it, or if needed, and still there existed an unpaid balance of the debt, the estate being liable to contribute to its payment with D. E. Young, it should be a party for that purpose.

We hold therefore that the personal representative of A. H. Alley was a necessary party to a complete determination and settlement of the question involved in the action, and that the demurrer for his non joinder ought to have been sustained.

The judgment of the court below overruling the demurrer is reversed, and this will be certified to the end that the administrator of Alley be made a party to the cause, and that the parties may file answers and proceed to a trial on the merits of the case.

Error. Reversed.

A. B. DALTON v. B. R. WEBSTER.

Plea of Former Judgment—Jurisdiction—New Trial—Appeal.

1. Upon plea of former judgment, the defendant showed by the record of a justice's court that there had been a trial between the same parties on the same bond, the defence was a plea to the jurisdiction and *non est factum*, and case dismissed at plaintiffs' cost the justice testified there was evidence on the plea of *non est factum* at the trial before him, and that he decided against plaintiff on the ground of a want of jurisdiction; *Held*, the plea is not sustained by the proof.
2. A justice of the peace has no jurisdiction of an action where the "principal sum demanded" exceeds two hundred dollars, unless the plaintiff remits the excess, and the same is entered of record.
3. Whether a new trial should be granted under the circumstances of this case is a question of discretion addressed to the presiding judge, and no appeal lies from his ruling thereon.

(*Jones* v. *Jones*, 3 Dev. 360; *Hedgecock* v. *Davis*, 64 N. C., 650, cited and approved.)

CIVIL ACTION tried at Spring Term, 1879, of STOKES Superior Court, before *Schenck, J.*

Defendant appealed from the judgment below.

Messrs Watson & Glenn, for plaintiff.
Messrs. Mebane & Scott, for defendant.

ASHE, J. This is an action brought by the plaintiff against the defendant in the superior court of Stokes county, on a note under seal for two thousand dollars, due one day after date, and dated the 6th day of January, 1864, to be paid in the currency of the country. The defendant in his answer relied upon three defences, to wit: 1. That the bond described in the complaint was not his bond. 2. That there was a former judgment duly had upon the merits, in a jus-

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

tice's court in Rockingham county on the 6th day of December, 1873, on the same cause of action and between the same parties. 3. That in an action pending in a justice's court in the county of Stokes, on the same cause of action and between the same parties, the plaintiff had on his own motion dismissed said action at his own costs, in such manner as to constitute a *retraxit.*

Several issues were submitted to the jury in respect to the first defence set up by the defendant, as to the execution of the bond declared on, all of which were found in favor of the plaintiff. There was no evidence offered to sustain the defence of *retraxit.*

Upon the plea of former judgment he offered in evidence the record of T. M. Woodburn, a justice of the peace in the county of Rockingham, to show that a trial had been had before him between the same parties, upon the same bond. This record showed that the defendant's defence before the justice was, first, "that the court had not jurisdiction," and secondly, "that the note is not the note of the defendant," and that the justice, after hearing the evidence and the arguments of counsel and the allegations of the respective parties, adjudged that the case be dismissed at the plaintiff's costs.

Woodburn, the justice, was then introduced and examined by the defendant, and testified that there was evidence before him on the plea of "*non est factum*," and that an appeal was taken from his judgment to the superior court of Rockingham county; and the same witness testified on cross-examination that he had decided the case against the plaintiff on the ground that he did not have jurisdiction, and would not have given judgment for the plaintiff even if the note had been proved. He also proved that no *remittitur* was entered by the plaintiff.

A transcript from the superior court of Rockingham county was then produced by the plaintiff as evidence, by

which it was shown that at spring term, 1874, of said court, the plaintiff's appeal from the judgment of the justice was duly dismissed, as null and void for want of notice.

Upon this evidence His Honor held that the plea of former judgment was not sustained, to which the defendant excepted. After the verdict and before judgment the defendant read to His Honor an affidavit by the justice (Woodburn) stating that he was mistaken in his evidence on the trial in saying that he decided the case before him upon the ground that he did not have jurisdiction, but that it was decided upon the merits; and upon this affidavit the defendant moved the court to set aside the verdict and grant him a new trial, which was refused by His Honor and judgment pronounced upon the verdict, from which the defendant appealed.

The record in this case presents but two questions for our consideration; first, was it error in His Honor to hold that the plea of former judgment was not sustained by the proof? and secondly, was there error in refusing to set aside the verdict and grant a new trial?

It is conceded that a justice's judgment would not be a bar unless the case was decided upon its merits. The record of the justice shows that the case was defended before him upon a plea to the jurisdiction as well as upon that of *non est factum*. And because evidence was offered by defendant upon the issue raised by the latter plea, it does not follow as a matter of course, that the case was not dismissed for the want of jurisdiction. By reference to the record it cannot be seen upon which ground the judgment of dismissal was rendered, and therefore the defendant introduced the justice as a witness to relieve the court from any doubt on that subject, and he testified that the case was dismissed by him on the ground of want of jurisdiction; and the defendant insists that the evidence was brought out upon the cross-examination and that it was not competent for the

plaintiff to show by the justice what he meant by his judgment. But the defendant did not object to the evidence. He introduced the witness himself and examined him on that very point, and he can have no ground of complaint that the fact was brought out in the cross-examination which was adverse to his defence, for it would have been error in His Honor to have refused the plaintiff the privilege of a cross-examination.

But admitting this point to be with the defendant, there is another view of the case which entirely sustains the ruling of His Honor. The note sued on was for two thousand dollars. If the justice of the peace had no jurisdiction of the action on the note, then his judgment was a nullity and may be so treated when it comes in question collaterally. Waits Actions and Defences, p. 805, and section 9. *Jones* v. *Jones*, 3 Dev. 360.

By the constitution of 1868 it is declared " that the several justices of the peace shall have exclusive original jurisdiction under such regulations as the general assembly shall prescribe, of all actions founded on contract wherein the *sum demanded* shall not exceed two hundred dollars." Art. IV., § 33. And the legislature has provided by section 15, chapter 63, of Battle's Revisal, amended by the acts of 1877, ch. 63, that " where it appears in any action brought before a justice that the *sum demanded* exceeds two hundred dollars, the justice shall dismiss the action and render judgment against the plaintiff for the costs, unless the plaintiff shall remit the excess above two hundred dollars (and the interest on the excess) and shall, at the time of filing his complaint, direct the justice to make his entry: The plaintiff in this action forgives and remits to the defendant all interest and so much of the principal of this claim as is in excess of two hundred dollars." And this court in the case of *Hedgecock* v. *Davis*, 64 N. C., 650, has construed the words "sum demanded" to mean the principal of the note. The

action brought before the justice was not on the note. It was for two hundred dollars, and the note we suppose was offered in evidence to show that the amount or some other sum was due on it; whereas the action should have been brought on the note for two thousand dollars and then the *remittitur* should have been entered as provided in section 15 *supra*. This we believe is the practice in other states before justices of the peace; if it is not it ought to be. But in the case before justice Woodburn no *remittitur* was entered so as to bring the note, if the cause of action, within his jurisdiction, and therefore he had no jurisdiction of the case and his judgment being void was no bar to the plaintiff's recovery in this action.

As to the exception taken to the ruling of His Honor upon the motion to set aside the judgment and grant a new trial, there was no error. It was a pure matter of discretion with His Honor, from which no appeal lies.

There is no error. The judgment of the court below must be affirmed. Let this be certified to the superior court of Rockingham county.

No error. Affirmed.

MELVIN & MELVIN Adm'rs, v. CHARLES H. STEPHENS, Adm'r and others.

Evidence—Equitable Defence—Payment.

In an action against an administrator for the non-payment of a decree rendered at spring term, 1857, the defendant denied that there was such record and averred it was of spring term, 1856, and that he had paid the same; and the court having ruled that the record was of 1856

to which there was no exception, it thereupon became competent for the defendant to sustain his allegation of payment by the production of receipts which were dated after the actual decree but before the time of the decree as alleged by the plaintiff. And even if the receipts were anterior, they were available as an equitable defence.

(*Meekins* v. *Tatem*, 79 N. C., 546; *Covington* v. *Ingram*, 64 N. C., 123, cited and approved.)

CIVIL ACTION on an Administrator's Bond, tried at Spring Term, 1879, of BLADEN Superior Court, before *McKoy, J.*

Judgment for defendants, appeal by plaintiffs.

Mr. Robert. H Lyon, for plaintiffs.

Messrs. D. J. Devane and *T. H. Sutton,* for defendants.

DILLARD, J. The plaintiffs as administrators *de bonis non* of John Melvin, deceased, sue in this action on the administration bond of Charles H. Stephens as administrator of George Melvin, and allege a breach of the conditions of the bond in the non-payment of the sum of four hundred and thirty-three dollars and eighteen cents, with interests thereon and costs, adjudged in favor of the plaintiffs against the defendant Chas. H. Stephens, administrator aforesaid, by a decree of the court of equity for Bladen county at spring term, 1857, of said court.

The defendants for answer deny the recovery of a decree at spring term, 1857, or at any term of the court of equity of Bladen, against the defendant Stephens as administrator of George Melvin for four hundred and thirty-three dollars and eighteen cents, with interest on the same and for costs, and they deny that there is any record of the said supposed recovery remaining in the said court of equity in manner and form as the plaintiffs have in their complaint alleged; but they admit that plaintiffs obtained a decree on or about fall term, 1855, of the court of equity of Bladen county, for four hundred and thirty-three dollars and eighteen cents, to

be paid to plaintiffs less the "taxed costs" to come out of the fund, and they aver that Stephens, the administrator of George Melvin, paid off the said decree soon after it was entered.

Upon the trial His Honor framed two issues, one involving the inquiry, whether the plaintiffs obtained a decree at spring term, 1857, for four hundred and thirty-three dollars and eighteen cents, with interest and costs; and the other, whether Stephens, the administrator of George Melvin, had paid off the said decree against the estate of his intestate; and as pertinent to the question, (when was the decree obtained?) the parties respectively produced not a transcript of the record of the equity cause, but merely informal entries or memoranda from the trial and minute dockets of the court of equity.

The plaintiffs to support their contention produced from the records of spring term, 1857, an entry composed of the title of the cause, with the memorandum opposite, "decree according to award," followed by the award of Warren Winslow and J. G. Shepherd; and the defendants on their part produced from the records of fall term, 1854, an entry composed of the title of the cause and the memorandum, "order of reference see minutes," followed by the reference drawn out on the minutes to Warren Winslow and J. G. Shepherd, and entries continuing the cause from term to term until spring term, 1856, when the record showed the cause stated by its title with the entry opposite, "exceptions to award filed, exceptions overruled, report confirmed," followed by an order on the minutes formally overruling the exceptions and confirming the report.

In this state of the record, the case states His Honor found the first issue in favor of defendants, by which we are to understand that he found the decree to have been obtained, not at spring term, 1857, as contended by plaintiffs, but at spring term, 1856, as insisted on by the defendants, and

no exception being taken to the action of His Honor, and no assignment of error made in relation thereto, no review according to the established rule of the court, can be had before us as to this point; and therefore we are to take it as a fixed fact that the decreew as obtained at spring term, 1856. *Meekins* v. *Tatem*, 79 N. C., 546. This conclusion of His Honor being announced, the plaintiffs asked leave to amend their complaint so as to declare upon the decree as set forth in the record of spring term, 1857. This was refused and the plaintiffs excepted.

No explanation is made of the particulars wherein the amendment was desired to be made, and we are unable to perceive why the leave was asked. It could not have been to declare, making the decree the foundation of the action as in an action of debt, for that would be a departure from the case made in the complaint and would in effect be a case constituted in court with a different cause of action and with a change of parties. We can conjecture no motive to amend, unless it be that whereas the complaint describes the decree as being for four hundred and thirty-three dollars and eighteen cents *with costs*, they desired to make it describe a decree for the same sum *less the costs*, to be paid out of the fund. If such was the object, no good could arise to plaintiffs from the amendment. It would be quite immaterial, as they were concluded by the decision of the judge fixing the time of the decree at spring term, 1856, to which they took no exception, and as to which no error is assigned. It is our opinion therefore that the refusal of amendment gave the plaintiffs no just ground of complaint.

In support of the defence of payment of the decree involved in the second issue submitted, the defendant Stephens offered in evidence two receipts, dated the 5th of August, 1856, executed by the then clerk and master of the court of equity in exact conformity to the terms of the award, which was confirmed at spring term, 1856, one being for the costs

in the equity cause, and the other for the residue of the four hundred and thirty-three dollars and eighteen cents. The plaintiffs objected to the admission of said receipts on the ground that they evidenced payment anterior to the decree of spring term, 1857, and the objection being overruled they excepted.

There could certainly be no error in receiving this evidence if the decree was obtained at spring term, 1856, as ruled by His Honor and not excepted to by the plaintiffs. In that case the receipts were of date subsequent to the decree and were relevant and fit and proper to be considered of by the jury in passing on the alleged payment. But a further error is assigned, in that, the court in its direction to the jury told them, that even if the decree in point of fact was obtained at spring term, 1857, as contended for by plaintiffs, if they should believe the amount thereof was paid prior thereto upon an agreement that the same was to be credited on the decree when entered, such payment would in law operate as a satisfaction and discharge of the decree.

Was not this exposition of the law correct? It is unquestionable that a judgment at law or a decree in equity is conclusive, that what they call for is due at its entry; and as a general rule it is inadmissible to go behind the same and show anterior payments or credits which ought to have been allowed, upon the principle that there may be an end to litigation. But in either case, if the party lost the benefit of such prior payments or credits through oppression, imposition, surprise, fraud, or a violation of a promise relied on, either express or implied, a court of equity would interfere and relieve against the wrong. Adams Eq., 419; Story Eq. Pl., § 428. In such case if a party had received the amount of a debt and afterwards took decree and sought to enforce a second payment of the same money, it would be regarded in equity as unconscionable, and the court even after decree enrolled, would entertain a bill to impeach the

original decree and relieve against the attempted injustice. And what could have been done in equity under our former system, may be done in some form under our present system of courts.

Since the adoption of the code of civil procedure, all legal and equitable powers being united in the same court, the jurisdiction to relieve and the mode of relief against the final decree of the late court of equity, are by a civil action in the superior court; and in that tribunal it was competent to the defendant to seek relief against the enforcement of plaintiffs' decree, by action in his name as plaintiff, as a substitute for the bill in equity to impeach an enrolled decree; or if sued as in this action, he was entitled under the provisions of the code to set up as many defences as he might have, whether heretofore denominated legal or equitable, or both, and to have such relief, affirmative or other, as might be legally authorized on the facts constituting his defence. *Covington* v. *Ingram*, 64 N. C., 123; C. C. P., §§ 102, 248; *Dobson* v. *Pearce*, 2 Kernan, (N. Y.) 157; 4 Wait's Actions and Defences, 195.

There is no error and the judgment of the court below is affirmed. Let this be certified.

No error. Affirmed.

FANNIE WILLIAMS v. FRANK JOHNSTON.

Witness under section 343—*Inadequate Price—Judge's Charge.*

1. The incompetency of a witness under section 343 of the code, arises where he has an interest in the event of the suit or may avail himself of the benefit of a verdict in support of his claim in a future action; *Therefore* where a deed was made by father to son, and then from the

son to the plaintiff in ejectment upon the understanding that plaintiff would pay him two hundred dollars if a recovery was had, and it appeared that the defendant in ejectment derived his title from a purchaser at execution sale against the father, *it was held* (the father being dead) that the son was an incompetent witness under said section.

2. Upon the question of inadequacy of price for land, the court was requested to charge that it must be such as shocks the "moral sense" of persons acquainted with the property and to create surprise, &c.; but told the jury "there was no *formula* by which an inadequate price was defined, yet if the consideration be such as to shock the moral sense or create surprise, they might find the price inadequate;" *Held* no error.

CIVIL ACTION to recover Land tried at Fall Term, 1879, of DAVIE Superior Court, before *Gilmer, J.*

There was a verdict for the defendant, a motion for a *venire de novo*. Motion overruled and judgment for defendant, from which the plaintiff appealed.

Messrs. McCorkle and *Bailey*, for plaintiff.
Messrs. Watson & Glenn and *Clement*, for defendant.

ASHE, J. On the trial the plaintiff offered in evidence a deed from Francis Williams to his son Monroe Williams, dated 15th August, 1865, with a consideration stated of one hundred dollars, and also a deed from Monroe Williams tc Fannie Williams, his sister in-law, dated September, 1875. The plaintiff then introduced Monroe Williams and proposed to ask him how much he had contracted to pay his father for the land in controversy, and how much he had paid him; but the defendant objected upon the ground that it was incompetent for him under section 343 of the code of civil procedure, to testify to any transaction or communication with Francis Williams, his father, it having been proved by the witness on his preliminary examination that his father was dead, and that he, the witness, was poor and

could not maintain the suit and had executed a deed to plaintiff upon the understanding that in the event of a recovery of the land, she was to pay him two hundred dollars. The court held the witness incompetent, and the plaintiff excepted.

The defendant adduced evidence tending to show that Francis Williams was insolvent; that there was a judgment for some five thousand dollars then unpaid, and other large judgments against him remaining unsatisfied; that he conveyed other lands to another son, before he conveyed the tract in controversy to Monroe, and did not retain a sufficient amount of property to pay his debts; and the land in dispute was sold under execution by the sheriff of Davie county, and J. G. Lash became the purchaser at the sheriffs sale. There is nothing in the record which shows directly how Johnston, the defendant, became the owner of the land in dispute, but it must be presumed from the character of the evidence offered, the course of the trial, the exceptions taken by plaintiff, and the argument of counsel in this court, that he derived his title and possession from Lash, the purchaser at the sheriff's sale, and is therefore in law the assignee of Francis Williams.

Assuming this to be so, was the proposed testimony of Monroe Williams as to the transaction between him and his father Francis Williams, then dead, competent under section 343 of the code? The provisions of that section are so intermixed that it is difficult to interpret it, without culling and grouping together its parts applicable to the particular question arising under its provisions; but after dissecting it in that way, it will read as applicable to this question: "No person who has a legal or equitable interest which may be affected by the event of the action, nor any person who previous to such examination has had such an interest, nor any assignor of anything in controversy in the action shall be examined in regard to any transaction or communication

between such witness and a person at the time of such examination deceased, as a witness against a party then defending as assignee, when such examination, judgment or determination of such action can in any manner affect the interest of such witness." The proposed testimony of Monroe Williams seems to fall directly within this inhibition. Francis Williams, the person with whom the transaction was had, was dead. Johnston, who was defending the action, was his assignee, and the witness, Monroe Williams, previous to his examination, had had a legal interest in the land, and at the time had a legal interest in the event of the action; for the plaintiff was to become his debtor for two hundred dollars if she should effect a recovery of the land. So that the verdict and judgment in her favor would be evidence for him in an action against her on the promise if she should refuse to pay him.

The rule that excludes a witness on the ground of interest is, when the witness might derive a benefit or advantage from the event of the suit, and this benefit may arise to the witness in two cases; first, when he has a direct and immediate benefit from the event of the suit itself; and secondly, when he may avail himself of the benefit of the verdict in support of his own claims in a future action. Phil. on Ev. 83, 84. The testimony was incompetent and there was no error in excluding it from the jury.

As to the error assigned in the alleged refusal of the court to give the special instructions to the jury as prayed for: The plaintiff asked His Honor to charge the jury that to constitute a grossly inadequate consideration it must be such as shocks the "moral sense" of all persons acquainted with the property sold, and to create great surprise at the smallness and inadequacy of the consideration. The court in response charged the jury that there was no certain *formula* in the law by which an inadequate price was defined, and although he could not tell them there was no inade-

quacy unless their "moral sense was shocked, yet if the consideration in this case was such as to shock the moral sense of all persons acquainted with the land and to create great surprise at the smallness and inadequacy of said consideration, they might find the price was inadequate." The charge was given almost *verbatim* as prayed for, and we are unable to see upon what ground the exception was taken, unless it was to the remark of His Honor that he could not tell them that there was no inadequacy unless their "moral sense" was shocked. We know of no rule of law requiring anybody's "moral sense" to be shocked before inadequacy of price can be found. It was a strong expression originally used, and since followed by the courts, to denote the degree of disparity between the consideration and the value of the property sold, that would amount to inadequacy, but any other terms that would convey the same idea would have the same effect.

There is no error in the ruling of His Honor. Let this be certified to the superior court of Davie county.

No error. Affirmed.

JOHN M. ROBERTS v. ELISHA COLE.

Breach of Contract—Measure of Damages.

1. Where owners of land agreed to keep up a *division fence* and defendant failed to fulfil his contract by reason of which stock broke in and injured plaintiff's crop, and in an action for damages the court told the jury that plaintiff was entitled to recover the cost of repairing the fence and "the difference between what the crop would have made and what was made;" *Held*, the latter part of the charge is erroneous.

2. The measure of damage in such case is the cost of reparation and such sum as will cover the injury done to the crop before plaintiff knew of the breaking in and had time to put up the fence, to be ascertained by the jury without reference to the conjectural estimate of the value of the crop if it had not been interfered with.

(*Boyle* v. *Reeder*, 1 Ired., 607; *Foard* v. *R. R. Co*, 8 Jones 235; *Mace* v. *Ramsey*, 74 N. C., 11, cited and approved.)

CIVIL ACTION tried at Spring Term, 1879, of MOORE Superior Court, before *McKoy, J.*

Verdict in favor of the plaintiff, judgment, appeal by defendant.

Mr. Neill McKay, for plaintiff.

Messrs. Worthy and *Hinsdale & Devereux*, for defendant.

SMITH, C. J. The parties to the suit entered into a mutual agreement to build and keep in repair, each a separate portion of a common division fence, which separated and protected their respective cultivated fields. The defendant failed to fulfil his contract, and his part of the fence becoming decayed and rotten, hogs broke through into the plaintiff's field, and rooted up and injured his crop, and this action is brought to recover compensation in damages therefor. The only exceptions of the appellant taken during the trial are:

1. The refusal of the court to charge the jury that the plaintiff was entitled to recover, for the breach of the contract, the value of the labor and materials necessary to put the fence in good order, and

2. In the instruction given, that if the fence was in the contemplation of the parties intended to protect the crop from depredations of stock, the plaintiff was entitled in addition to the costs of reparation, to be remunerated for the injury to his crop, and the measure of his damages was the difference between what the crop, undisturbed, ordinarily

would be, and that which was made, diminished by the breaking in of the hogs.

While the court very properly declined to restrict the plaintiff's claim to compensation for the defendant's breach of contract as requested, and correctly directed the jury to estimate and allow for the ravages of the hogs, the rule by which the measure of his injury was to be ascertained, was too vague and uncertain to act upon. The value of the crop made is capable of definite calculation, but what it would have made if it had not been interfered with, the other element in the proposition, is and must be purely and wholly conjectural. The season may have been more favorable to later planting, and many contingencies may be supposed, in a greater or less degree, affecting and determining the result. It was therefore erroneous to leave the defendant's liability dependent upon such an uncertainty.

In *Boyle* v. *Reeder*, 1 Ired. 607, the plaintiff sued the defendant for a breach of covenant in failing to furnish an engine for his mill within the stipulated time, and as compensation for the delay claimed its anticipated earnings and profits when in active operation. In delivering the opinion, RUFFIN, C. J. says: "Very certainly damages are not to be measured by any such vague and indeterminate notion of anticipated profits of a business or adventure, which like this depends so much on skill, experience, good management and good luck for success," and that his damages were "a reasonable rent and insurance during the period of suspension," in addition to the expense of supplying the defective parts of the machinery. So in *Foard* v. *R. R. Co.*, 8 Jones, 235, where the defendant was charged with negligence and delay in forwarding a steam pipe needed in working the plaintiff's flouring mill, the rule laid down in *Boyle* v. *Reeder*, was approved, and BATTLE, J., adds: "The plaintiff will be entitled to recover from the defendant in another trial, compensation for his capital invested, while it was

lying idle for the want of the pipe, not forwarded in proper time, that is, the legal interest on such capital, also for any workmen or hands, necessarily unemployed for the same cause, and also for the expenses of sending the machinist after the necessary pipe, besides any other damages which were the direct and necessary result of the defendant's negligence."

In *Mace* v. *Ramsey*, 74 N. C. 11, the defendant had agreed to construct a boat for the plaintiff in time to be used in the transportation or ferriage of an excursion party, expected soon to arrive, and failed to do so. It was declared by the court that inasmuch as the use of the boat for this special occasion was contemplated by the parties to the contract, "the immediate and necessary consequence of the failure of the defendant to furnish the boat, was the loss of the plaintiff of the *fares of the passengers engaged* by him for the trip to Beaufort and excursions in the harbor."

Applying the rule thus laid down to the facts of the present case, the jury should have been instructed to give the plaintiff as damages such sum as would repair and put the defective fence in order, and cover the injury done to the crop before the plaintiff knew of the irruption of the hogs and had time to drive them out and put up the fence; *these to be ascertained and estimated*, and irrespective of any conjectural estimate of the value of the crop if it had not been interfered with. For this error there must be a *venire de novo* and it is so ordered. Let this be certified.

Error. *Venire de novo.*

A. J. McCURRY and wife v. JAMES L. McCURRY.

Continuance—Evidence in Slander—Nonsuit—Issues, response to.

1. The continuance of a trial is matter of discretion in the presiding judge and not reviewable unless the discretion is palpably abused.
2. It is competent for the defendant in an action for slander to prove a common neighborhood report of the truth of the facts charged, in mitigation of damages. And it is in the discretion of the court to admit the proof though elicited by a leading question.
3. Upon a motion to nonsuit, an objection of the plaintiff to the permission given to defendant's counsel to argue the force and effect of plaintiff's evidence after he had closed his case, cannot be sustained where the court intimated an opinion for plaintiff and after the argument adjudged in his favor.
4. In slander the issues were. 1. "Did defendant say in substance that your mother, meaning feme plaintiff, is an old rogue and has concealed for you (her son) from your cradle up?" and 2. "Did he say that your mother is a rogue, has stolen herself, and has concealed for you from your cradle up"? and the jury found the words spoken to be, "you are a rogue and your mother has upheld you in stealing from your cradle up;" *Held* sufficiently responsive, and not *per se* actionable. They do not impute to plaintiff any punishable crime.

(*Austin* v. *Clark*, 70 N. C., 458; *State* v. *Lindsey*, 78 N. C., 499; *Armstrong* v. *Wright*, 1 Hawks, 93; *Pegram* v. *Stoltz*, 67 N. C., 144; *Nelson* v. *Evans*, 1 Dev., 9; *Stith* v. *Lookabill*, 71 N. C., 25; *Eure* v. *Odom*, 2 Hawks, 52, cited and approved)

CIVIL ACTION for Slander tried at Spring Term, 1879, of YANCEY Superior Court, before *Graves, J.*

The complaint charged the defendant with saying to her son—McCurry: 1st. "Your mother (meaning the feme plaintiff) is a damned old rogue and has concealed for you from your cradle up." 2d. "That your mother (meaning the feme plaintiff) is a rogue, she has stolen herself and has concealed for you from your cradle up." The answer denied each allegation of the complaint.

When the case was called for trial the plaintiff filed an affidavit for the continuance of the cause for the absence of

his wife, Sarah, a party plaintiff, who was detained by sickness, and whose presence was necessary, as a witness for herself, and in the management of the cause. His Honor granted the continuance on the payment of the costs of the term, which the plaintiff declined and excepted.

The following issues were submitted to the jury:

1. Did the defendant speaking of the plaintiff say that your mother (meaning the said Sarah McCurry) is a damned old rogue and has concealed for you (meaning McCurry) from your cradle up, or words substantially the same in meaning?

2. Did the defendant speaking of the plaintiff say that your mother (meaning Sarah McCurry) is a rogue, has stolen herself, and has concealed for you (meaning McCurry) from your cradle up, or words substantially the same in meaning?

3. What damage, if any, have the plaintiffs sustained?

4. Was this action begun within six months after the speaking of the words charged?

The jury responded to the third issue, "none," and to the fourth "yes," and on the first and second they answered, "The evidence does not sustain the allegations as a whole, the jury do find that defendant James L. McCurry did say, you McCurry are a rogue and your mother Sarah McCurry has upheld you in stealing from your cradle up; for their verdict do say they find the issues as above set forth and answered."

After the plaintiffs closed their case His Honor permitted (after objection by plaintiffs) the defendant's counsel to argue the force and effect of the plaintiff's testimony, upon a motion to nonsuit the plaintiffs, which exception His Honor refused. The defendant then offered himself as a witness in his own behalf, and on his examination, in answer to a leading question by his counsel, testified that there was a common report in the neighborhood that McCurry had been in

the habit of "slipping out or stealing out" his father's property, and selling it, and his mother was protecting him from his father, to which the plaintiffs excepted, and His Honor overruled the exception. The plaintiffs then objected to the form of the verdict because it was not responsive to the issues, but this exception was overruled, and the plaintiffs moved for a new trial for the exceptions filed and for the reason that the verdict did not respond to the issues submitted to the jury. The motion was disallowed, and the court adjudged that the defendant go without day, and the plaintiffs pay the costs, from which they appealed.

Mr. J. M. Gudger, for plaintiffs.
Mr. J. L. Henry, for defendant.

ASHE, J. The first exception taken by the plaintiff was to the ruling of His Honor in regard to the continuance of the cause, but that was no ground for a new trial. It was a matter of discretion. All questions of practice and procedure as to amendments and continuances arising on a trial in the court below, are in the discretion of the presiding judge, and are not reviewable in this court, unless possibly when the discretion is palpably abused, which is not the case here. *Austin* v. *Clarke*, 70 N. C., 458; *State Lindsey*, 78 N. C., 499; *Armstrong* v. *Wright*, 1 Hawks, 93.

The next exception was to the admission of the testimony of the defendant in regard to the report in the neighborhood: Whether the objection was to the leading character of the question propounded to witness, or to its admissibility on the ground of incompetency does not appear, but on neither ground can the objection be sustained; not on the first ground because it was in the discretion of His Honor to allow a leading question, 1 Greenl. Ev., § 435; *Pegram* v. *Stoltz*, 67 N. C., 144; nor can the objection be sustained

on the second ground. In both the forms in which the words are charged to have been spoken, the charge of concealing is imputed to the feme plaintiff, and if that, in the connection with which the words were used, amounted to slander, then it was material and competent for the defendant to show in mitigation of damages the common report in the neighborhood of the truth of the facts charged. *Nelson* v. *Evans*, 1 Dev., 9; 5 Wait's Act. and Def, 759.

As to the exception that the defendant's counsel was allowed to argue the force and effect of the plaintiffs' evidence on a motion to nonsuit in the midst of the trial: It has been held in the case of *Stith* v. *Lookabill*, 71 N. C., 25, that it is "an improper and loose mode of practice and should not be tolerated." And in that case the court below sustained the motion to nonsuit, and this court awarded a *venire de novo*, and very properly; for if the plaintiff had gone on before the jury as he had the right to do, he would have done so under the disadvantage of having had his case frustrated by the opinion of the court. But in our case there was no such objection, for His Honor after hearing the argument of defendant's counsel, ruled against defendant and the plaintiffs proceeded in the trial with the prestige of a favorable opinion from the court upon the evidence he had adduced. And whatever "moral effect" may have been produced by the arguments on the motion to nonsuit, it was all in favor of the plaintiffs, for the ruling of the court clearly intimated that the plaintiffs had made out their case. The plaintiffs had no ground for complaint.

The remaining exception was to the irregularity in the finding of the jury: We think the finding of the jury was sufficiently responsive to the issues. They find that no damage was done, in answer to the third issue; and in their finding that the words spoken by the defendant were, "You, McCurry, are a rogue and your mother has upheld you in stealing from your cradle up," is a sufficient response to the

two first issues. They find substantially that the defendant did not speak the words charged in the complaint. The words found by them to have been spoken cannot be construed to mean a charge that the feme plaintiff was a rogue, or that she had stolen herself or even concealed anything stolen by her son, but simply that she had upheld him in stealing from his cradle up. These words do not impute to her any crime that is punishable by the common or statute law. There are many ways in which a mother may be said to uphold a son addicted to criminal practices without incurring herself any amenability to the criminal law. She may not have punished him when his conduct deserved it, or suppressed the evidence of his guilt within her knowledge, or shielded him from prosecution, or vindicated his character when assailed. Such upholding as this would be no crime, however it might violate the moral law; and if this is the meaning of the charge, it is not actionable. Words which convey only an imperfect sense or practice of moral virtue, duty or obligation are not sufficient to support an action. *Eure* v. *Odom*, 2 Hawks 52.

The words found by the jury were not "*per se*" actionable and could not be made so, without an *inuendo*, pointing their meaning, and giving them a slanderous import; and when they are capable of two interpretations, the one innocent and the other slanderous, it is for them to say how the defendant used them. 5 Wait's Act. and Def., 749, and cases there cited. By the finding of the jury in this case that the plaintiffs have sustained no damage, we must conclude that in their estimation the words were not used in a defamatory sense.

There is no error in the ruling of His Honor upon the exceptions. Let this be certified to the superior court of Yancey county.

No error. Affirmed.

THOMAS Y. LYTLE and another v. JOHN D. BURGIN.

Ejectment—Parties.

In an action to recover land, a third party claiming to be joint owner with defendant, has the right on affidavit to be let in as a party defendant.

(*Colgrove* v. *Koonce*, 76 N. C., 363; *Rollins* v. *Rollins*, *Id.*, 264, cited and approved.)

MOTION heard at Fall Term, 1879, of MCDOWELL Superior Court, before *Schenck, J.*

The plaintiffs, T. Y. Lytle and B. F. Bynum, brought this action to recover possession of land purchased at an execution sale on a judgment against the defendant who was in the sole possession claiming it as his own. No answer being filed to the complaint, the plaintiffs moved for judgment by default and for a writ of possession, and thereupon the counsel for L. E. Burgin filed an affidavit and moved to be made a party defendant, and have leave to file an answer. The plaintiffs filed counter-affidavits, and upon the hearing the court refused the motion of L. E. Burgin; first, because the affidavits show that the defendant was in the sole possession of the land claiming it as his own and had been for years; and secondly, the motion is also refused, in the exercise of what the court believes to be its discretion. And from this ruling L. E. Burgin appealed.

Mr. D. G. Fowle, for plaintiffs.
Mr. W. H. Malone, for defendant.

DILLARD, J. It seems to us that in view of the claim of ownership in the subject matter of the action as set forth in the affidavit on the part of L. E. Burgin, and of the fact found by the judge and proved by the counter affidavits,

the said L. E. Burgin had the right to become a party to defend her interest in the land sued for, and it was error to refuse her motion.

Under our system, one of the prominent objects is to have all questions growing out of an action adjudged and finally determined therein, and in furtherance of this end, ample provision is made in sections 61 and 65 of the code for bringing before the court all persons who may be necessary to a complete settlement of the questions involved. By section 61, among other things, it is provided that in an action to recover the possession of real estate, the landlord and tenant thereof may be joined as defendants, and any person claiming title or right of possession to real estate may be made party plaintiff or defendant, as the case may require, to any such action; and by section 65 it is enacted in the second paragraph, that in an action for the recovery of real or personal property, a person not a party, but having an interest in the subject thereof, may apply to the court to be made a party and on such application the court may order him to be brought in by the proper amendment.

These sections of the code have received a construction by this court, and by reference thereto it may be seen who may apply to become parties to an existing suit under the one section, and who under the other, and in what mode, and also what applications are to be passed on by the court as of right, and what are addressed to the discretion of the court.

In *Colgrove* v. *Koonce*, 76 N. C., 363, a third person applied to be admitted a party, claiming adversely to both plaintiff and defendant, and the court ruled that section 61 applies only when the "person applying is connected in interest with one or the other of the parties as co-tenant with the plaintiff or in privity with the defendant, or on claim of a common possession with them," and therefore the application did not come within that section, but the court held

that the application was within the second paragraph of section 65, and as such it was discretionary to allow or refuse the leave.

In *Rollins* v. *Rollins*, 76 N. C., 264, one Henry applied to become party, claiming to be landlord to the tenant in possession, and plaintiff opposed his admission claiming also to be landlord to the same tenant. The court in passing on the right of the applicant ruled that at common law every landlord had the right to be admitted to defend with or without the tenant, and that under the term "landlord" all persons had the right to come in as parties "whose title was connected or consistent with the possession of the occupier and is divested or disturbed by any claim adverse to such possession, and that it was not necessary they should have exercised previously any acts of ownership on the land." The court also held that the same right of admission existed in this state under the Revised Code, and is admissible still within section 61 of the code of civil procedure, and on the interest of the party being manifested by affidavit, the application was to be passed on as a question of right in law, and not to be granted or refused as a matter resting in the discretion of the judge.

These cases, in our view, are decisive of the case under consideration. Here by affidavit, which it is said in the case last cited, is like an affidavit to continue or remove a cause, it is made to appear that L. E. Burgin claims a title in the land in controversy not adversely to, but as joint owner with John D Burgin, the tenant in possession. This joint ownership with the defendant is not denied by plaintiffs, but by their affidavits they show merely that the applicant, L. E. Burgin, has not resided on the land for fifteen years, nor been known nor heard of as claiming any title or interest therein, but that during the said time the defendant, John D. Burgin, has lived on the land claiming it as his own and paying the taxes thereon. The title of the appli-

cant as joint owner not being denied, it is to be assumed for the purposes of the application to have once existed. Taking that to be so, the facts established in opposition of adverse possession in John D. Burgin for fifteen years under a claim of right and of non claim by L. E. Burgin, are not, in law, sufficient to perfect the title of John D. Burgin as against her, either by presumption of a deed or as tolling her right of entry.

We think therefore it was not discretionary with the court below to allow or refuse the admission of L. E. Burgin as a party, but that upon the claim of title as contained in her affidavit, and not denied by plaintiffs, she was entitled to be received to defend her interest in the land sued for and should have been allowed to become a party to the action.

The judgment of the court below denying the motion of said L. E. Burgin is reversed, and this will be certified that she may be allowed to become a party and set up her defence in the action if she shall so desire.

Error. Reversed.

DANIEL FRY v. COMMISSIONERS OF MONTGOMERY COUNTY.

Mandamus—Debt against County—Practice.

A creditor of a county having reduced his debt to judgment is entitled to a *mandamus* in the nature of an execution to compel payment. The practice is to issue an alternative then a peremptory writ, and if good cause be not shown for failure to obey, then (as here) an *alias* peremptory writ may issue, or an order of attachment if applied for.

McLendon v. *Com'rs*, 71 N. C., 38; *Lutterloh* v. *Com'rs*, 65 N. C., 403; *Tucker* v. *Raleigh*, 75 N. C., 272, cited and approved.)

FRY *v.* COM'RS OF MONTGOMERY.

MOTION for an *Alias Mandamus* heard at Fall Term, 1879, of MONTGOMERY Superior Court, before *Buxton, J.*

After due notice given by the plaintiff of a motion to renew an order for a writ of *mandamus* to be issued to defendant commissioners, His Honor made the following order: It appearing from an inspection of the record in this case that plaintiff recovered judgment against defendants at fall term, 1875, for four hundred and fifteen dollars and ninety seven cents, and obtained a writ of *mandamus* at spring term 1876, commanding defendants to levy and cause to be collected according to law a tax sufficient to pay said judgment and costs, and apply the same as speedily as practicable in satisfaction thereof, and to report to this court their compliance with this order; and it further appearing that defendants have disregarded said order, and that said judgment still remains unpaid: It is therefore ordered by the court that an *alias mandamus* issue to defendants returnable to the next term, again commanding them to perform the order heretofore made in this case—requiring them to provide the means and apply the same to the payment of the plaintiff's debt and costs, and to certify their obedience to this order at the next term of this court. Defendants appealed.

Messrs. Hinsdale & Devereux, and *Neill McKay*, for plaintiff.
Messrs. M. S. Robbins and *J. T. Crocker*, for defendants.

DILLARD, J. It is settled by the decisions of this court that a party may sue to recover a debt due from a county, and in the same action may demand a *mandamus* for its payment. *McLendon* v. *Com'rs of Anson*, 71 N. C., 38; *Lutterloh* v. *Com'rs of Cumberland*, 65 N. C., 403. The *mandamus* issued on the establishment of a debt by judgment is usually an alternative *mandamus* and on insufficient cause shown for

non-compliance therewith the course is to issue a peremptory *mandamus*. *Tucker* v. *City of Raleigh*, 75 N. C., 272.

In this case the plaintiff proceeded in accordance with the law as established in this state. He brought his action to fall term, 1875, for judgment on a money demand, and also for *mandamus*. At the return term, the defendants failing to appear and answer, judgment by default according to the course and practice of the court was entered, and a writ of *mandamus* ordered to issue at the expiration of six months, commanding the defendants at the proper time to raise by taxation the means and apply the same to the satisfaction of plaintiff's debt, and to make return to court of their action under the writ. The writ was issued as ordered and the debt not being paid, and no return made by defendants according to the command of the writ, the plaintiff on the 12th of February, 1878, notified defendants to appear in court at spring term next after, and show cause, if any they had, against the issue of a peremptory writ of *mandamus*. The motion was continued from term to term until fall term, 1879, when defendants showed for cause, that they had exhausted all the funds, they were authorized annually to collect, in payment of the current expenses of the county, and also the special taxes levied under chapter 128 of the acts of 1874–'75, for the special purposes mentioned in said act.

His Honor, on the answer of the defendants, ordered in pursuance of the terms of plaintiff's notice an *alias* peremptory writ of *mandamus* to issue, commanding the defendants to provide the means by taxation and satisfy the plaintiff's debt, and to certify their obedience to the court as required in the first writ that was issued, and in the order of the *alias* writ, it is claimed there is error.

Unquestionably a creditor of a county having an action to reduce his debt to judgment, is entitled to some means to enforce payment. He cannot have a *fi. fa.* effectual as

on a judgment against a natural person, and in such case the writ of *mandamus* in the nature of an execution is the only means by which to have any fruit of his recovery. On the rendition of judgment the creditor generally has an alternative *mandamus* to which a return is to be made, and if good cause be not shown for failing to do the thing required, then a peremptory *mandamus* issues. And if a peremptory writ issue and the return thereto do not set forth obedience or a good legal excuse therefor, it is the creditor's right to move for compulsory obedience by process of attachment.

In this case the first writ issued was in form peremptory, but the creditor treated it as an alternative writ in the form of his notice calling on defendants to show cause against the issue of a peremptory one, and so was it regarded by His Honor; and thus defandants had the same opportunity of defence against the issuing of the last writ, as if the first one had been technically an alternative *mandamus*.

This writ, we have said, is in the nature of an execution, by means of which payment is to be had. It is for the creditor's benefit and may be issued or not, as he may ask. The creditor may enforce a return to the writ or not, and may waive or insist on process of attachment for disobedience. The court will not be actor and *ex mero motu* compel the earliest possible raising of the money in the case of an individual creditor, but will apply the law and award whatsoever process the law allows, if moved so to do by the party to be benefited.

No good reason appears to us why the plaintiff, even if the first writ were a peremptory *mandamus*, might not waive application for process of attachment on the coming in of the return thereto, and have an *alias* peremptory writ, thus giving defendants another opportunity to obey the command of the law.

Upon the question of the sufficiency of the cause shown

by defendants in answer to plaintiff's notice for the writ to authorize process of attachment, it is not necessary to express any opinion, as the creditor did not ask for, nor did His Honor pass upon his right to have such process.

The complaint made of His Honor's order for a peremptory *mandamus* on the motion of plaintiff, instead of proceeding of his own motion as for a contempt by attachment, seems to us most unreasonable. The writ as issued was an indulgence to defendants, and gave further day of obedience, and it seems singular that defendants or any debtor should complain of not being forced to pay a debt as quickly as strict law might permit.

We think there was no error in ordering the *alias peremptory mandamus* as moved for by plaintiff and the judgment below is affirmed. Let this be certified.

No error. Affirmed.

COMMISSIONERS OF IREDELL COUNTY v. W. F. WASSON, Sheriff.

Endorsement—Contract—County Funds—Sheriff.

1. In an action by the *first* endorsee against the endorser (payee) in blank of a negotiable instrument, it is competent for the defendant by parol, to rebut the legal presumption of his liability by showing an agreement between the parties at the time, that the endorsement was *to pass the title only*. (Otherwise where the action is by a *remote* endorsee, as held in *Hill* v. *Shields*, 81 N. C., 250).

2. Where in such case the sheriff of a county endorsed a bank certificate of deposit to the treasurer as part of the county funds, the bank afterwards becoming insolvent, and the county commissioners brought suit against the sheriff upon the certificate, alleging ownership in the same; *Held* that the treasurer is not merely the custodian of the funds, but

the certificate became the property of the county as soon as received by him.

(*Hill* v. *Shields*, 81 N. C., 250; *Mendenhall* v. *Davis*, 72 N. C., 150; *Davis* v. *Morgan*, 64 N. C., 570, cited, distinguished and approved.)

CIVIL ACTION tried at August Special Term, 1879, of IREDELL Superior Court, before *Gudger, J.*

The following are substantially the facts as shown by the record and statement of the case: The plaintiff declared upon a certificate of deposit, which is as follows, to wit: Bank of Statesville, No. 1,604. Statesville, N. C., May 10th, 1875. W. F. Wasson has deposited in this bank one thousand currency dollars, payable thirty days after notice is given R. F. Simonton, cashier, on the return of this certificate properly endorsed, with interest at the rate of eight per cent per annum, if left for twelve months.

(Signed) R. F. SIMONTON, Cashier.

The certificate was endorsed by W. F. Wasson in blank, and he was sued as endorser. The certificate was transferred by the defendant W. F. Wasson, who was sheriff of the county of Iredell, to C. A. Carlton, then the treasurer of the county, on a settlement in payment of the taxes due the county for which he was liable as sheriff; and it was afterwards turned over by Carlton to his successor in office as a part of the county funds. The defendant Wasson contended that he was not liable as an endorser of the certificate, for the reason that when he endorsed it in blank, it was understood between him and Carlton that he was not to be liable for the same. And there being some conflict of testimony on this point, the issue was submitted to the jury: "Was it the intention of the parties that Wasson was to be liable on the transfer of the certificate, or was it endorsed by Wasson only to transfer the title and enable the county to draw the money on it?"

It was in proof that the bank was considered good at the

time of the transfer, and the certificate was the property of the county, and it was admitted that C. A. Carlton was treasurer of the county at the time, and that the certificate of deposit was a negotiable instrument. The plaintiff asked the court to instruct the jury,

1. That if they believed that the board of commissioners received said certificate with a blank endorsement thereon of defendant's name, for value and without notice of any understanding, if any, as to the nature of said endorsement, made between Carlton and Wasson, then defendant is liable.

2. That if the jury believe that Carlton took the certificate of deposit, relying on his ability to collect the same, and that he turned over said certificate to plaintiff in settlement of his indebtedness and without notice of any understanding between Carlton and Wasson, then defendant is liable and plaintiff is entitled to recover.

The court declined to give the instructions as prayed for, and charged the jury, "that if Carlton received the certificate as treasurer of Iredell county, and in payment of a debt due by Wasson to the county, his (Carlton's) act was the act of the county; that if defendant wrote his name across the back of the certificate of deposit, the law presumed that he intended to make himself responsible therefor, and that the burden was on the defendant to rebut this presumption raised by the law; that if he (Wasson) had satisfied them by a preponderance of testimony that at the time he endorsed the certificate, the contract between him and Carlton was, that he was not to be liable and that his endorsement was to pass the title only, then they should find the issue in favor of the defendant; but if they were not so satisfied, they should find the issue in favor of the plaintiff."

The plaintiff excepted to the instructions, and the jury found the issue in favor of the defendant, Wasson, and that he was not liable for the certificate of deposit. No defence having been set up by the other defendants, judgment was

rendered against them and in favor of the defendant Wasson upon the finding of the jury, from which judgment the plaintiff appealed. The bank of Statesville, one of the defendants, was solvent at the time the deposit was made, and alleged to be insolvent at the time of suit brought.

Mr. J. M. McCorkle, for plaintiff.
Messrs. Scott & Caldwell, for defendant.

ASHE, J. The only question presented for the consideration of this court by the appeal is, was there error in the instructions asked for or those given by His Honor to the jury? It was contended by the plaintiffs' counsel that Carlton was only the custodian of the funds of the county and had no right to make any contract binding on the commissioners, but to this it is objected that admitting the position to be correct, it was proved by the chairman of the board of commissioners that the certificate was the property of the county, and the fact that the commissioners of the county have brought this action in their own name for the recovery of the amount of the certificate, alleging in their complaint that "they now hold and own the same," concludes them from repudiating the act of Carlton, as the agent of the county in receiving the certificate. "The assent and election of the holder to treat the endorsement as a transfer is proved by his sueing upon it in his own name" Danl. Neg. Inst., 514. It is the strongest ratification of the act that can well be imagined. They are concluded by the maxim "*omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*"

The principle involved in the instructions asked for by the plaintiff and refused by His Honor is correct, when applied to a case where the action is brought by a remote endorsee against a prior endorser. *Hill* v. *Shields*, 81 N. C., 250. But it has no application to the facts of our case. Here, Carlton was the financial agent of the board of commission-

ers and he received the certificate for the use of the county in his official capacity in payment of an indebtedness to the county. It was the property of the county as soon as received by Carlton, certainly so after the ratification. And when delivered by him to his successor, as a part of the county funds in his hands, the ownership of the certificate was not changed; it was still the property of the county. The board of commissioners were not remote endorsees in any sense, whose rights were unaffected by any special agreement between the endorser and payee, but in fact they were the first endorsees with whom the special agreement was made.

In the instructions given to the jury we do not discover any error. There was no error in telling them that if Carlton received the certificate as treasurer in payment of a debt due by Wasson to the county, his act was the act of the county, in view of the fact that the commissioners had ratified the act by sueing upon the certificate claiming it as their own. Nor do we think there was any error in the latter proposition laid down by the judge, "that if Wasson had satisfied them by a preponderance of testimony, that at the time he endorsed the certificate the contract between him and Carlton was, that he was not to be liable and that his endorsement was to pass the title only, then they should find the issue in favor of the defendant, but if they were not so satisfied, they should find the issue in favor of the plaintiff.

While there is much diversity in the English as well as American decisions upon the subject of admitting evidence to rebut the legal presumption, that every endorser in blank of a negotiable instrument intends to incur the liability which the law attaches to the act of endorsement, in this state it is settled that in an action by the first endorsee against the payee, a special agreement between them restricting the endorser's (payee's) liability when the en-

dorsement is in blank, may be interposed as a defence to the action. *Mendenhall* v. *Davis,* 72 N. C., 150; *Davis* v. *Morgan,* 64 N. C., 570.

We do not feel ourselves called upon to express an opinion upon the negotiability of the certificate, as it was admitted on the trial to be a negotiable instrument. There is no error. Let this be certified to the superior court of Iredell county.

No error. Affirmed.

JONAS HOFFMAN v. JAMES O. MOORE and others.

Negotiable Instrument—Endorsement—Evidence.

1. One who endorses a negotiable paper before the payee has become the holder is liable as an original promisor, but if it be after the payee has become the holder, then such party can only be held as guarantor, unless a different intent is deducible from the terms of the endorsement.
2. Parol evidence is admissible to control the effect of a blank endorsement, as between the immediate parties thereto.
3. The burden of proof is upon him who seeks to avoid, by parol averment, the ordinary legal effect of a blank endorsement.
4. Bat. Rev., ch. 10, § 10 is not intended to determine who are endorsers, but merely to fix the liability of those whose relation as such is admitted or undeniable.

(*Baker* v. *Robinson*, 63 N. C., 191; *Mendenhall* v. *Davis*, 72 N. C., 150; *Hill* v. *Shields*, 81 N. C , 250, cited and approved.)

CIVIL ACTION tried at Fall Term, 1879, of GASTON Superior Court, before *Buxton, J.*

The plaintiff brings his action to recover the balance due on a promissory note under seal as follows:

"$3,000 On the first day of January, 1876, with interest from the 1st day of June, 1875, at eight per cent per annum, I promise to pay Jonas Hoffman the sum of three thousand dollars for value received.

Witness my hand and seal, this —— day of ———, 1875.

JAMES O. MOORE. [SEAL.]"

On the back of the note are signed the names of J. H. Wilson, Jr., Wilson, Moore & Co., E. C. Wilson and E. A. Osborne.

On the trial it appeared in evidence that the plaintiff sold and conveyed a tract of land to the firm of G. W. McKee & Co. for the sum of three thousand dollars, and took their note therefor, secured by a mortgage upon the property. They sold the land to Wilson, Moore & Co., consisting of the defendants J. H. Wilson, Jr., J. W. Moore and James O. Moore, for six thousand dollars, on the terms of their taking up the note in the hands of the plaintiff, and paying the residue in money. The plaintiff, to enable them to comply with their contract, on application, surrendered to the defendants, Wilson and J. O. Moore, the note of G. W. McKee & Co., and entered satisfaction of the mortgage upon the registry, and received in place thereof the note sued on in the form and with the endorsements before stated. There was no evidence offered of any agreement or understanding among those who endorsed the note, as to the liabilities they thereby incurred, and it was without explanation delivered to the plaintiff.

The defendants, Wilson and Osborne, asked the following instruction: "That the defendants are not in law endorsers." The court declined so to charge, and after recapitulating the evidence, instructed the jury that "if the defendants J. H. Wilson, Jr., and E. A. Osborne placed their names on the back of the note, before its delivery to Jonas Hoffman, with the intention of giving it credit with him, and to induce

him to take it, without in any way qualifying their liability, then they are in law sureties to the maker, and the jury should so find." The jury in their verdict say that these defendants did, each of them intend, by putting their names on the note, to become sureties for the payment thereof. The defendant E. C. Wilson being a feme covert, judgment was rendered against the defendants J. O. Moore, J H. Wilson, Jr., and E. A. Osborne only, from which the two last named appealed.

Messrs. Hoke & Hoke, for plaintiff.
Messrs. Wilson & Son and *W. P. Bynum*, for defendants.

SMITH, C. J. The question to be solved is simply this: What liability is incurred by a person who not being in privity with the written contract, writes his name on the back of a negotiable security before its delivery to the payee, and if open to explanation upon whom does the burden of proof rest?

There is great diversity of opinion in the rulings of the courts and among elementary writers upon the point. By some of the authorities he is held to be liable as a second endorser; by others that he is a guarantor only of the debt; by some that he is a surety, and by the larger number that he must be regarded *prima facie* as a joint maker. 1 Danl. Neg. Inst. § 713, and cases referred to in notes. 1 Pars. Cont. 206; *Ray* v. *Simpson*, 22 How. 341. There is however a general concurrence of opinion that as between the immediate parties, their understanding of the obligation assumed may be shown by parol proof of the facts and circumstances attending the transaction, and the intention when ascertained will control and determine the liability. 1 Danl. Neg. Inst. § 710.

In *Baker* v. *Robinson*, 63 N. C. 191, the facts were very similar, and it appeared that the parties signing intended to

give the weight of their names as sureties for the maker and it was declared that they were "sureties liable to the plaintiff in the same manner as if their names had been signed on the face instead of the back of the notes."

The subject has undergone a thorough review by the supreme court of the United States in *Good* v. *Martin*, 95 U. S. 90, and the true rule deduced from an examination of the cases announced in these words: "When the endorsement is in blank, if made before the payee, the liability must be either as an original promisor or guarantor, and parol proof is admissible to show whether the endorsement was made before the endorsement of the payee and before the instrument was delivered to take effect, or after the payee had become the holder of the same; and, if before, then the *party so endorsing the note may be charged as an original provisor;* but if after the payee became the holder, then such a party can only be held as guarantor, unless the terms of the endorsement show that he intended to be liable only as second endorser, in which event he is entitled to the privileges accorded to such endorser by the commercial law."

The right to introduce proof to explain the intent with which the endorsement was made in order to fix the endorser's legal liability, must be confined to the immediate parties to the transaction and an intent common to both. As thus understood, the proposition is obviously correct. The intent must be not only that of the person signing but that of the person to whom the note is payable, and the explanatory evidence is only competent in a controversy between them, and could not follow and affect the security when transferred before maturity to a *bona fide* endorsee for value and without notice. *Mendenhall* v. *Davis*, 72 N. C. 150; *Hill* v. *Shields*, 81 N. C 250.

The legal effect of such a signing ought to be, and we think is, fixed and definite, when the security is assigned, and for like reasons should be, when, as in the present case,

it is delivered unexplained to the payee, and the legal liability of the endorsers not left contingent upon an unexpressed and unknown understanding among themselves. But however this may be, it is clear the evidence restrictive of the implied obligation must come from the parties who are charged. Not only was no such testimony produced, but the evidence tended to show that the plaintiff accepted the note under the belief that the signers were all sureties for the debt. The charge of the court was almost in the very words upon which in *Baker* v. *Robinson, supra*, the decision was made, holding the endorsers responsible as sureties for the maker.

We do not construe the statute, (Bat. Rev. ch. 10 § 10) which declares an "endorsement unless it be otherwise plainly expressed therein shall render the endorser liable as surety to any holder" as applicable to the present case. It extends to endorsers who are known as such to the commercial law, and through whom the legal title of the holder of the instrument is traced, but does not include those who not being in privity with the original contract simply write their names upon the back of it.

It must be declared there is no error and the judgment is affirmed.

No error. Affirmed.

D. A. McMAHAN v. W. O. MILLER, Adm'r of A. T. Miller.

Contract, rights of party to—Verdict—Variance.

1. Where there are mutual dependent stipulations in a contract constituting mutual considerations and the plaintiff in an action for a breach is himself in default, he cannot recover; but if defendant's conduct is such as to prevent performance on the part of plaintiff, the plaintiff may

then abandon the contract and recover on the common counts in *assumpsit.*

2. The plaintiff sued on a written contract and defendant alleged terms not contained therein but existing in parol, and the jury found that the omitted terms alleged were not of them, and that plaintiff complied with the terms of the writing and those drawn into issue on the pleadings; *Held*, the verdict was not inconsistent and the plaintiff is entitled to recover.

3. In this case the complaint alleged terms in the writing, and there was proof and the fact found of other terms as to which there was no averment in the answer, no issue to the jury, and no objection on the part of defendant; *Held*, as the adverse party was not misled, the variance is immaterial.

(*Dula* v. *Cowles*, 7 Jones 290; *Winstead* v. *Reid*, Busb. 76; *Jones* v. *Mial*, ante 252, cited and approved.)

CIVIL ACTION for Damages for breach of contract tried at Fall Term, 1879, of TRANSYLVANIA Superior Court before *Graves, J.*

Verdict and judgment for plaintiff, appeal by defendant.

The plaintiff was not represented in this court.

Mr. James H. Merrimon, for defendant.

DILLARD, J. The plaintiff became lessee to defendant's intestate of a tract of land for the year 1877 under a written lease, executed to him by the lessor which is referred to in the complaint and offered to be produced, or a copy thereof, whenever required.

The facts constituting the plaintiff's cause of action are that he entered on the premises and did work of considerable value in and about preparations for a crop, and that defendant was to have furnished him a horse or mule and all necessary tools to make a crop, and also to furnish and haul upon the land, lime to manure the land at the rate of twenty bushels per acre, and that defendant drove him off the land whereby he was damaged as to the work already done and

in respect of his disappointment in making a crop for the year.

The defence set up by defendant is, that he executed a written lease signed by himself only, and that there were terms of the lease for performance on the part of the plaintiff not mentioned therein, and while not denying that the lime was to be hauled on the land by him as alleged, he averred that it was agreed that plaintiff was to burn the lime at the kiln, and he failing to do so, the defendant therefore could not perform the contract of hauling on his part; and as to the plow-horse to be furnished, defendant (not denying that the horse was to be furnished) alleged that it was stipulated that plaintiff was himself to work the horse, and not another, and he denies that he drove the plaintiff from the premises and prevented him from making a crop.

It is thus seen that the controverted facts material to the decision of the action were as to the duties of burning the lime by plaintiff so as to have it ready to be hauled by defendant, and as to the use of the horse by plaintiff in person, (and not by another) which are alleged by defendant to be terms of the contract on the part of the plaintiff not contained in the written lease, and denied by plaintiff.

If these were duties resting on plaintiff, they were a material part of the contract, and if he failed and refused performance in these respects and then left the premises, he could not, being in default himself, recover for any work he had done, or for any alleged breach on the part of defendant. This rule is founded on honesty. A party to a contract cannot wilfully be in default himself in the performance of matters material on his part, and then abandon the contract and turn round and have action to recover for what he may have done or for a breach of the other, caused by his own conduct. To allow this to be done, is to allow one to do wrong himself in the first instance, and

then to take advantage of it by a recovery for a breach by the other party, induced and brought about by his own act.

If, however, these duties were not owed by plaintiff, but defendant was himself to burn and haul the lime on the fields, and also to furnish a horse to cultivate the farm without any restriction to be used by the plaintiff alone, and the defendant, on pretence of these terms, refused to furnish the lime and the horse, they were necessary parts of the contract, and his default in these respects authorized the plaintiff in law, if not driven out, to hold the contract as abandoned by defendant, and to sue to recover damages for what he had done, and his losses occasioned by the default of the defendant. *Dula* v. *Cowles*, 7 Jones, 290; *Winstead* v. *Reid*, Busb. 76, and notes to *Cutter* v. *Powell*, 2 Smith's Leading Cases, 13.

With a view to ascertain how these controverted facts were, His Honor submitted issues to the jury and in response thereto they found:

1. That there was a written lease.

2. That the lease did not contain all the terms of the contract.

3. That it was not a part of the contract that plaintiff was to burn the lime.

4. That it was not a part of the contract that the plaintiff was to plough the horse himself.

5. That plaintiff complied with the undertaking on his part.

6. That defendant's intestate failed and refused to comply with his agreement.

7. That plaintiff sustained damages to the sum of fifty dollars.

Upon the return of the verdict the defendant moved for a new trial and afterwards in arrest of judgment, on the grounds that the verdict of the jury was inconsistent and contradictory; that the complaint did not set out the con-

tract but only a part of it, and for a variance between the contract alleged and the one proved; and on the further ground that the complaint did not state facts sufficient to constitute a cause of action, in that it stated no consideration for the lease, and no averments of a readiness and willingness to perform the contract on plaintiff's part. In the refusal to grant a new trial and to arrest the judgment, the error of the court is alleged to consist.

We are unable to see that the verdict of the jury was liable to the objection of inconsistency. The complaint was on the written lease referred to and offered to be produced, and that contained stipulations on both sides. And the answer of defendant alleged and particularized two terms of the contract existing in parol. The jury found there were terms of the contract not contained in the writing, but that the omissions alleged by defendant were not of them, and they found that plaintiff had complied with the agreement on his part. The fact found of compliance by plaintiff with the agreement is not to be understood as a finding with regard to the alleged terms omitted from the lease (as to which there was no allegation or proof), but with reference merely to the terms as set forth in the writing and those drawn into issue by the answer of defendant. Thus understood there is no inconsistency in the verdict.

As to the variance between the allegations of the complaint and the proof: It is true the complaint alleges the terms contained in the written lease only, and there was proof and the fact found that there were other terms, but as to the omissions the defendant made no averments in his answer and asked no issue to the jury, nor was any objection made on that account at the trial. The code (section 128) provides that no variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party in maintaining his action or defence on the merits. Here, although

there were terms not set out in the complaint, the defendant set up but two, and made no point as to any others either in his answer or at the trial by way of objection to the evidence, or by request of instructions from the court on account of the evidence, and it not appearing that defendant did or could have suffered a prejudice, it was not error to refuse a new trial or to arrest the judgment for that cause.

As to the objection that the complaint alleges no consideration for defendant's agreement: We think the entry of plaintiff on the premises and the work done towards making the crop and the rent agreed to be paid, are sufficiently stated to make the contract obligatory on defendant. And as to the point that no averment is made of a readiness and offer by plaintiff to perform his contract: We think the refusal of defendant to furnish the lime and horse and the driving of plaintiff off, were so inconsistent with the duty and right of defendant under the contract, and so hindered performance by plaintiff, as in law to amount to an abandonment of the contract by defendant, and to authorize the plaintiff to yield to the necessity thus forced upon him, and to sue for damages without any further offer to go on with the contract. *Dula* v. *Cowles, supra; Jones* v. *Mial, ante* 252.

There is no error, and the judgment of the court below is affirmed. Let this be certified.

No error. Affirmed.

LISTON SIMPSON and others v. JOHN A. JONES, Adm'r of John Jones.

Jurisdiction—Probate Court—Removal of Administrator.

1. Under the act of 1877, chapter 297, the probate judge has jurisdiction of a proceeding to remove an administrator notwithstanding the abrogation of article four, section seventeen, of the constitution.
2. Where an administrator had an adverse personal interest in an action against himself as administrator and made no defence to the same; *Held*, that upon petition by the distributees of the estate, alleging that there was a valid defence to the action which they desired to set up, the administrator was properly removed.

(*Hunt* v. *Sneed*, 64 N. C., 180; *Taylor* v. *Biddle*, 71 N. C., 1; *In re Brinson*, 73 N. C., 278; *R. R. Co.* v. *Wilson*, 81 N. C., 223; *Armstrong* v. *Stowe*, 77 N. C., 360; *Barnes* v. *Brown*, 79 N. C., 401; *Flemming* v. *McKesson*, 3 Jones Eq., 316, cited and approved.)

APPLICATION for the Removal of an Administrator heard on appeal at Spring Term, 1879, of NEW HANOVER Superior Court, before *Seymour, J.*

Upon the facts set out in the opinion of this court, His Honor ordered the case to be remanded to the probate court to the end that the defendant administrator be removed and a suitable person be appointed in his stead, and from this judgment the defendant appealed.

Messrs. A. T. & J. London, for plantiffs.
Mr. D. J. Devane, for defendant.

SMITH, C. J. The action commenced before the probate judge has for its object the removal of the defendant from his office as administrator of John Jones, deceased, for causes assigned in the complaint. To a part of the defendant's answer the plaintiffs demur, and from the judgment dismissing the proceeding, appeal to the superior court.

Upon the trial of the cause in that court, trial by jury being waived, the court finds the following facts: There is an action pending in the superior court of Pender, at the instance of Bruce Williams, administrator, *de bonis non*, and others against the defendant, as administrator, upon an alleged liability of his intestate, in which he has an adverse personal interest in the result and expects to share in the fruits of recovery, to be recovered out of his intestate's estate. He has caused no appearance to be entered in the action, and makes no defence thereto. There is a defence to the suit which the plaintiffs and other distributees of the intestate, in good faith, desire to be set up, in opposition to the claim, and passed upon, and it cannot be made available except by a separate answer of the defendant.

The court thereupon adjudged that the defendant be removed from his office and ordered the cause remanded to the probate court to the end that the removal be there entered of record, and another be appointed in his stead. From this ruling the defendant appeals.

1. The jurisdiction of the probate judge, and his right to make the removal upon a showing of dereliction of duty, unfitness or other sufficient cause, is fully established by the references in the brief of the plaintiffs' counsel—C. C. P., § 470; *Hunt* v. *Sneed*, 64 N. C., 180; *Taylor* v. *Biddle*, 71 N. C., 1; *In re Brinson*, 73 N. C., 278. These cases were decided under the constitution of 1868, Art. IV., § 17, which specially defines the jurisdiction of the clerk acting as probate judge. This section does not appear in the amended constitution of 1875, and the distribution of the judicial power, not pertaining to the supreme court, is vested in the general assembly by Art. IV, § 12, its substitute. The law however remains in force by virtue of the act which declares that "the jurisdiction and powers of the superior courts and courts of justices of the peace shall be in all respects the same as those granted to and exercised by them respectively before the first day of January, 1877, except as

the same may be modified, extended or altered by acts passed at the present session of the general assembly." Acts 1876-'77, ch. 287.

2. The next point to be examined is the sufficiency of the grounds of removal. The facts found are at variance with the statements in the answer and show it to be untrue and illusive. The defendant is under the bias of an interest in opposition to that of the estate he represents, in holding a note to the payment of which he expects part of the moneys that may be recovered out of the estate will be applied; and its influence is seen in his inattention to the suit and his neglect of preparation to resist it. The trust fund is thus without a protector, and interest is arrayed against fiduciary obligation. In the words of the opinion in *N. C. R. R. Co.* v. *Wilson*, 81 N. C., 223: "The law frowns upon any act on the part of a fiduciary which places interest in antagonism to duty, or tends to that result." The distributees are entitled to have an efficient defence to the action made in both answer and proofs, and it is apparent the defendant has not come up to his measure of official obligation.

"The chief safeguard and the one most relied on," says READE, J., speaking of personal representatives and the causes of removal, "is *integrity*, shown by an open hand, full and accurate accounts and frequent reports." *Armstrong* v. *Stowe*, 77 N. C., 360. And RODMAN, J., in reference to the removal of an executor uses this language: "Insolvency, whether known to the testator or not, coupled with a continued disregard of duty, even if not fraudulent or negligent, certainly shows that the trustee is unfit for his office, that the interests of his *cestuis que trust* are not safe in his hands, and that he ought to be removed, or at least required to give bond," &c. *Barnes* v. *Brown*, 79 N. C., 401. See also the remarks of BATTLE, J., in *Flemming* v. *McKesson*, 3 Jones Eq., 316.

It must be declared there is no error in the ruling of His Honor, and the judgment is affirmed. This will be cer-

tified in order that the cause may be remanded to the probate court for further proceedings therein according to law, as declared in this opinion, and it is so ordered.

No error. Affirmed.

M. P. PEGRAM and others v. JOHN M. ARMSTRONG, Ad'mr.

Jurisdiction—Superior and Probate Courts—Practice—Injunction.

1. Under the act of 1877, ch. 241, § 6, the superior courts have concurrent jurisdiction with the probate courts of actions to compel an administrator to account, and other actions of like nature.
2. The doctrine that relief can be had against a bond for the payment of the purchase money for land sold under decree of the probate court only in that court, applies only where the party asking relief is a party to the proceeding, and where the relief sought is against the judgment.
3. Where the plaintiff and defendant as administrator of A were judgment creditors of the executors of B, and afterwards the defendant became administrator d. b. n. of B and obtained judgment upon a note executed by the purchasers of certain land (who bought for the benefit of plaintiff,) sold for assets in the probate court, and plaintiff alleged that defendant threatened to collect and appropriate the whole of the fund to his judgment as administrator of A; *It was held*, not to be error for the superior court to order an account of the administration of B's estate by the defendant, and upon plaintiff's paying into court the amount of purchase money, costs, &c., to restrain the defendant from disposing of the fund until the hearing.

(*Haywood* v. *Haywood*, 79 N. C., 42; *Bratton* v. *Davidson*, *Id.*, 423; *Patterson* v. *Miller*, 72 N. C., 516; *Ballard* v. *Kilpatrick*, 71 N. C., 281; *Southhill* v. *Shields*, 81 N. C., 23; *Ransom* v. *McClees*, 64 N. C., 17, cited and approved.)

APPEAL from an Order made at Fall Term, 1879, of GASTON Superior Court, by *Buxton, J.*

The executors of Larkin Stowe qualified in 1857, and as such, sold the property and got in all the assets and paid off, it is alleged, all the debts of their testator, except a large debt to one Wilson now owned by the plaintiff, Pegram, and one other in favor of defendant Armstrong as administrator of J. N. Ford, on a guardian bond on which Larkin Stowe was a surety.

Both of these debts were reduced to judgment against the executors of Larkin Stowe at the same term of the court, and they filed their petition in the probate court for a license to sell the land for assets, and pending the proceedings they were removed from office, and the defendant Armstrong became administrator *de bonis non* with the will annexed. Said Armstrong as administrator of Stowe, connected himself with the special proceeding to sell the land, and procured a decree of sale, and at the sale one Craig became the purchaser for Pegram and gave his bonds with one Gulick as surety for the purchase money, and against them a summary judgment was entered by a motion in the cause.

The said Craig and Gulick being about to be pushed by execution to pay the judgment entered against them, Pegram tendered to the defendant as administrator of J. N. Ford, not the whole amount of the purchase money, but only the ratable part on a division of the fund between his judgment and said judgment assigned to him by Wilson, claiming to be entitled to retain the balance in part of the Wilson judgment, but the defendant refused to accept the sum tendered. Thereupon this suit was brought to have an account of defendant's administration of the assets of Larkin Stowe, and in the meantime to enjoin the collection of the judgment for the purchase money, on the allegation that he, Pegram, was entitled to at least his proportional part thereof on his judgment, and that defendant had refused a ratable division of the fund and had threatened to appropriate by right of retainer the whole proceeds of the

land sale to the debt due to him in his character of administrator of Ford.

A temporary restraint was ordered, and defendant answered, alleging that there was another liability against the estate. He denied any threat to appropriate the money to his debt as administrator of Ford, and averred his purpose to administer according to law, accompanied with an allegation of the solvency and sufficiency of himself and sureties to secure every creditor against his *devastavit* or maladministration.

At fall term, 1879, the court overruled the motion to dismiss on the ground of a want of jurisdiction, and it appearing that the main point in controversy between the parties was as to the priority of their respective judgments in the assets of Stowe's estate, an order was entered dissolving the restraining order previously obtained unless all the purchase money and interest, commissions and cost of suit were paid into court within ten days, and if so paid, then continuing the injunction to the hearing, and directing the clerk to take and report an account of the debts and assets of the estate. From the refusal of the judge to dismiss the action, and the interlocutory order of conditional dissolution of the injunction, and for an account of the debts and assets of the estate, the appeal is taken by defendant.

Messrs. W P. Bynum and *A. Burwell*, for plaintiffs.
Messrs. Wilson & Son, for defendant.

DILLARD, J., after stating the case. The appeal presents the points, that the superior court had not jurisdiction of the action, and if it had, then it was error in the court to continue the injunction conditionally, and make an order of account of the assets and debts against the estate. The superior court had jurisdiction of the action. By article four, section twelve of the amended constitution, the legislature

was empowered to redistribute and apportion jurisdiction, not belonging to the supreme court, among all the other courts then existing or thereafter created as they should deem best. Under this authority the legislature, by the act of 1876–'77, ch. 241, enacted that in addition to the remedy by special proceedings, actions against executors, administrators, collectors and guardians might be brought originally in the superior court at term, with competent power in the court to order accounts, adjudge the application of the assets, and to grant any relief the nature of the case might require.

The legal effect of this legislation, as settled by construction of this court, was to give the superior courts the same jurisdiction over actions like the plaintiffs' as before that time was vested in the probate courts. *Haywood* v. *Haywood*, 79 N. C., 42, and *Bratton* v. *Davidson*, *Id.*, 423. The probate court confessedly had jurisdiction at the suit of a creditor to compel an administrator to account, and to direct the application of the assets to the debts of the estate, and clearly had jurisdiction of the matters of this action. Since the act of 1876–'77, the superior court has a concurrent jurisdiction in actions of the class mentioned in the act with that of the probate courts, and therefore in this view of the question there was no defect of jurisdiction.

But it is insisted that though the superior court had jurisdiction generally over actions such as the plaintiffs', it is excluded in this case, because relief might be had against the judgment on the bond for the purchase money in the probate court, and if so, then the relief could be obtained in no other court. That is true in cases in which the doctrine applies. It applies only when the party asking relief is a party, and when the relief sought is against the judgment. Here, Pegram is no party to the judgment in the probate court, nor does he ask any change or modification thereof, but seeks, conceding its validity, to prevent an unconscien-

tious application, as he alleges, of the fruits of the judgment to defendant's debt against the decedent in exclusion of all participation by him. This relief could not be had in the probate court, both for want of power in that court to grant an injunction, and because it does not come within the scope of a petition for license to sell land for assets. And it is not competent by motion in the cause to change its character into a cause for settlement and distribution of the assets among the creditors of the estate.

It it next objected that Pegram's judgment is a legal demand, and being such, neither a court of equity nor the superior courts, exercising equitable powers, will entertain a suit in any other form than a creditor's bill.

The jurisdiction of the probate courts under Bat. Rev., ch. 45, § 73, is exercised in the proceeding of a single creditor as well as on a petition, in form a creditor's bill. Every proceeding for settlement of an estate, in that court, is necessarily a creditor's bill, and it is so held in the cases of *Patterson* v. *Miller*, 72 N. C., 516, and *Ballard* v. *Kilpatrick*, 71 N. C., 281. So in the superior courts, concurrent powers are given, and from the general words of the grant, a suit of a single creditor involving an account is necessarily a creditor's bill, and may be proceeded on as such, or be converted into one by amendment. Even under the equity system, on the suit of a single creditor for payment of his debt and for account, if the administrator answered admitting assets, a decree was made for him; but if in the answer debts of higher dignity were alleged to exist, then the suit, although not in form a creditor's bill, was proceeded with and treated as one or converted by amendment into a creditor's bill. 1 Story Eq., 546, and note 1; *Att'y Gen'l* v. *Cornthwaite*, 2 Cox Chan. Rep., 44; *Thompson* v. *Brown*, 4 Johnson's Chan., 619; *McKay* v. *Green*, 3 Johnson Chan., 56; *Southall* v. *Shields*, 81 N. C., 28.

The question of jurisdiction being disposed of, it remains

to consider of the error alleged in the order of account and the continuance of the injunction to the hearing: The defendant, by his acceptance of letters of administration on the estate of Larkin Stowe, assumed the duty to get in hand all the assets of the estate, including any sum unaccounted for by the original executors, and to apply the same to the debts of the estate according to their dignity, in this case, as prescribed by law in administration granted prior to July 1st, 1869. The application for injunction rested on the claim of right in plaintiff to have the account taken and the assets, including the purchase money due for the lands, applied to his debt wholly, or *pro rata* between his judgment and the one due to defendant on a breach of a guardian bond. It was claimed that Larkin Stowe was merely a surety on the guardian bond, and that the breach in which the recovery was effected was not until a long time after Larkin's death, and so the plaintiff having a specialty debt due by bond under seal had a priority entire over the contingent liability on the guardian bond; or at the least had the right to a ratable participation therein, and that in either case he should not be required to pay over to defendant a sum of money which in point of duty he should hand back to him.

How the law, applying to the question of priority or equal participation, is, we will not decide, as the case is not before us in such form as to enable us to assume what facts may be developed in the further progress of the cause; but we sustain the judge, continuing the injunction on the condition of the money being paid into court, on the ground that the plaintiff should not be compelled to part with his money to the defendant, until the question made as to their respective rights shall have been determined at the regular hearing.

His Honor coupled the order of account and continuance of the injunction with the pre-requisite of putting the whole

money and interest, and commissions and all costs of the action under the control of the court, by Pegram, and herein all defendant's rights personally, as well as the representative of Ford's estate, are made secure. As to the ultimate decision to be made as to the application of the fund, it is not unreasonable that defendant should abide the final hearing of the cause. See *Ransom* v. *McClees*, 64 N. C., 17.

There is no error and the judgment of the court below is affirmed, and this will be certified to the end that the cause may be proceeded with.

No error. Affirmed.

SEVER & WILD v. J. M. MCLAUGHLIN.

Practice—Appeal Bond—Time of Filing.

All appeals will be dismissed on motion of the adverse counsel when the appeal bond is not filed within ten days from the rendition of the judgment appealed from, unless there is a waiver on the record or in writing.

(*Wade* v. *City of New Berne*, 72 N. C., 498, cited and approved.)

CIVIL ACTION tried at Spring Term, 1879, of MECKLENBURG Superior Court, before *Kerr, J.*

Verdict and judgment in favor of plaintiffs, and the defendant appealed.

Mr. A. Burwell, for plaintiffs.
Messrs. Wilson & Son, for defendant.

ASHE, J. Upon the hearing in this court, the plaintiffs' counsel moved to dismiss the appeal, on the ground that

the appeal bond was not filed within the time required by law.

As appears from the record the judgment was rendered on the 3rd day of March, 1879, and the appeal prayed for and granted. The appeal bond bears date March the 20th, 1879, and there is an endorsement on the back of the bond by the clerk of the court that the bond was filed on the 29th day of April, 1879. Taking either date as the time of filing the bond, it was not done within ten days from the rendition of the judgment appealed from, as required by law, and it does not appear from the record that there was any agreement between the counsel, waiving the time of complying with the rule. *Wade* v. *City of New Berne*, 72 N. C., 498.

This court has established the rule that all appeals will be dismissed, on motion of the adverse counsel, when the appeal bond is not filed within the ten days from the rendition of the judgment, unless there is a waiver on the record or in writing. This appeal must therefore be dismissed. Let this be certified.

PER CURIAM. Appeal dismissed.

Same point decided in *Wadsworth* v. *Carroll* from Craven, (case not reported in full) at January Term, 1879, citing and approving *Wade* v. *City of New Berne*, 72 N. C., 498, as follows:

DILLARD, J. This was an action for breach of covenant of seizin, and the plaintiff by a motion in the cause sought an injunction to the sale of the premises advertised under a mortgage, and the plaintiff being dissatisfied with the order of the judge below appeals to this court. The defendant moved to dismiss the appeal on the ground that there is no case of appeal, and that the appeal bond filed was not filed within the time prescribed by law, and the plaintiff moved for a writ of *certiorari* to bring up the appeal.

On looking into the record, we find the appeal was taken and notice given on the 10th of September, 1878, and an appeal bond was executed and filed on the 1st of October, and there is no case of appeal. In *Wade* v. *City of New Berne*, 72 N. C., 498, this court decided that if an appeal bond is not given within ten day from the rendition of the judgment appealed from, the appeal will be dismissed, and we adhere to that rule. The appeal is dismissed, but with leave to plaintiff to move for a *certiorari*, on laying proper ground therefor to bring up the case for review.

PER CURIAM. Appeal dismissed.

SAMUEL CALVERT v. NICHOLAS PEEBLES,

Subrogation—Practice—Modifying Judgment.

1. The right of a surety who has paid the debt of his principal to be substituted to all the rights, liens and securities which the creditor held, can only be asserted by a civil action, commenced by the service of a summons.
2. When this court announces by its decision that there was no error in the judgment of the court below, that court has no right or power to modify that judgment, on mere motion, in any respect. It can only be done by a direct proceeding, alleging fraud, imposition or mistake.

APPEAL from an order made at Chambers in Tarboro on the 22nd of October, 1879, by *Avery, J.*

On the 6th of March, 1865, the defendant was appointed guardian of Mildred Peebles and others, and the plaintiff became one of the sureties on his guardian bond, and an action was brought against the principal and sureties and judgment recovered against them upon the bond at .....

term of the superior court of Northampton county for the sum of fifteen thousand three hundred and thirty-seven dollars and twenty-eight cents. Execution was issued thereon and the plaintiff was compelled to pay the sum of eight thousand six hundred and one dollars and eighty-four cents as surety to defendant. And afterwards the plaintiff brought an action for the said sum so paid by him against the defendant, at spring term, 1878, of said court, recovered a judgment in said action for the sum of eleven thousand four hundred and forty-eight dollars and thirty cents, with interest on the said sum of eight thousand and odd dollars, from which judgment the defendant appealed to this court, where it was held there was no error in the judgment below. See same case 80 N. C., 334. And when the decision of this court was certified to the court below, the plaintiff had served on R. B. Peebles as the attorney of the defendant, a notice of which the following is a copy:

"To R. B. Peebles, Esq., attorney for N. Peebles: Sir,—You are hereby notified that as attorney for the plaintiff, Samuel Calvert, in the above entitled action, we shall move before His Honor A. C. Avery, judge of the superior court, at chambers in Tarboro, Edgecombe county, on Tuesday the 22nd of October, 1879, at eight o'clock p. m., to conform the judgment heretofore rendered at spring term, 1878, of Northampton superior court, to the judgment and opinion of the supreme court in this case; to reform and amend the said judgment of spring term, 1878, in accordance with the records in said suit, and in the original suit in which the recovery was had against the defendant above named, and the plaintiff and others, as sureties, upon which judgment in the last mentioned suit the money was recovered out of this plaintiff as surety, which he has in the present action recovered against the defendant, the guardian, N. Peebles, so as to enable the plaintiff to enforce said judgment of spring term, 1878, against the property of the defendant, N.

Peebles, so far as the said records and pleadings and said opinion and judgment of the supreme court shall authorize; showing, first, that plaintiff is entitled to the same without regard to the homestead of defendant; and secondly, this notice is in renewal of a motion made before Judge Avery for the same purpose at fall term, 1879, of Northampton superior court, and not then acted on by the court by reason of objections then made by you for want of notice." Signed by plaintiffs' attorneys.

Upon the return of this notice executed on R. B. Peebles, the defendant's attorney, there being no answer filed, on motion it was adjudged by the court at fall term, 1879, first, that plaintiff recover of defendant the sum of $11,448.30, of which $8,601 84 is principal money, with interest from the 20th of May, 1878, being the sum for which Judge Seymour rendered judgment in this case at spring term, 1878, of said court, and for costs; secondly, it is further adjudged that plaintiff herein is subrogated to the rights of the plaintiff in a judgment of the supreme court, rendered at June term, 1872, (67 N. C., 97,) in the case of the state on relation of W. R. Cox, solicitor, against Nicholas Peebles, Edmund Jacobs, Samuel Calvert and Henry Boone; and also to the rights and credits of the plaintiff in a judgment rendered at spring term, 1872, of this court, wherein the state on relation of W. R. Cox, solicitor, to the use of Mildred Peebles was plaintiff, and Nicholas Peebles, Edmund Jacobs, Samuel Calvert and Henry Boone, were defendants, for $15,337.28, with compound interest thereon till paid and for costs and expenses of said action, which rights accrued to said plaintiff by virtue of said judgment; and plaintiff is entitled to the benefit of any lien which the said plaintiff acquired by means of said judgment against said Nicholas Peebles to the extent of $11,448.30 with interest on $8,601.84 from the 20th of May, 1878; thirdly, it is further adjudged that defendant is not entitled to the benefits of

any homestead or personal property exemption provided for in the constitution of '68, nor in any amendment thereto, as against this judgment. From this order the defendant appealed.

Messrs. Thos. W. Mason and *Mullen & Moore*, for plaintiff.
Mr. R. B. Peebles, for defendant.

ASHE, J., after stating the case. This is certainly a case of the first impression, and it is only necessary to make a statement of the proceeding had in the court below to show its extrajudicial character. The plaintiff brings an action to recover a sum of money which he had paid as surety for the defendant (an action of *assumpsit* according to the former practice) and obtains a judgment for the specific sum sued for, from which judgment there is an appeal to this court where it is held there was no error in the judgment below; and upon the receipt of the certificate of the clerk of this court, the court below, upon notice served on the attorney of the defendant, proceeds at chambers in another county in accordance, as it is said, with the decision of the supreme court at January term, 1879, to adjudge that the plaintiff be subrogated to the rights of the plaintiff in a judgment of the supreme court rendered at June term, 1872, and also to a judgment in the superior court of Northampton county; that the plaintiff is entitled to any benefit of any lien which the said plaintiff acquired by means of such judgments to the extent of $11,448.30, and that the defendant is not entitled to the benefit of any homestead or personal property exemption. It seems to be a summary mode adopted to get at the homestead and personal property exemption of the defendant, by a practice unwarranted by any authority of law known to this court. Under the former practice, a surety who paid money for his principal could be substituted to all the rights, liens and securities which his princi-

pal held; but it could only be done by a regular bill in equity brought for that purpose. And since, by section one, article four, of the constitution "the distinction between actions at law and suits in equity and the forms of such actions and suits are abolished, and there is but one form of action for the enforcement or protection of private rights, or the redress of private wrongs, which is denominated a civil action," the enforcement of an equitable right, as that of subrogation, can only be maintained by a civil action. And by the code of civil procedure (§ 70) civil actions in the superior courts of the state shall be commenced by a summons. But in our case there was no summons, no complaint, no proof, no allegation, no pleading, nothing upon which to found the judgment rendered.

We cannot understand what is meant by the court below, in professing to reform the judgment in that court, in accordance with the opinion of this court. In that opinion there was not the remotest intimation made that the plaintiff was entitled to be subrogated to the rights of the plaintiff in any action whatever, or that he was entitled to any lien on the property of the defendant, or that the defendant had no right to his homestead or personal property exemption. There is nothing in the opinion of this court from which even by the most liberal construction such inferences could be drawn. When this court announced by its decision that there was no error in the judgment of the court below, that court had no right or power to modify that judgment in any respect. It could only be done by direct proceeding alleging fraud, mistake, imposition, &c.

The judgment from which this appeal is taken is not according to the course and practice of the courts. It was irregular, and should have been set aside upon the exceptions taken by defendant's counsel. There is error. Let this be certified to the superior court of Northampton county.

Error. Reversed.

*JULIA A. COBLE and others v. DAVID COBLE Adm'r.,

Practice—Form of Issue—Evidence—Admissions of Administrator.

1. While that form of an issue cannot be commended which submits to the jury a series of alternative propositions which should have been separately presented, yet, if the case be such that an affirmative answer to any one of the propositions entitles the plaintiff to relief, no exception thereto can be sustained.

2. The admissions of an administrator, made before he was completely clothed with that trust, cannot be received against him in his representative capacity.

(*Beam* v. *Froneberger*, 75 N. C., 540; *Younce* v. *McBride*, 68 N. C., 532; *May* v. *Little*, 3 Ired., 27; *Mushatt* v. *Moore*, 4 Dev. & Bat., 124, cited, distinguished and approved.)

CIVIL ACTION tried at Spring Term, 1879, of GUILFORD Superior Court, before *Buxton, J.*

Samuel Coble died intestate in April, 1862, being the owner of a large real and personal estate and owing but few debts. W. A. Coble and W. R. Denny took out special letters of administration upon his estate, and subsequently they, together with David Coble, received general letters of administration. After a partial administration of the estate, Denny was appointed and qualified as guardian of the plaintiffs, who are the minor children of the intestate, Samuel Coble. While Denny was guardian, he bought a tract of land from one F. W. Shaw at the price of two thousand dollars, and paid for the same in confederate money, (alleged to be the funds of his wards), taking a deed to himself, and afterwards resigned his guardianship, and W. M. Mebane was appointed in his stead. Denny died insolvent in 1866, the defendant was appointed his administrator, and the sureties upon his

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

(Denny's) bond are also alleged to be insolvent. The said land was sold by Denny to one Peter Shoe for four hundred dollars in November, 1865, and the bond of said purchaser to Denny was to be delivered to the guardian of plaintiffs, but this was not done, and the defendant as administrator of Denny has collected the same by suit against the maker and a sale of said tract of land. This action is brought to recover the proceeds of the said sale, claiming it to be the property of the wards.

The answer denies that the money used in the purchase of the Shaw land belonged to Denny, as guardian, or as co-administrator, and demands proof of the matters alleged in the complaint.

The following issue was submitted to the jury: Was the Shaw land bought by Denny with his ward's money, or with money which had been substituted for theirs, or with the proceeds of property which had been substituted for their money?

The exception which constitutes the basis of the decision of this court is as follows: Upon the trial of the issue, the plaintiffs' counsel introduced the written evidence of the defendant, David Coble, taken before a commissioner appointed to take an account of the administration of said Samuel Coble's estate, in an action brought by his next of kin (including the present plaintiffs) against W. A. Coble and David Coble, as surviving administrators, in which action the defendant was examined as a witness, and his evidence reduced to writing by the commissioner and signed by the defendant. The evidence was objected to, objection overruled, and defendant excepted. The jury responded to the issue in the affirmative, judgment for plaintiffs, and appeal by defendant.

Mr. Thos Ruffin, for plaintiffs.
Messrs. Scott & Caldwell, for defendant.

SMITH, C. J. When this case was before the court at June term, 1878, BYNUM, J., in delivering the opinion remarked that "the law and merits of the case are probably with the plaintiffs, and it is with reluctance that we are compelled to withhold an affirmation of the judgment rendered below, and to award a *venire de novo*," (79 N. C., 589.) The verdict is again for the plaintiffs upon the single issue submitted, and the fact found upon which rests their equity to follow and subject the money paid into the clerk's office to their claim against the intestate, W. R. Denny, their former guardian. The form of the issue may be obnoxious to the criticism of the defendant's counsel, as containing a series of alternative propositions, which should have been separately presented, or separately passed on by the jury, yet as an affirmative answer to either entitles the plaintiffs to relief, no exception thereto can be sustained. The right to the relief is fully supported by the authorities cited by the plaintiffs' counsel. *Beam* v. *Froneberger*, 75 N. C., 540; *Younce* v. *McBride*, 68 N. C., 532; *Cook* v. *Tullis*, 18 Wall, 332.

Upon the trial of this issue, the proper response to the others with certain additional facts being agreed on by the parties, the plaintiffs offered in evidence, and after objection were permitted to read to the jury the deposition of the defendant, taken in a former action in which the present plaintiffs and other children of Samuel Coble by a former marriage were plaintiffs, against the defendant and W. A. Coble, surviving administrator of said Samuel Coble, for the settlement of the estate, the other administrator, the defendant's intestate, being dead. The deposition tended to show the possession by Denny, as guardian, of a large amount of trust funds and their use in payment of the land purchased from Shaw, and was material upon the subject matter of enquiry.

We think the deposition ought not to have been received.

It was but a declaration, the verification not adding to its quality as evidence, made by David Coble in a suit to which his intestate was not a party, and the witness himself represented another and different estate. We know of no principle on which such evidence can be used to charge the estate of Denny, nor does it become competent because the deponent defends in the present action in the capacity of its representative. The rule is thus laid down in a standard treatise on the law of evidence:

The admissions therefore of a guardian or of an executor or administrator *made before* he was completely clothed with that trust, or of a *prochein ami* made before the commencement of the suit, cannot be received either against the ward or infant in the one case, or *against himself as the representative* of heirs, devisees and creditors in the other. 1 Greenl. Ev., § 179. So the admissions of one before he became assignee of a bankrupt are not receivable against him when suing as assignee. *Fenwick* v. *Thornton*, 1 M. & M., 51. The same view is taken in *May* v. *Little*, 3 Ired., 27, where a declaration of the wife made in her husband's life time, but not as his agent, was after his death offered as evidence against her as his administratrix. In delivering the opinion, DANIEL, J., with his usual brevity and clearness says: "The evidence at the time being inadmissible, the *ex post facto* circumstances of the death of the husband, and the wife *administering on his estate and being a party to the record* does not in our opinion legitimate it. It was illegal evidence from public policy *ab initio*, and it is so still."

The case cited for the plaintiffs, *Mushatt* v. *Moore*, 4 Dev. & Bat., 124, where an affidavit of one of the parties was read in evidence against him, is inapplicable, since the declaration and his relation to the cause were in his individual capacity. The reason excluding such testimony is that an estate, committed to the care and management of a per-

sonal representative, ought not to be charged or affected by what he may have said or done before he assumed that relation, since such an act or declaration is purely personal to himself.

It must be declared there is error in admitting the deposition, and there must be a *venire de novo* and it is so ordered. Let this be certified.

Error. *Venire de novo.*

CHESTER & LENOIR RAILROAD COMPANY v. J. M. RICHARDSON.

Appeal—Practice.

1. An appeal does not lie from the refusal of a judge to dismiss an action.
2. Where, on an appeal from a justice of the peace to the superior court, the appellee moved to dismiss for want of notice of appeal, and the judge denied the motion and ordered notice of such appeal to be then issued; *Held*, that such order did not "affect a substantial right" within the meaning of the code, § 299, so as to give a right of appeal.

(*Mitchell* v. *Kilburn*, 74 N. C., 433; *Crawley* v. *Woodfin*, 78 N. C., 4; *McBryde* v. *Patterson*, *Id.*, 412; *Marsh* v. *Cohen*, 68 N. C., 283; *Sutton* v. *Schonwald*, 80 N. C., 20, cited and approved.)

MOTION to dismiss an Appeal from a justice's court, heard at Fall Term, 1879, of LINCOLN Superior Court, before *Buxton, J.*

The motion was refused and the defendant appealed.

The plaintiff was not represented in this court.

Mr. John D. Shaw, for defendant.

SMITH, C. J. On the trial before a justice of the peace on the 1st day of December, 1876, both parties being present, judgment was rendered for defendant. On the 8th day of the month the appeal was taken by the plaintiff, written notice thereof left with the justice, and an undertaking entered into for the stay of execution. No notice of the appeal, written or verbal, was given to the defendant. Upon the calling of the cause in the superior court at fall term, 1879, the defendant moved to dismiss the plaintiff's appeal for want of notice, as required by Bat. Rev., ch. 63, § 54. The motion was denied and notice ordered to issue of such appeal, and from this ruling the defendant appeals.

It has been too often adjudged in this court to need further discussion, that an appeal does not lie from the refusal of the judge to dismiss the action; and if taken, the appeal will be dismissed. The proper course is to proceed with the trial "leaving the parties to save their rights by exception" or to retain the cause until the trial can be properly had. *Mitchell* v. *Kilburn*, 74 N. C., 483; *Crawley* v. *Woodfin*, 78 N. C., 4; *McBryde* v. *Patterson*, *Id.*, 412.

The direction that notice shall issue to supply the appellant's omission, suggested by a remark of RODMAN, J., delivering the opinion in *Marsh* v. *Cohen*, 68 N. C., 283, as we suppose, does not "affect a substantial right," within the meaning of the code, § 299, so as to give a right of appeal. *Sutton* v. *Schonwald*, 80 N. C., 20. The appeal must therefore be dismissed and it is so ordered.

PER CURIAM. Appeal dismissed.

JOHN H. McELWEE v. W. T. BLACKWELL & CO.

Practice—Submitting Issues.

The issues in a cause are made by the pleadings, and it is not error to refuse to submit an issue which the pleadings do not raise.

CIVIL ACTION tried at Fall Term, 1879, of CATAWBA Superior Court, before *Schenck, J.*

The plaintiff appealed from the judgment below.

Mr. J. M. McCorkle, for plaintiff.

Messrs. Merrimon, Fuller & Fuller, for defendants.

DILLARD, J. This was an appeal from the refusal of the court below to submit a particular issue tendered by the plaintiff. The action was for violation of a trade mark, and among the facts constituting the cause of action the plaintiff alleged that he was the sole and exclusive owner. This fact was denied by the answer.

His Honor submitted an issue touching the controverted fact, and plaintiff requested the submission of one inquiring if plaintiff had not the exclusive right, what right did he have to the trade mark, and this one was refused on the ground that no allegation in the pleadings authorized it.

His Honor's refusal was plainly correct. An issue of fact arises upon a material allegation in the complaint controverted by the answer (C. C. P., § 221,) or upon new matter in the answer controverted in the reply, § 221 (2).

The only issue joined on the pleadings was as to the sole and exclusive ownership of the trade mark, and no amendment being moved for, it was not error to refuse the issue as to ownership, other than sole and exclusive, as alleged.

The judgment of nonsuit is therefore affirmed and this will be certified.

No error. Affirmed.

J. M. YOUNG and another v. THOMAS GREENLEE and wife.

Action for Land—Practice—Parties—Married Woman.

Plaintiff, being the purchaser at an execution sale of the land of the male defendant, brought an action for possession of the same. The feme defendant was allowed to intervene and to answer, setting up title in herself under a senior judgment and prior sheriff's sale. To meet this defence the plaintiff offered evidence that such sale was fraudulently and collusively made to protect the land from the husband's creditors; *Held*,

(1.) That such evidence could only be rendered competent by allegations *in the pleadings* impeaching the elder title, and setting forth special facts calling for the exercise of the equitable powers of the court to put the elder title out of the way.

(2.) That the wife was properly admitted as a party, to defend her possessory rights.

(*Crews* v. *Bank*, 77 N. C., 110; *Cecil* v. *Smith*, 81 N. C., 285; *Manning* v. *Manning*, 79 N. C., 293, cited and approved.)

CIVIL ACTION to recover possession of land tried at Spring Term, 1879, of MCDOWELL Superior Court, before *Graves, J.*

Verdict and judgment for defendants, appeal by plaintiffs.

The plaintiffs were not represented in this court.

Mr. W. W. Flemming, for defendants.

DILLARD, J. The plaintiffs sue to recover land as purchasers at sheriff's sale under a judgment and execution against defendant, Thomas Greenlee; and the defendant Margaret Greenlee, wife of the judgment debtor, resists recovery, claiming through sheriff's sale and deed to S. H. Flemming and a deed from Flemming to herself; the sale and judgment lien, with which she connects herself, being

prior to the sale and judgment under which plaintiffs claim title.

On the trial the plaintiffs alleged that the purchase by Flemming under the older judgment was on a secret trust for the debtor, and was effected through a fraudulent co-operation by them to stifle the bidding at the sale; and they claimed the right to recover on the rule of practice which estops the judgment debtor in possession at the sale, from raising any question of title on a subsequent suit by the purchaser; and they also put their right to succeed on the ground of fraud, making void the title of defendants. There was a verdict and judgment for defendants, and on the argument in this court the plaintiffs do not insist with any earnestness on the grounds of recovery agitated in the court below.

Both of the points are against the plaintiffs. The sale by the sheriff to Flemming and a deed executed to him were things done by the law acting through the sheriff, upon a judgment in full force, and under an execution clothing him with power to sell. His sale and deed passed the legal title to Flemming, and by his deed it was conveyed to and now resides in the feme defendant. Against a legal title thus communicated, a purchaser at a subsequent sale under a junior judgment and execution can not prevail in an action, basing his right of recovery on the legal title alone. The remedy in such case must be by an action impeaching the elder title, and setting forth the special facts calling for the exercise of the equitable powers of the court to put the elder title out of the way, in whole or in part. *Crews* v. *Bank*, 77 N. C., 110.

As to the ground of estoppel, it authorized no recovery. The legal title having come to the feme covert, Margaret Greenlee, it was by the constitution and laws of the state an estate vested, in point of possession and title, in the wife as her separate property, without any right whatsoever in

the husband, except the right of ingress, egress and regress to the dwelling of the wife and to live with her, and without the power in any creditor of the husband by execution to sell and have title passed to the wife's lands for the husband's debts. Bat. Rev., ch. 70, § 33; *Cecil* v. *Smith*, 81 N. C., 285; *Manning* v. *Manning*, 79 N. C., 293.

Such being the rights of husband and wife in the wife's separate estate, in case of a sale under execution for the debts of the husband, the wife if not joined as a party to a suit brought by the purchaser to recover the land, has the right on her motion to become a party to defend her possession and title, or if joined, may make her defence; and in either case, the sale being void, by express declarations of statute (Bat. Rev., ch. 70, § 33,) the action will be defeated, and no hindrance will arise from the rule of practice operating as an estoppel as in the case of a sale of the husband's own land for his debts. *Cecil* v. *Smith*, *supra*.

There was therefore no error on either point, and the judgment of the court below must be affirmed.

No error. Affirmed.

J. K. P. REEVES v. RETTA REEVES.

Divorce—Alimony pendente lite—Practice.

1. A *feme* defendant in an action for divorce, who does not set up a claim upon her part for a divorce, is not entitled to alimony *pendente lite*.

2. An application for alimony *pendente lite* can be made by motion in the cause.

(*Wilson* v. *Wilson*, 2 Dev. & Bat., 377; *Crump* v. *Morgan*, 2 Ired. Eq., 91; *Webber* v. *Webber*, 79 N. C., 572, cited, distinguished and approved.)

REEVES v. REEVES.

CIVIL ACTION for Divorce, tried at Fall Term, 1879, of MONTGOMERY Superior Court, before *Buxton, J.*

The feme defendant in this case applied for alimony *pendente lite*, by a motion in the cause, notice being waived by the plaintiff. The plaintiff moved to dismiss the application, for that, the law authorized the allowance of alimony only in a case where the feme was plaintiff, and if allowed at all here, it must be upon special proceeding commenced by summons. The court refused the plaintiff's motion, and made an order for alimony, from which the plaintiff appealed.

Mr. J. T. Crocker, for plaintiff.

Messrs. McKay, Mauney and *Hinsdale & Devereux*, for defendant.

ASHE, J. There are but two points presented by the appeal: First, Whether a feme defendant is entitled to alimony *pendente lite*, in a petition for divorce; secondly, Whether an application for such alimony must be made by a special proceeding or by a motion in the cause.

The first act of our legislature on the subject of divorces was the act of 1814, which contains an enumeration of the causes for which a divorce may be had, either from the bonds of matrimony or from bed and board, and provides that in either case when the decree is in favor of the wife upon her petition, the court shall have power to decree her such alimony as her husband's circumstances will admit. The construction put upon this act was, that the wife was only entitled to alimony upon the final hearing of the cause. *Wilson* v. *Wilson*, 2 Dev. & Bat., 377.

Judge GASTON, who delivered the opinion in that case, held, that the usages and customs of the ecclesiastical courts in regard to the subject of divorces had not been adopted in this state. But Chief Justice RUFFIN, in the case of

Crump v. *Morgan*, 2 Ired. Eq., 91, which was a bill in equity for divorce from the bonds of matrimony, said, that "it was an entire mistake to say that the common and civil laws as administered in the ecclesiastical courts of England, are not parts of the common law. Justice BLACKSTONE, following LORD HALE, classes them among the unwritten laws of England, as parts of the common law, which by custom are adopted and used in peculiar jurisdictions, 1 Blackstone Com., 79; Hale's Hist. Com. Law, 27, 32. They were brought here by our ancestors, as parts of the common law, and have been adopted and used here in all cases to which they were applicable, and wherever there has been a tribunal exercising a jurisdiction calling for their use. They govern testamentary causes and matrimonial causes. Probate and reprobate of wills stand upon the same ground here as in England, unless so far as statutes may have altered it." If the ecclesiastical law, unaltered by statute, is in force here as a part of the common law, there would be no doubt of the power of the court to decree alimony *pendente lite* to the feme defendant in this case, for that law not only allowed alimony *pendente lite*, but allowed it to the wife whether she was plaintiff or defendant. 2 Bishop, 384; Shelford on Marriage and Divorce, 33, 586.

When two such eminent jurists as Chief Justice RUFFIN and Judge GASTON differ upon a legal question, it is difficult to decide, and might be considered presumption in any court to overrule the opinion of either, deliberately expressed. But we think a solution of the difficulty may be reached without risking such an imputation. Judge GASTON's opinion in the case of *Wilson* v. *Wilson*, *supra*, was regarded as law at the time it was delivered, and recognized by the legislature as such, when in 1852, in consequence of that opinion they declared, 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 the judge of 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 proper and necessary expenses thereof, the judge may order the 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 and such order may be modified or vacated at any time, on the application of either party or of any one interested." * * * But admitting the ecclesiastical law as a part of the common law to be in force in this state, the legislature has seen proper to regulate the law and practice on the subject of divorces, by declaring in what cases they may be had and the mode of proceeding to obtain them, and who entitled to the benefit of its provisions. And while the act of 1852 was partly declaratory of the common law, it was in one sense a restrictive statute. It *only* gave alimony to the wife, *pendente lite*, when she was the petitioner in a proceeding for divorce, and impliedly repealed the doctrine of the common law which gave the courts the power to allot it to her when she was a defendant, by force of the legal maxim, *expressum facit cessare tacitum*. Broom's Legal Maxims, 285.

The defendant's counsel relied upon the authority of the case of *Webber* v. *Webber*, 79 N. C., 572. But that case is distinguishable from ours, and is no authority for the right claimed by the defendant There, the wife who was defendant set up in her answer a claim to be divorced from the bed and board with her husband.

There is nothing in the other exception that the application is not made by a special proceeding. It is expressly provided in the act of 1852, re-enacted by the act of 1871–'72, Bat Rev., ch. 37, § 10, that the judge before whom the suit is pending may order alimony to be paid upon the affi-

davit of the complainant. The provision for *special proceedings* is found in section eleven of chapter 37 of Battle's Revisal, and only applies to independent suits for alimony. There is error. Let this be certified to the superior court of Montgomery county.

Error. Reversed.

D. T. DURHAM v. WILMINGTON & WELDON RAILROAD COMPANY.

Killing Stock—Statutory Presumption—Negligence.

The act of 1857, (Bat. Rev., ch. 16, § 11,) which makes the act of killing stock by the engines or cars of a railway company *prima facie* evidence of negligence, applies only when the facts attending the killing are unknown and uncertain; but when those facts are fully disclosed in evidence, and it is *shown* that the defendant company adopted every precaution in its power to avert the injury, the court should instruct the jury that the defendant is not chargeable with negligence.

(*Proctor* v. *R. R Co.*, 72 N. C., 579; *Doggett* v. *R. R. Co.*, 81 N. C., 459, cited and approved)

CIVIL ACTION tried at Fall Term, 1879, of PENDER Superior Court, before *Eure, J.*

The plaintiff brought this action to recover damages of the defendant company for alleged negligence in killing a mule, the property of plaintiff. The facts of the case are substantially set out in the opinion of this court. His Honor intimated that the defendant had rebutted the presumption of negligence, if the facts should be found as stated by the witnesses, and in deference thereto the plaintiff took a nonsuit and appealed.

Mr. A. T. London, for plaintiff:

The act of 1857 (Bat. Rev., ch. 16, § 11,) which makes the fact of killing *prima facie* evidence of negligence on the part of defendant, was intended as a protection to owners of cattle, and is in pursuance of the general policy of the state in regard to stock, which are allowed to run at large and are protected by various statutes and decisions. Rev. Code, ch. 38; Bat. Rev., ch. 16; *Burgwyn* v. *Whitfield*, 81 N. C., 261; 7 Jones, 468 and 555. Defendant company cannot acquit itself except by showing there was no neglect whatever. *Clark* v. *R. R. Co.*, Winst., 109; *Pippen's* case, 75 N. C., 54. The counsel commented upon *Doggett's* case, 81 N. C., 459, and *Proctor's*, 72 N. C., 579.

Messrs. D. J. Devane, Junius Davis and *Stedman & Lattimer*, for defendant:

Notwithstanding the act of 1857, the plaintiff can no more recover in such case, when he has been guilty of contributory negligence, than he could before the passage of the act. *Forbes'* case, 76 N. C., at page 457. It was the duty of the court to say, if the witnesses were to be believed, whether or not the defendant was guilty of negligence. *Doggett's* case, 81 N. C., at page 462; *Manly's*, 74 N. C., 658; *Proctor's*, 72 N. C., 579; *Scott's*, 4 Jones, 432.

SMITH, C. J. The passenger train of the defendant company left Wilmington at the usual hour and was proceeding north on the night of February 13, 1879, at the usual speed of twenty-eight miles an hour and on schedule time, when the fireman, on the lookout, a little after 9 o'clock, observed some object on the track a few yards ahead and at once gave notice to the engineer in charge. The steam throttle was immediately closed and the brakes applied, but before the alarm signal could be blown, or the progress of the moving train perceptibly diminished, it struck and killed the plaintiff's mule. It had been raining and the night was dark

and foggy. By the head-light of the engine no obstruction on the track could be seen at a greater distance than twenty yards in advance. A train running at the rate of twenty-five or thirty miles an hour could not be brought to a stand-still short of about three hundred yards, and would require less than two seconds to pass over twenty yards.

No omitted duty on the part of the agents of the company in charge of the train is suggested, nor negligence in the employment of any available means by which the injury could have been avoided. The train was moving in its usual manner, the fireman with vigilance stimulated by the darkness of the night and consequent danger, is on the look out and discerns the obstruction the moment it becomes visible. The engineer is at his post and responds promptly to the first notice of its presence by shutting off steam and causing the brakes to be applied, and in a moment, before the whistle can be blown, the mule is stricken and killed. In the language of SETTLE, J., in a case not dissimilar, "what more could have been done? Nothing that we can see unless the road had been required to fence the track. Railroads are very properly held to a rigid accountability; but they are of great public benefit and should not be subject to such unreasonable restrictions, as would destroy or greatly impair their usefulness." *Proctor* v. *R. R. Co.*, 72 N. C., 579.

The responsibility of railroad companies for injuries to stock, straying upon their track, and the care and diligence required in the management of running trains, have frequently been before the court, and were fully discussed in *Doggett* v. *R. R. Co.*, 81 N. C., 459. It is of the highest importance that the law should be settled and understood, and we are not disposed to review and disturb that decision. We then declared that the force of the statutory presumption of negligence "applies when the facts are not known, or when from the testimony they are uncertain. In such cases the

statute turns the scale and fixes the responsibility, and not when all the facts are well established. This seems to follow from the principle that negligence is a question of law to be decided by the court upon admitted or proved facts, and thus the law is uniformly and consistently administered.' It would be an inconsistent proposition to allow a presumption, raised in the absence of evidence, to prevail over the deduction which the law itself makes from the facts proved, and render the presumption insuperable. Our construction of the act secures to those for whose benefit it was intended, adequate and ample protection to their rights of property and leaves the company in the enjoyment of its franchise and the discharge of its duties to the public.

In the plaintiff's brief, it is intimated that the company should enclose its track with a fence, and the want of this is a negligence for which it is liable. Without adverting to the public inconvenience of having such obstructions at every highway crossing, and in the towns through which the track passes, it is sufficient to say that this is not required by law and hence the company is not in default in this regard. Nor do we think the company should abate its usual speed on account of the obscurity of the night, though the vigilance of its officers and agents should be quickened on such occasions, since the running of its trains out of schedule time is attended with greater perils and is fruitful of disasters.

There is no error and the judgment is affirmed.

No error. Affirmed.

WILLIAM DEVRIES & CO. v. W. Y. and J. C. WARREN.

Counter-Claim—Parties.

1. Where the plaintiff sues upon a bond given for the purchase money of a life estate in land whereof he is tenant in common with the defendant and others of the reversion in fee expectant upon the termination of such life estate, the defendant cannot set up a counter-claim for damage done by the plaintiff to the inheritance in cutting timber from the land and committing other acts of waste, during the continuance of the life estate, and before the sale thereof to the defendant.

2. Even if such counter-claim were allowable, it could not be pleaded without making the other tenants in common of the reversion parties to the suit.

CIVIL ACTION tried at Spring Term, 1879, of CHOWAN Superior Court, before *Avery, J.*

The defendant, W. Y. Warren, appealed from the judgment below.

Messrs. Merrimon & Fuller, for plaintiffs.

Messrs. Pruden & Shaw and *Gilliam & Gatling*, for defendants.

DILLARD, J. The defendant, W. Y. Warren, executed his bond on the 15th of February, 1873, for $312.54, on a condition (which will be hereafter described) to the (now) plaintiff, J. C. Warren, who assigned the same to Devries & Co. Devries & Co. instituted suit on the bond and recovered judgment against the assignor and the obligor, and subsequently on the motion of W. Y. Warren, the judgment was set aside as to him for non-service of the summons on him, and thereupon J. C. Warren paid the amount of the recovery, and by consent the case was constituted in court as between J. C. Warren declaring on the bond as his cause of action, and

against W. Y. Warren, defending on the ground of a counter-claim against the bond.

In order to understand the consideration of the bond in suit and the matters constituting the counter-claim, and the alleged errors in law on the trial in the court below, it will be material to state the facts.

Thomas D. Warren was tenant by the courtesy of several tracts of land, of which the reversion in fee belonged to the parties, J. C. Warren and W. Y. Warren and other children of the life tenant, and the life estate of Thomas D. Warren in all the tracts was sold under execution, and bought by J. C. Warren and Thomas Warren, two of the tenants in common of the reversion, in the year 1869. In 1873 J. C. Warren sold and conveyed one of the tracts so purchased at sheriff's sale, to the defendant, W. Y. Warren, also one of the tenants in common, for the term of the life of the tenant by the courtesy, and the bond now in suit was executed to secure the purchase money.

The allegation of the defendant is that prior to the sheriff's sale in 1869, the plaintiff lived on one of the tracts of land with the life tenant, and in the years 1866 and 1867, cut and sold or removed therefrom timber of great value, in the net proceeds of which he and plaintiff, with the other children, were interested as tenants in common, and for which plaintiff was liable to account; and that between the purchase in 1869, and the death of the father in March, 1878, when all the lands were partitioned between the parties interested, the plaintiff had committed waste on the "Brial farm," both voluntary and permissive, whereby the value of that tract was greatly reduced.

Upon these facts the defendant insisted on the trial in the court below, to have the jury sworn in the cause to find, on the issues submitted, his *aliquot* share in the profits from the sale of timber in 1866 and 1867, and also his share in the damages from the voluntary and permissive waste done

on the Brial farm between the purchase of the life estate and the death of the life tenant, and claimed the benefit of the sum which ought to be due by way of counter-claim against the plaintiff's demand.

Upon the trial two issues were submitted to the jury, one inquiring into the damage to defendant from the sale of timber in 1866 and 1867, and the other into his damage from waste on the Brial farm, and after all the evidence was in, His Honor ruled that defendant's counter-claim could not be allowed under either of the issues. And thereupon the jury were discharged from finding on either issue, and judgment was entered for the plaintiff for the amount of his note, and the defendant appealed.

By the code, an answer setting up a counter-claim must state the facts necessary to constitute a cause of action against the plaintiff as if a separate action were brought thereon, and such cause of action must be one arising either out of the contract or transaction which forms the foundation of plaintiff's claim, or connected with the subject of the action, or arising out of some other contract. § 101 (1 and 2). Such a defence, if the plaintiff's cause of action be not denied, admits, modifies or qualifies it, and proposes to extinguish it by a cause of action the defendant has, having the requisites prescribed by law as above. So in order to determine the availability of defendant's counter-claim, we must consider whether it comes within the provisions of the statute on that subject.

The contract or transaction which is the foundation of the plaintiff's claim, is the sale and conveyance in 1873 by plaintiff to defendant for the life of the tenant by the courtesy, of one of the tracts of land in which plaintiff and defendant were to become tenants in common in possession in fee at the expiration of the life estate; and the bond sued on was for the purchase money, and was the contract on which plaintiff's action was founded. The damages claimed

to be discounted arose, if at all, from the sale of timber in 1866, while John D. Warren, the life tenant, was the possessor and owner, and from waste on the Brial farm, after the purchase of the life estate by plaintiff and before the expiration of the life estate. And thus it is seen that the facts constituting the counter-claim did not arise out of the contract or transaction on which plaintiff's claim is founded. Neither are the facts relied on connected with the subject of the action. The subject of the action is the money due on the contract of sale, or extending the term "transaction" to its accessories, it may embrace any violation of the covenants in plaintiff's deed to defendant as to seisin, quiet enjoyment, quantity of estate, or fraud in procuring the sale; but the counter-claim set up is in respect to matters long before the sale to defendant and about other tracts of land, and therefore in no manner connected with the subject of the present action. It is therefore our opinion that the counter-claim thus far is not maintainable.

But it is insisted that the right of counter-claim embraces any defences the defendant may have, whether legal or equitable, and it is claimed that plaintiff is liable to account for the profits from sale of timber, and also for the damages done the Brial farm by waste, and that the defendant's share therein may be availed of as an equitable counter-claim.

The requisites of a good counter-claim as prescribed by the statute embraces both legal and equitable defences, and the matter relied on as constituting such counter-claims must come within its spirit and meaning. Here, from the facts stated in the judge's statement, the sales of timber were during the ownership of the tenant for life, and the waste alleged on the Brial farm was before the reversion became a tenancy in common in possession; and whatever remedy existed therefor in favor of the co-tenants in reversion, whether by injunction to future sales and waste, with account for the

past sales and waste, or by action, such as an action on the case in the nature of waste, it was a matter in tort, and as such the *aliquot* share in such damage, however ascertained, could not be applied as a discount from the bond in suit, as it was a tort and in no manner connected with the contract, transaction or subject of the plaintiff's action, but concerned other tracts of land and not the one which forms the consideration of the bond declared on. Pomeroy on Remedies, § 784; *Kurtz* v. *McGuire*, 5 Duer, 660.

But take it most strongly for defendant, and say that plaintiff is liable to account in the respects claimed, can defendant assert and have benefit of such liability on the averments in his answer? A defendant asserting a counter-claim is as to that a plaintiff; and to maintain the same, his facts must be legally sufficient, and be stated in such manner, and with all necessary parties, such as would entitle him to recover, were he suing as plaintiff in a separate action, consistently with the rules of practice applicable according to the nature of the claim. The code prescribing what counter-claims may be allowed, prescribes that all parties in interest must be parties to the cause. And herein, it is the embodiment of the equity rules adopted on the reason to determine the rights of all persons involved, in one action, and thereby avoid multiplicity of suits, and save a party liable from the vexation and expense of repeated actions about the same matter.

Now here it is alleged in the answer and the proof shows that the parties to the action and others, not before the court, are interested in the profits from sales of timber and in the damage done to the Brial farm by waste; and upon the allegations and proofs, if defendant were suing as plaintiff in a separate action for an account and payment of his share thereof, a court of equity would hold the absent parties as necessary to a complete determination of the contro-

versy, and would not decree any relief unless they were brought before the court.

If His Honor had ruled the defendant entitled to have the jury to find his share in the damages against the plaintiff, the plaintiff would be exposed to as many similar accountings as there were tenants in common of the lands. The code, even if it be conceded that defendant had the right claimed by him, never intended to authorize the defendant to have an account taken and his share in such profits and damages used as a counter-claim, unless all the parties interested in the account were before the court.

In our opinion there was no error in the particulars complained of by defendant and the judgment of the court below is affirmed.

No error. Affirmed.

E. S. CRAVEN v. P. P. FREEMAN, Adm'r of William Kirkman.

Co-Sureties—Contribution.

1. A surety upon a bond who voluntarily pays a balance due upon the same after he has obtained his discharge in bankruptcy is entitled to contribution from a co-surety.
2. Where a surety upon a bond pays a balance due upon the same with knowledge of the existence of a covenant upon the part of the obligee to a co-surety not to sue him, he is not entitled to contribution from such co-surety.

(*Sherrod* v. *Woodward*, 4 Dev., 360; *Reeves* v. *Bell*, 2 Jones, 254; *Jones* v. *Blanton*, 6 Ired. Eq., 115; *Evans* v. *Raper*, 74 N. C., 639; *Russell* v. *Adderton*, 64 N. C., 417, cited and approved.)

CIVIL ACTION tried at Fall Term, 1879, of RANDOLPH Superior Court, before *McKoy, J.*

The action was brought to recover a sum, by way of contribution, of the defendant's intestate, William Kirkman. A demurrer to complaint was overruled by the court, and the defendant appealed.

Messrs. Scott & Caldwell, for plaintiff.
Mr. J. T. Morehead, for defendant.

SMITH, C. J. The complaint avers that one Thomas S. Kirkman, as principal, the defendant's intestate and the plaintiff as sureties, on December 22, 1866, executed their bond to Moses Routh and therein promised to pay him, one day after date, eight hundred dollars with interest from the 3rd of March preceding, which bond was transferred to Hugh Parks; that the principal died in 1867, intestate and insolvent, and his administratrix made several small payments, the amount and date of which are specially set out; that the plaintiff in December, 1872, filed his petition in bankruptcy, and afterwards obtained his discharge; that his assignee in bankruptcy sold the excess of the land above the homestead, and it was bought for the plaintiff at the price of two hundred dollars; and all the personal estate was assigned as his exemption; that the creditor duly proved his debt against the bankrupt's estate, and no other proof of debt was filed; that the plaintiff assigned his bid to Parks, and sold him part of the homestead for the aggregate sum of six hundred and fifty dollars, the amount due on the debt in full satisfaction; that on May 31, 1873, before the discharge of the residue of the debt, the defendant's intestate paid to Parks one hundred and forty dollars, and took from him an acknowledgment in these words:

Received May 31, 1873, of William Kirkman, one hundred and forty dollars, in full of his part of a certain note or bond, of which I am the assignee, given by Thomas Kirkman, the said William Kirkman and E. S. Craven, and

payable to Moses Routh, due one day after date for eight hundred dollars, in consideration whereof I do hereby contract and agree that I will not again sue, or cause to be sued the said William Kirkman, his executors or administrators, for or on account of the said bond or any part thereof, now due or to become due, nor further demand at law or in equity any further payment on account of the same. Witness my hand and seal the day and year above written, it being expressly understood between the parties hereto that this instrument shall and does in no event affect as a release of the other obligors on said bond, but as a contract to him, the said William Kirkman.

(Signed) HUGH PARKS, [seal.]

The defendant demurs to the complaint and assigns as causes of demurrer apparent thereon:

1. That the plaintiff was discharged from the debt and paid it voluntarily when under no legal obligation.

2. That the defendant by virtue of the covenant was released from all further liability on the bond.

The defences will be considered in their proper order:

First—This is not an effort to revive an obligation which the creditor, by lapse of time or a discharge in bankruptcy, has lost the right to enforce, and against which the surety is equally protected, by his voluntary payment and bringing his action for indemnity against the principal, or for contribution against the co-surety, because the statute in such case runs only from the payment. *Sherrod* v. *Woodward*, 4 Dev., 360. In such case PEARSON, J., expresses a doubt and says: "If the action of the original creditor was barred, we are inclined to the opinion that a surety, who afterwards pays the debt, can stand in no better situation." *Reeves* v. *Bell*, 2 Jones, 254. But he does not refer to the previous case in which a contrary doctrine was held, and in which NASH, J., says: "If the ward of Hicks, as is alleged, had reached twenty-one more than three years before

they commenced their suit against the present plaintiff, he might, if he had so chosen, have protected himself under the act limiting the time within which actions must be brought against the sureties to guardian bonds. But he did not so choose. A recovery has been had against him upon a just claim, and he now seeks to make the defendant bear an equal share of that just demand. * * * There was no obligation on the plaintiff either in law or equity to plead that statute, or rely upon the protection it gave him." *Jones* v. *Blanton*, 6 Ired. Eq., 115.

But whatever may be the correct principle, the present case does not fall within it. The intestate was not released, but remained liable as before to the creditor for the whole debt. The bankrupt act provides that "no discharge granted under this act shall release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, endorsee, surety or otherwise." Rev. St. U. S., § 5118. When therefore the plaintiff paid the debt under a sense of moral but not legal obligation, it was in effect an extinction of one-half of the intestate's liability, and a transfer of the other to a substituted creditor, which the surety becomes by his payment. Instead of being charged with an extingushed liability, he is relieved of one-half a debt for which he was bound, and in paying which he would have had no redress on the plaintiff, if the latter had availed himself of the discharge. The intestate was therefore benefited by the plaintiff's payment and can have no just ground for complaint.

Secondly—The effect of the covenant entered into with the creditor, Routh.

A covenant not to sue was no defence to an action at law, under our former system brought in violation of it, and the interposition of a court of equity had to be invoked to compel a specific performance of the contract, and this gave to it the practical effect of a release between the parties.

Adams Eq., 78; *Evans* v. *Raper*, 74 N. C., 639. The effect of a covenant not to sue one of the parties to a note is thus explained by PEARSON, C. J., in *Russell* v. *Adderton*, 64 N. C., 417: "The intention of the parties is carried out by allowing the creditor to take payment at law, leaving the party who holds the covenant to his remedy in equity for a specific performance, by which he is fully protected, not only from paying more directly, but if *there be sureties*, by restraining the creditor from collecting any amount out of them, because that would subject him to their action, and thus indirectly violate the covenant, or if there be other principal obligors, by restraining the collection of any more than an *aliquot* part of the debt, or any amount that would subject the party to an action for contribution." Under our present system the relief may be obtained by the debtor in the same suit, and in a case like this, the surety will be protected against any demand for a sum in excess of that paid by the surety to whom the covenant was given.

As the plaintiff has possession of the covenant, and does not allege that he paid the money before he was aware of its existence, and if he had such knowledge it was in his own wrong, the demurrer for this reason must be sustained. The judgment of the court below in overruling it must be reversed, and the defendant go without day, and it is so ordered.

Error. Reversed.

B. B. FREEMAN and others v. W. D. SPRAGUE and others.

Pleading—Ejectment—Statute of Limitations.

Upon the trial of an action of ejectment where the plaintiff claimed under a grant from the state and the answer of the defendant denied the plaintiff's title, it is competent for the defendant to show that the *locus in quo* had been occupied and cultivated for thirty years prior to the date of plaintiff's grant, without specially pleading the statute of limitations.

(*Davis* v. *McArthur*, 78 N. C., 347; *Powell* v. *Powell*, 1 Dev. & Bat. Eq., 380; *Call* v. *Ellis*, 10 Ired., 250, cited and approved.)

CIVIL ACTION to recover possession of Land, removed from McDowell, and tried at Fall Term, 1879, of CALDWELL Superior Court, before *Schenck, J.*

Verdict for defendants, judgment, appeal by plaintiffs.

Messrs. J. M. Gudger and *W. H. Malone,* for plaintiffs.
Mr. J. L. Henry, for defendants.

SMITH, C. J. The plaintiffs alleging themselves to be the owners, and the defendants, William Sprague and John H. Pearson, to be in possession, seek to recover the tract of land described in their complaint on which is a valuable hotel, and damages for the wrongful withholding. At the return term of the summons, Hiram Kelley, the other defendant, on his own application, is permitted "to come into court and defend as landlord." Thereupon the defendants put in a joint answer, denying the plaintiffs' title, and declaring that the defendants, Sprague and Pearson, as lessees of their co-defendant, within the past year entered into and took possession of the land on which the said hotel stands, less than one acre in quantity, but whether this is embraced within the boundaries claimed by the plaintiffs they are

unadvised, and have not information on which to found a belief, and that they have erected a valuable building on the land in their possession.

The only issue submitted to the jury and material to be considered on the appeal is as follows: Are the plaintiffs the owners of and entitled to the possession of the land described in the complaint? The jury found this issue in favor of the defendants, and by the concurrence of counsel of both parties were discharged from passing upon the others.

The plaintiffs derive title under a grant from the state issued to them June 7, 1876, and insist upon a location which covers the land in dispute. The defendants deny that the land is within the boundaries of the plaintiffs' grant and claim that it is embraced in each of two grants, to Thomas Hemphill, dated respectively in 1787 and 1803, and further proposed to show that the *locus in quo* has been occupied and cultivated for more than thirty years, to-wit: from June, 1805, to 1854, by different persons. This evidence was objected to by the plaintiffs on the ground that the defence arises under the statute of limitations, and not being specially set up and relied on in the answer, as required by the code, § 17, it was irrelevant and incompetent. The evidence was received and the plaintiffs excepted. Upon the correctness of this ruling the present appeal depends; since, if sustained, it puts an end to the action; and if not, results in a *venire de novo.*

The answer denies the plaintiffs' right to the land of which the defendants are in possession; and this, as an essential condition of recovery, is the point presented in the first issue. The evidence was introduced to show title out of the state at the date of the plaintiffs' grant and that no estate was conveyed thereby. It was pertinent and proper on the enquiry then before the jury, and to enable them to arrive at a conclusion. It was not offered to bar a pre-ex-

isting right of action lost by lapse of time, but to show that no title vested in the plaintiffs under the grant, and they never had a cause of action against the defendants. The provision in the code introduces no new rule, as the statute of limitations has always been required to be brought forward by special plea, to render the defence available. It was otherwise in equity, and if the bar of the statute appeared in the statement of facts contained in the plaintiff's bill, the protection afforded by his delay, could be obtained by a demurrer. As the separate systems are now merged in a single mode of procedure, in order to secure uniformity of practice, the rule which prevailed at law is adopted and prescribed. But it was never necessary to plead the statute in order to authorize the admission of proof that title to the land claimed was out of the plaintiff and in some one else, as well as that it was in the defendant, by prior and overreaching conveyances, or in consequence of long continued adverse possession, from which it is conclusively inferred. Either equally defeats the action, as the enquiry is not whether the defendant has not, but whether the plaintiff has title to the property claimed. *Davis* v. *McArthur*, 78 N. C., 357, and cases therein cited.

In *Call* v. *Ellis*, 10 Ired., 250, the defendant resisted the plaintiff's recovery on the ground that the action had not been brought within three years after the cause of action accrued, and that by his adverse possession of the slave during that period, the defendant had acquired title under the Revised Statutes, ch. 65, § 18. In delivering the opinion NASH, J., says: "The statute of 1820, Rev. St., ch. 65, § 18, does not bar merely the action after three years adverse possession, but confers title. So that such possession is not only a full answer to an action, but is in itself a complete title to support an action, either to recover the property specifically, or damages for a conversion or a trespass. It is similar in its operation

to a seven years adverse possession of land under color of title under the act of 1715, except that the possession of slaves need not be accompanied with any color of title." *Powell* v. *Powell*, 1 Dev. & Bat. Eq., 380.

If the action were governed by the limitations contained in the code of civil procedure, we can see no just ground for departing from the construction and practice under similar provisions of the previous law. But the case is controlled by the statutes in force when the new system was adopted § 16.

The plaintiffs alleged right to sue, it is true, did not arise until after the issuing of their grant, but a cause of action long before accrued to the state, to whose title they succeed and with whom they are in privity, and the test is the time of the accruing of a cause of action against a wrong-doer or trespasser, and not in whose behalf and benefit the suit is prosecuted.

The disposal of this exception dispenses with the necessity of considering the others. There is no error in the ruling of the court admitting the evidence, and the judgment must be affirmed.

No error. Affirmed.

R. G. A. LOVE v. J. C. SMATHERS.

Execution Sale—Trust Estate.

Where A executed a note for the purchase of land and having paid part thereof gave his note for the remainder with B and C as sureties, and had title executed to B who agreed orally that he would pay the balance due; afterwards B sold and conveyed the land to the defendant who purchased for value and without notice of the agreement; *Held*,

(1) That A had no legal or equitable interest in the land subject to sale

under execution upon a judgment obtained subsequent to the conveyance to the defendant.

(2) That the equity of A in the land, even if enforceable against B, was not such as could be enforced against the defendant at the time of the execution sale.

(3) That the trust estate in A, even if existing under the oral agreement with B, was not a pure and unmixed trust liable to sale under execution under the act of 1812.

(*Tally* v. *Reid*, 72 N. C., 336; *Battle* v. *Petway*, 5 Ired., 576; *McKay* v. *Williams*, 1 Dev. & Bat. Eq., 398; *Hinsdale* v. *Thornton*, 75 N. C., 381, cited and approved.)

CIVIL ACTION to recover possession of Land, tried at December Special Term, 1879, of HAYWOOD Superior Court, before *Graves, J.*

Verdict and judgment for defendant, appeal by plaintiff.

Messrs. J. H. Merrimon and *A. W. Haywood,* for plaintiff.
Messrs. Merrimon, Fuller & Fuller, for defendant.

DILLARD, J. This is an action to recover land, and the facts material to the points on which the case is decided in this court are as follows: William Johnston contracted to sell the land in controversy to one John Moody, and took the vendee's bonds for the purchase money and gave to him his own bond for title. Afterwards, John Moody, having paid a part only of the purchase money, procured the vendor to take his bond for the balance due, with his son, H. M. Moody and J. R. Love, as sureties and surrendered his original bonds. This being done, Johnston, on the written request of John Moody, executed title to the son, H. M. Moody, and the jury find that H. M. Moody agreed orally with John Moody that he would pay the balance still due of the purchase money to Johnston, and that they have never paid any part thereof.

H. M. Moody, in December, 1865, sold and conveyed to

defendant, Smathers, the jury say, for a valuable consideration and without notice of the oral agreement between John Moody and H. M. Moody for the payment of the debt to Johnston by H. M. Moody. The debt not being paid to Johnston, he sued on the bond of John Moody, H. M. Moody and J. R. Love; and on the recovery of judgment, J. R. Love or his executors paid the amount thereof. Thereupon the executors of J. R. Love brought suit to spring term, 1873, against John Moody, the principal, for the sum paid as his surety, and at the return of the writ, John Moody confessed judgment therefor, which the defendant alleged and the jury found was fraudulently obtained, after the sum had been previously paid to the executors of J. R. Love, with the intent thereby to defeat his title under H. M. Moody. On this judgment the lands of defendant, conveyed to him mediately from John Moody through H. M. Moody, was levied upon and sold by the sheriff, when the plaintiff, who was one of the executors of J. R. Love, became the purchaser under execution and received the sheriff's deed, purporting to convey the land to him, and upon this title the plaintiff brings this action and demands judgment for the possession.

There was an execution in favor of one Killian in the hands of the sheriff at the time of the sale, issued on a judgment of prior lien to the judgment in favor of Love's executors, but obtained after the sale and conveyance to defendant, to which the money raised by the sale was applied. And evidence of this fact was offered and admitted to meet the defence of invalidity of the judgment in favor of Love's executors, under which the sale was made according to the recitals in the sheriff's deed, and there was exception to the proof received to show the collusion and fraudulent character of the Love judgment.

Our opinion proceeds on the assumption that the Love judgment was valid, and that the sheriff having in his

hands an execution on that judgment, and also on the judgment in favor of Killian, sold under both; and therefore it is not necessary to pass on the exceptions to the evidence admitted for the impeachment of the Love judgment, nor on the question of the sufficiency of the Killian execution in the hands of the sheriff, to sustain the plaintiffs' title, notwithstanding the recital in the deed of a sale under the Love execution only.

Stripping the case of all unnecessary issues and facts, the question for our consideration and determination is, whether, assuming the sale to have been made under both of the executions and that they were valid, the debtor, John Moody, had at the time of the sale any title, legal or equitable, such as might be sold under execution and a title pass under the sheriff's deed. We are of opinion that John Moody had not such a trust estate as conld be levied upon and sold under execution. A trust estate of a debtor in land could not be levied on and sold under execution until the act of 1812, nor under that act if it was to be raised by construction of a court of equity by reason of fraud, or being an expressed or implied trust in an honest transaction, unless the debtor, at the time of the sale, was in such situation as to have the legal title decreed to him if he were to sue for it. The debtor being in a condition to call for the legal title is received as having the absolute beneficial property, as much so as if he had the legal estate; and hence in such case the act, instead of putting the creditor to go into equity as formally, allowed the trust estate to be sold by execution, and gave to the sale and sheriff's deed the legal operation to take the title out of the trustee and vest it in the purchaser. *Tally* v. *Reid*, 72 N. C., 336; *Battle* v. *Petway*, 5 Ired., 576; *McKay* v. *Williams*, 1 Dev. & Bat. Eq., 398; *Hinsdale* v. *Thornton*, 75 N. C., 381.

From these and many other cases in construction of the act of 1812, we extract the principle that the legal estate is

not to be divested out of the trustee by a sale, if he or any other person than the *cestui que trust* has an equity in the same property. Now take it that the deed executed to H. M. Moody by directions of John Moody, was to pay the balance due of the purchase money on the bond to which he and J. R. Love were sureties, and that a trust thereby was created for the exoneration of John Moody; still, upon the fact found by the jury of a purchase on valuable consideration and without notice of such agreement by defendant, although he knew as admitted in his evidence that the bond to Johnston for the purchase money was outstanding and unpaid, the trust orally declared or implied could not be enforced in equity against the defendant. It could not be done, for the reason that by the act of John Moody an absolute title had been conveyed to H. M. Moody, defendant's vendor; and thereby he had enabled him to draw defendant in to buy the land and pay him the money without any knowledge of the alleged trust, which the jury find he did not have. Under these circumstances the defendant had a strong equity, at least equal to, if not superior to any equity in favor of John Moody, and having got the advantage of the legal title, the equity of John Moody, even if enforceable against his son, H. M. Moody, was not such as could be enforced against the defendant at the time of the purchase by plaintiff. 2 Blackstone, 330; Adams Eq., 148—152.

In this view then, John Moody at the sale by the sheriff had not an equity on which he could demand and have decreed the legal title to him against defendant. And therefore there was no trust estate in John Moody, which could be sold and conveyed to plaintiff.

But look at the case in another aspect: The deed to H. M. Moody who was a surety with J. R. Love for John Moody without doubt passed the legal title to him. And suppose a trust to exist by virtue of the oral agreement alleged, about the sufficiency of which we do not intend to express

any opinion, it was not a pure and unmixed trust, which alone is liable to sale under the act of 1812. H. M. Moody had become bound personally as surety for John Moody, and having the legal title he held it in trust for himself *pro tanto* the payments made by his father before the execution of the deed, which were a gift; and if not good against creditors, the gift was at least good against John Moody himself; and he held also for himself as an indemnity against loss by reason of his liability as surety of John Moody. And H. M Moody having such rights, John Moody could not at the time of the sale, even if H. M. Moody still had the legal title, have enforced the legal estate to be conveyed to him and thus have left him a loser as to the payments which had been given to him, and exposed to the sacrifice of the land at sheriff's sale, and to the consequent hazard of loss from being still bound as his surety. H. M. Moody had the right, having the legal title, to use the advantage of a judicious private sale for his relief as surety, and not to loss by a forced execution sale. No court would by decree deprive him of his legal title without being exonerated.

In this view of the case also, the trust in favor of John Moody, if in law there was any, was not a pure trust but mixed, and so, was not liable to sale under execution.

This is our opinion on the material facts as collected from the record proper, and the case of appeal made out by the judge. And we here take occasion to say that the case of appeal is very voluminous, containing a recital of all the exhibits and all the evidence, and all that was done on the trial, and the judges ought to omit every thing not necessary to present the exceptions for error.

There is no error and the judgment of the court below is affirmed. Let this be certified.

No error. Affirmed.

S. H. JOHNSON v. LAWSON HAUSER.

Landlord and Tenant—Vendor and Vendee.

The defendant entered upon land under a parol contract of purchase and paid a portion of the purchase money and afterwards the vendor conveyed the land to A, under agreement with the defendant that he was to remain in possession twelve months and pay A the purchase money due and take title from him, and if he failed to do so within twelve months, to surrender possession; during the twelve months, A conveyed to plaintiff who took with knowledge of the agreement, and defendant failed to pay within that time; *Held*, that the relation existing between plaintiff and defendant was that of vendor and vendee, and that plaintiff was not entitled to evict the defendant by summary proceedings before a justice of the peace under the landlord and tenant act.

(*Greer* v. *Wilbar*, 72 N. C., 592; *Riley* v. *Jordan*, 75 N. C., 180; *McCombs* v. *Wallace*, 66 N. C., 481, cited and approved.)

PROCEEDING under the Landlord and Tenant act, commenced before a justice of the peace and heard on appeal at Spring Term, 1879, of YADKIN Superior Court, before *Schenck, J.*

The following facts appear from the case agreed:

1. The defendant entered the premises in controversy under a parol contract of purchase with one R. C. Poindexter in 1872.

2. The defendant paid a portion of the purchase money to the said Poindexter, and the balance not being paid, according to contract, the said Poindexter conveyed the land to Jenkins & Hauser under the following parol contract with Lawson Hauser, to-wit: Lawson Hauser, the defendant, was to remain in possession twelve months and pay to Jenkins & Hauser the balance of the purchase money and take title from Jenkins & Hauser; and if he failed to do so, he was to surrender the possession.

3. That during the twelve months, Jenkins & Hauser conveyed to the plaintiff, S. H. Johnson, who took with full knowledge of the above parol understanding.

4. That the defendant, Lawson Hauser, at the end of the twelve months, failed to pay the balance of the purchase money according to agreement, and the plaintiff, S. H. Johnson, after giving the defendant twenty days notice to quit, brought this action to evict him under the landlord and tenant act.

His Honor being of opinion that the justice had jurisdiction of the case, and that the plaintiff was entitled to recover, gave judgment for the plaintiff, from which the defendant appealed.

No counsel for the plaintiff.

Mr. A. W. Haywood, for defendant.

ASHE, J. The construction given to the landlord and tenant act by several decisions of this court is, that it applies only to the relation of lessor and lessee, when the latter holds over after the expiration of his term and when there is no other relation to complicate the question. But where one enters upon land under a contract of purchase, he cannot be evicted therefrom by a summary proceeding under the act. *Greer* v. *Wilbar*, 72 N. C., 592; *Riley* v. *Jordan*, 75 N. C., 180; *McCombs* v. *Wallace*, 66 N. C., 481.

In this last case, the court held that the construction given by this court to the act, excludes from the operation of the act two classes, viz: "vendees in possession under a contract for title, and vendors retaining possession after a sale." Under this construction we do not see how this defendant can be brought within the operation of the act. He entered under a contract of purchase and continued to hold the possession under that contract, and no other, up to the institution of this proceeding. He never became the lessee of the plain-

tiff, or entered into any contract from which such a relation could be implied. When the plaintiff purchased the land from Jenkins & Hauser, and had the understanding with defendant that he was to remain in possession twelve months, and pay to Jenkins & Hauser the balance of the purchase money, and take the title from them, and if he failed to do so he was to surrender the possession, there was nothing in that agreement to change the relations of the parties. The defendant continued in possession under the former contract, with an extension of credit for twelve months, on condition that he would surrender the possession if he failed to pay at the end of that time. There was no agreement to pay rent, or do any other act which characterized his possession of that of a lessee. The agreement to surrender at the expiration of the twelve months could not have the effect of converting the original relation of vendor and vendee, into that of lessor and lessee.

We are of opinion the justice of the peace had no jurisdiction. There is error. The judgment of the court below is reversed, and the defendant will go without day. Let this be certified.

Error. Reversed.

CALEB WHITE and others, to the court.

Partition of Land—Confirmation—Resale—Equity.

1. Confirmation of a sale of land for partition ought regularly to be made after notice to parties interested to file exceptions, as prescribed in Bat. Rev., ch. 84 § 5, unless they be present at the confirmation of the report of sale, when notice may be considered as waived.

2. After confirmation had, a resale may be ordered for sufficient cause

shown; but should be upon petition or notice to the purchaser who has acquired equitable rights under the first confirmation.

(*Ex parte Bost*, 3 Jones Eq., 482; *Wood* v. *Parker*, 63 N. C., 379; *Pritchard* v. *Askew*, 80 N. C., 86; *Ex parte Yates*, 6 Jones Eq., 306; *Ashbee* v. *Cowell*, Busb. Eq., 158; *Blue* v. *Blue*, 79 N. C., 69, cited and approved.)

PETITION to open biddings for sale of land heard on appeal at Fall Term, 1879, of PERQUIMANS Superior Court, before *Gudger, J.*

On the death of Henrietta Winslow her lands were sold by decree of the probate court for partition among the heirs-at-law by Caleb White, appointed a commissioner for that purpose. The sale was ordered to be made at the court house door, on the terms of one-half the purchase money to be paid in cash, and the other half at twelve months, and the sale was made as directed on the second day of December, and W. H. Perry was ascertained as the proposed purchaser. The commissioner reported the sale immediately, setting forth the price fair, and a compliance with the terms of sale by the purchaser, and he recommended to the court its confirmation, and accordingly an order of confirmation was entered on the same day.

Within twenty days after the confirmation of the sale, the commissioner made another report, wherein he represented that Perry, the purchaser, on the day of the sale did not in fact make the cash payment required in the decree of the court, but gave his due bill therefor, and had not paid the same. He also reported that one Harrell had offered and secured a ten per cent. advance on the sum at which the lands were knocked off to Perry, and in the petition he prayed an order to open the biddings, which was granted on the same day, and without notice to Perry, the former purchaser.

The commissioner made the second sale, and at that sale Harrell became the highest bidder at the advance of ten per

cent, and complied with the terms of sale by making the cash payment, securing the balance by his bond. The commissioner reported the sale on the same day, and Perry then came into court and showed for cause against the confirmation, that he had required rights by the acceptance of himself as purchaser by the court at the first confirmation, and that said order was in full force and not reversed.

The probate court held the cause shown in opposition to the confirmation of the sale to Harrell as insufficient, and thereupon entered a confirmation of the sale, from which Perry appealed to the superior court, and in the superior court the order for confirmation was reversed, and from that ruling of the superior court, the petitioners and Harrell appeal to this court.

Mr. J. W. Albertson, for petitioners.
Mr. W. A. Moore, contra.

DILLARD, J., after stating the case. A purchaser at a sale under a decree of court is an ascertained proposer, and forthwith acquires no other right, on compliance with the terms on his part, than to be accepted as such by the commissioner. And this right is subject to the power of the court to accept or reject the offer. While the proposed bargain is thus incomplete, the practice and law in this state are that the court may refuse to accept the bid, and order another sale for the reason of a ten per cent. advance, offered and secured, above the sum at which the land was knocked off to the former bidder, or for fraud, inadequate price or for any other cause deemed sufficient by the court; and the purchaser will have no legal ground of complaint at the rejection of his offer any more than a proposing party at a private sale would have to complain that the owner of the land was not willing to sell to him at the price offered. *Ex*

parte Bost, 3 Jones Eq., 482, and cases cited, and *Wood* v. *Parker*, 63 N. C., 379; *Pritchard* v. *Askew*, 80 N. C., 86.

But on the confirmation of the sale, the bidder is promoted to be purchaser, and has then the right to hold the parties selling through the decree of the court as bound to performance of the contract, while he is himself bound to pay the money and take the title. These are rights which neither party can destroy at his will. Cases *supra* and *Ex parte Yates*, 6 Jones Eq., 306. The court undoubtedly may, after confirmation, set aside an order confirming the sale, and order a new sale, for causes legally sufficient; but then the power must be exercised always with a due regard to any rights which have arisen, and consistently with the settled principles and rules of procedure applying in such cases.

In the case of an application to have a resale, the orderly proceeding is to set aside the order confirming the sale which has been already made; otherwise, the power of the court has been once exercised, and the second sale will not displace the first purchaser, and in doing this, the rule is, to present the grounds on which the application is based by petition or notice, on which the purchaser under the existing confirmation may be heard in vindication of his own title. *Ashbee* v. *Cowell*, Busb. Eq., 158.

Now apply these principles to our case, and let us see what is the result. Perry bid off the land at the first sale, and he gave his due bill for the cash payment, which the commissioner accepted as cash, and executed his bond for the deferred payment. Thereupon, on the report filed, the sale was confirmed by an order in the cause. So long as that order stands in force and not set aside, he had an equitable right to pay the purchase money and have the title, and no subsequent sale to Harrell under a mere order of sale without notice to him would affect his right, or operate a vacation of the order of confirmation on which he rests.

But it is urged, in support of the right of Harrell, that the previous sale to Perry was confirmed on the day of the sale, and was therefore voidable, if not void, for being done without notice. The answer to that objection is, that the design of the statute requiring notice to be given before confirmation is to give the parties a day in court to except to the report, and thereby to conclude them; but if they be all present at the time the report is filed and confirmed and make no exception to it, they ought to be held as much bound as if they were brought in by service of a formal notice. Here, it appears from the judge's statement, that all the parties were present at the confirmation, the adults in person, and the infants by their *prochein ami*, and knew the result of the sale which had just occurred at the court house door in their presence, and they ought to be held concluded from objecting a want of notice. But even if the judge of probate was mistaken in supposing such presence of the parties dispensed with notice and authorized an immediate confirmation, still the order of confirmation was erroneous, or at most, only irregular, as held in *Blue* v. *Blue*, 79 N. C., 69, and so long as it remained in force, it protected the claim of Perry.

We conclude therefore that the order of resale by the probate judge without a day in court to Perry to contest the sufficiency of the grounds on which it was asked, was unavailing to deprive him of his equitable right under the first sale, and that His Honor was correct in reversing the confirmation of the sale to Harrell in the probate court.

It does not necessarily follow from the insufficiency of the order of sale under which Harrell purchased, that therefore the order of confirmation on which Perry rests his claim may not be vacated and a resale ordered; but it is to be understood, that that can only be done on sufficient cause, and on a rule or notice to Perry to contest the sufficiency of the cause on which it is asked.

There is no error in the judgment of the superior court, and this will be certified, with directions to remand the cause to the probate court, with directions to that court to receive the purchase money of Perry and have title executed to him, unless the petitioners shall be able to procure a vacation of the order of confirmation under which Perry claims, and a new sale, on grounds legally sufficient therefor, with a day in court to Perry to contest the application.

No error. Judgment accordingly.

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*WILLIAM HORNE v. STATE OF NORTH CAROLINA.

Claim against the State.

An owner and holder of a bond of the state and coupons past due thereon, has a right to invoke the recommendatory jurisdiction of the supreme court to pass upon the validity of the coupons as a claim against the state, under article four, section nine of the constitution, and section 416 of the code. A motion by the state to dismiss was refused.

(*Sinclair* v. *State*, 69 N. C., 47; *Bledsoe* v. *State*, 64 N .C., 392; *Reynolds* v. *State*, *Id.*, 460, cited and approved.)

CLAIM against the The State heard at January Term, 1880, of THE SUPREME COURT.

The application of plaintiff for leave to constitute an action against the state was made at June term, 1879, and the court declining at that time to pass upon the question of leave or the merits, ordered a copy of the complaint to be furnished the governor to the end that he may make such defence against the motion or otherwise at the next term,

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

as he may be advised. And at this term, the attorney general in behalf of the state moved to dismiss for want of jurisdiction.

Mr. W. P. Batchelor, for the plaintiff.
Attorney General, for the State.

ASHE, J. At June term, 1879, of this court, an action was instituted by the plaintiff against the state of North Carolina for a claim alleged to be due by the state to plaintiff, as set forth in his complaint then filed, as the law directs, in the office of the clerk of this court.

The complaint alleges substantially that the plaintiff is the owner and holder of a bond of the state, issued under and by virtue of an act of the general assembly of said state, ratified on the 3rd day of February, 1869, and entitled "an act to amend the charter of the Western railroad company"; that the bond is for one thousand dollars due on the 1st day of April, 1899, and has coupons for interest attached at the value of six per cent. per annum, payable on the 1st of April and 1st of October in each year from 1st of April, 1870, to 1st of October, 1879, inclusive, and that there is now the sum of five hundred and seventy dollars due by the state to the plaintiff, by reason of its failure to pay the interest after demand duly made. And for this he brings his action, praying for the recommendatory decision of this court, upon his claim, under section nine, article four of the constitution, which is as follows: "The supreme court shall have original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the general assembly for its action."

At the June term, 1879, this court deferred taking action on the case until this term, when the attorney general

in behalf of the state, moved to dismiss the action, on the ground that it did not come within the class of claims against the state contemplated by the constitution, to be prosecuted before this tribunal. But after due consideration of the question raised by the motion of the attorney general, we are of the opinion it cannot be sustained, and the court is in duty bound to take cognizance of the case.

In section 416 of the code of civil procedure, it is provided that any person having any claim against the state may file his complaint in the office of the clerk of the supreme court, setting forth the nature and grounds of his claim; he shall cause a copy of his complaint to be served on the governor, and therein request him to appear in behalf of the state and answer his claim; the copy shall be served at least twenty days before application for such relief shall be made to the court. This provision of the code is very broad in its terms, "any person having any claim," and regarded in the light of a cotemporaneous exposition of the constitution would seem to embrace *all* claims against the state; but this court in construing the section of the constitution referred to held that it was intended to apply only to cases wherein questions of law were involved, and that the jurisdiction of this court ought not to be exercised in small matters of small value, particularly when there is no doubt about the law. *Sinclair* v. *State*, 69 N. C., 47; *Bledsoe* v. *State*, 64 N. C., 392; *Reynolds* v. *State*, *Id.*, 460. In this case, the court must take notice of the fact, from the legislation had in reference to the class of bonds from which the coupons now sued on were detached, that grave questions of law may arise in the investigation of the cause, and that it is therefore a proper case to invoke the jurisdiction of this court.

The governor having at this term made appearance in behalf of the state, through the attorney general, he is given until the first day of the next June term of this court,

to answer or demur to the complaint, or take such other course in the premises as he may be advised in behalf of the state.

PER CURIAM. Motion refused.

JOHN H. PEEBLES v. COMMISSIONERS OF DAVIE COUNTY.

Elections—Powers of Canvassers.

1. A board of county canvassers under the election law (acts 1877, ch. 275) has no authority to revise the registry or to examine into the qualifications of those who voted or who were refused permission to vote.
2. They must decide upon the authenticity and regularity of the returns; but when received the returns must be counted as importing absolute verity, as far as the county canvassers are concerned.
3. Their *quasi* judicial functions do not extend beyond an enquiry into and a determination of the regularity and sufficiency of the returns themselves.

(*Moore* v. *Jones*, 76 N. C., 182; *Swain* v. *McRae*, 80 N. C., 111, cited and approved.)

APPEAL from an order of Injunction made at Fall Term, 1879, of DAVIE Superior Court, by *Gilmer, J.*

The injunction granted was continued to the hearing, and the defendants appealed. The facts of the case are substantially set out in the opinion.

Messrs. Watson & Glenn and *J. M. McCorkle*, for plaintiff.
Mr. J. M. Clement, for defendants.

SMITH, C. J. The cause is before us on the appeal of the defendants from an interlocutory order of injunction, to continue in force until the hearing, restraining them from

subscribing in the name of their county to the capital stock of the Winston, Salem and Mooresville railroad company and issuing bonds in payment therefor. The action is brought by the plaintiff on behalf of himself and other residents and tax payers in Davie county, and he insists that a majority of the qualified voters of the county have not voted for and authorized the proposed subscription as required by the act of March 5, 1879. In the case agreed the following are the material facts:

A new registration of electors was ordered and taken in the different townships of the county just prior to the election in August last, preparatory to obtaining an expression of their will on the proposition of a county subscription of $35,000 to the capital stock of said railroad, and an election for that purpose was held on the 7th day of August, 1879. There were enrolled on the registrars' books the names of 1,953 persons as entitled to vote; of this number on the day of the election and just before, in Callahan township, were entered the names of seventeen persons who in age and residence were competent electors, but failed to take the oath prescribed by law. The name of one of these was transferred by the registrar from the old to the new registry without authority from the voter and nine directed him to make the transfer of their names. Of the nine thus registered one voted for and four voted against the subscription, and the others did not vote. The remaining seven, upon their own direct application, were registered, and of these, five voted against, one registered on the day of election voted for the subscription, and one did not vote. These seventeen names were stricken from the list of voters by the county canvassing board when met to canvass the returns, after enquiry and proof of the facts stated, upon the ground of their incompetency to vote on such registration.

The whole number of votes cast, as shown by the returns, was 1,953, reduced by the action of the board to 1,936, of

which 972 were in favor of subscription, being a majority of four votes. If the two rejected votes for subscription are added to this majority, and any six of the other fifteen are counted, the result is reversed; and even upon the construction of the statute that a majority of those voting is sufficient, as contended for the defendants, the subscription fails to obtain the popular approval.

The point thus presented then is this: Have the county canvassers the authority, in discharging their official duties, to go behind the registry of voters and to examine into the regularity of the action of the registrars, and their associate judges of election, to strike from the roll the names of all such as they may deem to be improperly entered, and to change the voting lists accordingly? The power, it must be conceded, is susceptible of great abuse, and its exercise in the present case neutralizes the force of the popular will, as expressed at the ballot box in the form regulated by law. The proposition which asserts that this power resides in such a body is so fundamentally at variance with the practical workings of our electoral system, and the well understood functions of the public agents charged with collecting and reporting the popular vote from the different precincts, that its bare statement would seem to be its refutation. This will be fully manifest from an examination of the provisions of the law regulating elections Act 1877, ch. 275.

The registrars are required to revise the registration books so that they shall show an accurate list of electors previously registered, and still residing in their precincts or townships, without requiring the electors to be registered anew, and then for thirty days before an election to keep the books open for the registration of such as are entitled to vote, and whose names have not been previously registered; and instead of this, the board of justices may order an entire new registration. § 6.

On the Saturday before the election, the registrar with the four appointed judges of election must attend at the place of election with his books open for inspection and challenge of any whose names have been entered. If any voter is challenged, a day and place are appointed for the trial of the challenge and the determination of the question of his legal qualifications, and if found incompetent, his name is erased. § 8.

On the day of election any elector may, and it is the duty of the judges to, challenge the vote of any person "who may be known or suspected not to be a duly qualified voter." § 14. Such are the safeguards thrown around the ballot box to preserve the elective franchise and protect it from illegal and fraudulent invasion. Obviously the whole duty of preparing the registration lists and rectifying errors, devolves exclusively upon these officers, and a supervising power over them and the other public agents conducting the election is not conferred upon that body, constituted of representatives from the several voting precincts, whose duty is to ascertain and declare the general result. The county canvassers are directed "to open and canvass the returns, and make abstracts, stating the number of ballots 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." § 25.

No authority is given to the board to revise the registry, nor to examine into the qualifications of those who have been allowed to vote, and whose names are on the returns, with a view to the erasure of such as are found to be incompetent, any more than to enquire who offered to vote and were wrongfully refused, and for whom such person would have voted, in order to restore their names to the voting lists. The prosecution of such an enquiry is foreign to the purposes of their organization and would lead to embarrassments and delays seriously obstructing the execution of the

election laws, and evidently not necessary in the performance of their duties, nor contemplated by the act creating the board.

To canvass, as defined by Worcester, "to sift, to examine, to scrutinize" *the returns*, not the qualifications of the electors whose names appear therein, is the duty enjoined, and more specifically set out in the words that follow. They may and must determine the authenticity and regularity of the returns themselves; but when received, they must be counted as importing absolute verity, as far as the county canvassers are concerned, in determining the aggregate vote and its result. This we think fairly deducible as the true doctrine as to the functions of the county board, from the decisions in this and other states. *Moore* v. *Jones*, 76 N. C., 182; *Swain* v. *McRae*, 80 N. C., 111; Brightly Elections, 300, 306, 434; McCrary Elections, § 84, and numerous cases cited by both authors.

While in *Swain* v. *McRae*, *supra*, attention was called, in the opinion, to the difference of phraseology in the act prescribing the duties of county canvassers, from that defining the duties of county commissioners, their predecessors, under which the decision in *Moore* v. *Jones*, *supra*, was made, as indicating an intent to enlarge the powers of the former, it was not intended to suggest that these *quasi* judicial functions extended beyond an enquiry into, and determination of, the regularity and sufficiency of the returns themselves, or that the canvassing board could look into the personal competency of voters, and add to or diminish the number certified in counting them up. We are clearly of opinion this power is not conferred, nor was intended to be conferred by the statute, and that the defendants acted entirely *extra vires* in attempting to reform the registry and change the result of the returned vote. This may be done by a legislative body, to whom a member with a regular certificate of election is accredited, or by a proper proceeding instituted under C. C.

P., Title 15, ch. 2, but not by a canvassing board created under the statute.

It appears that a majority of those who voted did not vote in favor of the subscription, and it becomes unnecessary to pass upon the question, so elaborately debated, as to the legal effect of section two of the act, which requires the assent "of a majority of all the voters entitled to vote therein" to-wit, the county of Davie.

We have heretofore at the present term said that we do not intend, upon an appeal from the granting or refusing a temporary order, ancillary to the main relief sought, to pass upon the merits of the controversy, unless it was necessary in deciding upon such order. In the present case that necessity is forced and our opinion may dispose of the case.

There is no error in the ruling of the court. This will be certified to the end that further proceedings be had in the court below.

No error. Affirmed.

J. C. CODNER, Adm'r, v. C. W. BIZZELL.

Evidence—Payment of guardian note.

The defendant, B, executed his note to C, guardian, in January, 1861, for rent of ward's land; the evidence of B and another was that in February, 1861, C applied to B for the loan of money, which he refused, but agreed to let C have the money in payment of the guardian note. C consented, but not having the note with him, gave B an acknowledgment for money borrowed, and promised to deliver up the guardian note for cancellation but did not do so. After the death of C, and of the ward, the note was transferred to the ward's administrator, and upon suit brought defendant pleaded payment; *Held*,

CODNER *v.* BIZZELL.

(1) That as B's evidence was admitted without objection, plaintiff was concluded as to its competency.

(2) That while there was no evidence of payment as a strictly *legal* plea, there was evidence tending to show an *equitable* discharge of the bond.

(3) The defendant had a right to pay his debt to the guardian even before it was due, and the evidence shows no intent by guardian to misapply the ward's funds or any concurrence therein by defendant.

(*State* v. *Patterson*, 78 N. C., 470; *State* v. *Storkey*, 63 N. C., 7; *Rhodes* v. *Chesson*, Busb., 336, cited and approved.)

CIVIL ACTION commenced before a justice of the peace to recover the amount of a note and tried on appeal at Fall Term, 1879, of WAYNE Superior Court, before *Eure, J.*

The note sued on was in the following words: "On demand, first day of January, 1862, I promise to pay William Carraway, guardian to W. B. Best, or order, one hundred and forty dollars, for rent of 'home place' and creek field, value received. January 17, 1861. (Signed) C. W. Bizzell. (Seal)." Its payment was resisted by defendant upon the facts set out in the opinion. The jury found the issues in favor of defendant, judgment, appeal by plaintiff.

Messrs. G. V. Strong and *G. M. Smedes*, for plaintiff.
Messrs. Grainger & Bryan, for defendant.

DILLARD, J. The defendant executed the note in suit on the 17th of January, 1861, payable at twelve months, to Carraway guardian of intestate of the plaintiff for the rent of land, and after the death of Carraway, his administrator, Everitt, finding the note among his papers, assigned over the same to the plaintiff who had qualified as administrator on the estate of the deceased ward.

The action on said note was begun in a justice's court, and by appeal came to the superior court, and on the issue joined between the parties on the defence of payment and

set-off, it was submitted to the jury to find whether the note declared on had been paid. The defendant, in support of the issue on his part, introduced in evidence an instrument executed to him by Carraway in the following words and figures, to-wit:

"Borrowed and received of C. W. Bizzell, one hundred and fifty dollars, which I promise to pay when called for, with interest. February 19, 1861.

"(Signed) WM. CARRAWAY. [Seal.]"

And defendant, by the oath and examination of himself and one Grant, showed that Carraway applied to him to loan him the sum of one hundred and fifty dollars, and that he refused to do so, but told him he would let him have the money in payment of his note to him as guardian, if he would discount the interest until it was due. They both testified that Carraway agreed to this, but said that he did not have defendant's note with him, and that he would give his note for the money and bring over defendant's note and surrender it to him, and accordingly the money was handed to Carraway, and the instrument, introduced in evidence by defendant, was executed with the declaration that the note now sued on was paid, and that he, Carraway, would bring it to defendant.

The jury upon the issue submitted to them found that the note declared on was paid, and thereupon plaintiff moved for a new trial, on the ground that there was no evidence of payment, and also for that the evidence at most disclosed that the payment claimed was a fraud on the ward's rights to which defendant was privy. His Honor overuled the motion for a new trial and in that refusal plaintiff claims there was error.

The evidence admitted was received without objection by the plaintiff, and thereby he was concluded as to its competency, and its admission cannot be urged as in anywise to constitute error in the refusal of a new trial. But it is said

that although admitted, it was not such evidence as to warrant the finding by the jury of the payment alleged, and that the court should have so told the jury.

The rule in such case is, if there be no evidence of a fact in issue, not to allow the jury to find as to it, but if there be any evidence tending to establish the fact and reasonably sufficient to authorize it to be found, its sufficiency is a question for the jury, and the court will leave it to them to consider and to find according to such weight as they may think the evidence entitled to. *State* v. *Patterson*, 78 N. C., 470; *State* v. *Storkey*, 63 N. C., 7.

Here, there was evidence tending to prove the controverted fact. The peculiar wording of the instrument, coupled with evidence of the refusal of defendant to lend the money, and the execution of the instrument, accompanied with a declaration that the note was thereby paid and was to be brought and delivered by Carraway to defendant, was certainly some evidence, the sufficiency of which to establish the payment was properly left to the jury.

It is insisted, however, that admitting the facts relied on by defendant, they do not amount to a payment of the sealed obligation in suit, on the authority of *Rhodes* v. *Chesson*, Busb., 336. The position in a court of law is undeniable. The facts claimed by defendant would not, at common law, be admissible on the maxim of *eo legamine quo legatur*, nor after the statute of ANN allowing a plea of payment supported by parol evidence, on the ground that the proof here established not a payment made, but a payment to be made. But in equity the act done of furnishing one hundred and fifty dollars by defendant, in part, a payment of the note to Carraway, and a loan for the excess, and the taking of the instrument shown forth in evidence by the defendant, was in substance a discharge of the bond, and effect would be given to it as such, although ineffectual at law. Adams

Eq., 106. And just so in our superior courts which administer equitable rights in every action.

Again, it is urged by plaintiff that the transaction by defendant with Carraway, the guardian, was with the knowledge of a diversion of a trust fund to Carraway's private uses, and therefore not to be availed of as a payment against the ward or his personal representative.

The defendant certainly had the right to pay his debt even before due, and the evidence is that he would not lend the one hundred and fifty dollars, except on the agreement that thereby he was paying his note to the guardian, and that the same was to be taken as extinguished and to be delivered up to him. There would be no color for the argument, that the money paid was vitiated as a payment without proof of a purpose on the part of Carraway to misapply the funds of his ward to his individual purpose, and a concurrence therein by defendant, and here the circumstances do not show the existence of any intent to misapply, and are quite consistent with a wish to borrow the money for the use of the ward or his estate.

In every view of the case, to say nothing of the failure of plaintiff to except to evidence and to have the matter of law relied on put on the record through requests for instructions from the court, there was no error in the refusal of the new trial, and the judgment of the court below must be affirmed.

No error. Affirmed.

COMMISSIONERS OF WILKES COUNTY v. ESLEY STALEY.

Bankruptcy—Fiduciary Debt—Novation.

Where the defendant, being indebted to a county for public moneys collected by himself as sheriff, executed his note to the county commissioners for the amount due, and took from them a receipt in full, and after the note was reduced to judgment received his discharge in bankruptcy; *It was held*, upon a motion by plaintiffs for leave to issue execution upon the judgment (which had become dormant) that the new security was not a "debt created by his defalcation as a public officer," and the motion was refused.

MOTION for leave to issue Execution heard on appeal at Fall Term, 1879, of WILKES Superior Court, before *Gilmer, J.*

The motion was granted and the defendant appealed.

Mr. L. L. Witherspoon, for plaintiffs.
Messrs. A. M. Lewis and *B. B. Lewis*, for defendant.

SMITH, C. J. At fall term, 1871, of the superior court of Wilkes, the plaintiffs recovered judgment against the defendant on his sealed note executed to them; and the judgment becoming dormant, after notice and on affidavit that the debt originated in an official defalcation and was unpaid, on January 6th, 1879, the plaintiffs moved before the clerk for leave to issue execution. The defendant resisted the motion, and pleaded and produced his discharge in bankruptcy, obtained since the rendition of the judgment, as a defence. The clerk granted leave and the defendant appealed. The cause was remanded by the judge, the parties allowed to file other pleadings, and the clerk directed to take testimony and find and report the facts. In accordance with the order, the clerk made due return and finds

the facts, so far as it is material to present the point in controversy, as follows:

The defendant filled the office of sheriff of Wilkes county for the four years from 1855, to 1858 inclusive, and in his settlement with the county commissioners in January, 1869, was found to be indebted for public moneys collected and unaccounted for, in the sum of three hundred and fifty dollars reduced by county claims in his hands to $282.07, and for this residue he executed, January 22, 1869, the note sued on. At the same time the commissioners gave him an acknowledgment in these words: "Received January 22, 1869, of Esley Staley, three hundred and fifty dollars, which sum is in full of all his liabilities as late sheriff of the county of Wilkes, for county revenue for the use of the county, and fines and tax fees levied in the county and superior courts for the use of the county of Wilkes.

(Signed) B. B. BRYAN,
Chm'n of Co. Com'rs."

The defendant has been adjudicated a bankrupt and obtained his discharge on September 25, 1873, which he exhibits and relies on in bar of the present proceeding to enforce the judgment. The debt was proved in bankruptcy, but nothing has been paid thereon. On hearing the motion, His Honor, being of opinion that the debt was created by the defendant's "defalcation as a public officer," and was not discharged, affirmed the order of the clerk, and remanded the cause with direction to issue the execution. From this ruling the appeal is taken,

And brings up for our determination the question, whether a debt thus contracted, and not for a breach of official duty, is protected from the operation of the discharge, within the meaning of the bankrupt act. Rev. Stat. U. S., § 5117. The section seclares that "no debt created by the fraud or embezzlement of the bankrupt, *or by his defalcation as a public officer*, or while acting in a fiduciary character,

shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt."

There can be no question that the liability incurred by the defendant on his official bond, for his failure to account for and pay over the public moneys in his hands, is for a defalcation contemplated by the statute, and if this were a proceeding to enforce the obligation, the debtor would not be protected by his discharge. But this is not the same debt, though substituted for it, and exists only by force of the covenant to pay the sum specified in the note. This new liability is not incurred by any default of the defendant in his office, but arises solely out of his covenant obligation and its breach. He promised to pay and failed to pay a sum measuring his default, and from this springs the personal liability which it is the object of the original action and the present motion to enforce. Whether the official bond remains in force, or its obligation is extinguished, by the novation of another and distinct security, is a question that does not arise, since the action rests alone upon the latter obligation, and this arises solely out of a subsequent contract. The distinction is obvious, and it is supported by two adjudications to which reference will be made.

In *Manufacturing Co* v. *Barnes*, 49 Maine, 312, the defendant, as executor of one Josiah M. Barnes, contracted with the plaintiff, a creditor of the testator's estate, to hold assets for the satisfaction of the debt, and having misapplied them, was sued, and set up his discharge in bankruptcy in bar. The plaintiff insisted that the defendant holding the funds in trust for payment of debts, his obligation was fiduciary and not affected by the discharge. The court say: "In making the agreement he (the defendant) was acting outside of his character as executor, and he was not acting in a fiduciary character as respects the plaintiff."

In *Coleman* v. *Davies*, 45 Ga., 489, decided in 1872, the

defendant became indebted, as guardian, to Carrie Coleman and gave his note therefor to her trustee, the plaintiff. The action was upon the note with a count upon the defendant's statement of the indebtedness for which the note was given. The defendant pleaded his discharge in bankruptcy and the court say: "The sole question necessary to be considered in this case, is, whether under the facts the note given by Davies to Coleman was a novation of the original debt, and destroyed its fiduciary character so as to take it out of the operation of the 33rd section of the bankrupt act of March 2, 1867, and allow the discharge in bankruptcy of the defendant to relieve him from the debt. We think that sections 2811 and 2827 of the code, under the facts, make the acceptance of the note a novation and *destroy the fiduciary character of the debt.*"

This is an adjudication upon the very point before us, that a new security given for a fiduciary obligation is not itself a fiduciary obligation, exempt from the operation of the discharge, and such in our opinion is the law. It must be declared that there is error in the ruling of the judge, and the judgment is reversed, and judgment must be entered for the defendant.

Error. Reversed.

EPHRAIM AMMON and others v. ALLEN AMMON and others.

Practice—Suit in Equity.

Where, under the old practice, proceedings in equity for partition by sale were transferred to the supreme court, the whole case was taken up, and all subsequent and necessary orders in the cause will be made in this court.

AMMOM *v.* AMMON.

MOTION to reinstate a cause heard at January Term, 1880, of THE SUPREME COURT.

Messrs. G. S. Ferguson and *Reade, Busbee & Busbee,* for plaintiffs.

Mr. J. H. Merrimon, for Johnston, the clerk, &c.

DILLARD, J. The plaintiffs filed their bill in the court of equity of Macon county, asking a decree of sale of the lands in the bill mentioned for partition, claiming as devisees under the will of Ephraim Ammon, deceased, while the defendants claimed that the land did not pass under the will, but descended to them as tenants in common with the plaintiffs, as in case of an intestacy.

This court at June term, 1857, adjudged that by the said will the lands were devised to the plaintiffs and that defendants had no interest therein, and decreed the lands to be sold on one and two years' credit, and appointed J. Johnston, the clerk and master of the court of equity of Macon county, to make and report the sale as in the decree directed. The clerk and master made the sale on the 13th of July, 1859, amounting to nine hundred and forty-six dollars and reported the same to this court at ——— term, 1859, and the sale was confirmed and no further orders were ever made in this court in the cause.

But at fall term, 1878, of the superior court of Macon, an order was made in that court upon the idea that the cause was in that court, referring it to the clerk to enquire and report what sales had been made by Johnston the clerk and master, to whom and for how much, whether any of the purchase money had been paid, what sum, to whom, and when; and the clerk having reported upwards of four hundred dollars collected, and claimed to be invested in confederate certificates, and the balance amounting to more than one thousand dollars to be still due and unpaid by the pur-

chasers, a rule was issued against said Johnston the late clerk and master, to spring term, 1879, to make report to court or show cause to the contrary.

On the return of the rule, it appearing that the cause was in the supreme court, His Honor dismissed the proceeding against Johnston the former clerk and master.

And now in this court, in pursuance of notice duly executed, it is moved to reinstate the case on the docket here, and on consideration thereof, it is ordered that the clerk of this court bring forward the case on the docket, and issue a rule to be served on Johnston, the late clerk and master of the court of equity for Macon county, to make report of his sales and collections if any, to return the bonds of the purchasers, and to show cause if any he have, why he shall not be compelled to pay so much of the money as he may have collected, returnable to the next term of this court.

PER CURIAM. Order accordingly.

F. J. OSBORNE v. COMMISSIONERS OF MECKLENBURG COUNTY.

Road-Law Construed—Streets in a City not Subject to—Bridging Streams—Taxation.

1. The act of 1879, ch. 83, which directs the commissioners of Mecklenbug, Forsyth and Stokes counties to divide their respective counties into road districts, to be under the control of supervisors therein provided for, and authorizes the levy of a tax for the repair and improvement of highways, was not intended to apply to incorporated cities and villages in those counties.
2. The construction and repair of bridges over large streams, beyond

the means of the several road-districts, devolves by the general law upon the county authorities; and taxes for this purpose should be levied upon all the subjects of taxation within the county, whether the same be situate within or without the cities and villages.

3. Taxes for road purposes, which may be discharged by labor on the road, stand on a different footing, and must be controlled by the same principle which governs the taxation of the labor itself.

APPLICATION for Injunction heard at Fall Term, 1879, of MECKLENBURG Superior Court, before *Buxton, J.*

The plaintiff, on behalf of himself and others, the male residents in the city of Charlotte between the ages of eighteen and forty-five years, and tax payers, seek in this action to restrain the defendants from enforcing certain provisions of the act of March 13, 1879, within the corporate limits of that city. Act 1879, ch. 83. The act which is confined to the counties of Mecklenburg, Forsyth and Stokes (sec. 40) directs the commissioners of these counties to divide them into suitable road districts, to be under the control of supervisors first appointed by them (sec. 34) and afterwards biennially elected, and requires all male persons, within the age specified, who are able to perform or cause to be performed the required labor, to work annually on the public roads a time not exceeding four days. (Sections 1, 2 and 4.) The commissioners are further authorized, at their annual sessions in the month of June, to levy a tax of limited amount for the construction and repair of bridges and the improvement of highways. The commissioners have made the city of Charlotte, with its defined corporate boundaries, a single road district, declared the streets therein public roads within the meaning of the statute, and appointed a supervisor to enforce road duties upon such as are liable thereto. They have also levied a tax, under the authority given in section 17, upon all the taxable property in the county, including that in said city, and are taking measures to collect the same "for road and bridge purposes."

The only question raised by the demurrer, is, as to the application of these provisions of the act to the persons and property in the city of Charlotte, and this alone is before this court on the appeal of defendants from the judgment below overruling the demurrer.

Mr. Clem. Dowd, for plaintiff.
Messrs. Wilson & Son, for defendants.

SMITH, C. J., after stating the case. Although cities and incorporated towns are not expressly mentioned and excluded from the comprehensive and general language of the act which directs a division of the territory of the "counties into suitable road districts," yet the inference of an intention to exclude, is plainly deducible from the structure and scope of the act, and warranted by the inconveniences and embarrassments which will attend any other interpretation. This will sufficiently appear from an examination of some of its provisions.

Its title is "An act relating to *roads and highways*," language appropriate to those thoroughfares which traverse the country, and not to the streets of a populous incorporated city or town. A *street*, as defined by Worcester, is "a public way in a city or town passable by carriages;" and by Webster, as a "paved way or city road;" while a *road* is defined by the former to be "an open way or public passage, as between one town, city or place and another," and by the latter, "a track for travel forming a communication between one city, town or place and another." It will be noticed that the statute makes no mention of *streets*, but speaks throughout of *roads and highways*, to be laid out, improved and repaired, an omission significant of its objects. The intention will be more manifest by looking into its details, which are appropriate to the county territory outside, but not to that within the city limits.

The supervisors are authorized to enter upon lands near or adjoining, uncultivated or unencumbered with crops, for timber, sand or other materials needed in repairing their roads, and to cut ditches for drainage to some near and convenient water course, section three; to construct foot bridges over streams of water, section twelve; to erect at the forks or cross-roads posts and guide boards with "legible letters directing the way and distance" to some town or public place on their roads, section thirteen; and to do other acts appropriate to county highways only.

In our opinion incorporated cities and towns whose charters make provision for the repair of streets are not included, nor intended to be included, in an act to regulate roads and highways; and they are still left in possession of their chartered rights and privileges in this regard. By section 22 of the act of March 10, 1866, incorporating the city of Charlotte, it is made the duty of its board of aldermen "to keep the streets of said city in good order," and to this end they have power, and it is their duty to cause the said streets to be drained, "and they may have them graded and paved," may "lay out and open new streets or widen those already made, and make such improvements as the public convenience may require."

It can hardly be supposed that these provisions of the charter were intended to be swept away and superseded by the very inadequate substitute of the general law in regard to public roads; and the conflict between them is avoided by a construction of the act which confines its operation to parts of the county in which roads, as distinguished from streets, are to be found. The action of the defendants therefore in declaring the streets to be roads, and laying off the city into a road district, and placing it under a supervisor, is unauthorized by the statute, and void.

2. The plaintiff also demands an injunction against the levy of the tax for road and bridge purposes, under section

17. The construction and repair of bridges over large streams and rivers, beyond the means of the supervisors of the separate road districts, and the force at their disposal, by the general law devolves upon the county authorities, and taxes should for this purpose be levied as part of those required for current county expenses upon all taxable property, as well within as without the city limits, and to this extent the defendants have exercised a lawful power. But those to be collected for road purposes and which may be discharged by labor on the roads, and the proceeds whereof are distributable among the districts under sections 18 and 19, stand upon a different footing. This provision is but subsidary and in aid of the labor imposed upon the road hands, and the exaction of the tax must be controlled by the same principle that applies to the requirement of the labor itself. If the labor, needed in the reparation of the public roads outside of the city, cannot be demanded of its residents, neither should be the tax which takes its place.

There is no violation of the rule of uniformity and equality prescribed in the constitution, any more than is the levy of unequal taxes in different counties for county purposes. The territory of the county is divided into separate parts, occupied by the city and outside of it, and different taxation is imposed by different taxing powers for its separate parts. The repair of the streets is provided for in the charter, and its burden rests exclusively upon the inhabitants and their property therein. The same duty and the like burden as to the roads, rest upon those and their property who are outside the corporate boundaries. But the taxation for the two objects, one of which is sanctioned by the act while the other is not, is blended in a single *ad valorem* per centum, and the plaintiff is entitled to be protected from so much of it only as is to be applied to the reparation of the public roads. The demurrer which goes to defeat the whole action must

therefore be overruled, and the judgment below sustained. This will be certified.

PER CURIAM. Modified.

SMITH, C. J. Since this opinion was prepared, and at its late session, the general assembly passed an act amendatory of that construed and which contains the following provisions: Sec. 44. This act shall not apply to any incorporated city or village, and any labor or tax levied or required of any citizen of any city or incorporated village, by the "act relating to roads and highways" ratified the 13th day of March, 1879, is hereby remitted.

A. J. JACKSON v. S. L. LOVE and another.

Evidence—Presumption from Possession of Chose in Action—Real Party in Interest.

1. The possession of an unendorsed negotiable note or bond, not payable to bearer, raises a presumption that the person producing it on the trial is the real and rightful owner, and entitled to the money due from the defendant, the promisor.

2. This presumption is not repelled or altered by a denial of the defendant, in his answer, that the plaintiff is the rightful owner of the paper declared upon.

(*Andrews* v. *McDaniel*, 68 N. C., 385; *Abrams* v. *Cureton*, 74 N. C., 523, cited and approved.)

CIVIL ACTION tried at December Special Term, 1879, of HAYWOOD Superior Court, before *Graves, J.*

The plaintiff alleging himself to be the owner brings this action to recover the amount due on a note, as follows:

One day after date we promise to pay W. W. Stringfield one thousand dollars, for value received. Witness our hands and seals this 29th Oct., 1872.

(Signed) J. L. LOVE, [seal.]
R. G. A. LOVE, [seal.]

The defendants, admitting the execution, deny the plaintiff's title to the note and the moneys due thereunder. On the trial of the issue made by the pleadings, the plaintiff being in possession produced the note and read it as evidence to the jury. No other evidence was offered. The plaintiff's counsel asked the court to charge that the possession and production of the note was presumptive evidence of his ownership, and there being no rebutting testimony he was entitled to a verdict responding in the affirmative. The court declined to give the instruction, and charged that the defendants having in their answer denied the plaintiff's ownership, it devolved on the plaintiff to prove that he was the real party in interest, and no such presumption would arise. Upon this intimation the plaintiff submitted to a nonsuit and appealed.

Messrs. Marcus Erwin and *W. H. Malone*, for plaintiff.
Messrs. J. L. Henry and *A. W. Haywood*, for defendants.

SMITH, C. J. The only question presented in the record is this: Does the possession of an unendorsed negotiable note or bond raise a presumption that the person producing it is the real and rightful owner, and entitled to the moneys due from the defendants, the promisors?

It is settled upon ample authority that the possession of a note endorsed in blank or payable to bearer is presumptive evidence of title in the holder, and the rule extends to a case where there are subsequent endorsements which he may strike out. *Picruet* v. *Curtis*, 1 Sumner, 478; *Warren*

v. *Gilmore*, 15 Maine, 70; 1 Danl. Neg. Inst., § 812; Pom. on Rem. and Rem. Rights, § 140.

In *Pettie* v. *Prout*, 3 Gray, (Mass.) 542, an action was brought on a note payable to the Chester Iron Works, of which plaintiff was the general agent, "or bearer," and, with a view to use a set-off, the defendant contended that the note belonged to the company. The note was exhibited on the trial by the plaintiff, without further evidence. SHAW, C. J., thus declared the doctrine: "When the plaintiff brings the note declared upon in his hand and offers it in evidence, this is not only evidence that he is the bearer, but also raises a presumption of fact that he is the owner, and this will stand as proof of title until other evidence is produced to control it."

This and the other decisions referred to are based upon the principles of commercial law, that govern and regulate the transfer of negotiable securities, in the interests of trade and to facilitate and render safe, dealings in such paper. Will the same inference be drawn from possession in favor of a person, not the payee, holding an unendorsed note, under the statute which requires that "every action must be prosecuted in the name of the real party in interest," with an exception inapplicable to the present case? C. C. P., § 55.

In *Andrews* v. *McDaniel*, 68 N. C., 385, it is decided that the proper plaintiff is the party in interest and not the endorsee, the legal owner, unless he is also entitled to the money due, and parol proof was admitted of the plaintiff's equitable title.

In *Abrams* v. *Cureton*, 74 N. C., 523, the plaintiff to whom the note had been endorsed was nonsuited on its being made to appear, that it was under a contemporary agreement that he should collect, retain compensation for his services, and pay over the residue to the endorser. This recognition of equitable ownership of a negotiable bond or note, as prop-

erty, seems to place it upon the footing of other personal property, and admit the application of the rule which infers title from possession, until the presumption is met and overcome by rebutting evidence. "As men generally own the personal property they possess," says Mr. GREENLEAF, "possession is presumptive proof of ownership." 1 Greenleaf Ev., § 34. "Upon the same principle," says Mr. POMEROY, "the equitable owner of a promissory note is the real party in interest within the statute, and is the proper person to sue upon it, although there may be no endorsement, and possession of the instrument is *prima facie* evidence of such ownership." Rem. and Rem. Rights, § 140. He cites in support of the proposition, *Garner* v. *Cook*, 30 Ind., 331, in which the court say: "When *Vandagrift* v. *Tate*, was decided, the equitable owner of a note could not sue upon it in his own name; now he can; and the *possession of the note is evidence of such ownership.*"

The judge in the court below held that the denial in the answer of the plaintiff's title, had the effect of requiring from him proof beyond and in addition to the production of the note. In this we think he misconceived the legal effect of the conflicting pleadings. The denial destroys the force of an allegation and puts the controverted fact in issue. It would do the same, in case the endorsee or bearer brought the action in his own name. But in neither case is the denial evidence against, nor the plaintiff's allegation evidence for, the truth of the disputed fact, to be considered by the jury. The issue is eliminated and presented in the form of a simple enquiry as to the plaintiff's ownership of the note in suit. The burden of proof rests upon him; and upon the authorities, the presumptive evidence is furnished when the note is produced and read in support of his title. As there was nothing shown to repel its force, the presumption should have prevailed, and the plaintiff was entitled to the verdict. There is error in the ruling of the court, and

the judgment must be set aside and a new trial awarded, and it is so ordered. Let this be certified.

Error. *Venire de novo.*

JOHN C GAY v. W. F BROOKSHIRE and others.

Bankruptcy—Appeal.

1. Where a suggestion is entered on the record that a defendant, sued on a bond, has been adjudged a bankrupt, the court should stay proceedings until the question of the debtor's discharge shall have been determined.
2. Where the defendant pleads bankruptcy in bar, and the plaintiff demurs thereto, and afterwards the defendant is allowed to withdraw his plea and move a stay of proceedings until his right to a discharge can be passed upon, which motion is granted by the court, no appeal lies from a refusal to try the action on the demurrer after the withdrawal of the subject matter to which it relates, and the consequent continuance of the cause.

(*Paschall* v. *Bullock* 80 N. C., 329; *State* v. *Scott, Id.*, 365; *Mitchell* v. *Kilburn*, 74 N. C., 483; *Crawley* v. *Woodfin*, 78 N. C., 4; *McBryde* v. *Patterson*, *Id.*, 412; *State* v. *Lindsey*, *Id.*, 499, cited and approved.)

CIVIL ACTION tried at Fall Term, 1879, of RICHMOND Superior Court, before *Seymour, J.*

The plaintiff sues to recover the residue due on a bond executed to him by the defendants, after deducting the several payments admitted and specified in the complaint. The defendant, Bookshire, alone put in an answer, in which he states that additional payments have been made, and as a further defence, that he has been adjudged a bankrupt in the proper district court of the United States, and the plaintiff has proved his debt in the proceeding pending therein. The plaintiff replies, denying the allegation of other payments, and demurs to the sufficiency of the other matters of

defence. At fall term, 1875, the defendant had leave to withdraw his defence founded on the bankrupt act, and to enter on the record a suggestion of the bankrupt proceedings, in order to a stay of the action. Thereupon the plaintiff demanded judgment on the demurrer, and from the refusal of the court to grant it, appealed to this court.

Messrs. Platt D. Walker and *G. V. Strong*, for plaintiff.
Mr. John D. Shaw, for defendants.

SMITH, C. J. There has been no adjudication upon the issue raised by the demurrer, either sustaining or overruling it, but a refusal to proceed to judgment, and, as we interpret the record, a suspension of further action in the cause until the proceedings in bankruptcy are determined, and the defendant obtains or is denied his discharge. As the suggestion was not controverted, we assume the fact to have been acted on, as if on proof or admission, and if so, the stay and continuance are in direct accord with the requirements of the act of congress.

"No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity against the bankrupt, until the question of the debtor's discharge shall have been determined, and any such suit shall, upon the application of the bankrupt, *be stayed*, to await the determination of the court in bankruptcy on the question of discharge, unless," &c. U. S. Rev. Stat., § 5106. This mandate is addressed as well to the courts of the states as to the courts of the United States, and, as the supreme law, is obligatory on all. Bump Bank., 434 and references. *Sampson* v. *Burton*, 4 B. R., 1.

The effect of an adjudication of bankruptcy has been held to be itself an injunction against the further prosecution of a suit in a state court, to enforce payment of a demand provable in bankruptcy, when brought to its notice. *Penny*

v. *Taylor*, 10 B. R., 200. And if the adjudication be averred in the answer and proved, it operates to suspend proceedings. *Frostman* v. *Hicks*, 15 B. R., 41.

The purpose aimed at in the stay, is to enable the debtor, when his discharge has been granted, to plead it in bar of the recovery. *Paschall* v. *Bullock*, 80 N. C., 329; Blum, Law & Prac., Bank., 484.

The sufficiency of the demurrer is not before us on the appeal, and while not intending to pass upon it, we call attention to the preceding section, which declares that "no creditor proving his debt or claim shall be allowed to maintain any suit in law or equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced, or unsatisfied judgments already obtained therein against the bankrupt, shall be deemed to be discharged and surrendered thereby. U. S. Rev. Stat., § 5105.

But the appeal may be disposed of upon another ground. It is taken from a refusal of the court to proceed to try the action on the demurrer, after the withdrawal of the subject matter to which it relates, and the consequent order of continuance, involving no "matter of law or legal inference" in the cause. C. C. P., § 299. It stands upon the same basis as an appeal from an overruled motion to dismiss, or to nonsuit the plaintiff, or an order of continuance, which we have held will not be entertained. *Mitchell* v. *Kilburn*, 74 N. C., 483; *Crawley* v. *Woodfin*, 78 N. C., 4; *McBryde* v. *Patterson*, *Id.*, 412; *State* v. *Lindsey*, *Id.*, 499; *State* v. *Scott*, 80 N. C., 365. The appeal must therefore be dismissed and this will be certified.

PER CURIAM. Appeal dismissed.

J. H. WILSON, Jr., and wife v. C. J. LINEBERGER.

Motion to Dismiss—Appeal.

1. Where the defendant demurs to the complaint, for that, it does not state a cause of action, and the demurrer is overruled, the same point cannot be again presented by a motion to dismiss.

2. No appeal lies from a refusal to dismiss.

(*State* v. *Evans*, 74 N. C., 324; *Jones* v. *Thorne*, 80 N. C., 72; *Garrett* v. *Trotter*, 65 N. C., 430; *Mastin* v. *Marlow*, *Id.*, 695; *Long* v. *Bank*, 81 N. C., 41, cited and approved.)

MOTION by defendant to dismiss the action heard at Fall Term, 1879, of GASTON Superior Court, before *Buxton, J.*

At the first term of the court after the coming in of a report of a referee of the statement of an account, the defendant's counsel moved to dismiss the action "for want of equity," and was proceeding to state the grounds of the motion, when the court expressed the opinion that as a demurrer to the complaint had once been filed and overruled, and no appeal taken, this motion was not in apt time. Motion refused, and defendant appealed.

Messrs. Wilson & Son, for plaintiffs.
Messrs. Jones & Johnston, for defendant.

SMITH, C. J. The plaintiffs bring their action against the defendant for an account and settlement of his administration of the estate of Laben Lineberger, a lunatic, of whom he was guardian in the intestate's life time, and one of his administrators in association with the feme plaintiff, possessed of the trust fund after his death; also for the adjustment of a co-partnership of which himself and the intestate were members, and to carry into effect an agreement in relation thereto, entered into between the parties. The defend-

ant demurred to the complaint on the ground of its multifariousness, which at spring term, 1876, of Gaston superior court was overruled, and an appeal taken but not prosecuted. At fall term following an answer was put in, not denying the fiduciary relations charged, and his contract, but assigning as a reason for not fulfilling it that the plaintiffs were to give him an indemnifying bond against the claims of the creditors of the intestate, then supposed to be of small amount, and now ascertained to equal the penalty of the proposed bond, for which he would be liable, and the feme plaintiff, his co-administratrix, had mortgaged her lands for their full value. A single issue was framed and submitted to the jury at spring term, 1877' and in response they find the feme plaintiff has not mortgaged her estate for more than it is worth. Thereupon an order of reference was made to a commissioner to state the various accounts required in ascertaining the defendant's liability, and to take the necessary testimony in relation thereto. After the lapse of four terms the report was made to fall term, 1879, and ninety days allowed each party to file exceptions. The defendant then moved to dismiss the proceedings for want of equity, and the motion was denied on the ground that the subject matter upon which it rested had been decided in overruling the demurrer, and was *res adjudicata*. From this ruling the case is brought up on the appeal.

We think the motion was properly refused and for the reason given. If the facts stated in the complaint do not constitute a cause of action, the demurrer ought to have been sustained. The overruling judgment is a decision that the complaint is not liable to any of the objections specified. The motion to dismiss for alleged inherent defects or "want of equity" can only raise and present such points as were or could have been assigned as cause of demurrer, and the effect is in either case equally conclusive.

In *State* v. *Evans*, 74 N. C., 324, the prisoner was put on

trial for larceny, and the jury not being able to agree were discharged. The prisoner's counsel thereupon moved for his discharge on the ground that he could not again be tried. The motion was refused, and at the next term similar motion was made and allowed. On the appeal, PEARSON, C. J., says: "So we have the conflicting rulings of two of the judges of the superior court in the very same case; in fact one judge reverses the decision of the other judge. How is this unseemly conflict of decision to be prevented? It can only be done by enforcing the rule, *res adjudicata.*"

So upon a second application during the progress of a civil action for an injunction and the appointment of a receiver, this court remarked: "The matter has passed into and become *res adjudicata.* A party ought not to be harrassed 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 a new and essentially different case." *Jones* v. *Thorne*, 80 N. C., 72.

But aside from this, as has been repeatedly decided, a refusal to dismiss an action or proceeding before the final hearing, does not "affect a substantial right" as meant in section 299 of the code, and an appeal therefrom does not lie. *Garrett* v. *Trotter*, 65 N. C., 430; *Mastin Marlow, Id.*, 695; *Long* v. *Bank*, 81 N. C., 41, and the case of *Gay* v. *Brookshire, ante* 409.

There is no error. This will be certified that the cause may proceed in the court below.

No error. Affirmed.

E. BELO v. COMMISSIONERS OF FORSYTH COUNTY.

Shares of Stock in N. C. R. R. Co. subject to Taxation.

1. Shares in the capital stock of the North Carolina Railroad Company are not exempt from taxation by a legislative enactment that "all real estate held by said company for right of way, for station places of whatever kind, and for work-shop location shall be exempt from taxation until the dividends or profits of said company shall exceed six per centum per annum."
2. Shares of stock in an incorporated company may be taxed, as a distinct species of property, belonging to the holder, independently of the taxation imposed upon the value of the franchise and upon the real and personal estate of the corporation itself.
3. The legislature by the act of 1877, ch. 155, § 9 (6) intended to, and did provide for taxing the shares of stock in railroad corporations, owned by private parties.

(*R. R. Co.* v. *Com'rs*, 76 N. C., 212, and 77 N. C. 4; *R. R. Co.* v. *Brogden*, 74 N. C., 707; *R. R. Co.* v. *Com'rs*, 72 N. C., 10; *Bridge Co.* v. *Com'rs*, *Id.*, 15; *Buie* v. *Com'rs*, 79 N. C., 267, cited and approved)

APPLICATION for an Injunction heard at Fall Term, 1879, of FORSYTH Superior Court, before *Gilmer, J.*

The plaintiff's application was granted and the defendant commissioners appealed.

Mr. J. C. Buxton, for plaintiff.
Messrs. Watson & Glenn, for defendants.

SMITH, C. J. The plaintiff is the owner of three hundred and forty-five shares of the capital stock of the North Carolina railroad company, which have been assessed and charged with an *ad valorem* tax in the manner prescribed by law, and the tax list has been made out and delivered to the defendant, Hill, the sheriff of Forsyth, for collection. This suit is instituted to restrain him and the county com-

missioners from levying and collecting the tax, on the ground of alleged exemption under the charter of the company, and for the further reason that all proper taxes upon the taxable property of the company are paid by the company.

It is conceded that the franchise and property of the company have been leased to the Richmond & Danville railroad company at an annual rent of two hundred and sixty thousand dollars, or six and a half per centum per annum upon the par value of the stock; that no dividends or distribution of profits has been made among the shareholders in excess of six per cent, and the half per cent has been appropriated to the payment of salaries and other necessary expenses of the lessor corporation, and the interest, and in reduction of the principal of its debt. Upon these admitted facts, a perpetual injunction was awarded and the defendants appeal.

The clause in the amended charter of the company which, it is claimed, protects the plaintiff from the demand of any tax upon his stock, is in these words: "That all real estate held by said company for right of way, for station places of whatever kind and for work-shop location shall be exempt from taxation until the dividends or profits of said company shall exceed six per centum per annum." Acts 1854–'55, ch 32, § 5.

This section has received an authoritative interpretation in the *R. & D. R. R. Co.* v. *Com'rs of Alamance*, 76 N. C., 212, and is thus explained by BYNUM, J.: "It is clear that the real estate which the company may own, is not exempt, but such only as may be held by the company for the right of way, for station houses and for work-shop location. Real estate held and used for other purposes is not exempt from taxation. The exemption is coupled with a condition, and that condition equally attaches to each of the three purposes described in the act. Land held for the right of way

is exempted for that use only; that held for station places must be applied to that purpose; and that held for work-shop location can be applied to no other uses than for work-shops. Otherwise, in each case the land so held becomes liable to taxation as other property." *N. C. R. R. Co.* v. *Com'rs of Alamance*, 77 N. C., 4.

Upon a statement of the facts essentially the same as those now before us, it has been held that the immunity conferred remains unimpaired. *R. & D. R. R. Co.* v. *Brogden*, 74 N. C. 707.

It is also settled that the franchise of the company and its property outside the exemption are liable as distinct subjects of taxation. *R. & D. R. R. Co.* v. *Brogden, supra. W., C. & A. R. R. Co.* v. *Com'rs of Brunswick*, 72 N. C., 10; *Bridge Co.* v. *Com'rs of New Hanover, Id.*, 15.

The only question then for us to consider is this: As all the property of the company, real and personal, is either given in for taxation and the taxes thereon paid by the company, or is exempt under the act, can the shares in the hands of the stockholders be also assessed and charged as an independent subject of taxation? The question is scarcely open to debate, and we shall only refer to some among the many authorities sustaining the affirmative of the proposition.

In *Gordon* v. *The Appeal Tax Court*, 3 How. (U. S.) 133, Mr. Justice WAYNE thus expresses himself: "The franchise is their corporate property, which like any other property, would be taxable, if a price had not been paid for it. The capital stock is another property, corporately associated for the purpose of banking, but in its parts, is the individual property of the stockholders, in the proportion they may own them; and being their individual property, they may be taxed for it as they may for any other property they may own. * * * A franchise for banking is, in every state in the Union, recognized as property. The banking capi-

tal attached to the franchise is another property, owned in its parts by persons, corporate or natural, for which they are liable to be taxed, as they are for all other property, for the support of government."

In an able opinion of the author of that valuable work on railways, commenting on the law, he says: "We here find the clear recognition of this kind of corporate property, taxable to the corporation, and the shares in the hands of the corporators, distinctly defined as a *fourth species of corporate property, taxable only to the owners or holders.* 1. The capital stock; 2. The corporate property; 3. The franchise of the corporation, all of which is taxable to the corporation; and the shares in the capital stock which are taxable only to the shareholders." 1 Red. Am. R. Cases, 497.

A tax on the shares of stockholders in a corporation is a different thing from a tax on the corporation itself, or its stock, and may be laid irrespective of any taxation of the corporation where no contract relations forbid it. Cooley Const. Lim., 169. Field on Corp., 521.

A share of stock in a corporation is personal estate and is taxable to the owner thereof, as other personal estate, at the place of his residence. Burroughs Taxation, § 90.

Stock in a corporation is in the nature of a chose in action. It has no locality and of necessity follows the person of the owner. The tax upon it is in the nature of a tax upon income which of necessity is confined to the person of the owner. 1 Potter's Law Corp., § 192.

In Massachusetts it has been decided under a statute of that state that a citizen may be taxed for his stock in a turnpike company in another state. *Great Barrington* v. *Com'rs of Berkshire,* 16 Pick., 572.

In *Van Allen* v. *Assessors,* 3 Wall., 573, it is held that shares in a National bank may be taxed to the holder, although the whole capital is invested in securities of the

national government, which an act of congress declares to be exempt from taxation by state authority.

These references are sufficient to show that shares of stock in an incorporated company may be taxed as a distinct species of property, belonging to the holder, independently of the taxation imposed upon the value of the franchise and upon the real and personal estate of the corporation itself.

Has the legislature exercised its power to tax the plaintiff's stock upon its assessed value, and thus secured the uniformity prescribed in the constitution?

The taxes covered by the restraining order were levied in 1878 under the requirements of the act of March 7th, 1877, section 9 of which prescribes what the tax lists shall contain, and in paragraph 6, enumerates the following: "Stock, in national, state and private banks, and stocks in any incorporated company or joint stock association, railroad or canal company, and their estimated value;" and this valuation is charged in the act of raising revenue with the *ad valorem* tax levied, and uniform on property. The stock must be listed in the county and townships of the owner's residence, where he resides in the state, as was decided upon the construction of the statute in *Buie* v. *Com'rs of Fayetteville*, 79 N. C., 267.

There is nothing unreasonable in the subjection of this form of property to its share of the common burden of taxation, necessary in the support of government. Income is or may be taxed, unless in the special case forbidden in the constitution, from whatever source derived. Dividends are but net profits distributed among the shareholders, and if they must be taxed, why cannot the stock be taxed from which they proceed?

The subject may be considered in another aspect. The relation of the stockholders to the corporate body, for the purposes of the present enquiry, is very analogous to that

of a creditor towards his debtor. The means and resources of the debtor, in connection with the skill, industry and integrity, impart value to his personal obligation, as property possessed by the creditor. It is not pretended that the assessment and taxation of the estate of the former where he may reside, or his estate may be found, should relieve the security, which the latter holds, from liability for its share of the common burden. The same principle, and with equal force, may be applied to the stockholder and the corporation. The latter must bear the taxation imposed upon its property, and this may diminish its distributable profits, but the stockholder cannot, any more than the creditor, claim exemption on this account, for his stock, as distinct and separate property in his own hands.

It must therefore be declared that there is error in the record and the judgment must be reversed, and judgment entered here that the defendants go without day and recover their costs and it is so ordered.

Error. Reversed.

DAVID WORTH v. COMMISSIONERS OF ASHE COUNTY.

Taxation—Stock of Foreign Corporations.

Shares of stock in foreign corporations are personal property. They follow the person of the owner, and when he lives in this state, they may here be taxed.

APPLICATION for Injunction heard at Fall Term, 1879, of ASHE Superior Court, before *Schenck, J.*

The plaintiff is a citizen of Ashe county and owns three hundred and sixty-four shares of stock in the bank of Abing-

don chartered and doing business in the state of Virginia. The stock in the bank is taxed by the laws of Virginia, and the defendant commissioners have listed the same for county and state taxes and placed the list in the hands of the sheriff of the county for collection. The plaintiff asks that defendants and their agents be restrained from collecting the said tax, and for judgment that the assessment be declared invalid and without authority of law. The defendants demurred to the complaint, in that, the matter therein set forth is not sufficient in law to enable the plaintiff to maintain his action. The court overruled the demurrer, and granted the injunction, from which the defendants appealed.

Messrs. Mason & Devereux and *G. V. Strong,* for plaintiff.
Attorney General, for state and county.

SMITH, J. C. This case differs from *Belo* v. *Com'rs, ante* 415, in a single feature. The plaintiff Belo residing in Forsyth county, held stock in the North Carolina railroad company, a domestic corporation, and claimed relief on the ground that the company itself returned and paid taxes upon all its taxable estate, and hence the tax on his shares was cumulative upon the same property and not uniform. The plaintiff, in the present case, holds three hundred and sixty-four shares of capital stock in the bank of Abingdon, a foreign corporation, existing under the laws of, and doing business in, the state of Virginia, and insists upon their exemption for the reason that all the corporate property is outside the limits of the state, and his stock is not subject to its taxing power. The principle involved in both cases is substantially the same, and is so fully examined in the other case as to require little to be added to what is there said.

In *Whitehall* v. *County of Northampton,* 49 Penn. St. Rep.,

519, the question came up for consideration and the supreme court declared: "The defendant being a citizen of this state, it is clear that he is subject personally to its power to tax, and that all his property accompanying his person, or falling legitimately within the territorial jurisdiction of the state, is equally within its authority. The interest which an owner of shares has in the stock of a corporation is personal. Whithersoever he goes it accompanies him."

The correlative proposition, the right of a state to tax the shares of non-residents in a domestic corporation, may admit of question; and in an able opinion of Judge REDFIELD'S referred to in the other case, he held that such tax could not be levied, and in this case he is sustained by the decision in *Oliver* v. *Mills*, 11 Allen (Mass.), 268. The act of congress however confers upon the states wherein national banks may be organized, the authority to tax the shares of non-resident as well as of resident stockholders, under certain restraints, and to collect the same through the corporation.

That the general assembly has included among the subjects of an *ad valorem* taxation, stocks held by its citizens in foreign corporations, is apparent from the several provisions of the revenue act and that for the collection of revenue. Acts 1879, ch. 70, and 71. Taxes are levied "upon the true value of all moneys, credits, investments in bonds, *stocks*, joint stock companies or otherwise. Ch. 70, class 1, § 1.

Every person is required to list his "real and personal property, moneys, credits, investments in bonds, *stocks*, joint stock companies," &c., in his possession or under his control, on June the first, preceding. Ch. 71, § 4. The list must contain "any certificate of deposit in any bank, whether in or out of the state, *certificate of stock in any corporation or trust company* whether in or out of the state." *Id.*, § 9, (5).

It is unnecessary to make further extracts to indicate the

purpose of the legislature to include such property, as the plaintiff owns, among the subjects out of which its revenues are to be raised, as these are quite sufficient.

It must therefore be declared there is error in the ruling of the court and the judgment must be reversed, and judgment entered here sustaining the demurrer of the defendants and dismissing the action, and it is so ordered.

Error. Reversed.

THOMAS L. CLAYTON v. R. B. JOHNSTON.

Burden of Proof—Mistake of Fact—Cost of Transcripts.

1. Upon a motion to strike out an entry of satisfaction of judgment on the ground of a mistake of fact, it was found that the moving party had failed to show by preponderance of proof such mistake on his part at the time he made the entry, there being no exception to the evidence or that it was insufficient, and the court refused the motion; *Held*, no error.
2. The costs of unnecessary and irrelevant matter, accompanying a transcript, in regard to which no exception is taken below, will be taxed against the appellant whether he succeeds or not. (See *Grant* v. *Reese*, *ante*, 72—opinion.)

MOTION in the cause heard at Fall Term, 1879, of BUNCOMBE Superior court, before *Graves, J.*

This motion was made by plaintiff to strike out an entry of satisfaction of judgment which had been made at his instance. His Honor found that plaintiff had failed to show by preponderance of proof that he entered satisfaction under a mistaken fact, and refused to allow the motion. From which ruling the plaintiff appealed.

Mr. James H. Merrimon, for plaintiff.
Messrs. J. M. Gudger and *K. Elias*, for defendant.

SMITH, C. J. In the superior court of Buncombe at spring term, 1873, the plaintiff recovered judgment against the defendant for the sum of seven hundred and forty-one dollars, on which execution issued returnable to the following term. On December 17th, 1874, the sheriff gave the defendant a receipt, not specifying the amount paid, but in full for principal and interest due on the debt. In the early part of the year 1877, the plaintiff on the defendant's application, caused satisfaction to be entered on the record of the judgment, signing his name thereto. His present motion is to have this entry stricken out to the end that execution may issue for three hundred dollars, which sum, he alleges, was allowed in settlement for the residue, upon the assurance of the sheriff that this sum had been collected and applied, as he was directed to do, upon another judgment on which he was liable as a surety for one R. L. Overby, and he subsequently learned that the money had not been collected, but assumed by the sheriff, and had not been so applied.

Upon the hearing of the motion, numerous affidavits were read and some oral testimony received, upon which His Honor found as a fact "that the plaintiff had failed to show by preponderant proof, that there was a mistake of fact, on his part, at the time the entry of satisfaction of the judgment was made upon the record," and denied the motion. There is no suggestion that any evidence was improperly admitted or refused, or that it was insufficient to warrant the conclusion arrived at, and therefore it cannot be considered on the appeal.

Assuming the fact of the want of evidence to sustain the plaintiff's allegation, it cannot be contended that His Honor erred in refusing to cancel the entry made voluntarily and under no misapprehension by the plaintiff himself, and ex-

pose the defendant to another demand of a discharged debt. Indeed the argument before us was mainly directed to the effect of the proofs offered, and not to the deductions of the court therefrom, which are conclusive on the appeal. The ruling of the court must therefore be sustained and the judgment affirmed.

We again call attention to the requirements of C. C. P., § 301, in stating the case on appeal, and to the voluminous and unnecessary matter that often accompanies the transcript in regard to which no exception is taken. This remark is applicable to the evidence sent up in the present case upon which His Honor has conclusively passed and which is not subject to our review. We shall be constrained to tax the appellant with the costs of such irrelevant matter, as we have directed in *Grant* v. *Reese, ante* 72, whether the appellant succeeds or fails. It imposes also upon the court much unnecessary labor in examining the record.

No error. Affirmed.

J. M. HUTCHISON v. RUMFELT, and another.

Appeal, dismissal of—Rule of Court, construed.

1. An appeal will not be dismissed because a case was not prepared and served on the appellee, where it appears of record that the facts contained in the judge's statement were assented to by the parties.
2. Under the rule of this court, motions to dismiss appeals may be made "at or before the calling of the case," which is construed to mean—at or before the time when the case is taken up and heard. And an objection to any irregularity in the appeal, not extending to the subject matter, must be taken before the trial is entered upon.
3. An appeal will be dismissed on motion of the appellee, where the

requirements of the statute for perfecting it not are complied with. (See *Sever* v. *McLaughlin*, *ante*, 332.)

(*Wallace* v. *Corbett*, 4 Ired., 46; *Arrington* v. *Smith*, *Id.*, 59; *Robinson* v. *Bryan*, 12 Ired., 183; *Wade* v. *Newbern*, 72 N. C., 498, cited and approved.)

CIVIL ACTION heard in GASTON county at Chambers on the 26th of February, 1879, before *Schenck, J.*

His Honor in the court below, upon the agreement of the parties to this suit, found the facts which were deemed essential to present the points involved, and from his ruling thereon, both sides appealed. The case was disposed of on motions made in this court, rendering it unnecessary to set out the facts found.

Messrs. John E. Brown and *G. V. Strong,* for plaintiff.

Messrs. A. W. Haywood and *Reade, Busbee & Busbee,* for defendant.

SMITH, C. J. The motions in the cause were heard upon facts found by His Honor and assented to by the parties, at chambers on February 26, 1879, and from the rulings thereon, both appeal. The defendant moves to dismiss the appeal of the assignee on two grounds; first, for want of a case prepared and served on the appellee, McLean, alone interested in the subject matter of the appeal; and secondly, because no appeal bond was filed within the time limited by law.

The first ground is untenable since the facts constituting the case on appeal were agreed on and in writing at or before the hearing. It was not open to corrections by either, and therefore does not come within the rule.

The second ground assigned sustains the motion, unless the appellee by laches has lost the right to make it. This is maintained by the appellant upon the authority of *Wallace* v. *Corbett*, 4 Ired., 46; *Arrington* v. *Smith, Id.*, 59, and

Robinson v. *Bryan*, 12 Ired., 183. An examination of the cases show that they do not support the proposition. In the first case, it was declared to be too late to make the motion after the cause had been moved to another county, and had there remained for three years, and an ineffectual bond had been given. In the second case, two years had elapsed and witnesses on both sides had been summoned and costs incurred, and the motion was not entertained. In the last case, the facts were substantially the same, witnesses were summoned and the cause was depending for two years, and the defect in the bond was the omission of the name of the obligee, and the court refused to dismiss. In all the cases, laches in making the motion was imputed to the appellee, and for this reason his motion was denied. The same reasons do not apply with equal force to proceedings pending in this court, where causes are taken up in regular order, and preliminary motions, while allowed to be entered, are not then disposed of, unless, as when a writ of *certiorari* is wanted to supply or correct an imperfect record, some preliminary order is needed preparatory to the trial. Nor do costs accumulate here by delays as in jury courts.

But the appellant insists that inasmuch as the transcript was filed at the last term, and when reached the case was continued for the absence of counsel, and again, upon the first call of causes in the sixth district, was put to the foot of the docket of the district, the motion is not made, "at or before the calling of the case," as required by the rules adopted by this court, and cannot be entertained. RULES—*Appeals*, § 5, 80 N. C., 489. The rule is in these words: "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." But we do not understand the rule in this restricted sense, nor has such been its practical construction. The case is not called when passed over for

the absence of counsel, within the meaning of the rule, but is *effectually called* when taken up and heard. A preliminary objection resting upon an irregularity in the manner, time or form of taking and perfecting the appeal, and not extending to its subject matter, must be taken before the trial is entered upon, and if not, will not be entertained during its progress. This is a reasonable and proper requirement, and this, the purpose of the rule. The motion therefore is not too late, and as the court, guided by the decision in *Wade* v. *City of Newbern*, 72 N. C., 498, have frequently since decided, the appeal will be dismissed when the requirements of the statute for perfecting it are disregarded. *Sever* v. *McLaughlin* and *Wadsworth* v. *Carroll, ante*, 332, 333. The appeal is dimissed.

PER CURIAM. Appeal dismissed.

JOHN P. LEE v. M. H. EURE and others.

Executors and Administrators—Sale of Land—Jurisdiction.

1. A proceeding under section 319 of the code, instituted against the heirs, personal representatives, etc., of a deceased judgment debtor, more than three years after his death for the purpose of subjecting certain lands to the payment of the judgment debt, resembles an ordinary action and should be made returnable to a term of the superior court, and not before the clerk.

2. An order made by the clerk granting leave to issue execution upon such judgment, is a nullity, and no title is conveyed to the purchaser by a sale under such execution.

(*Murchison* v. *Williams*, 71 N. C., 135; *Lyerly* v. *Wheeler*, 11 Ired., 288; *Jennings* v. *Stafford*, 1 Ired., 404, cited and approved.)

LEE *v.* EURE.

CIVIL ACTION for the possession of Land, tried at Fall Term, 1879, of GATES Superior Court, before *Gudger, J.*

Judgment for defendant, appeal by plaintiff.

Messrs. Gilliam & Gatling and *Pruden & Shaw,* for plaintiff.
Messrs. J. P. Whedbee and *W. A. Moore,* for defendant.

SMITH, C. J. The land in controversy belonged to one W. H. Lee, who by his deed of September 12, 1867, conveyed to the defendant M. H. Eure. At fall term, 1867, of Gates superior court of law, Riddick Gatling, as guardian, recovered judgment against said W. H. Lee, on which execution issued in October of that year, and was levied on the land. The judgment on the reorganization of the courts, was transferred to the docket of the superior court. In September, 1868, W. H. Lee was adjudicated a bankrupt, and in January, 1869, obtained his certificate of discharge. He died in 1870, intestate. In 1877, the assignee of the judgment, upon notice to the administrator and heirs at law of the intestate, but not to the defendant, on motion before the clerk, was granted leave to issue a writ of *venditioni exponas,* under which the land was sold by the sheriff and bought by the plaintiff, and a deed therefor executed to him.

Upon these facts admitted by the parties, and upon an assumption, for the purposes of the trial, of the fraudulent character of the defendant's deed, the court held that the plaintiff's action for the recovery of the land could not be maintained, and gave judgment for the defendant.

The discharge in bankruptcy is a personal defence, to be set up by the debtor or his personal representative, and if, when opportunity is offered, it is not brought forward, the case stands as if it had not been granted. In like manner every other valid objection to the issuing of execution must be presented, or it is deemed to be waived. This defence

may therefore be put out of view in considering the case. The only question then is this:

Is the proceeding under which the plaintiff derives title regular and sufficient in law?

In *Murchison* v *Williams*, 71 N. C., 135, it is declared that "when a debtor dies against whom there is a judgment docketed" (and the lien of a levy under a *fieri facias* must follow the rule) "his land descends to his heirs or vests in his devisees, and his personal property vests in his administrator or executor, just as if there was no judgment against him, and the whole estate is to be administered just as if there were no judgment, that is to say, the personal property must be sold if necessary, and all the personal assets collected, and out of these personal assets, all the debts must be paid, if there be enough to pay all, as well docketed judgments as others." The reason for this mode of administration is that, although a lien on land exists, the judgment should be paid out of the personal estate, if any, in exoneration of the land for the benefit of the heir or devisee. Bat. Rev., ch. 45, § 40.

Conceding this, the appellant's counsel insists, on the intimation in the opinion in *Murchison* v. *Williams*, *supra*, that after an inaction of three years, the plaintiff may pursue the remedy and enforce his lien as provided in C. C. P., ch. 2, § 319, *et seq.* Section 319 is as follows: In case of the death of the judgment debtor after the judgment, the heirs, devisees or legatees of the judgment debtor, or the tenants of real property, owned by him and affected by the judgments may, after the expiration of three years from the time of granting letters testamentary or of administration upon the estate of the testator or intestate, be summoned to show cause why the judgment should not be enforced against the estate of the judgment debtor in their hands respectively; and the personal representatives of a deceased judgment debtor may be so summoned at any time within one year

after their appointment. The personal representatives of a deceased judgment debtor, if there be any, shall always be parties to any summons against his heirs, devisees, legatees, or tenants, to enforce the judgment.

The subsequent sections require the summons to be accompanied by an affidavit that the judgment has not been satisfied, and specifying the amount due, authorizes an answer, demurrer or replication, the preparation and trial of issues, as in an original action, and with the same rules as to verification of the pleadings. Except that no complaint is necessary, the affidavit being substituted for it, the proceedings are assimilated to an original suit as prescribed in the code.

But the act of January 25, 1871, suspending the operation of the code of civil procedure in certain cases, makes important modifications in the mode of bringing and prosecuting actions, applicable to this, as to an original proceeding. It requires process to run in the name of the state, under the seal of the court, and to make it returnable and returned to the next ensuing term, thus withdrawing the action from the clerk and giving exclusive cognizance to the judge, except in the cases committed to his jurisdiction as judge of the court of probate. Bat. Rev., ch. 18.

The act would have expired by limitation on the 1st day of January, 1873, but that it was continued in force until otherwise provided by law, by the act of 1872–'73, ch. 14.

The plaintiff can derive no support to his title under the proceeding authorized against a debtor, when the judgment becomes dormant by section 256 of the code. The judgment rendered by the clerk is a nullity, and inasmuch as the plaintiff is the purchaser at a sale under his own execution and must show both a judgment and execution, he must fail in his action. *Lyerly* v. *Wheeler*, 11 Ired., 288; *Jennings* v. *Stafford*, 1 Ired., 404.

There is no error and the judgment is affirmed.

No error. Affirmed.

J. E. STENHOUSE and another v. M. L. DAVIS, Adm'r, and others.

Executors and Administrators—Injunction.

Where an administrator sold land to make assets, and it was bought by his sister either for his or their joint benefit, the plaintiffs becoming her sureties for the payment of the purchase money, and judgment was rendered against her and the plaintiffs for the balance due on the purchase money; and it further appeared that the administrator who was insolvent, remained in possession of the land; *It was held*, that the plaintiffs were entitled to an order appointing a receiver to re-sell the land (which was not resisted), and an order restraining the administrator from collecting the money due on the judgment against the plaintiffs, and from using or assigning the commissions due him from the estate, until the determination of the action.

(*Smith* v. *Smith*, 5 Ired. Eq., 34; *Egerton* v. *Alley*, 6 Ired. Eq., 188; *Ferrer* v. *Barrett*, 4 Jones Eq., 455; *Mast* v. *Raper*, 81 N. C., 330, cited and approved.)

MOTION of plaintiffs for an Injunction heard at Chambers in July, 1877, as of Spring Term, 1877, of MECKLENBURG Superior Court, before *Cloud, J.*

The motion was granted and the defendants appealed.

Messrs. A. Burwell and *Shipp & Bailey*, for plaintiffs.
Messrs. Dowd & Walker, for defendants.

SMITH, C. J. The plaintiffs surviving members of the partnership firm of Stenhouse, Macaulay & Co., in their complaint allege that the defendant M. L. Davis, administrator of J. H. Davis, finding it necessary to convert his intestate's real estate into assets for the payment of debts, obtained license from the probate court, and on October 26, 1869, among others, sold the tract of land described in the complaint for the sum of eleven thousand three hundred

and fifty-one dollars and fifty cents, on a credit of twelve months with interest from date, to his co-defendant and sister-in-law, Sue H. Davis; that the land was bid in by her under an arrangement between them, not for herself but for the administrator, and she gave her bond for the purchase money with Stenhouse, Macaulay & Co. and another who is insolvent and has removed from the state, as sureties; that suit has been brought on the bond and judgment recovered against the principal, the plaintiffs, and the other surety, for the amount due; that the administrator is insolvent, and after deducting partial payments, there remains still due on the judgment about seven thousand dollars; and that the administrator is in possession of the land, whose annual rental is of the value of one thousand dollars which he is appropriating to his own use, and there is a considerable sum coming to him for compensation in administering the estate.

The object of the action is to secure these funds and to have the land resold, and the proceeds from both sources applied to the discharge of the said debt.

The defendants both answer, denying that the land was bought for the administrator alone, and declaring that it was bid in for the common and equal benefit of both; and the defendant, M. L. Davis, alleges that the rental value is only six hundred dollars; that the assets have been properly administered and regular accounts thereof made out and returned; and not denying his insolvency, says, it is dependent on the sum for which the land may be resold, and further that his allowance of commissions have been used except about eighteen hundred dollars, which has been assigned to one W. R. Miller. The other matters set up in the defence are not material now to be considered.

At the hearing of the plaintiff's motion at chambers on July, 1877, the court made an interlocutory order restraining the said M. L. Davis from collecting the moneys due on the

judgment, from receiving, using, or assigning his commissions, appointing one T. L. Vail, receiver, to take possession of the land and collect the rents, and authorizing him to advertise and sell the land in order that the proceeds may be appropriated to the debt.

To the part of the judgment directing the sale, the counsel of both parties give their consent in writing, which is filed with, and accompanies, the transcript, and the defendants' appeal only requires a review of the other directions.

Without enquiring into the merits of the controversy at this preliminary stage, it is sufficient to say the case made in the pleadings and upon the evidence fully warrants the order made for the preservation of the fund until the final hearing. There is no disposition manifested by the plaintiffs to interfere with the original sale, confirmed by the probate judge, since the money the land will now command, tested by an attempted sale since, is hardly sufficient to pay the residue of the purchase money, reduced by payments to about half the original price. Upon obvious principles of equity, the property of the principal debtor, acquired by giving the very security sought to be enforced against it, is primarily liable for the debt and the indemnity and protection of the sureties. *Smith* v. *Smith*, 5 Ired. Eq., 34; *Egerton* v. *Alley*, 6 Ired. Eq., 188; *Ferrer* v. *Barrett*, 4 Jones Eq., 455; *Mast* v. *Raper*, 81 N. C., 330.

This is the equity asserted in the complaint, and it is but a reasonable precaution to secure the fund from waste and loss until the rights of the parties can be fully determined and settled. In this view it is immaterial how the title lies between the defendants, for whether one or both are entitled, *the owner's property* is pursued by the sureties, to subject it to the debt contracted in the purchase, and for their exoneration. Nor is it proposed to disturb the due course of administration and distribution of the assets of the intestate's estate, by requiring the property of the principal debtor to

be applied in payment of a debt constituting a part of the trust fund itself.

It must therefore be declared there is no error in the interlocutory judgment, and it is affirmed. This will be certified in order that the cause may proceed in the court below.

No error Affirmed.

MOSES CURTIS' HEIRS, Ex Parte.

Clerk and Master's Bond—Remedies.

Where land was sold under proceedings in equity for change of investment in 1855, and in 1859 the title was made to the purchaser, the clerk and master ordered to pay the interest on the purchase money annually to the life tenant, and the cause was dropped from the docket; upon a re-docketing of the cause in 1878 after the death of the life tenant, and a motion by the remainder-man that the executrix of the clerk and master should be required to show cause why a judgment should not be entered against her for the amount of the purchase money and accrued interest: *Held*, that the remedy was not by a motion in the cause, but by a summary motion against the executrix and sureties of the clerk and master under Bat. Rev., ch. 80, § 14, or by action upon his official bond.

MOTION heard at Spring Term, 1879, of MCDOWELL Superior Court, before *Graves, J.*

Moses Curtis devised all his lands to Mary Curtis, his widow, for life, with remainder to his children as expressed in the will. The widow and children presented their petition *ex parte* to the court of equity of McDowell county at spring term, 1854, praying a sale of the lands, and investment of the proceeds, and the payment of the annual in-

terest to the widow during her life, and at her death, a division of the principal money among the children, share and share alike.

A sale was made under a decree in the cause by W. M. Carson, the then clerk and master, to Thomas L. Hemphill and William Spake, the aggregate amount of their purchases being $734, and on report filed, the sales were confirmed by the court, and an order thereafter made as follows: At fall term, 1855, the master was ordered to lend out the money first deducting the costs. At fall term, 1857, the master was ordered to pay over to Burgin, the guardian of the widow, all the interest which had accrued on the purchase money for her support.

At fall term, 1858, it appearing that the purchase money of the lands bought by Hemphill had been paid, it was ordered that title be executed therefor.

At spring term, 1859, an order was entered in the cause substituting Elijah Kester in the place of Burgin as guardian to the widow, and the clerk and master was ordered to pay the annual interest to him.

After spring term, 1859, the cause was dropped from the docket and did not again appear thereon, nor on the superior court docket until spring term, 1878, when the same was entered on the docket, accompanied by a petition in writing representing the death of the widow and alleging the non-payment to them of any part of the principal money.

It was further shown that Wm. Spake had died without paying for the lands bought by him, and C. L. Corpening, the clerk and master, since the time the money was ordered to be put at interest and the abolition of the court of equity, had died, and that Martha A. Corpening was his executrix, and it was prayed that they might be brought before the court by notice.

The court ordered notice to issue to the administrator of

Spake to show cause at the next term why he should not pay for the land purchased by his intestate, and to the executrix of the late clerk and master a similar notice to show cause why judgment should not be entered against her for the amount of the money paid to her testator in his official character and used by him, and in the last instance, it was ordered that service by publication should be sufficient, and it was referred to G. G. Eaves to take an account and report to the next term.

The executrix, Martha A. Corpening, pursuant to the published notice, came into court and by answer filed, showed for cause against the judgment prayed for, that the cause, in which the proceeding was had, was finally disposed of in 1859, and that the same was brought forward, without notice and without leave of the court, and she particularly objects to the manner of the service of the notice and to the order of account made before the publication of the notice.

Answering to the merits, the executrix alleged that the sale was made by Carson, the predecessor of her father in the office of clerk and master, and that she was ignorant how much he had received, and she disclaimed all knowledge of her testator's receiving any of the money, and averred her belief to be that if he ever received any of it, he had paid it out to those entitled.

At the hearing, the plaintiffs dismissed their motion as to Spake, thereby abandoning all ground of relief as to his purchases, but moved for an order of account of the purchase money which came to the hands of the testator of Martha A. Corpening and of the assets which came to her hands as his executrix legally applicable to their claim. His Honor refused the motion and from that refusal the appeal is taken by the petitioners.

Messrs. P. J. Sinclair and *W. H. Malone,* for petitioners.

DILLARD, J., after stating the case. No facts are found, nor is it stated for what reasons the motion of plaintiffs was refused, and therefore we can only examine the record and the admitted facts to determine if there was error.

Upon the adoption of our present system of courts, provision was made for the transfer into our present superior courts, at the option of any party interested, of all causes in the late courts of equity, wherein anything remained to be done that was material or necessary to the objects for which they were instituted. That provision of the law was continued and yet exists, as may be seen in section 412, chapter 17 of Battle's Revisal, and chapter 9, laws 1876–'77, so that under that authority the plaintiffs might immediately, on the establishment of our new system in 1868, have brought forward their case from the equity docket, if they had occasion to do so, and after entering it on the superior court docket, they might have made any appropriate motion therein which their interest required. But they did not do that. The record shows that they and the widow of Moses Curtis sold all the lands through the agency of the court, and that by consent the widow was to have the interest on the purchase money during her life, and accordingly the funds were decreed to be put to interest to be paid to the widow. It also showed title decreed to Hemphill for *his purchases*, and from the dismissal of the case as to Spake at the hearing, from which the appeal comes, it is implied that there was nothing to be done *as to him*. Thus it would seem that the cause was in substance at an end as to the money and the rights of the parties therein, and as to the execution of title to the purchasers, so that it might be dropped from the docket without any real necessity to require any further action on the part of the court.

The omission to transfer the cause not only indicates that it was regarded as finally disposed of, but there was no necessity of any aid from the court in getting the money at

the death of the widow. Upon any other supposition, the parties upon the death of the widow would have moved in the matter before the expiration of Corpening's office in 1868, and if not within that time, they would have moved before his death in 1875.

Upon these appearances, no reasonable explanation or account to the contrary being shown, His Honor might very reasonably have adjudged the equity cause as finally disposed of and left the parties to seek remedy for non-payment of their money, by suit on the clerk and master's bond. But let it be conceded that plaintiffs had never received the principal money, after the widow's death, could they make effectual the proceeding they resorted to against the executrix of the clerk and master? It is to be remembered that the plaintiffs, in their petition filed in the cause, base their claim to make the executrix responsible upon the allegation that Corpening wasted and used the money which came to his hands. If he did so, certainly, while he was in office and possibly after the abolition of his office, payment might have been enforced against him by a proceeding in the cause. But after his death how is that liability to be asserted against his estate?

No remedy operating *in personam* could be had against the personal representative. All the estate would be assets to pay the testator's debts to be administered in a due course of law, and the claim of the plaintiffs would be a debt only, and take its place in its proper class in the application of the assets.

Would the court, the scope of whose action in the cause was to sell the land and to decide as consented to by the parties, depart so far as to collect a mere debt against the estate of the clerk and master by administering his estate on a mere motion in the cause? Such a proceeding would be inconvenient and is without a precedent so far as we can find by the aid of counsel, or upon our own researches.

In the existing state of things, in our opinion, the remedy of the plaintiffs, if any they have, is by summary motion against the executrix and the sureties of the clerk and master under Bat. Rev., ch. 80, § 14; or by an action on the bond of the clerk and master and not by a notice or rule in the equity cause.

There was no error in the court below in the refusal of the plaintiffs' motion for judgment and for account of the assets of the clerk and master, and this will be certified.

No error. Affirmed.

M. H. WEAVER, Adm'r, *v.* D. M. JONES, Adm'r.

Motion to set aside Judgment—Practice.

Where attorneys who had for six years represented a defendant, after his death assume to represent his administrator, who was his son living in another county, and consent to the administrator's being made a party without actual service of notice; and six years after the verdict for plaintiff the defendant administrator moves to set aside the judgment because he had no notice of his being made a party and had not retained the attorneys to represent him; *Held*, that as defendant's affidavit did not show a meritorious defence, made no allegation of mismanagement upon the part of counsel, and gave no explanation of the long delay in making the motion, the motion was properly refused.

(*Doyle* v. *Brown*, 72 N. C., 393; *Pender* v. *Griffin*, *Id.*, 270, cited and approved.)

MOTION to vacate a Judgment heard at Fall Term, 1879, of HENDERSON Superior Court, before *Graves, J.*

The motion was refused and the defendant appealed.

Messrs Reade, Busbee & Busbee and *S. V. Pickens*, for plaintiff.

Messrs. G. S. Ferguson and *Merrimon & Fuller*, for defendant.

SMITH, C. J. This action, commenced in 1866 in the county of Polk and in 1867 removed to Henderson, was depending in the superior court thereof at the death of the defendant's intestate in 1872, and a month afterwards administration on his estate was committed to the defendant. At fall term, 1873, under an arrangement previously entered into between the counsel for the plaintiff and the intestate, the original defendant, who assumed still to represent the administrator, that no formal process need issue to make him a party, an order was entered making the defendant a party as of the preceding term and the record states as follows: "The defendant comes into court and pleads no assets, fully administered and especially the amnesty act of the general assembly of North Carolina, passed at its session 1866–'67." Thereupon the jury were impaneled, the cause tried, a verdict rendered for the plaintiff and judgment entered accordingly. At fall term, 1879, upon a verified application and for the reasons therein assigned, the defendant moved the court to set aside the judgment, and from the refusal to do so he appealed to this court.

Upon hearing the motion, the judge finds as facts that no notice or other process issued to the defendant, after the death of the intestate, his father, to make him a party to the action, and that he gave no authority to the attorneys previously employed by the intestate to conduct the defence to represent himself, or to make him a party, although they acted in good faith in continuing to act as such.

The defendant's affidavit sets out the facts found by the court, and avers further that when the trial occurred he resided in Macon county and knew nothing of its taking place. It does not allege a meritorious defence; any omission or mismanagement of counsel to his prejudice; when he first had knowledge of the trial and its result; whether he took any and what action on learning the facts, before making the present motion; nor is any excuse or explanation given

of his long delay and inaction. These are matters peculiarly within his own knowledge, and material in repelling the inference of his acquiescence and implied ratification of what was done. The motion rests upon the simple proposition of the want of service of legal process and the absence of any direct re-employment of the counsel, retained by the intestate, to continue in the defence.

We concur with His Honor that upon these facts, the plaintiff was not entitled to his motion and it was properly overruled. While the court has an undoubted right to amend the records and vacate an erroneous judgment, the power should be used with care and discretion, more especially where there has been great remissness in invoking its exercise, and interests acquired upon the faith of the integrity and stability of the record may be injuriously affected. The subject matter of the suit was of such notoriety in the county in which it was brought, as to induce the intestate to have it removed to another; and for six years after its termination, the defendant slumbers upon his rights before his activity is quickened to seek redress for his wrong. The record is in proper form, his defences are put in, himself represented by counsel, no suggestion of an unfair trial or wrong in the verdict, a delay of many years without an explanation; the inference may be fairly drawn of acquiescence and ratification of what was done by the appearing attorneys, of equivalent legal force to a previous employment. The want of service of process is not a patent defect, rendering the judgment void upon its face, for the record shows the defendant's presence, but the fact is found upon evidence *aliunde*, and an order of vacation becomes necessary. *Doyle* v. *Brown*, 72 N. C., 393; *Pender* v. *Griffin*, *Id.* 270.

When the facts are ascertained, the vacating or refusing to vacate a judgment is not a matter of uncontrolled discretion but of legal right, and hence the judge correctly held that upon the case made in the application, the record was

not successfully impeached and was conclusive. Freeman on Judg., § 102; Weeks on Attys., § 200 *et seq.*

The judgment must be affirmed and it is so ordered.

No error. Affirmed.

JOHN L. DRAKE and others v. BRITTON DRAKE and others.

Confederate Money—Scale—Evidence—Vouchers—Commissions—Negligence.

1. Disbursements made by an administrator in confederate money should not be scaled, where such money is the money of the estate, and is received by the creditors at its nominal value.
2. Independently of section 480 of the code, receipts of living persons are not strictly legal evidence to show a full administration; but when they are acted on by a referee, without pointed, specific objection *then* made, such as will give the opposite party an opportunity to remove the difficulty, one cannot be heard in a subsequent stage, unless unfairness be made to appear.
3. An administrator who does not deduct his commissions until a final settlement is entitled to his *per centum* on the aggregate of his receipts and disbursements, including interest thereon.
4. An administrator brought suit in May, 1861, on a solvent note, against the principal and surety thereto; judgment was delayed by appeals and continuances until fall term, 1862; under an execution issued thereon, the sheriff in January, 1863, collected confederate money, and the same was paid into office, and taken out by the administrator in the fall of that year, the receipt of such currency being then customary among execution creditors in that locality; *Held*, that the administrator was not chargeable with negligence.
5. Where confederate money has been received by an administrator under such circumstances, he should not have to bear the loss of a part of the same by an investment thereof, in good faith, in certificates of the Confederate States.

(*Finch* v. *Ragland*, 2 Dev. Eq., 137, cited and approved.)

DRAKE *v.* DRAKE.

SPECIAL PROCEEDING commenced in the probate court and heard on appeal at Fall Term, 1879, of CHATHAM Superior Court, before *Gilmer, J.*

This proceeding was commenced by the next of kin of George Drake, deceased, against the defendant, Britton Drake, his administrator, for an account and settlement, and was heard upon exceptions to a report of the clerk of the court. The plaintiffs appealed from the ruling of the judge upon the exceptions, and from the judgment rendered.

Messrs. Merrimon & Fuller and *J. J. Jackson,* for the plaintiffs.

Mr. John Manning, for defendants.

SMITH, C. J. This cause is before us on the plaintiffs' appeal from rulings of the court upon numerous exceptions to the administration account of the defendant, taken and reported by the referee. They will be noticed in their proper order:

1. The first exception is to the full allowance of the sums disbursed and evidenced by vouchers numbered 1, 2, 4, 5, 8, 9, 13, 15, 16, 17, 18, 19, 20 and 21, for that, they should have been reduced by applying the scale to their true value in national currency. The referee finds that letters of administration on the intestate's estate issued to the defendant from May term, 1860, of the county court of Chatham; that all the claims due the intestate were collected in confederate money and in bank notes, and his debts paid out of these funds; that two hundred and ten dollars received in bank notes, and not thus applied, were loaned out and subsequently collected in confederate money, and that a portion of the confederate money, not needed in payment of debts, was invested in certificates of indebtedness of the Confederate States, and lost. It thus appears that the currency, though equally depreciated when much of it was received

for claims of the intestate, has been applied to the extinguishment of his indebtedness in an equal amount, and payable in like medium. Hence no loss has accrued to the estate from the delay and depreciation. It would be manifestly unjust to charge the administrator with the entire amount collected, and scale his disbursements of the very same moneys. The exception was properly overruled.

2. The plaintiffs object to the credit of forty-two dollars paid to R. J. Foushee for want of proof of the correctness of the account and of the time of its payment. The defendant was asked during his examination before the referee, when he paid the debt, and said he did not know. Besides this enquiry of the plaintiffs' counsel, there was no suggestion and no evidence offered to impeach the validity of the debt. There are no findings of fact adverse to the claim and the referee has allowed the credit. There was a general objection made to the allowance of this payment when it was passed on by the referee, but it was not pointed or specific so as to give the defendant an opportunity to meet and remove it. This not being done, the exception will not be favorably considered by the court. "Receipts of persons living," says RUFFIN, J., in *Finch* v. *Ragland*, 2 Dev. Eq., 137, "are not strictly legal evidence to show a full administration, and especially upon accounts. But when they are taken and acted on by the master without objection then made, one cannot be heard in a subsequent stage, unless it be founded on something unfair appearing." The matter is now regulated by statute and "vouchers are presumptive evidence of disbursement, without other proof, unless impeached." C. C. P., § 480. The court did not err in disallowing the exception.

3. The third exception is similar to that preceding, and for similar reasons must be overruled.

4. For that the defendant is allowed commissions on the aggregate receipts and disbursements, in good money,

whereas the amount in confederate currency should be scaled, and no commissions given on the accumulated interest. This credit and all other items on either side of the account are in one and the same currency, and the scale is applied to none of them. A trustee may deduct his compensation as of the day of receiving and paying out; the residue of the sum received constituting the proper charge; and the sum paid increased by the commissions, the proper credit. The same practical result is reached by deducting commissions from both principal and interest ascertained on the final settlement. The exception is untenable.

6. The sixth exception is to the aggregate disbursements without specifications, and while too indefinite to be considered it is virtually disposed of in passing upon the others.

8. The eighth exception is covered by previous rulings as to the application of the scale by the defendant's payments.

9. The plaintiffs insist that the defendant should be charged with three hundred and ten dollars in bank notes, the excess of the sum received over the sum paid out in 1861. The defendant is already charged with the whole sum so collected, five hundred and ten dollars, and this would be to duplicate the excess, the use made of which, by the referee's report, was in discharge of debts and by a loan and collection in confederate money. The objection is based mainly upon the ground that the fund was not disbursed in 1861. The proposition cannot be maintained.

10. For that the defendant improperly collected in confederate currency a debt due from solvent parties in the fall of 1863. The referee finds that the defendant instituted an action on this note against J. A. Alston and his surety in May, 1861, in the county court of Chatham wherein it was removed to the superior court and judgment recovered at fall term, 1862; that execution issued thereon returnable to fall term, 1863, at or about which time the money, which the sheriff had collected in January preceding, was paid into

the office and taken out by the defendant; that this currency was then generally received by creditors under execution, and an abstract of many judgments satisfied at or about the same time, taken from the docket of the court is filed without exception, as evidence thereof. The finding of the referee is warranted by the evidence as well as his exculpation of the defendant from the imputation of negligence.

11. This exception rests upon similar ground and must be decided in the same manner.

13. The plaintiffs object to the allowance of the credit of four hundred dollars, invested in a certificate of the Confederate States, and lost. The referee finds this to be money collected on the Alston judgment and other debts in 1863. The defendant so testified, and adds that he may have used some portion of the trust funds for private purposes, but he could not say he had so misapplied any, and if he had, the amount was very inconsiderable. He retained about seven hundred dollars which the referee disallows, besides the sum invested. We think he was properly credited with the amount.

14. The plaintiffs except to the finding of the referee that confederate money was current in 1863, and generally received by creditors in payment of debts. We think the proofs support his findings of fact, and these his conclusions of law.

15. The last exception is directed to the general result, and besides its vagueness includes in a summary way the special exceptions already passed on.

The several exceptions to the referee's ruling upon points of law are disposed of in passing upon the enumerated exceptions, and require no further examination. The referee further finds that the defendant has acted in good faith in administering the intestate's estate during those difficult times which taxed the vigilance and discretion of fiducia-

ries in the highest degree, and we concur with His Honor in approving the conclusions of the referee in this respect.

It must be declared there is no error, and it is referred to the clerk to correct and reform the account in accordance with the rulings of the court and make report thereof.

No error. Affirmed.

J. L. SMITH v. WILLIAM HAYNES.

Witness—Parol Evidence—Contract.

In 1860, the plaintiff signed a note payable to defendant (at defendant's request) as accommodation paper, and upon his promise to protect him (plaintiff) from liability; defendant raised the money upon the note by an endorsement to a third party who collected the amount out of plaintiff, and the plaintiff thereupon sued defendant to recover the same;

Held, that the plaintiff is a competent witness in his own behalf to prove the fact that he signed in the character of a surety to defendant.

Held further, that the act of 1879, ch. 183, does not apply, that act being only to forbid the introduction of testimony of parties in interest to rebut the presumption of payment raised by time.

Held also, that parol evidence is admissible to prove the contract between the principal and surety upon a note, being a collateral contract not necessarily appearing on the face of the instrument.

(*Wharton* v. *Woodburn*, 4 Dev. & Bat., 507; *Thornton* v. *Thornton*, 63 N. C., 211; *Mendenhall* v. *Davis*, 72 N. C., 150; *Love* v. *Wall*, 1 Hawks, 313, cited and approved.)

CIVIL ACTION tried on appeal at December Special Term, 1879, of HAYWOOD Superior Court, before *Graves, J.*

This action was commenced before a justice of the peace in the county of Haywood. The plaintiff alleged in his

complaint that he had paid the amount sued for, as surety for the defendant under the following state of facts: The defendant requested the plaintiff to sign an accommodation note for him to enable him to raise some money by selling the note to James Parks; that he agreed to do so upon the defendant's promising him that he should not be troubled about the matter, and never have the money to pay; that the note was brought to him for his signature while he was deeply engrossed with his business as clerk of the court, and he signed it without noticing that the note was payable to defendant; that Parks, the payee, brought an action on the note and he was compelled to pay the sum of forty-five dollars and eighty-one cents.

The note signed by the plaintiff which he was forced to pay, was as follows, to-wit: "Six months after date we or either of us promise to pay William Haynes twenty-one dollars and thirty-four cents for value received of him. Witness our hands and seals, this 27 of March, 1860.

(Signed) L. D. RUSSELL, [seal.]
J. L. SMITH, [seal.]"

And endorsed as follows, "pay the within note to James Parks, (signed) William Haynes."

On the trial before the justice the defendant, Haynes, denied all the allegations of the plaintiff's complaint, but the defendant, Russell, made no defence, and judgment was rendered in favor of the plaintiff against both the defendants, from which judgment the defendant, Haynes, alone appealed. And on the trial in the superior court, the case was submitted to a jury, who found all issues in favor of the plaintiff. Upon which verdict there was judgment and the defendant appealed.

The plaintiff was not represented in this court.

Messrs. G. S. Ferguson, W. H. Malone and *J. H. Merrimon* for defendant.

ASHE, J. The only exception taken by the defendant on the trial was to the competency of the testimony of Russell and the plaintiff, who were offered on the part of the plaintiff, to show that the plaintiff had signed the note as surety and for the accommodation of the defendant. But His Honor overruled the objection and allowed the evidence to be introduced. The defendant contends that the testimony of the plaintiff had been made incompetent by the act of 1879, chapter 183, and that of the witness, Russell, was also incompetent because it explained a written contract.

The testimony of both the witnesses was properly admitted. The act of 1879 referred to, has no application to a case of this kind. It had reference only to actions founded on judgments and bonds under seal, rendered or executed before the first of August, 1868, the purpose of which act was, to prevent the presumption of payment arising after the lapse of ten years, upon such judgments and bonds, from being rebutted by the testimony of the plaintiff in the action.

The other ground of the exception is equally untenable. It is conceded that it is a general rule of law that parol evidence cannot be admitted to contradict, add to, subtract from, or vary the terms of a written contract. "But it is to be recollected that the contract between the principal and surety, though it may be inferred from the nature of the security given to the creditor, is not contained therein, nor evidenced thereby, but is a collateral contract, usually a parol one, which may therefore be shown by any competent and satisfactory evidence." *Wharton* v. *Woodburn*, 4 Dev. & Bat., 507. See also the cases of *Thornton* v. *Thornton*, 63 N. C., 211; *Mendenhall* v. *Davis*, 72 N. C., 150; *Love* v. *Wall*, 1 Hawks, 313; Dan'l Neg. Inst., § 1336.

There is no error. Judgment will be rendered here for the plaintiff.

No error. Affirmed.

A. L. PAINE and others v. GARRISON ROBERTS and ROBERT PAINE.

Evidence—Part of Conversation—Undue Influence.

1. Upon the trial of an action brought for the cancellation of a deed, one of the plaintiff's allegations being the inadequacy of the price ($400), a witness for the plaintiff testified upon cross-examination that he had heard two of the plaintiffs say they would not give more than $400 for the land on account of the title. Plaintiff then proposed to prove by the witness the whole of the conversation, in which the two plaintiffs expressed the opinion that the deed was fraudulent, &c., but the evidence was excluded; *Held*, to be error, for the defendants had brought out a part of the conversation, and the whole was admissible as evidence qualifying the plaintiff's estimate of the value.
2. The law does not require that persons should be able to dispose of property with judgment and discretion. It is sufficient if they understand what they are about. Susceptibility to undue influence will not vitiate an instrument operating *inter vivos* or after death, unless it was induced by fraudulent practices.

(*Wright* v. *Stowe*, 4 Jones, 516; *Buie* v. *Carver*, 73 N. C., 264; *Moffit* v. *Witherspoon*, 10 Ired., 185; *Horne* v. *Horne*, 9 Ired., 99; *Cornelius* v. *Cornelius*, 7 Jones, 593, cited and approved.)

CIVIL ACTION for the Cancellation of a Deed, tried at November Special Term, 1878, of MADISON Superior Court, before *Avery, J.*

Verdict and judgment for defendants, appeal by plaintiffs.

Messrs. C. M. McLoud, J. H. Merrimon and *M. E. Carter*, for plaintiffs.

Messrs. T. F. Davidson, J. L. Henry and *Reade, Busbee & Busbee*, for defendants.

SMITH, C. J. The plaintiffs and the defendant Robert Paine are the heirs at law of James Paine, who died intestate in February, 1875, over ninety years of age. On De-

cember 19, 1867, he conveyed by deed to his son, the defendant Robert, and to his grandson, the defendant Garrison, for the recited consideration of four hundred dollars, a tract of land consisting of several associated parts, estimated to contain two hundred and twenty acres, and therein particularly described. The purpose of this suit is to obtain a judgment annulling the conveyance, upon an allegation of the imbecility of the grantor's mind and a fraudulent influence exerted over him by the defendants in procuring the execution of the deed. The only issue, with consent of counsel of both parties, submitted to the jury is this:

"Was the execution of the deed from James Paine to Robert Paine and Garrison Roberts procured through fraud, circumvention or undue influence, on the part of the defendants or either of them?" Upon which, after hearing the testimony, the jury responded in the negative.

During the progress of the enquiry before the jury, many exceptions were taken by the plaintiffs to the rulings of the court in excluding evidence offered, of which it is only necessary to notice a single one:

The alleged inadequacy of the price paid for the land was a subject of controversy and of conflicting testimony, and was relied on by the plaintiffs as showing an impaired capacity and susceptibility to fraudulent influences of the deceased. On the cross-examination of one of the plaintiffs' witnesses, and in answer to an interrogatory of the defendants' counsel, he stated that he asked the plaintiffs, John and Daniel Paine, why they did not buy the land, and they replied that they would not give more than four hundred dollars for it on account of the title. Plaintiffs then asked the witness to detail all that was said in reference to that point, and upon the defendants' objection thereto being sustained, they proposed to prove that the said John and Daniel in the same conversation expressed the opinion that the deed to the defendants was not valid. This testimony was

also excluded, and we think ought to have been heard, not as proof of the incapacity of the deceased, or the exercise of fraudulent influences in procuring the deed, but as qualifying and explaining their estimate of the value of the property. Its admission would perhaps have removed an apparent antagonism between their estimate and their present contention that the price paid was grossly insufficient, and becomes material upon the question of capacity and fraud. It is a rule of general application that where a part of a conversation is extracted from the witness, the other party is entitled to all that was said bearing on the point, in order that its import and effect may be understood.

"The whole admission is to be taken together," says Mr. GREENLEAF, "for though some part of it may contain matter favorable to the party, and the object is to ascertain that which he has conceded against himself, for it is to this only that the reason for admitting his own declarations applies, namely, the great probability that they are true; yet unless the whole is received and considered, *the true meaning and import of the part* which is good evidence against him, cannot be ascertained." 1 Greenl. Ev., §201.

It is upon a similar principle that a witness is not allowed to testify to what a deceased witness swore on a former trial, unless he can repeat the substance of all the testimony. *Wright* v. *Stowe*, 4 Jones, 516; *Buie Carver*, 73 N. C., 264.

It is not necessary to pass upon the other exceptions, and we simply advert to the form of the questions put to the witnesses to elicit their opinion as to the capacity of the deceased, to say, the law does not require that persons should be able to make a disposition of their property, "with judgment and discretion," in order to the validity of the act. It is sufficient if they understand what they are about. *Moffit* v. *Witherspoon*, 10 Ired., 185; *Horne* v. *Horne*, 9 Ired., 99; *Cornelius* v. *Cornelius*, 7 Jones, 593.

Nor will susceptibility to undue or fraudulent influences

however clearly shown, vitiate an instrument operating *inter vivos*, or after death, unless it was induced by fraudulent practices.

For the error assigned in ruling out the evidence, there must be a *venire de novo*, and it is so ordered and adjudged.

Error. *Venire de novo.*

A. L. RAY v. WILLIAM GARDNER.

Claim of right to land—Crop raised thereon—Recovery of value for conversion.

The plaintiff being in possession, under a claim of right, of a tract of land also claimed by defendant, raised, gathered and stacked a crop of oats on the land; defendant entered without license, carried off the oats, converted them to his own use, and subsequently recovered possession of the land; thereupon plaintiff brought an action against defendant for the value of the oats: *Held*, that he is entitled to recover.

(*Brothers* v. *Hurdle*, 10 Ired., 490; *Walton* v. *Jordan*, 65 N. C. 171, cited and approved.)

CIVIL ACTION tried at Fall Term, 1879, of BUNCOMBE Superior Court, before *Graves J.*

The plaintiff by his own labor in cultivating a tract of land of which he was in possession, raised a crop of oats which at maturity he gathered in bundles and stacked. The defendant's intestate entered without license, took and carried away the oats and converted them to his own use. The plaintiff had been forbidden to sow the oats by one McIntire, who occupied an adjoining tract, as the tenant of the plaintiff (intended probably for the defendant). It was admitted on the trial that the defendant claimed the

land and had subsequently recovered possession by virtue of a superior title.

The defendant's counsel asked the court to instruct the jury that the plaintiff having raised the oats on the defendant's land without his consent was a trespasser, not entitled to the property, and could not recover. The court declined to give the instruction asked, and charged the jury that if the plaintiff went into the possession of the land under a claim of right and remained on the premises until he had made, gathered, and stacked the oats, and then the intestate went on the land without authority and carried them off, he was liable to the plaintiff for their value. The jury found a verdict for the plaintiff and from the judgment thereon the defendant appealed.

Messrs. W. H. Malone and *J. M. Gudger*, for plaintiff.
Mr. James H. Merrimon, for defendant.

SMITH, C. J. The ruling and the instruction given were in our opinion entirely correct and fully justified by the decision of the court in *Brothers* v. *Hurdle*, 10 Ired., 490, the facts of which were very similar. In that case the defendant had in an action of ejectment recovered the land upon which the crop had been raised and partly gathered, and was put in possession by the sheriff. He then appropriated to his own use the gathered and ungathered crop, for the former of which the suit was brought. It was held that he was entitled to recover. In the elaborate opinion of the late Chief Justice, he thus states the law applicable to such cases: "Where one who is in the adverse possession gathers a crop in the course of husbandry, or severs a tree or other thing from the land, the thing severed becomes a chattel, but it does not *become the property of the owner of the land;* for his title is divested; he is out of possession, and has no right to the immediate possession of the thing; nor can he bring

any action until he require possession." Nor can the owner after being put in possession sue and recover the article or thing severed, because as the Chief Justice adds, "it is not his chattel; it did not become so at the time; it was severed and the title to it as a chattel cannot pass to him *afterwards* when he regains possession, by force of the *jus post liminii*." See also the case of *Walton* v. *Jordan*, 65 N. C., 171. It is needless to pursue the subject further. There is no error and the judgment is affirmed.

No error. Affirmed.

TOBIAS KESLER *v.* ISAAC S. LINKER.

Surety and Principal—Exoneration—Subrogation.

1. If there be an agreement between a creditor and surety, at the time a mortgage is taken (here of perishable property) to secure the debt of the principal, that the creditor is to "look after" the security, the creditor is bound to active diligence; and if loss is occasioned by his laches, the surety is exonerated to the extent of the value of the mortgaged property.
2. But in the absence of such agreement, his quiescence will not discharge the surety; nor is he required to resort in the first instance to the property conveyed, but may proceed against the surety, who is subrogated to the rights of the creditor upon payment of the debt.
3. Or, after the debt becomes due and before the surety pays it, he may compel the creditor to proceed against the principal upon indemnifying him against loss from the suit.

(*Pipkin* v. *Bond*, 5 Ired. Eq., 91, cited and approved.)

CIVIL ACTION tried at Fall Term, 1879, of ROWAN Superior Court, before *Gilmer, J.*

The action was commenced before a justice of the peace

upon a note executed by one C. A. Lowder and the defendant as his surety, and carried after judgment by appeal to the superior court. The defendant amongst other defences set up, alleged, in his answer, that at the time he signed the note the plaintiff took a mortgage from said Lowder, the principal in said note, amply sufficient to pay off and discharge the note, and the plaintiff being the mortgagee by ordinary diligence could have made the debt and failed to do so by his laches; and it was agreed that plaintiff should make said debt, that the mortgage was on perishable property, and the plaintiff made no effort to get the money.

The plaintiff in his replication denies that there was any agreement between him and the defendant to take the mortgage; that defendant, Linker, drew the mortgage and that plaintiff knew nothing of it, but it was made for the protection of Linker, as surety.

The mortgage was offered in evidence, and the plaintiff was the mortgagee named therein, and was made payable the day it was executed, and conveyed the growing crops of wheat, corn, oats and tobacco of the said Lowder. There was evidence tending to show that the property conveyed was amply sufficient to pay the debt, but the plaintiff never used any effort to take it into his possession or sell any of the property conveyed to secure the debt, and that the mortgagor was permitted to hold and apply to his own use all the property, except a portion of the tobacco crop which was paid the plaintiff. The defendant testified that at the time he signed the note, he wrote the mortgage at the plaintiff's request, and before signing the same he asked plaintiff who would take the mortgage, to which plaintiff replied, "I will of course; I will attend to that."

The defendant asked the court to charge the jury, that if they believed Tobias Kesler, at the time he received the note of defendant as surety for C. A. Lowder, took a mortgage on the perishable property of said Lowder, amply suf-

ficient to pay off said note, and plaintiff by laches failed to make the money out of said mortgage, then the defendant is discharged by reason of said negligence.

The court declined to give such instruction, but charged the jury that it was the duty of defendant, Linker, to see that the property mortgaged should be sold to satisfy the said mortgage, and as there was no evidence that defendant, Linker, ever tried to have said property sold, that plaintiff was entitled to recover. The defendant excepted to the charge and there was a verdict and judgment for the plaintiff, from which the defendant appealed.

Mr. J. S. Henderson, for plaintiff.

Messrs. J. M. McCorkle, Witherspoon and *Bailey*, for defendant.

ASHE, J., after stating the case. The only question presented for our consideration is, was there error in the instructions given by His Honor to the jury. His Honor committed no error in refusing the instructions, but we do think there was error in the instructions which he did give.

Whether at the time of the execution of the note and the mortgage, (for they seem to have been simultaneous acts) there was an agreement between the plaintiff and the defendant, that the plaintiff would attend to the securing the property conveyed in the mortgage, was a question squarely raised by the pleadings. It was a material inquiry in the case and should have been submitted to the jury for their determination. The jury, it is true, found all issues in favor of the plaintiff, but the result of their finding might have been different if His Honor had charged them with that question. His Honor should have charged the jury, "that it was the duty of Linker to see that the property mortgaged should be sold to satisfy the mortgage, and as there was no evidence that he had ever tried to have

said property sold, that plaintiff was entitled to recover, unless there was an agreement or understanding between plaintiff and defendant at the time of taking the mortgage, that the plaintiff would look to securing the mortgaged property and apply it to the debt.

Without some agreement or understanding between the parties to that effect, the plaintiff is not required to resort, in the first instance, to the property conveyed in the mortgage, before proceeding against the surety; nor is there any positive duty incumbent on the creditor to prosecute measures of active diligence. *Froener* v. *Yingline*, 37 Md. Rep., 491; Brandt on Part., &c., § 204.

The surety is the guarantor, and it is his business to see that the principal pays the debt, and when there is a collateral security taken by the creditor from the principal debtor, it is his duty to see it is made available. The creditor can do no act with reference to the security which will prejudice the surety, but his quiescence will not discharge the surety, for he is not bound to active diligence. *Pipkin* v. *Bond*, 5 Ired. Eq., 91.

The remedy of the surety is to pay the debt, and he will then be subrogated to, and may enforce all the liens held by the creditor for the payment of the debt. Brandt on Part., &c., § 204. And it has been held in England and in some of the American states, that a surety may by a suit in chancery, after the debt becomes due and before he pays it, compel the creditor to proceed to collect the debt from the principal, provided he indemnify the creditor against loss, from a fruitless suit against the principal. *Id.*, § 205, and the cases there referred to in note.

Such is the law applicable to the case when there is no agreement or understanding between the creditor and the surety. When there is such an agreement or understanding, the creditor is bound to active diligence, and if by his neg-

lect the property is lost, or destroyed, or surrendered, the surety will be exonerated to the extent of the value of the property conveyed in the mortgage or other security, which might be secured by proper diligence; and the reason is, because by the understanding or agreement to look after the mortgage and see that the property conveyed therein shall be applied to the debt, it put to sleep the vigilance of the surety and produces a false confidence, but for which he might have taken security for his own indemnification. There is error. Let this be certified to the superior court of Rowan.

Error. Reversed.

NANCY STEVENS v. NATHAN BROWN.

Arbitration and Award.

1. It is within the discretion of arbitrators to choose an umpire before or after disagreement; if before, the award is that of the umpire; if after, it is that of the arbitrators; and the joining of the other in the award of either will not vitiate.
2. Arbitrators have no right to award compensation for their services unless the power to do so is expressly contained in the submission. But this will not vitiate the award *in toto* where the matters disposed of are separable—approving *Griffin* v. *Hadley*, 8 Jones, 82.

(*Borretz* v. *Patterson*, Tay. Rep., 37; *Carter* v. *Sams*, 4 Dev. & Bat., 182; *Griffin* v. *Hadley*, 8 Jones, 82; *Cowan* v. *McNeely*, 10 Ired., 5, cited and approved.)

CIVIL ACTION to recover possession of land tried at Fall Term, 1879, of BUNCOMBE Superior Court, before *Graves, J.*

The action having been depending for several terms, it was agreed at fall term, 1879, of said court, that the cause

should be referred to arbitrators to settle the differences between the parties, when the following entry was made upon the docket: "It is agreed by the parties to the above entitled action that the issues therein be referred to R. V. Blackstock and T. C. Westall, as arbitrators, with leave to choose an umpire in case they cannot agree. The said arbitrators may go upon the premises in dispute, and hear testimony. They shall make their report to the present term of the court, and their award shall be final." The award was made in behalf of the plaintiff and for the costs of action; and they further awarded as compensation to the arbitrators, six dollars to Westall and B. F. Patton (umpire) each, and eight dollars to Blackstock, as part of the costs.

The defendant excepted to the award on two grounds: first, that the proceedings of the referees chosen in the case and the award filed therein are irregular and invalid, for that, it does not appear from the face thereof or otherwise, that the parties could not agree before they chose the said so-called umpire; and secondly, for that, the said referees undertake to fix and award their own compensation. The exceptions were overruled by the court, and judgment rendered according to the award, from which the defendant appealed.

Messrs. T. F. Davidson and *Mason & Devereux*, for plaintiff.
Mr. James H. Merrimon, for defendant.

ASHE, J. There is no error in the ruling of the court upon either of the exceptions. It is the policy of the law to sustain awards by giving them a liberal construction, and not allow them to be set aside upon light and technical objections. In the case of *Borretz* v. *Patterson*, Tay Rep., 37, Chief Justice TAYLOR held that "awards are to be construed liberally, and nice objections ought not to be allowed to defeal them. * * * To adapt the rigorous rules to

them, or pursue them through the endless subtlety of refinements, would be in truth to render awards of no use in the main purpose of their introduction, that is, adjusting the controversies of men before a domestic tribunal, unattended with expense, trouble or delay." And in the case of *Carter* v. *Sams*, 4 Dev. & Bat., 182, it is held that "the court will always intend everything to support awards, and give a construction to an award that it may be supported, if possible."

It matters not at what time during the progress of an arbitration the umpire is appointed. It is within the discretion of the arbitrators to appoint him before or after their disagreement. Where a submission to the award of two persons authorized the appointment of an umpire by them, if they disagree, it was held they might choose an umpire before they entered upon the inquiry. *Bates* v. *Cooke*, 17 E. C. L. Rep., 407.

The award in our case is either the award of the umpire or the award of the arbitrators. Take it either way, and it is good. If the appointment of the umpire by the arbitrators was proper at the time he was chosen, then it is his umpirage, and their joining with him will not vitiate; for a mere stranger may join in an award or umpirage without invalidating the proceeding. But if on the other hand the arbitrators had no right to choose an umpire before disagreement, then it would be their award, and the fact of the umpire's joining in it would not vitiate it. In the case of *Soulsby* v. *Hodgson*, 3 Burr. Rep., 1474, there was a submission to arbitrators with power to choose an umpire, if they could not agree in a certain time. They failed to agree within the limited time, but chose an umpire. The umpire accordingly made an award and the arbitrators joined in it. The court were clear that this was the umpirage of the umpire alone, and held he was at liberty to take what advice or opinion or assessors he pleased. And again, in *Beck* v. *Sargent*, 4 Taun. Rep., 232, which was a case where there

was a submission to arbitrators to make an award, and if they could not agree within a limited time, then to appoint an umpire. They did not agree within the time, but chose an umpire and then joined with him in his umpirage. Chief Justice MANSFIELD said, what the arbitrators did in making the award was nothing, and the award in law is the award of the umpire alone; it was nothing more than if mere strangers had joined in the award, and could not vitiate. And HEATH, J., who sat in the same case, said, it has been decided in very old cases that the circumstance of another joining with the arbitrators in making an award, does not vitiate.

As to the other exception, as we have said, there was no error in the ruling of the court. The compensation awarded by the arbitrators to themselves did not lie within the terms of the matter submitted, and consequently was not within the scope of the arbitrators' powers. But for that reason, the arbitrament is not void *in toto*. It may be bad in part and good in part. And where an arbitrator disposes of matter which was referred, and also of other matter which was not referred, and the two are in their nature separable, it is the duty of the court to distinguish them and give judgment for that which is within the terms, and reject that which is without. *Griffin* v. *Hadley*, 8 Jones, 82; *Cowan* v. *McNeely*, 10 Ired., 5.

There is no error. The judgment of the court below is affirmed. Let this be certified.

No error. Affirmed.

*W. M. WALTON and others v. RICHMOND PEARSON, Executor, and others.

Appeal—Certiorari.

1. To the rule that appeals will be dismissed on motion of the appellee if not perfected according to law, there are the following exceptions: first, Where the record shows a written agreement of counsel waiving the lapse of time; and secondly, Where the alleged agreement is oral and disputed, and such waiver can be shown by the affidavit of the appellee, rejecting that of the appellant.
2. So, upon petitition for *certiorari* where it appears from the affidavit of the party resisting it, that there was an oral agreement to waive the "code time," the writ will be granted.

(*Wade* v. *Newbern*, 72 N. C., 498; *Adams* v. *Reeves*, 74 N. C., 106; *Rouse* v. *Quinn*, 75 N. C., 354, cited and approved.)

PETITION for a *Certiorari* heard at January Term, 1880, of THE SUPREME COURT.

Messrs. Battle & Mordecai and *J. M. McCorkle*, for plaintiffs.

Mr. D. G. Fowle, for defendants.

DILLARD, J. This action was brought to trial at fall term, 1879, of Catawba superior court, and on a waiver of trial by jury, the questions of law and fact were found by the court, and by consent of parties the decision of the judge was reserved until the court in Burke (which was to be held during the succeeding week), with some agreement between the parties touching the right of appeal from the judgment which might be rendered.

On the 12th of September, 1879, at Burke court, the judge made his decision upon the law and facts, in writing, with

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

an endorsement in writing of "appeal prayed and granted, notice of appeal waived," and read it in the presence of some of the counsel on both sides, and the same was sent to Catawba to be filed in the case.

The judgment of the court was in favor of the defendants; and James Wilson and S. McD. Tate, having become assignees of the plaintiffs' claim and being dissatisfied with the judgment, executed an appeal bond within the time prescribed by law, as a preparation towards taking the case by appeal to the supreme court; and the making out of a statement of the case of appeal was left with the counsel who were to prepare, and did prepare it, and caused it to be presented to the defendants' counsel at Catawba court, who declined then to sign it, and it was afterwards presented at Iredell court, and again refused.

The right of appeal being thus lost, the said Wilson and Tate now present their petition for a writ of *certiorari* to bring the case up for review, as on appeal. On the hearing of the petition, after notice to defendants, affidavits are produced and read on the part of the plaintiffs tending to show an agreement between the counsel at the argument of the case at Catawba, to the effect, that either side might appeal from the decision of the judge (when he should make it) at any time during the circuit. And affidavits on the part of the defendants were also read tending to show that no such agreement was made, or if any, that it was indefinite as to time, and that the party desiring to appeal should take it within the time and in the manner prescribed by the statute, or at the least, within a reasonable time thereafter.

Upon this state of facts and the disagreement of counsel as to the taking of the appeal, we are called upon to decide whether under the rules of law and the practice in such cases, the plaintiffs are entitled to the writ of *certiorari*.

It is the duty of a party intending to appeal to make entry of the appeal on the record, to give notice thereof to the

adverse party, to file his appeal bond, and to make and serve on the appellee a statement of the case of appeal, and in default of an agreement upon a case, then to notify the judge and have him to appoint a time and place to settle the same. This is the course prescribed by the statute and ought always to be pursued; otherwise, the trouble arises which exists in this very case. The observance of this statutory requirement is not rigidly exacted from suitors, but cases may be and frequently are brought up and constituted in this court otherwise than is required by the statute, according to the special agreement of counsel. But disputes have so often arisen as to the terms of such agreements between counsel and parties on the respective sides, that this court has adopted the rule and promulgated it through its decisions, that it will respect no oral agreement for a deviation from the statutory mode of appeal, if the same shall be denied by either party, or the terms thereof are to be decided on conflicting affidavits, but will on motion dismiss the appeal. *Wade* v. *Newbern*, 72 N. C., 498; *Adams* v. *Reeves*, 74 N. C., 106; *Rouse* v. *Quinn*, 75 N. C., 354.

But a party may waive the lapse of time, and in case of controversy as to an alleged agreement to allow an appeal after the time specified in the code, if such waiver can be shown by the affidavits of the appellee, rejecting those on the part of the appellant, a motion to dismiss an appeal will not be allowed. So in case a right of appeal is lost by reason of not being perfected within *code time*, if upon a petition for a *certiorari* as a substitute, it can be collected from the affidavits of the party resisting the writ, rejecting those on the part of the party desiring it, that there was an agreement to waive a compliance with the rules of the code, the court will consider such waiver, notwithstanding the agreement may be oral, and disputed. *Adams* v. *Reeves*, *supra*. In accordance with this rule, on looking into the affidavits of the defendants, we find the fact to be, (stated by

Mr. Folk, one of defendants' counsel) that it was agreed at Catawba that either party might appeal after the judge's decision was made, and that nothing was said about the time within which the appeal was to be taken, but that it was understood that either party was to have reasonable time within which to perfect his appeal. It also appears from the same affidavit that plaintiffs', by their counsel, presented a case of appeal at Caldwell court for signature, and again presented it at a subsequent court in Iredell, and on both occasions the counsel of defendants refused to sign it.

Upon these facts and circumstances, ought the writ of *certiorari* to be refused? The plaintiffs were diligent to give their appeal bond within ten days after the judge's decision was filed, and this was all they could do personally in perfecting the appeal. The preparations of a statement of the case for this court was left with their counsel, who alone could take that step, and they relied on and trusted to them to do whatever else was required. It seems to us that under the agreement to dispense with the taking of the appeal within the time specified in the code, though indefinite as to its duration, it might have been reasonably expected by plaintiffs and their counsel, that it would be admissible to present their case at Caldwell court, at the distance of eight or ten weeks from the trial at Catawba, as there was still ample time to send forward the record before the next term of the supreme court.

The writ of *certiorari* is allowed, and the clerk will issue the same.

PER CURIAM. Motion allowed.

*R. C. BADGER and others v. W. A. DANIEL and others.

Appeal—Certiorari—Laches.

Where the appeal from a judgment is lost by laches, and the party afterwards moves to vacate the judgment and for the grant of an appeal therefrom, which motion is refused, and the appeal from this judgment is also lost by a failure to give bond within the time required by law, this court will not grant the writ of *certiorari* to bring up the case for review, especially where, as in this case, the petitioner shows no merits. The right of appeal cannot be restored by motion to vacate a judgment and an appeal from the refusal.

Hervey v. *Edmunds*, 68 N. C., 243; *Molyneux* v. *Huey*, 81 N. C., 106, cited and approved.)

PETITION for a *Certiorari* heard at January Term, 1880, of THE SUPREME COURT.

Messrs. Gilliam & Gatling and *Day & Zollicoffer*, for petitioner.

Messrs. Walter Clark and *Mullen & Moore, contra.*

DILLARD, J. The matters in litigation in the above cause were adjudged in this court at June term, 1878, (79 N. C., 372) and the opinion certified to the court below, and at the fall term of Halifax superior court, a motion was made for judgment in conformity to the opinion certified, and by consent of parties His Honor held the case for consideration until the 29th of January, when the judgment now sought to be reviewed was entered. No appeal was taken from said judgment, but notice was given of a motion to be made at the ensuing spring term to vacate said judgment and of appeal therefrom. The motion was made and refused, and thereupon entry of appeal taken and notice waived were entered of record, and the bond required by law not being given until the 16th of May, the appeal was dismissed on

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

motion of the plaintiff in this court. The defendant Henry Hervey, having lost his right of appeal, by not perfecting his appeal according to the statute, now seeks the extraordinary writ of *certiorari* as a substitute for an appeal.

We are of opinion he is not entitled to have the writ. Upon the petition and the answer filed in opposition, it appears, that by consent of the parties His Honor was at liberty to make up his judgment, and when made up and filed in the clerk's office, it was to be entered as of the fall term, 1878, and he afterwards, to-wit, on the 29th of January, 1879, filed the judgment in the office, and thereupon it was entered, as agreed to be done, as a judgment of the preceding term, and in law it was effectual as such. *Hervey* v. *Edmunds*, 68 N. C., 243; *Molyneux* v. *Huey*, 81 N. C., 106.

It is one of the causes shown against the grant of the writ, that notice was given to the parties of the judgment filed by the judge, and it is not denied by the petitioner. No step, as required by law, was taken by petitioner towards an appeal after such opportunity, and no dispensation from compliance with the statute was granted by the plaintiff, nor is it claimed to have been by the petitioner, Hervey. By his laches in this respect the right to appeal from *that* judgment was lost, and no reason whatever is given to excuse, or relieve against the loss. The refusal of the court to vacate this judgment at spring term, 1879, was in pursuance of a notice to plaintiffs of a motion to vacate the same, and for the grant of an appeal therefrom. At the refusal to vacate, appeal was prayed from *that* judgment, and entry thereof made on the record; but, the appeal bond not being given until the 16th of May, long after the expiration of the time given by law to file the same, the petitioner lost his right to appeal from that judgment also.

Petitioner shows no merits as against the judgment of the court *refusing* to vacate the judgment entered on the 29th of January, as of the previous term, and sets out none.

And besides, in the appeal brought up, which was dismissed for want of bond, the record contains no findings of fact, no judgment of the court on the refusal of the motion to vacate, and therefore it is to be taken that petitioner has no merits as against the refusal of His Honor to vacate, and never intended to have His Honor's refusal to vacate, reviewed.

It seems to us that the petitioner, Henry Hervey, having lost his right of appeal from the judgment of the court as of fall term, 1878, sought, through the peculiar terms of his notice of motion to vacate, in case the court refused to vacate to appeal from the refusal, and to hitch on the judgment, and thus by indirection restore into himself the benefit of an appeal which he had lost.

The right of appeal from a judgment, and a review thereof for errors of law in it, cannot be restored to a party, who has lost the right, by a mere motion to vacate and an appeal from the refusal, whether founded on irregularity, or for the causes under section 133 of the code of civil procedure.

By the insufficiency of the application on the accounts above mentioned, the petitioner's only ground of objection to the judgment pronounced in the court below, is for alleged non-conformity to the certified opinion of this court, and wherein that consists, or how, or to what extent it is unjust or hurtful to the petitioner, does in no manner appear. It seems to us that a substitute for a lost appeal from a judgment ought not to be granted for alleged non-conformity to the decision of this court, unless the departure was indicated in the petition, and the injury to the petitioner therefrom pointed out. The motion for *certiorari* is disallowed.

PER CURIAM. Motion refused.

CATHARINE McQUEEN v. ALEXANDER J. McQUEEN.

Divorce, evidence in— Witness, credit of.

1. In an action for divorce, all the facts relied on as constituting the cause must be specifically set out in the petition, verified by the oath of the petitioner, and proved to the satisfaction of the jury. And it is error in the court not to confine the proof to the specific facts charged.
2. A witness cannot be allowed to strengthen or confirm his credit as to matter really in issue, by his evidence of a fact foreign to the issue.

(*Whittington* v. *Whittington*, 2 Dev. & Bat, 64; *Wood* v. *Wood*, 5 Ired., 674; *Foy* v. *Foy*, 13 Ired., 90, cited and approved.)

CIVIL ACTION for Divorce *a mensa et thoro* tried at Fall Term, 1879, of RICHMOND Superior Court, before *Seymour, J.*

Judgment was rendered for the plaintiff upon the verdict, and the defendant appealed.

Messrs. J. D. Shaw, McNeil & McNeil and *Battle & Mordecai*, for plaintiff.

Mr. B. Fuller, for defendant.

DILLARD, J. On the appeal to this court error is assigned in the refusal of His Honor to hold the facts found by the jury insufficient in law to authorize the divorce prayed for, in the instructions given and refused, and also, in the admission of evidence.

The petitioner in her complaint, after showing the marriage in the spring of 1873, alleges specific acts of cruelty and indignity, beginning in the summer of 1874, and repeated at intervals through the years of 1875,-'76,-'77 as constituting a case which entitles her to a divorce *a mensa et thoro.*

Separate issues were framed and submitted to the jury as

to the truth of the several facts alleged in the complaint. In the progress of the trial, the defendant requested His Honor to restrict the proofs to the specific facts alleged as the grounds of divorce and embraced within the issue; but His Honor refused so to confine the plaintiff, and said she might go further and by evidence show the result or effect upon her of the conduct of the defendant as alleged in her complaint, and for this purpose and to this extent, leave was given to amend the complaint.

In the course of the evidence the plaintiff testified that in July, 1873, the defendant got mad with her, and she feeling some trouble about the matter went and called him, and he refused to answer. That being afraid to go to sleep, she then asked defendant if he would slip into her room and kill her in case she should fall asleep, and no answer being made, she left the house at ten o'clock at night through fear, and went to the house of her brother, Neill McDonald, and related to him the occurrence substantially as then deposed to. Neill McDonald was then allowed to corroborate the plaintiff by showing that she came to his house and made to him the same statement as that made by her on the trial.

In the case of appeal made out for this court, His Honor states that no amendment was asked for and no issue submitted as to the above transaction in July, 1873, and we think there was error in admitting the testimony of the plaintiff on this point, and the evidence of McDonald in corroboration.

The law will not sanction and authorize by its sentence the separation of husband and wife except for legal cause and on the special terms prescribed in the statute, and settled by the adjudications of this court, as to the pleadings and procedure for that purpose. Hence it is that all the facts, relied on as constituting the cause, are required to be set forth in a petition, and verified by the oath of the petitioner, and as to the manner of their allegation and the pro-

cedure thereon, they are to be charged, as far as possible, specifically and definitely, and be proved to the satisfaction of a jury and found by them to be true. *Whittington* v. *Whittington*, 2 Dev. & Bat., 64; *Wood* v. *Wood*, 5 Ired., 674; *Foy* v. *Foy*, 13 Ired., 90.

This particularity, in the statement of the facts, is evidently required for the twofold purpose, that it may appear to the court that the party seeking the divorce has a case fit to be heard, and that the specific acts or conduct of the party complained against, may be known to him or her, so that preparations may be made intelligently to meet the charges. A husband, from whose bed and board a wife seeks to be allowed to separate herself, owes the duty to himself and to society, and has the right, in discharge of that duty to be definitely informed of all the acts alleged and such as are to be given in evidence against him, or otherwise he may be surprised and thereby a great wrong perpetrated both upon him and on the public. *Cases supra.*

In view of this plain object of the law, not to sanction a dissolution of the marital obligations, whether total or partial, except in case of the truth of the facts on which the sentence of the law is asked, it seems obvious that the admission of the evidence of the wife as to the transaction in July, 1873, and the corroboration thereof by the testimony of McDonald, should not have been allowed.

The complaint contained no suggestion of any want of perfect harmony between the parties all through 1873, and therefore it is to be assumed that defendant was in the dark as to such an allegation against him, and hence was unprepared to meet the proof. The evidence was irrelevant to any issue before the jury, and being unreplied to, it may have had and most likely did have the effect, through the sympathy of the jury, to produce a response to the issues submitted to them differently from what it otherwise would have been. The reception of this evidence was objection-

able also, in its tendency to prevent a proper consideration of the credit that was due to the evidence of the plaintiff and defendant touching the facts in issue before the jury.

Without evidence as to this fact, the parties were before the jury with an estimate to be given to their respective evidence dependent on the manner and the matter of their several statements, but when plaintiff was received to prove this outside matter and then to confirm herself as to it by McDonald, the effect may have been to give her evidence the preponderance on the real issues on which the divorce depended.

It is inadmissible for a party or witness to confirm or strengthen his credit as to matters really in issue by his evidence of a fact foreign to the issue, although corroborated as to such fact.

For the error in admitting proof by plaintiff of the occurrence in July, 1873, and in receiving the evidence of McDonald to corroborate her, there must be a new trial and it is so ordered.

Error. *Venire de novo.*

A. ADRIAN v. MARY SHAW and A. R. CARVER.

Homestead—Conveyance of.

The constitutional provision in respect to a homestead is self-executing and vests it in the resident owner; and a conveyance of the homestead in the mode prescribed is effectual to pass the estate, exempt from the debts of the vendor, during his life at least; and this, notwithstanding the vendor may have since removed from the state.

(*Gheen* v. *Summey*, 80 N. C., 187; *Lambert* v. *Kinnery*, 74 N. C., 348; *Littlejohn* v. *Egerton*, 77 N. C., 379, cited and approved.)

ADRIAN *v.* SHAW.

CIVIL ACTION to recover Land, tried at Fall Term, 1879, of CUMBERLAND Superior Court, before *Seymour, J.*

A jury trial was waived and the court found the following facts: The *locus in quo* was the residence of John D. Jackson, and worth less than one thousand dollars. It was never laid off as a homestead. Jackson and wife conveyed the same to one McMillan under whom the defendants claim. On April 22, 1872, plaintiff purchased under an execution again Jackson in 1874. One of the judgments on which the sale was made was docketed November 20, 1871, and was for three hundred and forty-eight dollars and forty-seven cents, and the land was sold for less than that amount. Jackson and wife left the state in May, 1872, and have ever since been non-residents. He was insolvent when he left. Judgment, execution, levy, sale, and sheriff's deed were proved by plaintiff.

The question submitted to the court on these facts, was: Whether the defendant is entitled under the homestead provisions of the constitution to the land? or whether the plaintiff has acquired the title and a right of possession under the sheriff's deed? It was agreed that if the court was of opinion with the plaintiff, judgment should be rendered against the defendants for the land and its rental value, which was fifty dollars per annum, as damages for the detention. The court being of opinion with plaintiff, directs that the clerk compute the rental value at fifty dollars per annum from April 20, 1875, the date of the sheriff's deed, to date, and that the plaintiff have judgment accordingly, and a writ of possession. From which ruling the defendants appealed.

Messrs. Hinsdale & Devereux, for plaintiff.
Messrs. McRae & Broadfoot and *B. Fuller,* for defendants.

ASHE, J. The homestead is a right defined and secured

by the constitution and vests in the resident owner of the land, independent of any legislation on the subject—constitution article ten, section two, which reads: "Every homestead and the buildings used therewith, not exceeding in value one thousand dollars to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in any city, town or village, with the dwelling and buildings thereon, owned and occupied by any resident of this state, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution, or other final process, obtained on any debt."

We are not at a loss for expositions on the force and effect of this provision of the constitution. Cooley on Constitutional Limitations says: "The provision of the constitution which defines a homestead and exempts it from forced sale, is self-executing, at least to this extent, that though it may admit of supplementary legislation in particulars, when itself is not as complete as may be desirable, it will override and nullify whatever legislation, either prior or subsequent, would limit or defeat the homestead which is thus defined and secured." 4th Ed., ch. 4, p. 101. And in this state it is held that the homestead right is a quality annexed to land whereby the estate is exempted from sale under execution for a debt, and it has its force and vigor in and by the constitution. *Gheen* v. *Summey*, 80 N. C., 187. In *Lambert* v. *Kinnery*, 74 N. C., 348, this court held that the title to the homestead is vested in the owner by virtue of the constitution of the state, and no allotment by the sheriff is necessary to vest the title thereto; the allotment by the sheriff is only for the purpose of ascertaining whether there be an excess of property over the homestead which is subject to execution, and that the title to the homestead can only be divested in the mode prescribed in section eight, article ten, of the constitution. In that section it is provided that "nothing contained in the foregoing sections of this article shall

operate to prevent the owner of a homestead from disposing of the same by deed, but no deed made by the owner of a homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law."

The constitution then vests the homestead right in the resident owner of land and authorizes him to convey it. The vendee must take it with the same quality annexed that had attached to it in the possession of the vendor, that is, to be exempt from executions for the debts of the vendor, at least during his life; for the homestead is a right annexed to the land and follows it like a condition into whosoever hands it goes, without regard to notice. *Littlejohn* v. *Egerton*, 77 N. C., 379.

We have no doubt it was the intention of the framers of the constitution, when they authorized the owner of the homestead to convey it, that his deed executed in the mode prescribed therein should be effectual to pass the estate, exempt from execution for the debts of the vendor during his life at least; if so, it became by the conveyance an absolute vested life-estate in the vendee, which could not be defeated by any act of the vendor.

It may be that the owner of a homestead who leaves the state and changes his domicil should be considered as having abandoned his homestead. But the law when it authorizes one to sell his homestead would be untrue to itself and the obligations of justice, if it were to allow the owner to sell it, receive a full and fair price, and then leave it subject in the hands of his vendee to the satisfaction of his debts. We cannot believe that to be the law.

John D. Jackson was the owner of the land in dispute, and a resident of the state. The land was worth less than one thousand dollars. The constitution vested in him a right to hold the land exempt from executions during his life time at least, and authorized him to sell it. He did sell

it in the mode prescribed by that instrument, to McMillan, and McMillan sold to defendant Carver. We hold the defendant acquired a good and indefeasible title for the life at least of Jackson, against the creditors of Jackson, notwithstanding he may have since removed from the state.

There is error. The judgment of the court below is reversed and judgment must be entered here for defendant.

Error. Reversed.

J. R. PALMER v. LOVE'S EXECUTORS.

Confederate Money—Scale of Depreciation.

Where a note made in 1863 does not show upon its face that it is solvable in confederate currency, it is nevertheless presumed to be solvable in that currency under the act of 1866, ch. 39; and the scale of depreciation established by that act furnishes the measure of the value of the contract, subject to evidence of its execution with a different intent.

(*King* v. *W. & W. R. R. Co.*, 91 U. S., 3, (66 N. C., 277) cited and commented on.)

CIVIL ACTION, tried at December Special Term, 1879, of HAYWOOD Superior Court, before *Graves, J.*

The note sued on, "One day after date I promise to pay J. C. Palmer five hundred and twenty-five dollars, for value received. Witness my hand and seal. June 3rd, 1863. (Signed) J. R. Love, [Seal]," was endorsed to the plaintiff. Under the instructions of the court, there was a verdict for plaintiff, judgment, appeal by defendant.

Messrs. T. F. Davidson and *Reade, Busbee & Busbee*, for plaintiff.

Messrs. J. L. Henry, J. H. Merrimon and *A. W. Haywood*, for defendant.

DILLARD, J. This is an action founded on a bond for five hundred and twenty-five dollars, dated in June, 1863, which was given in consideration of various articles of personal property. On appeal to this court heretofore it was ruled that the judgment of the court below was erroneous, in that, the value of the property was held to be in law the true measure of the contract. See 75 N. C., 163. At the trial before Judge Graves, evidence was received against the objection of defendant, showing the contract sued on to be given for property, and tending to show the aggregate value of the property to be four hundred dollars. There was also evidence on both sides tending to show the value of confederate currency at the time and place where the contract was executed.

The defendant asked the court to instruct the jury that the value of the confederate money in which the note by presumption was solvable, must be fixed by the legislative scale. This instruction, the judge refused, but instead thereof told the jury, that the scale of depreciation was unconstitutional, and not binding on them in fixing the value of the contract and was not the best evidence, but that they might consider it together with the value of the property for which the bond was given, and also the testimony of the witnesses introduced as to the value of the confederate money in the neighborhood, in determining the value of the contract.

It was decided in *King* v. *W. & W. R. R Co.*, removed from this court to the supreme court of the United States and reported in 91 U. S. 3, that the act of 1865–'66, ch. 39, authorizing proof to be received of the value of the property which formed the consideration of a bond or note executed during the war, in determining the value of such bond or note, in the currency of the United States, was unconstitutional and void. There, the bond on its face was solvable in confederate money, and being so, the authority under

the act to furnish a measure of value of the money which was to be paid and received, by the value of the property for which it was given, was in effect a new contract made by the statute and not by the parties, and in this feature it was violative of the constitution of the United States. In our case the currency is not expressed on the face of the bond in which it was to be paid, but by presumption under the ordinance of the convention of 1865 it was to be deemed solvable in confederate currency unless a different intent be shown, and no such intent being claimed, it was only admissible to prove the equivalent value of the confederate currency due on the note in the money of the United States.

But His Honor holding the legislative scale to have been declared void by the supreme court of the United States in *King's case supra*, admitted proof of the value of the property as a better guide to the value of the note sued on than the scale, and although he cautioned the jury not to take the value of the property as fixing the value of the note, but only as evidence to be considered in connection with other proofs, and upon a view of the whole to find the value of the confederate money at the date of the contract, still its admission was contrary to the spirit of the decision in *King's case*. The value of the property given in evidence was the controlling evidence and diverted the minds of the jury from all enquiry into its equivalent value in gold and silver, which ought to have been found as the value of the note.

This mode of ascertaining the value of confederate money with reference to gold and silver was approved in the case of *Thorington* v. *Smith*, 8 Wallace, 1, and our scale act embodies a valuation of confederate money with reference to the same standard, and it not only has not been held void in *King's case*, but from its consistency with the principles declared in *Thorington* v. *Smith*, *supra*, we assume will never be.

The scale made in pursuance of the ordinance of the convention of 1865, by the acts of 1865-'66, ch. 39, § 1, applies by presumption to all contracts made during the war, subject to evidence of their execution with a different intent, and it has been pronounced constitutional in this court and acted on as such in all the cases which have arisen under the act. It embodies the mode of valuation precisely which received the sanction of the supreme court of the United States in *Thorington* v. *Smith*, and provides a measure of the value of confederate currency for every month in each year during the war, fair in itself and of convenient application, and in legal effect the ordinance of the convention requiring the adoption of a scale by the legislature, and the act establishing the scale, require its application as a measure to all executory contracts coming within its scope.

We hold, therefore, that His Honor was in error in receiving proof of the value of the property, but should have submitted it to the jury to find the value according to the legislative scale.

The judgment of the court below is reversed, and this will be certified to the end that a new trial may be had.

Error. *Venire de novo.*

JAMES M. GUDGER v. CLINGMAN HENSLEY.

Ejectment—Title under reservation in grant—Burden of Proof.

1. A continuous and uninterrupted possession of land for seven years under color of title, manifested by distinct and unequivocal acts of ownership (as distinguished from successive and occasional trespasses) is absolutely essential to bar the entry of the legal owner, and ripen a defective into a perfect title.

2. The law declaring what acts do, and what do not, constitute such possession, discussed by SMITH, C. J., and cases reviewed.

3. In ejectment, where a party relies upon a reservation in a grant to support his title, the *onus* is upon him to show that the land claimed is embraced within its terms. The presumption *contra spoliatorem* does not arise upon the facts in this case.

(*Sheppard* v. *Sheppard*, N. C. T. Rep., 103; *Moore* v. *Thompson*, 69 N. C., 120; *Williams* v. *Wallace*, 78 N. C., 354; *Ward* v. *Herrin*, 4 Jones 23; *Bartlett* v. *Simmons*, *Id.*, 295; *Holdfast* v. *Shepard*, 6 Ired., 361; *Bynum* v. *Carter*, 4 Ired., 310; *Tredwell* v. *Reddick*, 1 Ired., 56; *Williams* v. *Buchanan*, *Id.*, 535; *Loftin* v. *Cobb*, 1 Jones, 406; *McCormick* v. *Monroe*, *Id.*, 13; *Morris* v. *Hayes*, 2 Jones, 93; *Waugh* v. *Richardson*, 8 Ired., 470; *Melton* v. *Monday*, 64 N. C., 295, cited, commented on and approved.)

CIVIL ACTION to recover possession of Land, tried at Fall Term, 1879, of YANCEY Superior Court, before *Schenck, J.*

Verdict and judgment for plaintiff, appeal by defendant.

Messrs. J. L. Henry and *Merrimon & Fuller*, for plaintiff.

Messrs T. F. Davidson and *Reade, Busbee & Busbee* for defendant.

SMITH, C. J. The plaintiff derives title to the land described in the complaint under a grant from the state in 1796, to John Gray Blount, and successive conveyances through intermediate parties to himself. The defendant relies on seven years' adverse possession, by those from whom he claims, of the part occupied by him with color of title, and the insufficiency of the grant to Blount to pass the estate in the disputed lands.

In making out the defence, the defendant showed a grant issued in 1798 to Abraham Turner, and, without connection with the grantee, a series of deeds commencing with a deed from Samuel Banks to Abraham Banks, executed in 1827, a devise and several descents, whereby the title is transmitted to the defendant and his wife, Sarah, a daughter of

Polly Penland, deceased. To support his alleged possession, the defendant proved that in 1860 or 1861, Absalom Penland, the husband of Polly, went on the land which lies upon the slope of a mountain, and enclosed a cove (known as the "Nettle Cove,") deadened some trees, and cleared up a small patch, but did not fence it in; that in 1866, the children of Polly Penland enclosed about one-eighth of an acre, set out a few peach trees and planted corn and tobacco, but did not cultivate the ground, and when the fence was down, would repair it; that no further attempt was made to cultivate this small area until 1877, when the defendant ploughed and sowed it in oats.

The court held, and we concur in the correctness of the opinion, that these temporary occupations, separated by long intervals of time, were not in law a possession, sufficient with a deed purporting to convey the estate to vest the title and bar the entry of the legal owner. The possession, to have this effect, must be continuous and uninterrupted for the period of seven years. *Sheppard* v. *Sheppard*, N. C. T. Rep., 108; *Moore* v. *Thompson*, 69 N. C., 120; *Williams* v. *Wallace*, 78 N. C., 354. An interruption of twelve months in such occupation is fatal to the claim of title. *Ward* v. *Herrin*, 4 Jones, 23. And even for a shorter period. *Holdfast* v. *Shepard*, 6 Ired., 361.

Not only must the possession be unbroken for the full period of seven years, but it must be manifested by distinct and unequivocal acts of ownership, as distinguished from successive and occasional trespasses. There have been many cases where the court has been called on to determine what acts do and do not constitute a possession, which by force of the statute will ripen a defective into a perfect title. It has accordingly been held that such possession is shown by,

1. The occupation of pine land by annually making turpentine thereon. *Bynum* v. *Carter*, 4 Ired., 310.

2. Entering upon, ditching and making roads in a cy-

press swamp, and working up the timber into shingles. *Tredwell* v. *Reddick*, 1 Ired., 56.

3. Keeping up fish traps in a non-navigable stream, erecting and repairing dams over it, and using it every year during the fishing season. *Williams* v. *Buchanan*, 1 Ired., 535.

On the contrary, possession is not shown by,

1. Cutting timber for a saw mill, and feeding hogs upon land susceptible of other uses. *Loftin* v. *Cobb*, 1 Jones, 406.

2. Making pole-bridges over a ditch on the side of a public road for driving cattle into a swamp, and the occasional cutting and getting timber therein. *Morris* v. *Hayes*, 2 Jones, 93.

3. Cutting timber for rails every year for a few weeks at a time, on land valuable only for its growth of timber. *Bartlett* v. *Simmons*, 4 Jones, 295.

It is obvious then that the short occupancy of small pieces of the land in 1861 and in 1866, and again in 1877, in the manner described, is not the possession required by law, and cannot aid the defendant's defective title.

II. It is also insisted for the defendant that the grant to Blount was inoperative to convey the land in dispute, by reason of the exception following the description of the boundaries of the tract, and the plaintiff's failure to show that the portion he now seeks to recover is embraced in the exception: The exception is in these words—"Within which boundary there are 13,735 acres of land, entered by persons whose names are hereunto annexed, since the date of said Blount's entries and by his permission; but as they are not yet surveyed, their situation cannot be delineated." There was no list of names annexed to the grant exhibited in evidence, and no proof that any such ever was, beyond what is furnished by the grant itself.

In *Waugh* v. *Richardson*, 8 Ired., 470, the grant comprised within its boundaries (as ascertained by computation) 8,699 acres of land, and then follows these words—"Including

within its bounds 5,699 acres of land which is excepted in this grant;" and the reservation was declared to be void for uncertainty. "The granting part of a deed," says RUFFIN, C. J., "is not avoided by a defect in the exception, but the *exception itself becomes ineffectual thereby, and the grant remains in force.*"

In *McCormick* v. *Monroe*, 1 Jones, 13, the grant was of 500 acres under specified metes and bounds, and contained this reservation—"Including two hundred and fifty acres previously granted which is excepted in this grant." In delivering the opinion, NASH, C. J., remarks: "There is nothing in the grant to show to whom the land (excepted) had been previously granted, nor in what part of the land within the boundaries it was located;" and it cannot "be permitted to restrain the general terms of the grant in which it is contained," and he adds, "the plaintiff having shown a legal title to the whole of the land covered by the grant, if there be a valid title to any portion of it in another person, it was the duty of the defendant to show it." PEARSON, J., delivered a separate opinion and uses this language: "That case (referring to *Waugh* v. *Richardson*) differs from the case now under consideration, in this: here, the exception is 'two hundred and fifty acres previously granted.' This would point to the means by which the description in the exception may be made sufficiently certain to avoid the objection of vagueness, by aid of the maxim, *id certum est, quod certum reddi protest.* * * * So the only question is, upon whom does the *onus* lie? Clearly upon the defendant; he relies upon the exception; it must fall unless it is supported by proof of these facts; *he must therefore furnish the proof which is required*, to bring it within the operation of the maxim."

The proper construction of the very grant now under consideration was before the court in *Melton* v. *Monday*, 64 N. C., 295, and there, the plaintiff showed that among the

names on the list referred to, was this entry, "Gabriel Ragsdale, 100 acres," and proved that under this entry, the grant issued to one Williams from whom the plaintiff derived title. The court held that the exception was valid as to the grant of the 100 acre tract, and say: "By these references the exception of the 100 acres in controversy, is made as certain as if the land had been set out in the grant to Blount by metes and bounds." It seems that the list of names of those whose entries were excepted, was found and produced on the trial of that case; but no such evidence now appearing, we cannot consider the fact nor its effect in the present action.

The cases cited are conclusive of the point before us, unless under the maxim "*omnia præsumuntur contra spoliatorem*," invoked and so earnestly pressed in the argument, we are to assume that the name of Turner, the grantee, is on the list and would appear if it was produced. We do not think the severity of this rule of evidence can be extended to embrace the facts of our case. It does not appear where the original grant to Blount is, nor whether such list if originally annexed may not have become detached and lost, without default or agency of the plaintiff, or of any of his predecessors in the chain of title; and if so, it would be manifestly unjust to apply the stringent rule to him and deprive him of his property. A certified copy was used as authorized by law, (Bat. Rev., ch., 35 § 9), without suggestion of mutilation or defect, or inquiry as to the absent part, or explanation sought or given. We cannot see that any spoliation has been committed, nor any evidence suppressed or withheld which the plaintiff could or ought to have produced, to admit the application of the rule. If the evidence alleged to be withheld or destroyed, is shown to be unattainable or equally accessible to both parties, as are the registry of deeds and the records in the office of the secretary of state, the presumption *contra spoilatorem* ceases, and

no unfavorable inferences are to be drawn. Broom's Legal Maxims, 906.

It then devolves upon him who claims under the reservation, by proper proofs to bring himself within its terms, (as was done in the last case cited); instead of which, the defendant seeks to remove the burden from himself and put it on the opposing party. The court was not asked to charge the jury as to the force and effect of the alleged presumption upon the plaintiff's rights, and no assignment of error for an omission to give an unasked instruction can, according to the settled practice, be heard for the first time in the appellate court. The defendant's contention, if deemed a request for an instruction, was in substance that the *onus* of showing that the disputed land lay without the reservation, rested on the plaintiff, (in direct repugnance to the ruling in *McCormick* v. *Monroe, supra,*) and this was properly refused.

There is no error in the record, and the judgment must be affirmed.

No error. Affirmed.

L. J. DICKSON v. WILLIAM WILSON and others.

Ejectment—Boundary.

Wherever a natural boundary is called for in a patent or deed, the line must run *straight* to the natural boundary without regard to course and distance.

(*Cherry* v. *Slade*, 3 Mur., 82, cited and approved.)

DICKSON *v.* WILSON.

CIVIL ACTION to recover possession of land, tried at Spring Term, 1879, of CLEAVELAND Superior Court, before *Cox, J.*

After the evidence was adduced in support of the title of the parties respectively, the plaintiff's counsel requested the court to charge the jury:

1. That the call for a natural boundary controls course and distance, but the natural boundary not being found, the course and distance must prevail.

2. That marked trees and corners of another and junior grant cannot locate the lines and corners of a senior grant, but the course and distance in the senior grant must be run.

3. That marked lines and corners not called for may control obvious mistakes in regard to courses, but distance must be run unless controlled by natural boundaries.

4. If the "white oak" is a corner tree, we must run the course of the last line, and then go to the white oak.

The court refused the fourth instruction, but gave the others. The jury found the issues in favor of defendants. Judgment, appeal by plaintiff.

Messrs. Hoke & Hoke and *A. Burwell*, for plaintiff.

Messrs. Wilson & Son, Bailey and *Montgomery*, for defendants.

ASHE, J. The plaintiff asked for certain specific instructions, all of which were given except one, which is as follows: "If the white oak is a corner tree, we run the course of the last line and then go to the white oak." But His Honor declined to give this charge, and proceeded, after some explanation of the counsel for plaintiff as to the meaning of the exception, to give instructions which were not excepted to.

There was no error in refusing to give the instruction asked. We had supposed there was no rule of law better settled than that wherever a natural boundary is called for

in a patent or deed, the line is to terminate at it, however wide of the course called for, it may be, or however short or beyond the distance specified. *Cherry* v. *Slade*, 3 Mur., 82. According to this rule, the last line which called for course and distance to a white oak, must be run straight to the white oak, without regard to the course and distance. There is no error. Judgment of the court below is affirmed, and the defendants will go without day.

No error. Affirmed.

BANK OF STATESVILLE v. S. P. GRAHAM and others.

Exceptions on Appeal—Sales under Execution.

1. No exception can be taken in the supreme court in a civil case which does not appear to have been taken below, except for want of jurisdiction, or that upon the whole case the adverse party is not entitled to relief.

2. Upon a sale of land under execution regularly issued in favor of a plaintiff corporation, the land brought enough to pay off the judgment and costs, but the purchaser was not required to pay the amount of the bid, upon a mistaken belief that at least that much of the assets of the corporation would belong to the purchaser who received a deed for the land; the corporation was afterwards declared insolvent and placed in the hands of a receiver, who moved to set aside the sale, to cancel the receipt on the execution and annul the deed; *Held*, that in the absence of fraud (which was not alleged), the sale was regular and ought not to be set aside, and that the receiver's remedy, if any, was to pursue the land and charge it with the unpaid purchase money, as assets of the corporation.

(*Rimg* v. *King*, 4 Dev. & Bat., 164; *State* v. *Lingford*, Busb., 436; *Meekins* v. *Tatem*, 79 N. C., 546; *Whissenhunt* v. *Jones*, 80 N. C., 348, cited and approved.)

BANK *v.* GRAHAM

MOTION to set aside return on execution, heard at August Special Term, 1879, of IREDELL Superior Court, before *Gudger, J.*

The bank of Statesville in the superior court of Iredell recovered judgment against the defendants, S. P. Graham, Milton Graham and H. P. Sharp, and sued out execution under which the sheriff sold for six hundred dollars, (a sum sufficient to pay the debt and costs) to the defendant Roxana Simonton, a tract of land belonging to one or both the defendants first named, and executed his deed to her therefor. The costs only were paid in money, and the residue of the price, under the direction of an attorney representing, as we understand the case, both the plaintiff and the purchaser, was settled by endorsing satisfaction on the execution and a receipt given to the sheriff for the amount. This adjustment was made by the attorney under the belief that the bank was amply solvent, and there would be a large surplus after its debts were paid, belonging to the said Roxana, of which this was a payment in advance.

On motion of the receiver (of plaintiff bank) and after hearing the evidence, the court ordered that the receipt on the execution be set aside and annulled, and the sheriff's deed cancelled and surrendered to the defendant, S. P. Graham. From this judgment all the defendants appeal.

Mr. J. M. Clement, for plaintiff.
Messrs. G. V. Strong and *Mason & Devereux*, for defendants.

SMITH, C. J., after stating the case. There are several exceptions taken in the brief of the appellant's counsel which is affixed to, and sent up with, the transcript which cannot be considered in this court because they constitute no part of the case on appeal and do not appear from the record to have been taken on the trial. We are enforcing a rule of long standing and repeatedly announced, in refusing

to allow exceptions in civil causes to be first taken in this court, unless for want of jurisdiction, or where upon the whole case the party is not entitled to relief. *Ring* v. *King*, 4 Dev. & Bat., 164; *State* v. *Langford*, Busb., 436; *Meekins* v. *Tatem*, 79 N. C., 546; *Whissenhunt* v. *Jones*, 80 N. C., 348, and other cases.

Let us then examine the case presented in the record: No objection is suggested or urged against the sale or the manner in which it was conducted, and it seems to have been in all respects regular and fair. The defendant to whom the land belonged not only makes no complaint, but with his co-defendants resists the order intended to annul and set aside the sale. His property has been taken and disposed of by an authorized officer of the law acting under proper process for the payment of the execution, and all the debtors are interested in having the proceeds applied in its discharge. Their right to this is manifest. The misappropriation of the fund by the sheriff, whether intentional or the result of mistake, cannot be allowed the effect of reviving an extinct liability, and exposing other property of the debtors, should the re-sale produce a less sum, to seizure and sale for the deficiency and the subsequently accruing interest and costs. This is a fatal obstacle in the way of granting the plaintiff's motion.

Suppose, however, the purchase money had been in fact paid to the sheriff, and by him to the plaintiff's attorney, and by the latter returned to the defendant, Roxana, would this invalidate the sale in the absence of fraud, (which is not alleged) and impair the debtor's right to have the execution satisfied and so returned? And is not this the exact result of what was done? If the receiver has an equity, it is not to have the sale and conveyance vacated to the injury of the debtors, but to pursue the land and charge it with the unpaid purchase money. To this extent the defendant, Roxana, has assets of the debtor bank, which belong to its creditors, and may perhaps be called on to restore

them. But the remedy lies not in the direction the plaintiff is pursuing.

The order must therefore be declared erroneous and reversed, and it is so ordered.

Error. Reversed.

J. M. FITZGERALD and others v. ISAAC ALLMAN and others.

Removal of Causes—Constitutional Law.

In an action brought to annul a deed, &c., the defendants applied by petition for a stay of proceedings in the superior court in order that the cause might be removed to the circuit court of the United States, alleging that the plaintiffs were white persons in whose favor a great partiality existed in that locality, &c., and that the defendants were colored persons against whom there was existing a great prejudice, &c; *Held*,

That the defendants were not entitled to the removal. The act (Rev. Stat. of the U. S., § 641) applies only to cases when the laws or judicial practices of a state recognize distinctions on account of color, race, &c., and not to cases of mere local prejudice for which the case may be removed to another county.

(*State* v. *Dunlap*, 65 N. C., 491; *Capehart* v. *Stewart*, 80 N. C., 101, cited and approved.)

PETITION for Removal of a Cause heard at December Special Term, 1879, of HAYWOOD Superior Court, before *Graves, J.*

The action is brought by the plaintiffs, heirs-at-law of John A. B. Fitzgerald, to set aside and annul a deed conveying the lands described in the complaint and executed by himself and wife, to the defendants, upon the allegation that the intestate was of unsound mind and incompetent to

make the deed. The defendants, who are colored persons, controvert the allegation and assert his legal capacity to act. At the special term of Haywood superior court, held in December, 1879, the defendants applied by petition, verified by oath, for a stay of the proceeding, in order to its removal to the circuit court of the United States for the southern district of North Carolina, for the causes specified therein, and say that they cannot enforce in the judicial tribunals of the state their rights secured to them by law in said suit, on account of the fact "that the plaintiffs are white persons, and in whose favor there is great partiality existing in this locality, and the defendants, your petitioners, are persons of color against whom there is existing in the locality a great prejudice on account of their color." Upon this affidavit it was "ordered that all further proceedings in the cause cease in this court, and that the cause be removed to the circuit court of the United States" as aforesaid. From this ruling the plaintiffs appeal.

Messrs. G. S. Ferguson, A. W. Haywood and *J. L. Henry,* for plaintiffs.

Messrs. J. M. Gudger and *Battle & Mordecai,* for defendants.

SMITH, C. J., after stating the case. The act of congress by which the order is supposed to be sustained, is in these words: "When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state, or in the parts of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, * * * such suit or prosecution may, upon the petition of such defendant, filed in the said state court at any time before the trial or final hearing

of the cause, stating the facts and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending." Rev. St. U. S., § 641.

In *State* v. *Dunlap*, 65 N. C., 491, decided at June Term, 1871, the statute is construed to extend to, and "include cases where, *by reason of prejudice in the community*, a fair trial cannot be had in the state courts;" and this construction, followed in the court below, embraces that before us. Since this decision, the clause in the constitution which this act is intended to enforce has been interpreted and explained by the supreme court of the United States, more in consonance with its language and purposes, and it has been confined to trials in states whose laws discriminate adversely against a class of citizens to which the persons asking for the removal belong. In the *Slaughter House* cases, decided in 1872, (16 Wall., 36) the force and scope of this amendment of the constitution, and the statute passed under its authority, were carefully and elaborately considered, and the question as to its true meaning put at rest. Mr. Justice MILLER, speaking for the court, thus defines the article:

"In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the states, where the newly emancipated slaves resided, which discriminated with gross injustice and hardship against them, as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. If, however, the states did not conform their laws to its requirements, then by the fifth section of the article of amendment, congress was authorized to enforce it by suitable legislation. We doubt very much whether *any action of a state not directed by way of discrimination against the negroes, as a class, or on account of their race, will ever be held to come within the purview of this provision.*"

In the recent case, *Strauder* v. *West Virginia*, determined

at the present term of the supreme court of the United States, a copy of the opinion in which delivered by Mr. Justice STRONG, is before us, the same view is taken. The removal is in this case sustained upon the ground that tne law of that state, providing for the qualification of jurors, does discriminate against its colored population, in declaring that the jury shall consist of "white male persons who are twenty-one years of age and who are citizens of the state."

Referring to several clauses in the constitution and their effect, the court say: "What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons whether colored or white shall stand equal before the laws of the states, and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law, because of their color. The words of the amendment it is true are prohibitory, but they contain a necessary implication of positive immunity or right most valuable to the colored race, the right of exemption from unfriendly legislation against them distinctively, as colored, exemption from legal discrimination, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and the discriminations which are steps towards reducing them to the condition of a subject race."

It is not pretended that the laws and judicial practices in this state recognize any distinctions among its citizens "on account of race, color or previous condition," or that every right and privilege possessed by the white is not equally shared by the colored man. For local prejudice, the basis of the proposed removal, the law provides for a transfer of the cause, whoever may be the parties, to a county where such prejudice does not exist and a fair trial may be had.

This court has already said: "The law knows no dis-

tinction among the people of the state in their civil and political rights and correspondent obligations, and none should be recognized by those who are charged with its administration." *Capehart* v. *Stewart*, 80 N. C., 101.

The defendants are not within the act of congress, for they are not "*denied*" nor are they unable "to enforce in the judicial tribunals of the state, or in the part of the state where the cause is depending" "*any right secured to them by any law providing for the equal civil rights of citizens of the United States.*"

If the ruling of the court was a mere continuance, it would not be the subject matter of appeal, but it involved more, an absolute cessation of further action and therefore a denial of the right of trial. This does "affect a substantial right" claimed by the plaintiffs.

There is error and the ruling is reversed. This must be certified to the end that the cause may be proceeded with according to law.

Error. Reversed.

WILLIAM GORMAN and others v. MARSDEN BELLAMY and others.

Pleading—Recovery upon Special Contract.

The defendant in 1867 leased to plaintiff a city lot, with a covenant that the lessees might make certain improvements, "but they shall preserve unimpaired" the entrance and right of way from an alley to the rear of the premises, and providing for the valuation of and payment for the improvement at the expiration of the lease; *Held*, in an action brought by the lessees to recover the value of the improvements;

(1) That under section 93 of the code, a complaint which alleged that the improvements were made "in pursuance of the liberty and privi-

lege granted to the lessees," was sufficient without an express allegation that the rear entrance was preserved unimpaired.

(2) Such preservation is not a condition precedent, but a proviso, and if it had not been complied with, this should be set up in the answer.

(3) The tendency is to relax the stringency of the common law rule, which allowed no recovery upon a special unperformed contract nor for the value of the work because of the special contract, and to imply a promise to pay such remuneration as the benefit conferred is really worth.

(*Moore* v. *Edmiston*, 70 N. C., 510; *W. & R. R. R. Co.* v. *Robeson*, 5 Ired., 391, cited and approved.)

CIVIL ACTION tried at Spring Term, 1879, of NEW HANOVER Superior Court, before *Seymour*, *J.*

In June, 1867, Henry McLin leased a lot of land in the city of Wilmington to the plaintiff, Gorman, and John R. Davis for a term of years, at the annual rent of fifteen hundred dollars, in which lease is contained the following covenant: "And it is further provided, stipulated and agreed between the parties, that the party of the second part shall be at liberty to make additions and improvements on the premises outside the main building, and, to that end if they see fit, may pull down the outhouse at the eastern end of the lot, but they shall preserve unimpaired the entrance and right of way from Toomer's alley to the back part of the premises, and any such additions and improvements, as they shall make outside of the main building, shall at the end of the term be paid for by the party of the first part at the valuation to be made by two indifferent persons chosen by the parties, one by each, with power to choose an umpire in case they cannot agree, or that of the umpire to be binding, and in case the said outhouse and the back wall be pulled down in making said improvement, then the sum of one hundred and fifty dollars is to be deducted from the amount of said valuation and allowed to the party of the first part, as the agreed value of the material."

The complaint states that the lessees entered into the possession and occupancy of the said demised premises on the first day of October, 1867, and that "in pursuance of the liberty and privilege granted to them in said lease, as above set forth" (referring to the said covenant previously recited) "did erect and build on said premises certain additions and improvements, outside of the main building, of great value, to-wit, the sum of four thousand five hundred dollars."

The lessee, Davis, in 1868, assigned and conveyed his interest and share under the lease to the plaintiffs, Edward Kidder and James Walker. The action is to recover compensation for said improvements.

The defendant, Bellamy, demurs to the complaint, for that, as it appears upon its face, the privilege and license to make the additions and improvements mentioned in the complaint were granted upon the condition precedent, that in making said additions and improvements, the said lessees should preserve unimpaired the entrance and right of way leading from Toomer's alley to the back part of the premises of the said McLin, and the plaintiffs have not alleged nor shown in their complaint that the said lessees, Gorman and Davis, in making said additions and improvements did preserve unimpaired the said entrance and right of way." Demurrer overruled, judgment for plaintiffs, appeal by defendants.

Messrs. A. T. London and *E. S. Martin*, for plaintiffs.
Messrs. D. J. Devane and *DuBrutz Cutlar*, for defendants.

SMITH, C. J. The issue raised upon the demurrer is alone presented for decision upon the appeal. We are of opinion if the matter specified in the demurrer does in law constitute a condition precedent and essential to the recovery, it is sufficiently averred in the general terms used in the complaint, to-wit, that the work for which compensation is de-

manded was done "*in pursuance of the liberty and privilege granted to them (the lessees) in said lease as above set forth,*" within the requirements of section 93 of the code, and the demurrer is not sustained in this regard. These words clearly import the source from which authority to make the improvements is derived, and the restrictions imposed upon it. If the buildings were erected "*in pursuance of the liberty*" given in the covenant, none of its directions could have been disregarded and the avenue and entrance into the rear must have been left open and undisturbed. If these were obstructed, and this provision is a limitation upon the power conferred, it is not true that the lessees exercised it in conformity with the terms of the covenant. The present practice does not recognize the necessities of the system of pleading which it succeeds, and directs the court "in every stage of action" to "disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party." C. C. P., § 135.

"The subtle science of pleading heretofore in use," remarks BYNUM, J., delivering the opinion in *Moore* v. *Edmiston*, 70 N. C., 510, "is not merely relaxed, but *abolished by the code*, and the forms of pleading in civil actions, and the rules by which their sufficiency is to be determined are those prescribed in the code. C. C. P., § 91. The new system, thus inaugurated, is such, that *few if any of the ancient rules are now applicable.* All that is required of the plaintiff is a plain and concise statement of the facts constituting the cause of action; and of the defendant, a general or specific denial of each material allegation of the complaint controverted in the answer." *Jones* v. *Mial, ante*, 252.

But we do not wish to be understood as conceding that th preservation of the open way to the rear is so annexed to the license to build and improve as to constitute a condition precedent, and disable the lessees from seeking any compensation for their outlay in putting up additions to

the buildings then upon the lot. The covenant entitles them to claim, not full reimbursement of moneys expended in making the improvements, but their value to be ascertained in the mode appointed, and as the contract seems to contemplate, reduced by the injury to the premises resulting from erecting them. The clause in question seems rather to be a proviso than a condition of defeasance which need not be stated in the declaration, for this, says Mr. CHITTY, ought to come from the other side. *Railroad* v. *Robeson*, 5 Ired., 391; 1 Saunders, 334, note 2.

The inclination of the courts is to relax the stringent rules of the common law which allows no recovery upon a special unperformed contract itself, nor for the value of the work done because the special excludes an implied contract to pay. In such case if the party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. "The law therefore implies a promise," say the court, "to pay such remuneration as the *benefit conferred* is really worth. *Dumott* v. *Jones*, 23 How., (U. S.,) 220; *Monroe* v. *Phelps*, 8 Ellis & Black, 739.

But for the reason that a compliance with all the requirements of the covenant accompanying the grant of license is sufficiently alleged in the complaint, the demurrer resting on false premises must be overruled, and the judgment of the court below affirmed. As there are other defendants who have answered and the issues as to them are still open, the judgment of this court will be certified to the end that further proceedings be had in the cause in the superior court of New Hanover, and it is so ordered.

No error. Affirmed.

JAMES O. LATTA *v.* RILEY VICKERS.

Sale for Partition—Infants—Confederate Money.

In 1863 a petition was filed for sale of land for partition by certain tenants in common, among whom was the plaintiff, then a minor, appearing by next friend; there was a decree of sale, a sale in December 1863, a report to fall term, 1834, and a decree confirming sale, a payment to clerk and master in September, 1834, in confederate money, a decree at spring term, 1865, directing clerk and master to pay over proceeds to petitioners, and to the plaintiff's guardian; at fall term 1866, is the following entry: "collect and make title, but not issue execution;" title was made in April, 1866; the price paid was a fair one at the time of sale, but the land has subsequently increased in value; *Held*:

(1) The plaintiff has no equity to disturb the sale, or any of the orders.

(2) A formal direction to make title is not necessary when the order of sale reserves the title as an additional security for the purchase money, and the money has been paid.

(*Brown* v. *Coble*, 76 N. C., 391; *Wetherell* v. *Gorman*, 73 N. C., 380, cited and approved.)

CIVIL ACTION tried at Spring Term, 1879, of ORANGE Superior Court, before *McKoy, J.*

The plaintiff is one of four tenants in common in whose name a petition was filed in the late court of equity of Orange county at fall term, 1863, for partition and sale of a tract of land of one hundred and fifty acres, the plaintiff an infant appearing by his uncle and next friend the petitioner, Anderson Latta. A decree of sale was then made, and pursuant to its terms, the clerk and master advertised and exposed the land to public sale at Durham on December 1st, 1863, and the defendant became the purchaser at the price of thirty-three hundred and seventy-five dollars, and gave his bond therefor with sureties payable at six months. James C. Latta who had meanwhile been appointed guardian to the plaintiff was present at the sale. On June 1st,

1864, when the bond became due, the defendant tendered payment to the clerk and master, and he refused to receive the money on the ground that there had been no term of the court since the sale and it was not confirmed. The report was made to fall term following and the sale confirmed. Thereupon on September 16th 1864, the defendant paid into the office his debt, principal and interest in confederate currency, and his bond was surrendered to him. At spring term, 1865, a decree was entered directing the clerk and master to pay over to the petitioners the proceeds of the sale, first deducting the costs, declaring their respective interests in the fund, and that the plaintiff's share "to be paid to his guardian James Latta." At September term, 1866, is found the following entry: "Collect and make title, but not issue execution." The clerk and master made title to the defendant by his deed bearing date April 24th, 1866. The land was poor and sold for a fair price in confederate money, but its value has since greatly increased in consequence of the growth of the town of Durham near which it lies. The purchase and payment by the defendant were in entire good faith, and he had no agency in causing the various orders in the cause to be entered on the docket during its progress. The plaintiff arrived at full age on April 2nd, 1874. The petitioners, except the plaintiff, have received their shares, and his, remaining in the office, has become worthless. The plaintiff has heretofore sought relief by a motion in the cause and been refused, for the reason that the suit had been ended by a final decree, and this was not the appropriate remedy. He brings the present action to annul the defendant's deed, so far as it affects his interests, to charge the land with the payment of whatever sum shall, on enquiry, be ascertained to be due to him, and in case of non-payment, for a resale. The facts are found by His Honor, the counsel consenting to his passing upon them, or appear from the record, the transcript of which accom-

panies the case on appeal. Upon the hearing the cause was dismissed, from which judgment the plaintiff appealed.

Messrs. Graham & Ruffin, for plaintiff.
Mr. John M. Moring, for defendant.

SMITH, C. J., after stating the case. The case shows no equity in the plaintiff calling for the intervention of the court, and the disturbance of the successive orders and final judgment in the cause. The proceedings were conducted in accordance with the established and regular practice, and the petitioner was represented by his next friend in association with others, whose interests were identical with his own. No imputation upon the integrity of the defendant's conduct is made, no suggestion of unfair means used to influence the action of the court, and no reason, except the plaintiff's minority, is now assigned for interference with the proceedings. When paid into office and the order of distribution entered, it is his misfortune that the guardian did not take out his share of the money, as did the others, and by investment or otherwise make it available. It belonged to the plaintiff and its loss must fall on him. If confidence is to be reposed in the action of the courts, within the sphere of their jurisdiction, and their judgments upheld, there is no basis upon which the plaintiff's claim can be enforced. The land was sold when confederate money was the only currency, for its value, and payment tendered when the currency was less depreciated than at the time of sale. The sale was reported and confirmed, the purchase money paid, title ordered to be made, and made. It is true some of the decretal orders do not accord in time with what seems to have been done under them, but if not erroneously dated, they must be understood as intended to be, and have the effect of a recognition and ratification of an authority previously exercised and known.

But a formal direction to make title is not necessary when the order of sale, as in this case, reserves the title as an additional security for the purchase money, and the purchase money has been paid. "Whenever a court orders a sale," says RODMAN, J., "on a certain credit, as twelve months in this case, and a sale is so made, and the bond of the purchaser is taken payable at the end of the credit given, and the sale is confirmed, the master is authorized by a necessary implication to receive the money when it falls due. * * * An order that the master make a deed to the purchaser is not necessary after the payment of the purchase money, *and a deed without such order passes the title.*" *Brown* v. *Coble*, 76 N. C., 391.

The cases cited for the plaintiff when a payment in confederate money was only allowed its scaled value, or rejected, were cases arising upon notes given before the war, or the terms of the order were not complied with; or as in *Wetherell* v. *Gorman*, 73 N. C., 380, the sale for confederate money was made in April, 1865, when by the collapse of the confederate government its currency perished.

It must therefore be declared there is no error, and the judgment dismissing the action is affirmed.

No error. Affirmed.

R. O. BURTON, Adm'r. v. WILMINGTON & WELDON RAILROAD COMPANY.

Negligence—Damages—Judges's Charge, exception to.

1. In an action brought under Bat. Rev., ch. 45, § 121, for damages resulting from one's death caused by the negligence of another, the rule is that "the reasonable expectation of pecuniary advantage from the

continuance of the life of deceased," must guide the jury in estimating the *quantum* of damages; and to this end, evidence of the age, habits, industry, means, business, &c., of the deceased, is indispensable.

2. Where in such case it was in proof that at the time of his death the deceased was administrator of an estate, and the judge told the jury that in estimating the damages they might consider the amount of assets and debts of the estate and the commissions usually allowed in administering the same; *Held* error, in that, the instruction was too general and contained no explanation of the consideration to be given to the whole evidence in fixing the worth of the life. Nor is this error or the reception of improper evidence, cured by the judge's reducing the amount of damages assessed by the jury.

3. Although no instructions be asked and no exception taken to a charge at the time it is given to the jury, yet if there be error in the instructions given, the party aggrieved may assign it.

(*Kesler* v. *Smith*, 66 N. C., 154; *Bynum* v. *Bynum*, 11 Ired., 632, cited and approved.)

CIVIL ACTION for Damages removed from Halifax and tried at Spring Term, 1879, of NORTHAMPTON Superior Court, before *Eure, J.*

This action was brought under Bat. Rev., ch. 45, §§ 121, 122, 123, to recover damages for the pecuniary injury resulting from the death of Edward Conigland, (intestate of plaintiff) alleged to have been caused by the negligence of the defendant company. The statement of the case of appeal, sent up with the record proper, states that no special requests for instructions to the jury on the part of the defendant were refused, and that no exception was taken to any direction that was given, and so, the attention of this court is to be given to the matters assigned for error in the progress of the trial, and in the law as laid down to the jury by the judge.

In the course of the trial, the plaintiff, among other proofs adduced upon the point of the *quantum* of damages resulting from the death of his intestate by the alleged negligence and default of defendant, proved, against the objec-

tion of defendant, by one Gooch, that the intestate at the time of his death was administrator of the estate of J. L. Long, deceased, worth in all about twenty-two thousand dollars, and indebted to its full value, and requiring a sale and application of the whole of it to his debts. He also proved that intestate had collected and administered only five thousand of the assets, leaving the residue worth about seventeen thousand dollars, to be administered by the witness, who succeeded him as administrator *de bonis non*, and that the usual commissions allowed was from two and a half to five per cent on the receipts and disbursements, according to the amount of the estate and the trouble and difficulty in administering it.

To the admission of this evidence, the defendant objected, and in its reception error is assigned. Verdict and judgment for plaintiff, appeal by defendant.

Messrs. Day & Zollicoffer, Mullen & Moore and *J. B. Batchelor* for plaintiff.

Messrs. Gilliam & Gatling, for defendant.

DILLARD, J., after stating the case. It seems to us the evidence was properly received by the court. The action, though not allowable at common law, is authorized by statute in our state, wherein it is permitted to be brought by and in the name of the personal representative of the deceased, and the amount recovered is directed to be disposed of according to the statute of distributions of personal property in cases of intestacy. In assessing the damages, the jury in the terms of the act are restricted to such as they shall deem fair and just, with reference to the *pecuniary injury* resulting from the death. And it is declared that the damages so recovered shall be for the exclusive use and benefit of the widow and issue in all cases where they are surviving. So we see that the plaintiff, if entitled to recover,

was entitled to recover damages to the extent of the pecuniary injury resulting from the death of Edward Conigland to his children, of whom he left one or more surviving him, and for their benefit, and not to swell the assets of the estate.

The damages thus sustained were uncertain and indefinite, and no absolute or definite rule has been or can be laid down on the subject. In estimating the injury, it must necessarily be left in a great degree to the sound sense and discretion of the jury, in view of all the facts and circumstances. By the death of the intestate, his next of kin presently got what he had, and if he had not been killed, he might not have added anything more for their advantage, and in that event, they suffered no injury, or but little, in dollars and cents from his death. But then he might have accumulated something more, and whatever that might be in the judgment of the jury, is the measure of the injury sustained according to the statute.

To determine whether the deceased would have earned something or nothing further, to the pecuniary advantage of his next of kin, and if anything, then how much and of what value, was the question for the jury. The rule by which this estimate is to be made, is decided to be, "the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased." And under this rule, the only inquiry is, what pecuniary advantage might be expected by the family from the continuance of the life of Edward Conigland.

As a basis on which to enable the jury to make their calculation or estimate, it is competent to show the age of deceased and his prospect of life, his habits and character, his industry and skill, the means he had to facilitate the making of money, the business he was employed in of various kinds, whether a farmer, lawyer, or administrator on one or more estates, or any or all of them; the end of it all being,

as expressed by the court in *Kesler* v. *Smith*, 66 N. C., 154, to enable the jury to fix upon the net income which might be reasonably expected if death had not ensued, and thus get at the pecuniary worth of the intestate to his family. Evidence to these points was indispensable to enable the jury to make any estimate at all.

We think the evidence of Gooch was admissible, not as authorizing the jury in the calculation of intestate's worth to his family to set down the commissions on Long's estate and commute the same as so much loss to the next of kin, but simply as showing how the deceased was employing himself at his death, and his business qualifications, and the usual remuneration in such business; so that, taking that proof in connection with the other evidence as to his profession and farming interests, the jury from a view of the whole might say whether there was any, or if any, what reasonable expectation there was of pecuniary benefit from the continuace of the life of deceased. *Kesler* v. *Smith, supra; Railroad* v. *Brown*, 5 Wall., 90; *Chicago & Rock Island R. R.* v. *Morris*, 26 Ill., 400; *Balt. & Ohio R. R. Co.* v. *State, &c.*, 24 Md., 271.

In our opinion there was no error in admitting the evidence; but defendant says that although receivable, there was error in the direction of the court to the jury as to the consideration they were at liberty to give to the evidence in making up the value of the intestate's life to his family. His Honor's charge as to this point was, "that in estimating the amount of damages, they might consider the amount of the debts and the assets of Long's estate, and the commissions usually allowed administrators upon estates of that character, including commissions on so much of the real estate as was necessary to be sold to pay the debts." This direction to the jury is correct so far as it goes, but it is very general, and contains no qualification or explanation how they were to consider the evidence, and to what extent they

were to regard it in fixing the worth of the life; and although not excepted to at the time, nor any instructions asked by the defendant as to the point, it is still open to defendant to assign error in the direction to the jury as given, if any there be.

The true rule on this subject is laid down in *Bynum* v. *Bynum*, 11 Ired., 632, where Chief Justice RUFFIN says: "Although it be not error to refrain from giving instructions unless they be asked, yet care must be taken, when the judge thinks it proper of his own motion or at the party's to give them, that they be not in themselves erroneous, or so framed as to mislead the jury."

Now the question is, Was this charge so framed as to guide the jury to a proper consideration of the intestate's administratorship on the estate of Long, in connection with the whole evidence in the cause? or in other words, so as not to mislead the jury. The instruction as given may have left the jury under the impression that it was right to consider, that at all events the commissions on the estate amounting to over a thousand dollars was a certain loss; and upon this and other elements in the calculation, they may have fixed on some estimated annual income, which in reference to the expectancy of intestate's life, may have led to an excessive verdict. The instruction should have been so shaped as to prevent any misconception on the part of the jury in this respect, and as it may have prejudiced the defendant (and we cannot see that it did not) we have concluded, after much consideration of the point, there is error in the instruction as to this matter.

The plaintiff however urges in reply, that if there was any error in the reception of Gooch's evidence, it was cured by his Honor's reducing the verdict of the jury from fifteen thousand to ten thousand dollars, which much more than covers any estimate of the commissions on Long's estate. That may be so in point of fact. But a sufficient answer to

that view is, It cannot be seen that the unqualified instruction of the court may not have prevented an assessment of damages even below the sum to which the judge reduced the verdict of the jury.

For the omission in His Honor's direction to the jury as above, we must hold there is error and a new trial must be had, and it is so ordered. Let this be certified.

Error. *Venire de novo.*

H. MULHOLLAND v. R. W. YORK.

Evidence—Parol Trust.

1. It is admissible to prove by the verbal testimony of the sheriff who conducted an execution sale that he handed the writs of *ven. ex.* after the sale to the defendant, to endorse the proper returns and prepare the conveyance; and that the defendant individually, and not in a representative capacity, was returned as the bidder. The witness testifies to *facts* which are *collaterally* investigated.
2. Where one purchases land at an execution sale under a verbal agreement with the execution defendant that he shall be allowed to redeem on repayment of the purchase money, a trust is established between the parties; and when the trustee, so constituted, at a sale thereafter made by the assignee in bankruptcy of such execution defendant, bids in the same property to protect and disencumber the title, he will hold it subject to the trust and right of redemption growing out of the original agreement.

(*Reynolds* v. *Magness*, 2 Ired., 26; *Pollock* v. *Wilcox*, 68 N. C., 46; *Wilson* v. *Miller*, 69 N. C., 137; *Phillips* v. *Johnston*, 77 N. C., 227; *Turner* v. *King*, 2 Ired. Eq., 132; *Vannoy* v. *Martin*, 6 Ired. Eq., 169; *Vestal* v. *Sloan*, 76 N. C., 127, cited and approved, and *McKee* v. *Vail*, 79 N. C., 194, commented on.)

CIVIL ACTION tried at Fall Term, 1879, of CHATHAM Superior Court, before *McKoy, J.*

The jury found the issues in favor of the plaintiff, judgment, appeal by defendant.

Mr. John Manning, for plaintiff.
Mr. G. V. Strong, for defendant.

SMITH, C. J. The object of this action is to charge with a trust, in favor of the plaintiff, certain lands that had belonged to him, and were bought at a sheriff's sale under execution, and again at a sale by his assignee in bankruptcy, by the defendant, under an arrangement that the plaintiff might redeem on repayment of the purchase money, the same being paid in full. The answer denies the alleged agreement; the existence and validity of any trust to be supported by parol proof, the repayment of the money, and sets up the statutes of limitations in bar. Issues were thereupon submitted to the jury who find:

1. The defendant bought the plaintiff's lands at the execution sale under an agreement with the plaintiff that when he was reimbursed the purchase money and interest, he would reconvey the same to the plaintiff.

2. That the price paid by the defendant with interest is eight hundred and seventy-seven dollars and fifty cents, and the plaintiff has paid him nine hundred and twenty-seven dollars and thirty-one cents, an excess of about fifty dollars.

3. Three years have not elapsed since the plaintiff demanded and the defendant refused to reconvey the land.

The defendant's exceptions will be considered in the order in which they appear on the record:

1. During the examination of G. J. Williams, the sheriff who sold the land, and a witness for the plaintiff, he was allowed, after objection, to testify that he handed the writs of *ven. ex.*, after the sale to the defendant to endorse the proper returns and prepare the deed of conveyance, and that

R. W. York individually, and not as attorney, was returned as the bidder. The witness testifies to facts, and the evidence is not rendered incompetent because those facts were to be or are embodied also in a written official return. Besides, they are collateral matter, not within the rule which requires the production of the writing. *Reynolds* v. *Magness*, 2 Ired., 26; *Pollock* v. *Wilcox*, 68 N. C., 46; *Wilson* v. *Miller*, 69 N. C., 137.

2. The defendant proposed to show an arrangement made in the plaintiff's absence, by which an execution creditor was to be paid and by whom, and was not allowed: We see no ground on which any outside arrangement between the creditor and others for the payment of the debt, is pertinent to a controversy in which it is admitted that the defendant did advance the purchase money, and the alleged consequences of the payment only are disputed or relevant to any of the issues.

3. The defendant asked and was not permitted to have an additional issue submitted to the jury—"Have the parties treated the lands upon the footing of a trust, the plaintiff as *cestui que trust*, and the defendant as trustee; or have they treated it as an absolute sale, the defendant as landlord, the plaintiff as tenant? The rejection of the issue may be sustained upon two grounds, first, the matters of fact contained in it are substantially included in the other issues; and secondly, the proposed issue involves a question of law and not the facts upon which the law depends.

4. During the trial the court was moved to rule out all the parol evidence tending to show the alleged trust, as being within the statute of frauds; and especially all such as applied to the purchase at the assignee's sale. The denial of this motion presents the important point in the cause.

There is little difficulty felt in determining the last branch of the proposition. If an effectual trust was created by the

agreement and attaches to a purchaser at the sheriff's sale, it follows and attaches to that at the assignee's sale, which was only to confirm what was supposed to be a doubtful title. This will be manifest from two considerations: first, the substance of the contract is that the trust should arise and attach to the legal title when acquired by the defendant, and he cannot evade the obligation by refusing to take the sheriff's deed and taking that of the assignee; and secondly, the sheriff's sale was regular and sufficient to pass the title under his deed, inasmuch as the levy was made and the lien existed before the commencement of proceedings in bankruptcy. The assignee may take charge of encumbered property of the bankrupt, but he is not obliged to do so when the encumbrance is beyond its value, and the lien may be enforced in the state courts. *Eyster* v. *Gaff*, 91 U. S., 521; *Phillips* v. *Johnston*, 77 N. C., 227.

The enquiry is then narrowed to a single proposition: Can a trust, attaching to land, be evaded by a parol contract entered into between the debtor and his attorney, that the latter will buy the debtor's land at the execution sale, hold for his benefit, and reconvey on being reimbursed the money paid for it? In our opinion a trust may be thus formed, and it will be enforced on the ground of fraud in the purchaser in obtaining the property of another under a promise to allow him to redeem, and attempting afterwards to appropriate it to his own use. The principle is illustrated in several cases in our own reports, which will be briefly adverted to.

In *Turner* v. *King*, 2 Ired. Eq., 132, the defendant verbally agreed with the plaintiff to buy in his lands, about to be sold under execution, and allow him to redeem on repayment of the purchase money; and this being known to the bidders, two of them desisted, and the defendant bought, for one hundred and ninety dollars, lands worth four hundred and fifty. On a bill to redeem, DANIEL, J., uses this

language: "The attempt of the defendant to set up an irredeemable title, after the agreement he entered into, is such a fraud as this court will relieve against."

So in *Vannoy* v. *Martin*, 6 Ired. Eq, 169, the defendant made a similar agreement with one Kelly, a lessee of the plaintiff, that the plaintiff might redeem on returning the price and paying a small sum due on an unsettled account; and relying on the promise, the lessee made no further effort to raise the money, pay the debt and relieve the land. "We are satisfied," say the court, "that he (the defendant) made representations to that effect at the time of sale, which prevented the plaintiff's lessee, Kelly, or some other friend at his instance, from stopping the sale by paying off the amount due on the executions, or buying in the land for the plaintiff, and enabled the defendant, Martin, to purchase it at an under-value. *In either case it would be a gross fraud upon the plaintiff*, if the said defendant were permitted to set up an absolute title to the land, which it is the duty of a court of equity to prevent, and, in the way of preventing which, the act making void parol contracts for the sale of land does not stand."

The doctrine is reaffirmed, in *Vestal* v. *Sloan*, 76 N. C., 127, where facts almost identical with those in the present case were before the court, and PEARSON, C. J., says: "At the sale, plaintiff agreed to buy the land for Sloan and hold the title in trust to secure the amount of his bid and also the amount due to his wards. The whole amount is fixed at six hundred dollars. This constituted the relation of trustee and *cestui que trust*. By a sale of a part of the land, the defendant paid to the plaintiff five hundred dollars, and he also paid one hundred dollars, so that he had redeemed his land, except a balance of interest."

These adjudications proceed upon the assumption that the debtor, trusting to the good faith of the party promising, and lulled into a false security, may have desisted, in conse-

quence of the assurance, from making other efforts to prevent the sale and sacrifice of his property, and it would be a fraud in the purchaser to take advantage of the confidence and hold it thus acquired, for his own use, and to the injury of the owner.

We have not overlooked the more recent case of *McKee* v. *Vail*, 79 N. C., 194, wherein Mr. Justice READE declares such a contract, when not in writing, void. No authority was cited for the proposition, and it was not involved in the decision, since the jury find there was no contract, parol or other, to which it could apply. Moreover, in that case there was no confidential relations subsisting between the parties, and the promise, if made, was a mere gratuitous undertaking, supported by no consideration and without any equitable element. We prefer to adhere to the train of preceding decisions.

The record does not show that objection was made to the evidence, other than has been already noticed, and its sufficiency to warrant the findings of the jury, except that it was not in writing, and none other was competent to set up the trust. This, as we have seen, is not sustained by authority, and there was no error in admitting it. But the trust does not attach to the fifty acres conveyed by the defendant's own deed, the title to which, though the land may be comprised within the boundaries of that described in the assignee's deed, is not derived under it.

The plaintiff is entitled only to have reconveyed to him such estate as the defendant acquired in the lands purchased, as well at the sheriff's as at the assignee's sale. There is no error and judgment will be entered according to this opinion.

No error. Affirmed.

W. H. SHIELDS, Guardian v. MONTGOMERY T. WHITAKER, and others.

Evidence—Negotiable Instrument—Parol Trust—Reforming Verdict—Bankruptcy.

1. The admission of an indebtedness is evidence against one to whom the debtor has conveyed his land in trust to secure the payment of his debts.
2. A negotiable instrument, the execution of which is admitted, must be produced and filed before judgment is entered up, or else its loss must be proved, and adequate indemnity given to the parties liable thereon.
3. Where a debtor conveys land under an express verbal agreement that the same shall be held for and applied to the payment of certain debts due the grantee and others, such agreement may be proved and enforced in equity.
4. Where objection is not made in apt time, on the trial, to the sufficiency and effect of evidence, no such objection will be heard in this court.
5. No change has been made by the recent constitutional amendments which would authorize the judge to revise the verdict of the jury. He may set it aside in a proper case, but it cannot be reformed or amended.
6. A discharge in bankruptcy does not release from the obligations of a trust.

(*Morrow* v. *Allman*, 65 N. C., 508; *Braswell* v. *Gay*, 75 N. C., 515; *Wood* v. *Cherry*, 73 N. C., 110; *Shelton* v. *Shelton*, 5 Jones Eq., 292; *Turner* v. *Eford*, *Id.*, 106; *Thompson* v. *Newlin*, 3 Ired. Eq., 338; *Cook* v. *Redman*, 2 Ired. Eq., 623; *Kimbrough* v. *Smith*, 2 Dev. Eq., 558; *McDonald* v. *McLeod*, 1 Ired. Eq., 221; *McLaurin* v. *Wright*, 2 Ired. Eq., 94; *Franklin* v. *Roberts*, *Id.*, 560; *Allen* v. *McRae*, 4 Ired. Eq., 335; *Kelly* v. *Bryan*, 6 Ired. Eq., 283; *Clement* v. *Clement*, 1 Jones Eq., 184; *Bonham* v. *Craig*, 80 N. C, 224; *Briggs* v. *Morris*, 1 Jones Eq., 193; *Turner* v. *King*, 2 Ired. Eq., 132; *Whitfield* v. *Cates*, 6 Jones Eq., 136, cited, commented on and approved.)

CIVIL ACTION tried at Spring Term, 1879, of HALIFAX Superior Court, before *Eure*, *J.*

Judgment for plaintiff, appeal by defendants.

Messrs. Gilliam & Gatling and *Thos. N. Hill*, for plaintiff.
Messrs. S. Whitaker and *J. B. Batchelor*, for defendants.

SMITH, C. J. The defendants, Montgomery T. and James H. Whitaker, the first as principal, the other as surety, on February 21, 1860, executed to the plaintiff W. H Shields guardian, for the use of his wards, Charles T. and Olivia N. Lawrence, a bond in the sum of twenty-nine hundred and seventy-five dollars, payable one day from date, on which a small sum only has been paid. On May 1, 1868, the said Montgomery T. and wife executed a deed, absolute in form and for the expressed consideration of two thousand dollars, conveying to his brother, the defendant, Ferdinand H., a valuable tract of land in Halifax county. The plaintiffs allege, and the defendants deny, that the land was conveyed upon an express parol agreement that it should be held as a security, and be applied in payment of the indebtedness of the said Montgomery to said Ferdinand, and of one-half of the amount due on said bond, which by a compromise entered into was to be accepted in full satisfaction. The execution of the bond and their liability under it were admitted by the obligors, but not by Ferdinand. The following issues were submitted to the jury:

1. Did M. T. Whitaker convey to Ferdinand H. Whitaker the lands described in the complaint in trust to pay his debt and fifty cents in the dollar of the debt due the plaintiffs?

2. Did the defendants, Montgomery T. and James H. Whitaker, sign, seal and deliver to the plaintiff, as guardian of Charles T. and Olivia N. Lawrence, on February 21, 1860, their writing obligatory, wherein they promised to pay to the plaintiff, as such guardian, twenty-nine hundred and seventy-five dollars, one day after date with interest thereon from said date?

3. What payments have been made thereon and when?

To the first two issues the jury answer in the affimative,

and to the latter, they say "two hundred and sixty-four dollars, January 1, 1868."

On the trial before the jury several exceptions to the admissibility of evidence were taken by the defendant, Ferdinand, none by the others.

1. The bond was not produced nor its loss shown, and the defendant objected to any evidence of the indebtedness until the absence of the writing was accounted for. The objection was not sustained: The issue in reference to the bond was entirely unnecessary since the indebtedness was admitted by the only parties interested in it. If established as to the debtors, it is sufficient to raise and annex a trust to the debtor's land, conveyed to the grantee, for the reason that he takes it subject to the charge, and by means of his undertaking to discharge the trust. The question of indebtedness is not between the creditors and Ferdinand, but between them and the makers who owe, and the verdict only affirms what was not disputed by those competent to raise an objection to the kind and quality of the testimony offered. The declaration of one's liability, as against his interest and from the presumption of its truth, may be received against others. *Braswell* v. *Gay*, 75 N. C., 515.

It is manifest however the bond should be produced or its loss or destruction explained, and filed before judgment is entered up. *Morrow* v. *Allman*, 65 N. C., 508.

2. The contents of a letter from Montgomery to Shields, written pending negotiations between them for the settlement of the debt, and before the execution of the deed, were given in evidence, the original being lost, after an objection that Ferninand was not privy to the communication and ought not to be affected by it: If there were force in the objection, it would exclude proof of the arrangement by which the debt was to be secured, and the trust, created by the subsequent conveyance of the land, for its payment; and this result will follow, although the deed was made with

the full understanding of both the parties to it, that it was the mode adopted to give effect to the arrangement. The estate is acquired by Ferdinand, encumbered with the trust, and certainly its nature and extent became a proper subject of enquiry.

3. The objection to the notice given to Shields, and what was said at the time, of a proposed meeting on the premises with a view to an adjustment, is equally unfounded, as well for reasons already given, as because the meeting did take place and a proposition was made by, or with the consent of Ferdinand, to set off two hundred acres of the land to Shields in discharge of his claim.

The main point however discussed before us, and illustrated by numerous references in the brief of the defendants' counsel, is, as to the competency of parol proof to establish the alleged trust.

The question to be considered is simply this: A debtor conveys his land to one under an express verbal agreement that it shall be held and applied to the payment of certain debts of the grantor, and among them a debt due the grantee; will the latter be allowed, thus acquiring title, to repudiate his obligation and appropriate the property to his own individual use and benefit? Would not this be a gross fraud not only upon the debtor, but upon the creditors for whom he intends to provide, which a court of equity will interpose to prevent? The question seems to involve its own answer, and such in our opinion is the law declared by this court. We propose to examine some of the numerous adjudications on the subject:

In *Wood* v. *Cherry*, 73 N. C., 110, PEARSON, C. J., says: "A trust can only be made in one of four modes: 1. By transmission of the legal estate when a simple declaration will raise a trust. 2. A contract based upon a *valuable consideration* to stand seized to the use, or in trust for another. 3. A covenant to stand seized to the use of or in trust for

another upon *good consideration.* 4. Where the court by its decree converts a party into a trustee on the ground of fraud.

In *Shelton* v. *Shelton,* 5 Jones Eq., 292, land was conveyed by direction of Mary Morgan who bought and paid for it, to Vincent Shelton, son of her daughter Elizabeth, wife of an insolvent husband, subject to a verbal trust declared by said Mary Morgan, in favor of said Elizabeth for life, remainder to all her children. The trust was declared valid and enforced, PEARSON, C. J., thus explaining the doctrine: "The truth is, neither the declaration nor the implication of a trust has ever been considered as affected by that rule of evidence. The deed has its full force and effect in passing the absolute title at law, and is not altered, added to or explained by the trust, which is an incident attached to it in equity, as affecting the conscience of the party who holds the legal title. Herein a trust differs from a condition by which the estate is defeated at law upon the payment of money, for the condition affects the legal estate, and to give it force, must be added to, and constitute a part of the deed. It follows *that the class of cases in which it is held that a deed absolute on its face, may be converted into a security for money by adding a condition that the legal estate is to be void, so as to make it a mortgage upon proof of declarations and matters dehors, inconsistent with the idea of an absolute purchase, has no bearing on a question of a declaration of trust.*"

In *Turner* v. *Eford,* 5 Jones Eq., 106, the plaintiff's ancestor contracted for the purchase of land, paid the money and had title made to the defendant's ancestor, on a parol trust for the plaintiff's said ancestor, and the trust was upheld as not within the statute of frauds, but was not enforced because it was the result of a fraudulent arrangement entered into to defeat creditors, and the court would not lend its aid to either party to the transaction.

In *Thompson* v. *Newlin,* 3 Ired. Eq., 338, the antecedent trust for emancipation of the slaves bequeathed uncondi-

tionally in the will was held to be valid, and the legatee would be decreed to carry into effect the verbal directions of the testator to the legatee in that behalf. And even when, without special instructions, the testator's intention is known and assented to, the trust will be enforced. *Cook* v. *Redman*, 2 Ired. Eq., 623; *Mulholland* v. *York*, *ante*.

The cases relied upon by defendant's counsel, most if not all of them, belong to the class distinguished by the late Chief Justice from that before us, in which the plaintiff proposes to reform and correct the deed upon the ground of fraud, ignorance, mutual mistake, or undue advantage, of which mere declarations are insufficient, and proof of matter *dehors*, incompatible with the idea that it embodies the intent of the parties, is required before the court will interfere. *Kimbrough* v. *Smith*, 2 Dev. Eq., 558; *McDonald* v. *McLeod*, 1 Ired. Eq., 221; *McLaurin* v. *Wright*, 2 Ired. Eq., 94; *Franklin* v. *Roberts*, *Id.*, 560; *Allen* v. *McRae*, 4 Ired. Eq., 325; *Kelly* v. *Bryan*, 6 Ired. Eq., 283; *Clement* v. *Clement*, 1 Jones Eq., 184; *Bonham* v. *Craig*, 80 N. C., 224.

In *Briggs* v. *Morris*, 1 Jones Eq., 193, the defendant bought the land at public sale under an arrangement previously entered into with the plaintiff, by which he was to buy the land and reconvey on payment of the purchase money. This was made known to the by-standers who in consequence refrained from bidding, and the land was bought at an under-value. The court assimilates the case to that of an application to enforce a deed *inter partes* and engraft upon it a *proviso* for redemption, and dismissed the bill. But the attention of the court seems not to have been directed to the fraud involved in holding the property thus obtained, for the defendant's individual use, out of which the court will create a trust, and the decision is not, in this view, in harmony with *Turner* v. *King*, 2 Ired. Eq., 132.

In *Whitfield* v. *Cates*, 6 Jones Eq., 136, it is declared the case is not one of a parol trust, but of an attempt to annex

a new condition to the deed, and does not fall within the principle decided in *Shelton* v. *Shelton*, *supra*.

But it is urged that there ought to have been and was not proved, any outside fact in corroboration of the declarations and without this no trust will arise: There was no objection to the sufficiency and effect of the evidence, when introduced to set up the plaintiff's equity, and it cannot now be heard. But we do not concede the proposition that there was no outside fact shown in confirmation of the alleged trust. The agreement for a compromise of the plaintiff's debt at one-half its amount seems not to have been denied. The plaintiff is sent for; meets the two brothers on the premises; is offered, instead of an uncertain security for one-half the debt, an absolute conveyance of two hundred acres of the land. Is this no recognition of the plaintiff's interest in the land?

The defendant, Ferdinand, does not explicitly state how he paid the purchase money, or why he paid when his brother then owed him between four and five thousand dollars, of which he says the purchase money was not a part. The land was worth much more than the sum specified as the consideration, and Montgomery on his return from Baltimore, entered into and held possession as before, paying a very inconsiderable sum for use and occupation. Are no inferences to be drawn from these facts of an understood and existing trust attaching to the conveyance? The matters however are for the consideration of the jury and are adverted to only to meet the argument that there was no evidence of any fact *dehors* the declarations in their support. The competency and effect of evidence are subject to review but its sufficiency, when admitted to establish a fact, belongs to the jury to determine.

It is further contended that under the recent constitutional amendment, the court is not bound by the finding of the jury, and may look into the evidence and correct the

verdict. The suggestion is a novel one, we presume, never contemplated by those who made the organic changes in the law, and as little within their purview. The verdict of a jury may be set aside in a proper case, but it cannot be reformed or amended.

The defence of the discharge in bankruptcy set up by the defendant, Montgomery, is not pertinent, as it is not proposed to hold him liable for the debt or any part of it, but to assert and enforce a trust upon the land he has parted with. This is the scope and purpose of the suit.

We have given the case full and careful consideration, after retaining it over one term for an *adversari*, in view of the important principle involved, and have arrived at the conclusion that there is no error in the record, except, in that, no judgment should have been entered until the bond is filed or its absence explained, and in the latter case, if lost, upon giving an adequate indemnity to the party liable. Thus modified the judgment must be affirmed, and this will be certified.

PER CURIAM. Modified.

WESTERN N. C. RAILROAD COMPANY v. W. W. ROLLINS.

Corporations—Legislative Power—Altering or Repealing Charter Trusts and Trustees.

1. The legislature has the power, under section one, article eight, of the constitution, to alter or repeal all general laws and special acts by which corporations, associations and joint stock companies are formed.
2. Where the dissolution of a corporation is had by act of assembly or by decree of court, it is proper to appoint a suitable person by the repealing act, or a receiver by the court, to collect and apply the assets of the annulled body in the discharge of its liabilities. And it is compe-

tent to select another corporation, as well as a natural person, to administer the assets.

3. In the absence of such provision in the repealing act, the trusts in favor of creditors and stockholders will attach to the transferred property in the hands of the substituted trustee.

(*Mills* v. *Williams*, 11 Ired., 558; *State* v. *Petway*, 2 Jones Eq., 396, cited and approved.)

CONTROVERSY submitted without action under section 315 of the code, and heard at Fall Term, 1879, of BUNCOMBE Superior Court, before *Graves, J.*

The plaintiff company claims the right to recover all the property of the Western Division of the Western North Carolina railroad company in the hands of the defendant who was president of said Western Division, and the defendant resists the same upon the ground that the act of assembly dissolving the Western Division and transferring its property to the plaintiff, is unconstitutional and void. Upon consideration of the question, His Honor was of opinion with defendant, and the plaintiff appealed from the judgment.

Messrs. Battle & Mordecai, J. S. Henderson, T. F. Davidson and *W. H. Malone*, for plaintiff.

Messrs. J. H. Merrimon, M. Erwin and *C. M. McLoud*, for defendant.

SMITH, C. J. The Western North Carolina railroad was incorporated and formed under an act of the general assembly, ratified on the 15th day of February, 1855, to construct and operate a railroad from the town of Salisbury "to some point on the French Broad river, beyond the Blue Ridge, and if the legislature shall hereafter determine, to such point as it shall designate at a future session." Acts 1854, 55 ch. 258. By successive amendments and after surveys, the projected road was extended westward by branches, one of

which was to terminate "at a point on the line of the Blue Ridge railroad on the Tennessee river, or on the Tennessee line at or near Ducktown in the county of Cherokee;" and the other, "at or near Paint Rock." Acts 1858, 59 ch. 170.

By the act of August, 1868, the contemplated road was severed at the French Broad river into "two separate and distinct divisions," one to be called the Eastern Division and to embrace the road to the east; the other, the Western Division to embrace the divergent lines to the west of the river. The property, appropriations and subscription of stock are left in possession of the Eastern Division, to be used exclusively in the completion of its part of the divided road, under the management of the existing board of directors, while the Western Division is placed under the direction of another board of directors, constituted by appointments of the state and individual stockholders in the new organization under the act, to whom is entrusted the "selection of its own officers and agents, a distinct treasurer, and otherwise independent of the other;" and for its construction, funds are to be raised by stock subscriptions, as in the original act of incorporation, and the aggregate capital of the Western North Carolina railroad company, for the two divisions, is increased to a sum not exceeding twelve millions of dollars. Private acts, 1868, ch. 24.

This statute was re-enacted and confirmed by two subsequent acts, one ratified December 18th 1868, and the other, January 29th, 1869. Acts 1868–'69, chs. 7 and 20, repealed by act of April 5th, 1871, (acts 1870–'71, ch. 249,) and again restored with modifications, and the repealing act itself repealed by the act of February 8th, 1872, and power was conferred upon the revived company "to lease or sell or otherwise dispose of the whole or any part of said road to any person or corporation on such terms as may be agreed on," in order to its early completion. Acts 1871–'72, ch. 150.

On March 13th, 1879, was passed the act whose validity is

called in question in the present suit, the first section of which repeals the acts of August 19th, 1868, of January 29th, 1869, and of February 8th, 1872, by special mention, "and any and all other acts and parts of acts, creating, recognizing or continuing in existence the Western Division of the Western North Carolina railroad company."

The second section is in these words: That all the property, rights, credits, rights of action and effects that now exist in favor of the said Western Division of the Western North Carolina railroad company, or which may result from any existing matters, causes, circumstances or contingencies, shall become absolutely the rights and property of the Western North Carolina railroad company, and the said Western North Carolina railroad company is hereby authorized and empowered to prosecute, defend and manage any and all suits and actions pending in the courts of this state, in the courts of the United States, or the courts of any other state or territory, in reference to the property, rights and credits of the said Western Division of the Western North Carolina railroad company; *Provided*, the said Western North Carolina railroad company shall not be liable or responsible for any debt, contract, obligation or other liability of the said Western Division of the Western North Carolina railroad company, beyond the sum it shall actually realize and receive from the transfer of property, rights, credits, &c., provided for in this section.

The third section requires officers, directors and agents of the dissolved company, within thirty days after demand of the Governor, to surrender to the directors of the Western North Carolina railroad company, "all books, records, papers, moneys, bonds, property, contracts, effects and evidences of debt" in their possession, or under their control, and makes their failure or refusal a misdemeanor, punishable by fine or imprisonment.

The defendant, who was, at the time of the passing of the

act, president of the annulled company, has in his hands ninety-four first mortgage bonds, of one thousand dollars each, of the Florida Central railroad company, which with other of its effects are sought to be recovered in this action. The claim is resisted on the ground of the unconstitutionality of the act, and for the further fact, disclosed in the case agreed, that there are outstanding debts of the company, most of them reduced to judgments, fifty thousand dollars or more in amount, which the defendant alleges attach as a trust to the funds he holds, and must be paid therefrom. The state subscribed six and two-third millions to the capital stock of the Western Division, and bonds were issued therefor, while private stockholders own of paid-up stock fifty thousand dollars whereof all except one thousand dollars was paid by a sale and transfer of the property of the Buncombe Turnpike company. Upon this statement of facts two questions only are presented for determination.

1. Has the general assembly the power to destroy by a mere enactment the existence of the organization designated the "Western Division of the North Carolina railroad company"? and if it has,

2. Can it transfer and vest the property of the annulled company in a new corporation, bearing the name, but not being in fact the same, as that formed under the act of 1855, so as to entitle the plaintiff to sue and recover?

The solution of these enquiries disposes of the two appeals.

First—As to the repealing power exercised in the first section and its effect: The constitution of 1868 contains this provision, viz: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes and in cases where, in the judgment of the legislature, the object of the corporation cannot be attained under general laws. All general laws and special

acts, passed pursuant to this section, may be altered from time to time or repealed. Art. VIII, § 1. And the term "corporation," as used in the article, is defined in section three, "to include all associations and joint stock companies having any of the powers and privileges of corporations, not possessed by individuals or partnerships."

Invested with the attributes conferred by the various enactments which form and shape the Western Division, as a separate and distinct organic body, with capacity to contract debts, to sue and be sued, to mortgage the road to secure borrowed money, to lease and sell it, to appoint its own officers and agents and manage its own affairs, (with a succession which preserves its own integrity amidst changes among its members) if the possession of these facilities do not constitute a corporation, it will be difficult to point out any absent that would have the effect, within the purview of the constitution. But it is not material to solve the question, so earnestly and elaborately pressed in the argument, whether the Western Division by the effect of the legislation became and was a corporate body itself, or an agency and branch only of the original Western North Carolina railroad company, since in either case the effect of the legislation is the same. If it was but an agency, the same efficient power that created could destroy and again restore to life, as was done by antecedent acts. If it was a corporate body, it was formed under the controlling force of the constitution, and remained subject to the repealing power of the general assembly.

The case mainly relied on in opposition to the power to dissolve is that of *New Jersey* v. *Yard*, 95 U. S., 104, with a brief review of which we will be content. In 1835, the Morris and Essex railroad company was chartered. In March, 1865, an amendment was made authorizing the construction of a branch road. Two years later another amendment was added. In 1846 the legislature enacted "that

the charter of any corporation which should thereafter be granted by the legislature should be subject to alteration, suspension and repeal in the discretion of the legislature." In March, 1862, an act was passed for the assessment and taxation of the full amount of the capital stock of corporations, paid in and its accumulation, and the right to pass and enforce this enactment was the point before the court. Mr. Justice MILLER, speaking for the court, uses this language: "The case before us differs from those in which, by the constitution of some of the states, this right to alter, amend and repeal all laws creating corporate privileges becomes an inalienable legislative power. The power thus conferred cannot be limited or bargained away by any act of the legislature, because the power itself is beyond legislative control. The right in this case to amend or repeal legislative grants to corporations, being itself but the expression of the will or purpose of the legislature for one particular session or term of the state of New Jersey, cannot bind any succeeding legislature which may choose to make a grant, or a contract not subject to be altered or repealed. * * * * It follows that unlike the constitutional provision in other states, it is in New Jersey a question in every case of a contract made by the legislature, whether that body intended that the right to change or repeal it should inhere in it, or whether, like other contracts, it was perfect and not within the power of the legislature to impair its obligation."

The reasoning of the court, so far from denying concedes the power to modify or dissolve a corporation, when reserved in the fundamental law in force when the corporation was formed, and maintains the competency of the general assembly, notwithstanding a previous general enactment of similar import to enter into an inviolable contract, and that whether this is done in a particular case is a question of construction and intent. *Tomlinson* v. *Jessup*, 15 Wall, 454; *Holyoke* v. *Lyman*, *Id.*, 500; *Miller* v. *State*, *Id.*, 498.

Secondly. As to the assignment of the property to the plaintiff and the right of recovery from the defendant: The dissolution of the Western Division, as an organized body, possessing property and owing debts, renders necessary the appointment of a suitable person to take charge of, collect and apply its assets in the discharge of its liabilities. When the dissolution is brought about by a judgment of the court, a receiver is appointed for the purpose, who acts under its supervision and control. When it is the result of a lawful act of legislation, it is reasonable that the repealing act should make provision for such administration, and we see no reason why the plaintiff should not be thus appointed as well as a natural person. The transfer to the re-incorporated Western North Carolina railroad company is absolute, it is true, but (as we understand the proviso) in full recognition of the trusts in favor of creditors and their right of satisfaction therefrom. Its language clearly imports this in declaring that the plaintiff company shall not be liable or responsible for any debt, contract, obligation or other liability of the said Western Division of the Western North Carolina railroad company, beyond the sum it shall actually realize and receive from the transfer of property, rights, credits," &c., a distinct implication of such liability to the extent and value of the funds received. But in the absence of such provision, the trusts in favor of creditors and of stockholders, if there be any surplus, would attach to the transferred property and the plaintiff could be compelled to discharge the trusts therefrom. The creditors as such, are not complaining of this portion of the act, and so far as we know acquiesce in the transfer. They are not represented by the contesting defendant, nor is he the protector of their rights in the premises. He can only resist the legal operation of the act which takes from him the possession of that which he no longer holds as an officer, and places it in other hands. His

objection lies solely to the change of trustees, unaffected by inhering trusts for others.

The validity of the act is fully sustained by the case of *Read* v. *Frankford Bank*, 23 Maine, 318. On March 29th, 1841, the legislature passed an act repealing the charter of the defendant and appointing receivers who were required to demand and receive from the officers, the property of the bank in their hands. On April 16th following, another act was passed requiring creditors in order to entitle them to participate in the distribution of the assets and prevent their claims from being barred, to exhibit and prove them to the receivers on or before the 1st day of July thereafter. The repeal was by virtue of a power reserved in a general law passed in 1831. The bank was incorporated afterwards and subject to its provisions. Some creditors who had previously attached were the plaintiffs in the action, asserting their lien. The judge delivering the opinion of the court says: "The obligation of the contract between the plaintiffs and the bank was not impaired by a repeal of its charter, but the mode of obtaining indemnity for its violation was changed. The bank was created by the legislature, and by the charter there was no provision for the prosecution of suits against it, if that charter should be declared by the same power forfeited and void. But a mode has been provided in the repealing act, by which creditors are enabled to obtain satisfaction for their claims to the extent of the means existing therefor."

Sustaining the validity of section two, it is needless to consider that which follows and enforces compliance with appropriate penalties. For the same reasons it must also be sustained.

It is to be observed that the defendant sustains towards the controversy the relation of an officer of an extinct organization, and sets up a defence not open to the debtor, but to the creditor only, who, as we have before remarked, may be content with the legislation and substitution of the plaintiff as trustee in his place. While it is true that each cor-

porator may object to the repeal or to any material modification of the provisions of a charter granted for other than municipal purposes, and constituting a legislative contract protected by the constitution of the United States, yet in the absence of complaint, acquiescence in the change may be inferred, and ultimately its acceptance by the corporators. *Mills* v. *Williams*, 11 Ired., 558; *State* v. *Petway*, 2 Jones Eq., 396.

It must therefore be declared that there is error in the ruling of the court that sections two and three of the act of March 13th, 1879, are inoperative and void; and the plaintiff's exceptions to the ruling are sustained. Judgment must therefore be entered that the defendant deliver to the plaintiff the bonds and other effects and property of the Western Division of the Western North Carolina railroad company, as claimed in the action, and it is so ordered.

Error. Reversed.

In same case upon defendant's appeal:

SMITH, C. J. The matters involved in this appeal are considered and discussed in the opinion in the plaintiff's appeal, and for the reasons therein stated it must be declared there is no error in the ruling of the court to which the defendant excepts, and his exception is overruled.

HENDERSONVILLE v. G. W. MCMINN.

Towns and Cities—Prosecution under Ordinance.

A prosecution under a town ordinance must fail if no ordinance is set out in the proceedings as having been violated. (*Greensboro* v. *Shields*, 78 N. C., 417, approved.)

(*Wilmington* v. *Davis*, 63 N. C., 582; *Town of Edenton* v. *Wool*, 65 N. C., 379; *City of Greensboro* v. *Shields*, 78 N. C., 417, cited and approved.

PROCEEDINGS in the nature of a Criminal Action, tried at Spring Term, 1879, of HENDERSON Superior Court, before *Gudger, J.*

This was a warrant issued by the chief magistrate of the town of Hendersonville against the defendant, and is as follows:

"STATE OF NORTH CAROLINA,
Henderson County."

"*To the town constable to execute and return forthwith*: You are hereby commanded to take the body of G. W. McMinn and cause him to appear before me to answer the complaint of the town commissioners for a violation of one of the ordinances of the town of Hendersonville, prohibiting the sale of intoxicating liquors." (Signed and sealed by the chief magistrate.)

On the return of this warrant "executed" the magistrate of the town adjudged that a fine be entered against the defendant for the sum of fifty dollars and costs, and he appealed to the superior court, in which court the case was continued from term to term until spring term, 1877, when he pleaded "guilty." The judgment was suspended upon payment of costs, and defendant recognized for his appearance from term to term until spring term, 1879, when it was adjudged by the court that he pay a fine of fifty dollars, from which judgment he appealed.

Mr. C. M. McLoud, for defendant.
Attorney General, contra.

ASHE, J. The process under which the defendant was arrested is so defective in form and substance as not to warrant

the judgment pronounced upon him in the court below. It should have set out the ordinance, but instead of doing so it charges the defendant with the violation of *one of the ordinances* of the town of Hendersonville—prohibiting the sale of intoxicating liquors, implying that there was more than one ordinance of the town on that subject. Which did he violate? If it was intended to be a criminal prosecution, the warrant is the indictment; and every indictment must state the facts and circumstances constituting the offence with such certainty, that the defendant may be enabled to determine the species of the offence with which he is charged, in order that he may know how to prepare his defence, and that the court may be in no doubt as to the judgment it should pronounce if the defendant be convicted. Archb. Cr. Pl., 42, 43.

But the proceeding in this case is not a criminal action, because it is not brought in the name of the state, and cannot be sustained as a civil action because it is not in form a summons and does not require the defendant to answer the plaintiff for a debt; but even if it did, the town magistrate had no jurisdiction of the case as a civil action, unless he was also a justice of the peace, which does not appear. *Wilmington* v. *Davis*, 63 N. C., 582; *Town of Edenton* v. *Wool*, 65 N. C., 379; *City of Greensboro* v. *Shields*, 78 N. C., 417.

There is error. The judgment in the court below must be reversed. Let this be certified to the superior court of Henderson county.

Error. Reversed.

A. H. SUDDERTH, G'dn, v. R. D. McCOMBS and others, Adm'rs.

Petition to Rehear—Affirmance of Judgment.

The decision in *Sudderth* v. *McCombs*, as reported in 79 N. C., 398, is affirmed, and must stand as the judgment of this court.

PETITION to Rehear, filed at June Term, 1879, and heard at January Term, 1880, of THE SUPREME COURT.

Messrs. Merrimon & Fuller, for defendant petitioners.
Messrs. Battle & Mordecai, contra.

DILLARD, J. The intestate of defendant received as guardian from the executor of Abram Harshaw, in May and June, 1859, bonds belonging to the estate amounting to the sum of $7,716.50, which it was his duty to collect and invest, or change into his own name as guardian, so as to make it a fund bearing interest at a compound rate. Besides these ante-war notes, the guardian had under his control valuable real estate and several negro slaves, from which property a considerable quantity of confederate money was yielded every year, and with the same the guardian was chargeable up to the emancipation of slaves, and afterwards with the rents of the lands only up to the majority of the wards in 1873.

The referee, Allman, in his account reported to the court below and accompanying the appeal to this court, charged the guardian with the amount of the bonds turned over to him in May and June, 1859, and with all the receipts from the rent of land and hire of slaves, with compound interest to the first of January, 1873, and after crediting him for all commissions and vouchers, including a Confederate State's certificate for $6,000, he made a balance against the guar-

dian of $7,333.38, as of said first of January. The plaintiff excepted to the report because of the credit given for the confederate certificate, and the defendants excepted, for that they were not credited with a confederate bond or bonds for $3,400, and for other matters not material to be here specified.

On the hearing of the appeal in this court, the exception of the plaintiff as to said certificate was sustained, and that of defendants as to the confederate bonds was overruled, and the other exceptions on the part of defendants were disposed of as set forth in the opinion of this court, reported in 79 N. C., 398.

The account as taken by Allman, being remodeled in conformity to the opinion, the balance due from the guardian was increased, by the sum of the certificate for $6,000 and interest computed thereon, from $7,333.38, the footing of Allman's account, to the sum of $19,169.71, as of June term, 1878, and for that sum judgment was given against the defendants in this court.

In the petition to rehear, it is assigned for error that while it appears from the pleadings, testimony, and reports on file that the rents of land and the hires of slaves must have been received in depreciated currency, and that collections to some extent were made on the old notes in the same kind of money, the judgment of this court, by inadvertence or hasty consideration, held the guardian chargeable for the nominal value of the confederate money.

The same matters, involved in the present action, came up to the January term, 1871, of this court upon exceptions to the report of a referee, the same as now, and the action was dismissed on the ground that jurisdiction of the subject matter was with the probate court, with an expression of opinion by the court as a guide to further proceedings, that it was necessary to show when and under what circumstances the money converted into the certificates and bonds

of the Confederate States was received, and with a suggestion that the proofs taken as to this matter were insufficient. See *Sudderth* v. *McCombs*, 65 N. C., 186.

The defendants certainly had no right to complain of not being allowed an opportunity to make proof of the source whence the money came, that was claimed to be embraced in the confederate securities, and of the time when it was received, after being warned by this court of the necessity to have evidence on those points. And in our opinion they are equally without errors in law to complain of in the judgment of this court, given upon their case, deficient in proof as it was.

It may be, and we strongly suspect that some portion of the good notes was collected in depreciated money under circumstances to justify the apparent negligence in its reception. But the misfortune is, that when opportunity was given from the June term, 1871, when the case first came to this court, down to June term, 1878, when the judgment said to be erroneous was rendered, no proof was obtained tracing the connection of those solvent ante-war notes with the confederate securities. The notes turned over, amounting to $7,716.50, were solvent, and there was time to collect and invest or change the bonds into the guardian's name before any confederate money was ever issued, and hence it was his legal duty to have on hand the amount thereof in bonds secured by good personal security or otherwise, or if received in confederate money, then to show when received and his reasons therefor.

In the absence of such proof, the court with evident reluctance proceeded to pronounce the judgment of the law upon the case as it was, and we are unable in view of the state of the proofs to conclude that any part of the money covered by the confederate securities was received under circumstances to justify its reception, and to say there was error in refusing credit therefor.

The second ground of error is, that in Allman's account, compound interest is charged on $4,541.24 (being a part of the notes turned over in 1859) from the delivery of the notes in 1859 to the first of January, 1864. The fact appears to be that the referee at first charged up the said sum with interest *after* the first of January, 1864, and that afterwards at the end of his account he estimated and added in the interest for the omitted years from 1859 to 1864, which in effect was a charge of the interest for the whole time from 1859 to the full age of the wards in 1873. As to this point there was an exception by defendants, but the record shows that the same was abandoned in the court below, and it was not insisted on in this court. If there was anything unjust in this particular, it is inadmissible to defendants to assign for error this charge for interest, after withdrawing all objections to the same from the consideration and judgment of the court.

We have carefully examined the record as regards the two errors assigned, and although injustice may possibly be done to the estate of the deceased guardian, it is not made to appear, and, consistently with the policy to have an end of litigation, the former judgment of this court must be affirmed.

No error. Affirmed.

*STATE v. PETER LEITCH.

Appeal—Practice.

Where, on an appeal in a capital case, there is no statement of the case, and no error appears on the record, it will be certified to the court below that there is no error, so that it may proceed to judgment.

(*State* v. *Ray*, 10 Ired., 29; *State* v. *Langford*, Busb., 436; *State* v. *Murray*, 80 N. C., 364, cited and approved.)

INDICTMENT for Murder tried at Fall Term, 1879, of ROBESON Superior Court, before *Seymour, J.*

Judgment was pronounced upon conviction of the prisoner, and he appealed to this court.

Attorney General, for the State.

No counsel for prisoner.

DILLARD, J. This was an indictment for murder, and on the appeal of the prisoner to this court, there being no statement of the case, it is our duty to look through the record to see if there be any error therein.

We have carefully examined the whole record and are unable to detect any error entitling the prisoner to a new trial or arrest of judgment, and in such case we can only have certified our opinion to the court below that the court may proceed to judgment. *State* v. *Ray*, 10 Ired., 29; *State* v. *Langford*, Busb., 436; *State* v. *Murray*, 80 N. C., 364.

There is no error and this will be certified to the court be-

*The judge who presided on the trial of this case (after hearing an appeal was taken) informs the Reporter, by letter, that no bond or affidavit, &c., was filed during the term, and no appeal then perfected; and no exception was made to the ruling of the court on evidence or to its charge to the jury.

low that the sentence of the law may be pronounced and executed.

PER CURIAM. No error.

STATE v. MILES HINSON.

Appeal—Practice.

No appeal lies from an interlocutory order in a criminal action. (*State* v. *Bailey*, 65 N. C., 426; *State* v. *Wiseman*, 68 N. C., 203; *State* v. *Keeter*, 80 N. C., 472, cited and approved.)

INDICTMENT for a Misdemeanor tried at Fall Term, 1879, of Anson Superior Court, before *Seymour, J.*

The indictment is drawn under the act of 1879, ch. 127, for carrying a concealed weapon. The state proved that the defendant was seen on the track of the Carolina Central railroad pointing a pistol at a train leaving Lilesville, and that he discharged the same. Defendant objected, for that, there was no evidence of concealment, exception overruled, verdict of guilty, (but no final judgment pronounced thereon) and the defendant appealed.

Attorney General, for the State.

Messrs. G. V. Strong and *Gray & Stamps*, for the defendant.

SMITH, C. J. The defendant is indicted for carrying concealed about his person a pistol in violation of the act of March 5th, 1879, and on the trial was found guilty. On inspecting the record it appears that no final judgment has been rendered, and therefore as has been repeatedly held no appeal lies. It is only in civil causes that appeals from in-

terlocutory orders are allowed. *State* v. *Bailey*, 65 N. C., 426; *State* v. *Wiseman*, 68 N. C., 203; *State* v. *Keeter*, 80 N. C., 472. The appeal must therefore be dismissed, and it is so ordered.

PER CURIAM. Appeal dismissed.

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*STATE v. GEORGE W. SWEPSON.

Appeal, when allowed in state case.

An appeal does not lie in behalf of the state in criminal actions, except where judgment is given for defendant upon a special verdict or upon demurrer to indictment or motion to quash. (The law relating to appeal and *certiorari* discussed by ASHE, J.)

(*State* v. *Lane*, 78 N. C., 547, cited, commented on and approved.)

MOTION made at Fall Term, 1879, of Wake Superior Court, before *Avery, J.*

After notice given, the state moved to amend the record, *nunc pro tunc*, of the trial of the defendant on an indictment for conspiracy and false pretence had at the spring term, 1875, of the superior court of Wake county, by making the record show that at the time the trial of the defendant was had, and a verdict of not guilty entered of record in the action, the defendant George W. Swepson was not present in said court, and that the solicitor representing the state at the said trial did not waive his presence. The motion was overruled by the court and the solicitor for the state appealed.

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

Attorney General, Mason & Devereux and *A. M. Lewis*, for the State.

Messrs. Thos. Ruffin, D. G. Fowle and *Merrimon & Fuller*, for the defendant.

ASHE, J. The question presented for our consideration is, did the state have the right to appeal from the ruling of the court below? The case has been fully and ably argued by the counsel for the state and the defendant, and numerous authorities cited, but the counsel for the state have failed to furnish us with a single state authority which has recognized the right of the state to appeal, except where judgment has been given for defendant upon a special verdict, and where a like judgment has been given upon a demurrer to an indictment or upon a motion to quash. This court in the case of *State* v. *Lane*, 78 N. C., 547, held in these cases and these only may the state appeal; but from what source the right is derived we are not informed. It seems rather to have obtained from the long practice of the courts than from any authority derived from the common law or statute. It was not given by the common law, for upon examination of the works of writers on criminal law, we have been unable to find that the practice of granting writs of error to the Crown in criminal prosecutions, has ever attained in the courts of Great Britain. Some few instances are found but they are exceptional cases, the most notable of which is the case of *Regina* v. *Chadwick*, 11 A. & E., N. S., 205, which was brought before the Queen's Bench by a writ of error at the suit of the Crown, to reverse a judgment in favor of the defendant. But in that case the whole question was upon a special verdict, and as the judgment was not reversed and the grounds on which the writ of error was maintained are not stated, it has been held not being strong authority.

By reference to Bacon's Abridgment, title, "jurisdiction of the court of King's Bench in criminal matters," the right

of granting writs of error to the Crown in criminal cases is nowhere mentioned, but it is stated that that court "by the plenitude of its power may as well proceed on indictments removed by *certiorari* out of inferior courts as on those originally commenced here."

From which it is to be inferred that cases were only brought up from inferior courts for review in that court by *certiorari*.

In Massachusetts it has been held that a writ of error does not lie in a criminal case in behalf of the commonwealth. *Commonwealth* v. *Cummings*, 3 Cushing, 212. In New York in the recent case of *People* v. *Corning*, 2 Comst., 1, the subject was fully considered and elaborately reviewed in the court of appeals, and that court came to the conclusion that a writ of error would not lie in behalf of the people after a judgment for the defendant. In Tennessee it has been decided by the supreme court of errors and appeals, that a writ of error or appeal in nature of a writ of error would not lie for the state in a criminal case. *State* v. *Reynolds*, 2 Haywood, (Tenn. Rep.,) 110. The same doctrine has been held in Virginia, *Commonwealth* v. *Harrison*, 2 Virginia Cases, 202, and also in Illinois, *People* v. *Dilk*, 1 Scammon, (Ill. Rep.,) 257. All these cases were decided in states where the common law was in force.

It is contended on the part of the state that if the right of appeal is not authorized by the common law, that it is given by section eight, article four of the constitution. But in the case of *State* v. *Lane*, *supra*, this court gave a construction to that very section, and held that it did not give an appeal to the state, and assigned the reason that as the state is not mentioned in the section, it was not intended to apply to the state as a party to a criminal prosecution. And this construction is strengthened by the act of 1876–'77, establishing inferior courts, in which provision is made for appeals to the superior courts, but is silent as to any appeal on

the part of the state, leaving its right of appeal as established by the decisions and practice of the courts.

Nor is the right of appeal given the state by any statute; not by section twenty-one, chapter four of the Revised Code, for although it declares that an appeal may be had in any cause, civil or criminal, it cannot be construed to give an appeal to the state; it provides that an appeal may be had on giving bond and adequate security, and as the state never gives a bond, it is evident the appeal given by that section in criminal cases applies to defendants and not to the state. And no such right can be claimed from chapter 17, section 296, *et. seq.*, of Battle's Revisal, (title xiii, ch. 1,) for it is made to apply expressly and exclusively to civil actions.

We are of the opinion the state had no right of appeal in this case. The appeal therefore is dismissed. Let this be certified to the superior court of Wake county.

PER CURIAM. Appeal dismissed.

STATE v. CALLIS PADGETT.

Appeal—Setting aside Verdict.

It is an unwarrantable innovation in practice for a judge to set aside a verdict of "guilty" in a criminal action, and direct the entering of a verdict the reverse of that found by the jury; but as the regular and legal action of the court below ends with the setting aside of the first verdict, and the case cannot be re-heard on its merits, no appeal is allowed the state.

(*State* v. *Jones*, 78 N. C., 420; *State* v. *Lane*, *Id.*, 547; *State* v. *Keeter*, 80 N. C., 472, cited and approved.)

STATE *v.* PADGETT.

INDICTMENT for Removing a Fence tried at Fall Term, 1879, of RUTHERFORD Superior Court, before *Buxton, J.*

From the ruling of the court below, *Montgomery,* solicitor for the state, appealed.

Attorney General, for the State.

The defendant was not represented in this court.

SMITH, C. J. The defendant is indicted for violating the act of 1846, in removing a fence around and enclosing the cultivated field of Henry Hodge and Oliver Hicks. Bat. Rev., ch. 32, § 92. The jury returned a verdict of guilty, subject, as the record sets out, to the opinion of the court upon a case agreed, the facts of which are as follows:

It is agreed that Henry Hodge and Oliver Hicks, the alleged owners of the land, claimed under a grant from the state in 1875, and that two months before the bill was found, they had cleared and fenced and burned off a half acre, intending to break it up and sow turnips. All this was done in two days' time, and was for the purpose of asserting ownership. It is also agreed that the defendant is a *bona fide* claimant to the same land, under a proper title older than that of Hodge and Hicks, and was in occupation of part of the land covered by his deed, but not of that part claimed by them. The defendant, after being forbidden, pulled down the fence and carried away the rails, and for so doing he is indicted. The court thereupon set aside the verdict, and directed a verdict of not guilty to be entered, and from this ruling the solicitor appeals.

This is certainly a novelty in criminal procedure, and we know of no precedent which authorizes a judge to enter upon the record a verdict the reverse of that found by the jury and ordered to be set aside. It was entirely competent for His Honor to set aside the verdict rendered, for want of evidence or other sufficient cause, and the exercise of this

discretion is not the subject of review or correction. If, in his opinion, the facts proved do not constitute the offence charged, the solicitor could discontinue the prosecution by entering a *nolle prosequi*, or, upon a new trial, a verdict of acquittal be rendered. See *State* v. *Jones*, 78 N. C., 420.

The Attorney General, in his argument, treated the case as a special verdict, finding the facts and submitting the question of the defendant's guilt to the judgment of the court. But this is not the form nor the effect of the record.

"A special verdict," says RUFFIN, C. J., "is in itself a verdict of guilty or not guilty, as the facts found in it do or do not constitute in law the offence intended. There is nothing to do on it but to write a judgment thereon for or against the accused, that is, upon the supposition that the court deems the verdict as found to be sustained by the evidence. A judgment on it leaves the matter of law distinctly open to review in a higher court. It is for this reason principally that special verdicts are given in criminal cases, so that the state as well as the prisoner can have the matter of law solemnly decided. But in this case, instead of proceeding to judgment on the verdict given by the jury, the superior court set that aside and entered a general verdict of 'not guilty.'" "When the verdict was set aside," he adds, "the power of the superior court ended, and there is no power here to reinstate it." *State* v. *Moore*, 7 Ired., 228.

The legal and regular action of the court below terminated with the setting aside of the verdict, and in this state of the case no appeal lies and the merits cannot be enquired into. *State* v. *Bailey*, 65 N. C., 426; *State* v. *Keeter*, 80 N. C., 472.

The right of appeal is allowed the state only in cases where a special verdict is rendered and judgment given for defendant, or a like judgment upon his demurrer, or motion to quash, or to arrest the judgment, and in no other. *State* v. *Lane*, 78 N. C., 547.

The appeal must therefore be dismissed, and it is so ordered.

PER CURIAM. Appeal dismissed.

STATE v. JOHN KEETER and another.

Appeal—Judgment in arrest, final.

1. On appeal by the state from an order arresting judgment in a criminal action, the transcript of the record erroneously showing the judgment below to be a "new trial," instead of "arrest of judgment," the appeal will be dismissed.
2. On such dismissal certified to the court below, it is not error in the judge to refuse to pronounce judgment upon the verdict, the adjudication of the court arresting judgment being final until reversed on appeal.

(*State* v. *Lane*, 78 N. C., 547, cited and approved.

APPEAL by the State from the refusal of a motion for judgment, made at Fall Term, 1879, of HENDERSON Superior Court, by *Graves, J.*

Attorney General, for the State.
The defendants not represented in this court.

DILLARD, J. The defendants were indicted and convicted of forgery, at fall term, 1878, of Henderson superior court, and on the appeal of the solicitor for the state, the record showed the verdict of the jury to be set aside, and a new trial granted, while the statement of the case of appeal made out by the judge showed a verdict of guilty and judgment arrested. Such repugnancy appearing between the

record and the judge's case, the record controlled, and the appeal was dismissed on the ground that there had been no final adjudication. See the case as reported in 80 N. C., 472.

On the certificate of dismissal going down, at fall term, 1879, on motion of the solicitor for the state, and with the assent of the defendants, then present, the record of the cause was amended so as to show verdict of guilty and judgment arrested, and appeal by the state, instead of showing as it did verdict set aside and new trial granted. This being done, the solicitor for the state moved for judgment, and His Honor refused the motion and the state again appealed.

There was no error in refusing the motion of the state for judgment. The record after being made complete speaks a verdict of guilty by the jury, and arrest of judgment by the court. A judgment is the sentence of the law on facts charged in a bill of indictment sufficient in law to constitute the offence, and found by the jury or admitted by the accused, and appearing in the record. If these requisites appear of record, it is the duty of the court either to grant a new trial to a defendant or to pronounce judgment annexing the penal consequences prescribed by law. But if there be a substantial defect, in either of these material particulars, apparent on the record, then no penal consequence attaches, and the law speaking through the judge will arrest judgment on the verdict.

The arrest of a judgment is a final adjudication, and the state may appeal therefrom as decided in *Lane's* case, 78 N. C., 547, and if not reversed on appeal, it is a full discharge from that bill.

The appeal heretofore in this case was dismissed as being taken from an order granting a new trial; and so, that decision left the arrest of the judgment in the court below untouched, and it was in that situation when the judge refused the motion of the state for judgment from which the

appeal comes. So long as that adjudication stands against pronouncing judgment, His Honor had not the power to pronounce any judgment on the verdict. There is no error. Let this be certified.

PER CURIAM. No error.

STATE v. BARTLEY MILSAPS.

Assault and Battery—Judge's Charge.

1. In assault and battery, it appeared that defendant using insulting language picked up a stone about twelve feet from prosecutor but did not *offer* to throw it; *Held*, no assault, but only violence menaced.
2. In such case it was error in the judge to charge the jury "that if the acts and words of defendant were such as to put a man of ordinary firmness in fear of immediate danger, and defendant had the ability at the time to inflict an injury, he would be guilty."

(*State* v. *Myerfield*, Phil., 108; *State* v. *Mooney*, Id., 434, cited and approved)

INDICTMENT for assault and battery tried at Spring Term, 1879, of GRAHAM Superior Court, before *Gudger, J.*

The prosecuting witness testified that defendant on the occasion named was at his (prosecutor's) house, and on hearing a "jower" asked who began it; one Rogers who was present replied that defendant commenced it. Witness told the defendant he must stop, and defendant said "it is a lie, I was not making a fuss." Thereupon witness ordered defendant to go out of his house; he did not go, and witness pushed him out. After he got in the yard, "more fussing occurred" and witness told him to go out of the yard. He did not go immediately, but after some delay got over the fence into a lane leading to a public road and picked up a stone about ten or twelve feet from the witness, and called

him a horse thief, a rogue, and other insulting names. Witness told him to leave, and he said he would when he got ready. He did not offer to throw the stone, and made no resistance in the house or yard. The defendant excepted to the charge of the court which is set out in the opinion. Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.
Defendant not represented in this case.

DILLARD, J. This was an indictment for an assault, and to constitute that offence there must be an attempt to strike, or at least an offer to do so. An offer to strike is the lowest degree of violence begun which is indictable. An attempt includes an offer and is an advance beyond, towards a battery. The difference is illustrated in the books by the example, if one in anger draw back his fist to strike, being within striking distance, it is an offer; but if he draw back and make a lick and miss, it is an attempt. *State* v. *Myerfield*, Phil., 108.

In our case the stone was not thrown, and therefore there was no attempt, and so the guilt of defendant depends on the sufficiency of the offer as proved by the evidence to constitute an assault. The case of appeal states that prosecutor ordered the defendant to leave his house, and that on his failure to go out, he took hold of him and put him out. When the defendant was in the yard, angry words passed between the parties, and the prosecutor ordered him to go out of his yard, and thereupon defendant went out into a lane leading from prosecutor's house to the public road; and in the lane, when about ten or twelve feet from the prosecutor, the defendant picked up a stone and called the prosecutor a horse thief and other insulting names. On being ordered away from the lane defendant replied he would go when he

got ready. The statement is that defendant *did not offer to throw the stone.*

This case is very similar in its facts to the case of the *State* v. *Mooney*, Phil., 434. There, the defendant ordered the prosecutor to leave his house and he seized a gun but did not present it, and as the prosecutor was going away, he followed and picked up an axe some twenty-five yards from the prosecutor but made no offer to use it, and upon those facts it was held no assault, but a threat merely. Here, as the defendant did not offer to throw the stone, there certainly was no assault. The language used was insulting and invited an attack, and the picking up of the stone at most amounted to no more than putting himself in readiness to use it, if attacked.

His Honor charged the jury that if the acts and words of defendant were such as to put a man of ordinary firmness in fear of immediate danger, and if defendant had the ability at the time to inflict immediate injury, he was in law guilty of an assault. We think His Honor erred in giving this instruction, and that instead thereof, he should have told the jury that the acts and words of defendant did not in law make a case of assault, but only a menace of violence. For this error there must be a new trial. Let this be certified.

Error. *Venire de novo.*

STATE v. MARION BURKE.

Assault and Battery—Evidence—Relevancy "Molliter Manus."

1. Evidence to show that the brothers of a prosecuting witness were guilty of the same offence for which the defendant was then on trial should be rejected as irrelevant.

2. Where, according to the testimony of the witness most favorable to the defendant, he is guilty, it is not error to charge the jury that if they believe the testimony of any witness examined, the defendant is guilty.
3. An unarmed trespasser on one's premises must be requested to leave, and gentle means of removal must be employed, before a resort to blows.

INDICTMENT for an Assault and Battery, tried at July Special Term, 1879, of RANDOLPH Superior Court, before *Avery, J.*

The defendants, Marion Burke and Patsey Burke (his mother) were charged with an assault upon one Ed. P. Smith. From the judgment pronounced upon the verdict of guilty, they appealed to this court. The exceptions taken on the trial are sufficiently set out in the opinion.

Attorney General, for the State.

The defendants not represented in this court.

ASHE, J. There were several witnesses examined on the part of the state and the defendants. Ed. Smith, a witness examined on the part of the state, was asked by defendants' counsel, if he knew that his brothers had been indicted for the same offence as that for which the defendants were then indicted. Upon objection the evidence was excluded by His Honor because it was irrelevant. Their counsel then proposed to introduce the record of the indictment, trial and conviction of the brothers of the witness, but His Honor refused to admit the evidence upon the ground of its irrelevancy; and the ruling of the court upon both points was excepted to by defendants.

His Honor charged the jury that if they believed the testimony of any witnesses that had been examined, the defendants were both guilty. The charge was also excepted to by the defendants.

We are of opinion there was no error in the rulings on

the exclusion of the evidence, or in the charge to the jury. The indictment and conviction of the Smiths were not competent evidence for the Burkes, for it did not follow that because the Smiths were guilty, therefore the Burkes were not guilty. Their guilt or innocence depends entirely upon their conduct in connection with the transaction.

When a judge makes a charge like that in this case, the rule is to consider the testimony of that witness who gave the testimony the most favorable to the defendants. The testimony of Thomas Burke, who was the son of Patsy Burke, and the brother of the other defendant, was the most favorable to the defendants of any of the witnesses. He testified that Ed. Smith came into his father's yard about the same time, with several others. His mother told him three times to come no further, but Ed. walked on. The defendant, Marion, then pushed Ed. Smith, and his mother, Patsy Burke, struck him with a broom just as he pushed Marion back.

The violence used by the defendants to Ed. Smith, according to the evidence of this witness, was in excess of the force the law permits to be employed under such circumstances. After forbidding Smith to come into the yard, the defendants should have laid their hands gently upon him to remove him. They had no right, in the first instance, to push and strike him with a broom. They are both guilty. There is no error. Let this be certified.

PER CURIAM. No error.

STATE v. L. D. TAYLOR and another.

Assault—Defence of Dwelling—"Molliter Manus."

Ordinarily the occupant of a tenement must resist the entrance of a trespasser with gentle hands and a request to leave, but if the intruder defiantly stands his ground, armed with a deadly weapon, the occupant may at once resort to physical force; and it is for the jury to decide whether more force was used than was necessary.

(*State* v. *Davis*, 80 N. C., 351, cited and approved.)

INDICTMENT for an Affray tried at Fall Term, 1879, of WAKE Superior Court, before *Avery, J.*

The defendant and one Adolphus Williams were indicted for an affray; both were found guilty, and the defendant, Taylor, moved for a new trial on the ground of misdirection in the charge of the court to the jury. The motion was overruled, and judgment pronounced against both defendants, from which the defendant, Taylor, appealed. The grounds of the exception are sufficiently set out in the opinion.

Attorney General, for the State.
Mr. T. M. Argo, for defendant.

ASHE, J. The alleged affray occurred in the house of the defendant, and only three witnesses were examined, two for the state and one for defendant.

The court charged the jury that if they believed the testimony of any of the witnesses on behalf of the state or defendant, both defendants were guilty; that according to the testimony of any witness examined both defendants were guilty. And after the case was submitted to the jury with this charge, they came into court and asked His Honor to instruct them as to the amount of force that might be

lawfully used by the defendant Taylor, in order to expel the other defendant from his house. The court told the jury that question did not arise from the testimony, and that it was not made necessary or proper by the testimony of any witness who had been examined for the court to instruct them upon this point. To this ruling of His Honor the defendant excepted.

If then there was any one witness examined who testified to a state of facts, taken by itself, from which it might reasonably be inferred that the purpose of Taylor in advancing on Williams, the other defendant, with the whip-staff, was to remove him from his house, that question should have been left to the jury, and then the further question would necessarily arise as to the amount of force the defendant might use to accomplish his purpose. How then stands the case?

One witness, Bryan Smith, testified that the first he saw was Williams at the door of Taylor's house "cutting or reaching into the door and Taylor came out striking at Williams with a whip-staff, while Williams was cutting at Taylor with a razor; that Williams walked backwards cutting with his razor some ten or fifteen feet from Taylor's door, and Taylor continued to advance upon him with his whip-staff." When a trespasser or unwelcomed visitor invades the premises of another, the latter has the right to remove him, and the law requires that he should first request him to leave, and if he does not do so, that he should lay his hands gently upon him, and if he resists he may use sufficient force to remove him, taking care however to use no more force than is necessary to accomplish that object. But if the intruder defiantly stands his ground, armed with a deadly weapon, the doctrine of *molliter manus* does not appply, and the owner may at once resort to physical force, and it is a question for the jury to decide whether he used more force than was necessary. *State* v. *Davis*, 80 N. C., 351.

As Williams was at the door of the defendant's house, reaching in the door and cutting with a razor and the defendant was striking at him with a staff, we think the jury might have been warranted in coming to the conclusion that it was the purpose of the defendant to expel him from his house as he had the right to do; and then it would have been a material inquiry for the jury whether the defendant had used more force than was necessary. In this view of the case it was proper for the jury to ask the court for instructions as to the amount of force that might lawfully be used by the defendant, Taylor, in order to expel Williams from his house, and we are of the opinion it was the duty of the court to give the instructions, and in its failure to do so there was error.

Let this be certified to the superior court of Wake county that a *venire de novo* may be awarded to the defendant.

Error. *Venire de novo.*

STATE v. CHARLES UTLEY.

Attempt to Steal—Indictment.

In an indictment for an attempt to steal, it is not necessary to specify the particular articles intended to be stolen.

INDICTMENT for an Attempt to steal, tried at Fall Term, 1879, of WAKE Superior Court, before *Avery, J.*

There were two counts in the bill of indictment, and the solicitor not insisting upon the first, the defendant was tried upon the second count, which is as follows: The jurors, &c., present that Charles Utley, on the 23rd of June, 1879, did attempt to commit an offence prohibited by law, to-wit, did

attempt to feloniously steal, take and carry away from the dwelling house of one John J. Norris, there situate, the personal goods, chattels and moneys of said Norris, therein contained, by then and there being in said dwelling house, and by ransacking the drawers, chests, bureau and closets in said dwelling house, with intent the personal goods, chattels and moneys of said Norris then and there being, feloniously to steal, take and carry away; but said Utley then and there did fail in the perpetration of the larceny of the personal goods, chattels and moneys of said Norris in the said dwelling house then and there being, and was intercepted and prevented from feloniously stealing, taking and carrying away the personal goods, chattels and moneys of said Norris in the said dwelling house, contrary to the statute in such case made and provided, and against the peace and dignity of the State.

The jury rendered a verdict of guilty, and the defendant moved in arrest of judgment, on the grounds that the bill did not set forth specifically, or with sufficient certainty describe, the personal property which the defendant was charged with attempting to steal, and that the articles should have been described with the same certainty as is required in an indictment for larceny. The court overruled the motion and pronounced judgment, from which the defendant appealed.

Attorney General, for the State.
Mr. A. M. Lewis, for the defendant.

DILLARD, J. The defendant was indicted for an attempt to steal, take and carry away from the dwelling house of John J. Norris the goods and chattels and moneys of the said Norris in said house contained, and an appeal being taken from the refusal of the judge to arrest the judgment, it becomes our duty to examine and consider the whole re-

cord, and to see whether there be any error in the overruling of the motion in arrest of judgment, or any defect otherwise in the bill of indictment not authorizing the court to proceed to judgment.

At common law, an attempt to commit a felony or a misdemeanor, whether it be such at common law or by statute, is indictable, and to constitute the offence it is essential that there be an intention to commit the particular crime or misdemeanor, and that some act be done directly tending and apparently adapted to its accomplishment. 2 Whar. Cr. Law, §§ 2686, 2694; Roscoe Cr. Ev., 100; 1 Rumel on Crimes, 44, 47.

The indictment in this case contains all the facts which enter into and constitute the offence charged. It alleges an intent to steal, an act done, dictated by the intention and reasonably adapted to effectuate the intent, by an unlawful entrance into the house of Norris, and an examination into the drawers, chests and closets therein, and such as would apparently have resulted in a larceny if not prevented by interruption or some other occurrence independent of the will of the defendant; and therefore as it seems to us, the indictment was legally sufficient, at least in its general frame. But the defendant, in his motion in arrest, makes the point that the bill is bad for uncertainty in this, that it does not specify the particular goods and chattels the defendant had an intent to steal.

In our opinion the offence was complete by a general intent to steal, and by the act of entrance into Norris' house and ransacking his drawers, chests and closets towards the commission of the larceny, and it was not necessary to specify and describe any particular articles intended to be stolen. It was equally a public injury, whether the attempt was with a general intent to steal, or upon a particular intent. And the charge made of a general intent sufficiently notified the defendant for all purposes of preparing his de-

fence, and in that form it was the only manner in which practically any protection could accrue to the public from the law making attempts to steal criminal. Evidently, if it be held necessary to specify in the bill the particular articles intended to be taken by the attempting thief, it would be a folly ever to indict for such attempts at all, for the state could never prove the particular intent moving the accused, provided he kept his mouth shut, and did not otherwise communicate what he intended to take. Upon authority, as well as upon reason, we think the indictment is not liable to be held defective on the ground of the omission to specify the articles intended to be stolen.

In *Regina* v. *Collins*, 2 Bennett & Heard's Lead. Cr. Cases, 478, the defendant was indicted for an attempt to commit a felony by putting his hand into another's pocket with intent to steal the *property in said pocket then being*, and there was no proof that there was anything in the pocket, the conviction was quashed for want of such proof. The annotator to this case in 2 Heard, *supra*, reconciles the dicision with other English cases by the suggestion that the decision in *Regina* v. *Collins* was required by the language of the indictment, and proceeded on the ground that as the intent charged was an intent to steal "*property in said pocket then being*," there must be proof of the property in the pocket as laid.

The same view of *Collins'* case is taken in 2 Whar. Cr. Law, § 2698, and as thus explained the decision in that case, while it establishes that if a particular intent be charged to steal *property in the pocket then being*, there must be proof of the presence of property in the pocket, also establishes by implication at least that it might and would have been otherwise if the indictment had charged an intent to steal generally as in our case.

We therefore deduce the English rule to be that an indictment may be drawn charging the intent to steal gener-

ally, and without any mention of the specific articles intended to be stolen. And in harmony with this rule the law is generally held in America.

In Whar. Cr. Law, §§ 292 and 1282, it is said that in indictments for attempts to commit crimes in themselves indictable, it is not necessary to observe the same particularity as is required in indictments for the commission of the offence itself. And as illustrative of that position, he says an indictment for an assault with an intent to steal from the pocket is good without stating the goods or moneys intended to be stolen. In accordance with this statement of the rule, it has been decided in various states that the offence of attempts to commit larceny is complete by an intention to steal and an act done in pursuance thereof apparently efficient to carry out the the pupose, and it is not necessary in the bill of indictment to aver the specific articles intended to be taken, as such fact is extrinsic and not essential to constitute a criminal attempt. *State* v. *Wilson*, 30 Conn., 500; *Comm.* v. *McDonald*, 5 Cush, 365; *People* v. *Bush*, 4 Hill, 133; *Spencer* v. *Ohio*, 13 Ohio, 401; *Hunter* v. *State*, 29 Indiana, 80.

In some of these cases it is true the proceeding was under statutes, but they were in affirmance of the common law, making generally only a change in the punishment, and not altering the essential facts necessary to constitute the offence nor the rules at common law prescribing the requisites of indictments.

We are of opinion therefore that the allegation of specific goods or moneys as being intended to be stolen by the defendant was intrinsic and not essential to the offence of attempt to steal, and that the indictment therefore need not have contained any averment or charge as to such specific articles.

There is no error. Let this be certified to the end that the court below proceed to judgment.

PER CURIAM. No error.

STATE v. WILLIAM YEARBY.

Butcher, not a dealer under revenue act.

One who carries on the business of a butcher is exempt from the tax imposed by section twelve, schedule B of the revenue act of 1879. He is not a *dealer* within the meaning of the act.

(*State* v. *Chadbourn*, 80 N. C., 479, cited and approved.)

INDICTMENT for a Misdemeanor tried at January Special Term, 1880, of WAKE Superior Court, before *Avery, J.*

The solicitor for the state appealed from the ruling of the court upon the facts found by a special verdict, which is sufficiently set out in the opinion.

Attorney General, for the state.
Mr. A. M. Lewis, for the defendant.

SMITH, C. J. The defendant is charged with a violation of sections 12 and 32, schedule B, of the act of March 14th, 1879, entitled "an act to raise revenue," in failing to take out license to practice the profession of a butcher, and the jury render a special verdict, the material facts of which are found as follows:

The defendant between the first days of January and July of the year 1879 in the city of Raleigh carried on the business of a butcher, and was engaged in buying oxen, steers, cows, hogs and sheep, which he slaughtered, cut up and sold in pieces to various purchasers at his stall, without having any license or paying any tax therefor. Upon this finding the court adjudged the defendant not guilty and the solicitor appealed.

In the recent case of *State* v. *Chadbourn*, 80 N. C., 479, we had occasion to examine and construe a similar provision in the revenue act of March 10th, 1877. The defendants in

that case were proprietors of a steam saw and planing mill, and their business was to buy timber, and by sawing and planing, convert it into lumber and boards which they sold in the market. It was held that their calling was not within the purview of the act and they were not liable to the tax. The occupation of a butcher who purchases live animals suitable for food, and, after slaughtering and cutting them, sells in pieces at his stall, is not dissimilar. He does not buy and sell *the same article and in the same condition* as a mere *trader*. He buys a cow, a hog, or a sheep; he sells beef, pork or mutton. His labor and skill have been employed in making the change, and enhance the price. The reasons assigned for the exemption of the manufacturer of boards apply with equal force to the butcher. There is however some difference in the words used in the corresponding sections of the revenue laws. In place of the expression, "and every other *trader* who, as principal or agent, carries on the business of buying *or* selling goods, wares or merchandise," used in the former act, the latter substitutes "and every other *dealer* who shall buy *and* sell goods, wares or merchandise," and while, in the interpretation of the section, the opinion lays stress upon the word *trader*, that substituted in its place, and of the same import, as defined by Worcester, and with the like associations, must be allowed the same force and effect. If the general assembly had intended to make the section more comprehensive, language more direct and clear would have been employed to convey their meaning. On the contrary by coupling the two acts of *buying and selling*, as descriptive of the dealer to be taxed, instead of disjoining them, as before when applied to the *trader* in the act of 1877, it must be inferred that the purpose was to render the law more explicit, and in conformity with the construction put upon it. We must therefore adhere to our former decision and declare the butcher also exempt from the tax imposed in section 12 of schedule B.

No error. Affirmed.

STATE v. JEREMIAH VESTAL.

Challenge—Misnomer—Practice.

1. Where the disqualification of a juror has not been ascertained until after he has been passed to and accepted by the defendant, it is not error for the court to *then* allow a challenge by the state.
2. Slight variances in the name of a defendant, appearing in different parts of the record in a criminal action, will not sustain a motion for a new trial, or to arrest judgment. The objection, if available at all, can only be made by plea in abatement.

(*State* v. *Jones*, 80 N. C., 415; *State* v. *Boon*, *Id.*, 461, cited and approved.)

INDICTMENT for Fornication and Adultery tried at Fall Term, 1879, of YADKIN Superior Court, before *Gilmer, J.*

The defendant and one Lou Royal were charged and convicted of fornication and adultery, and appealed from the judgment of the court below.

Attorney General, for the State.
Messrs. Watson & Glenn and *J. M. Clement*, for defendants.

SMITH, C. J. While the jury were being formed and before they were impaneled, and after the solicitor and the defendant's counsel had announced that they had no objections to those in the box, a juror rose in his place and stated that he had, within the past two years, served on a jury in this court. He was ordered by the court to resume his seat and remain unless objected to by one or the other side. Thereupon the defendant's counsel said they had no objection and the solicitor asked leave to interpose a peremptory challenge for the state, and this after objection from the defendants was allowed by the court and the juror directed to withdraw.

The only exception presented in the record is to this ruling of the court, and we think it is entirely untenable. Indeed the point has been passed on and determined in two cases recently before this court. *State* v. *Jones*, 80 N. C., 415, and *State* v. *Boon*, *Id.*, 461. In the former, a juror was called, passed to the prisoner and by him challenged for cause. On enquiry into the cause it appeared that the juror had formed and expressed an opinion that the prisoner was not guilty. Thereupon the challenge was withdrawn and the state permitted to challenge, and the juror ordered to stand aside. In passing on the exception to this ruling the court say: "He (the juror) was not an impartial juror and it was the right and duty of the court to set aside the juror at any time before the jury were impaneled." In the other case, the juror had been accepted by the prisoner, and when about to be sworn, made known the fact that he was related to both the deceased and the prisoner, and at his request was allowed to retire. In reference to this action of His Honor, the court say: "It is the duty of the court to see that a fair and impartial jury are impaneled, subject to the right of the prisoner to his peremptory challenges." These were trials involving life, and the rule so just in itself and so clearly expressed, cannot be relaxed in its application to misdemeanors.

In the argument our attention was called to the variance in the name of the female defendant as she is described in the bill of indictment and in the judgment and other parts of the record, and her counsel moved in arrest of judgment or for a new trial. If this slight variance be not due to the inadvertence of the clerk in making out his transcript, it is not ground for either motion—not in arrest of judgment because no error is apparent in the record, nor for a new trial because we cannot assume that she is not known by either name. It is not pretended that the persons indicted, tried and convicted are not the same against whom

sentence has been pronounced, and this identity is the only material matter involved. If either party is misnamed the defence can only be made available by a plea in abatement, which must precede the plea of not guilty, and this as an answer and denial of the accusation, is an implied admission of the correctness of the name.

There is no error. This will be certified that judgment may be rendered on the verdict and it is so ordered.

PER CURIAM. No error.

STATE v. JOHN JACKSON and others.

Conspiracy—Practice—Evidence—Plea in Abatement—Punishment.

1. Regularly, proof of a conspiracy should precede proof of the guilt of the parties charged, but it rests in the sound discretion of the presiding judge to reverse this order, when thereby the case can be more conveniently developed.
2. When a case is continued, without requiring the presence of the defendant in court to enter his pleas, he is entitled, on his arraignment at a subsequent term, to plead a misnomer in abatement, or to enter any other plea which was open to him at the former term.
3. A conspiracy to charge one with infanticide, being only a common law misdemeanor, is not punishable by imprisonment in the penitentiary.

(*State* v. *Dean*, 13 Ired., 63; *State* v. *Earwood*, 75 N. C., 210; *State* v. *Christianbury*, Busb., 46, cited and approved.)

INDICTMENT for Conspiracy, tried at Fall Term, 1879, of WAKE Superior Court, before *Avery, J.*

The defendants, John Jackson, Anthony Cotten, Chaney Utley and Grace Burt, are charged with conspiring to impute to one Louisa Pierce the crime of infanticide, and to

cause her to be arrested, prosecuted and punished therefor. The indictment was found at June term, 1879, to which the defendants had been bound over, or were confined in prison from inability to give bail, and the cause without further action on it was continued. When the trial came on at August term following, the defendant, John Jackson, proposed to plead in abatement for misnomer, but was refused permission to do so, His Honor being of opinion that the plea should have been put in at the preceding term. Thereupon the defendants pleaded not guilty, and upon the issues were convicted. The other exceptions disclosed in the record are as follows:

1. The husband of Louisa Pierce, W. E. Pierce, was permitted to prove that his wife, in the presence of the defendant, Chaney Utley, said she had been delivered of still-born twins, and their bodies were then under the bed.

2. The witness, after objection from said Chaney, testified to a statement of Jackson that he had been told by his co-defendant, Cotten, of the reported murder.

3. The witness was allowed to show a search on the premises of Jackson and the finding on the hearth and in the fireplace the bones and teeth of some small animal.

4. Louisa Pierce testified to a declaration of the defendant, Grace Burt, when Cotten and Chaney were in the yard at the time looking towards them—"It is not Mr. Jackson; keep your eye on these hawks in the yard."

5. While the testimony was given in, tending to implicate some of the defendants, it was objected by their counsel that no further testimony should be received until the existence of the conspiracy was proved, or sufficient evidence thereof given to be submitted to the jury. In answer to this the solicitor stated that he expected to prove the guilt of the several defendants by their acts and declarations.

No objection was made to the charge of the court and no instructions asked. Verdict of guilty. Judgment that de-

fendant Jackson be imprisoned in the State's prison for ten years, Utley for eight years, and Cotten for five years. Appeal by defendants. Judgment suspended as to defendant Grace Burt.

Attorney General, and *R. G. Lewis*, for the State.

Messrs. Bledsoe & Bledsoe and *W. P. Batchelor*, for defendants.

SMITH, C. J. We must assume from this acquiescence, and in the absence of any complaint, that when the testimony was all in and it was left to the jury to pass upon the proof of the offence and the complicity of the defendants in committing it, the evidence was reasonably sufficient to establish their guilt and warrant their conviction. Thus considered, the point presented in all the exceptions, except the third, and directly in the last, is, that the combination and common design imputed to the defendants should be first shown, and until this is done, it is irregular and inadmissible to enquire into the particular criminal conduct of the parties accused.

Although the usual and more orderly proceeding in the development of a conspiracy is to establish the fact of its existence, and then the connection of the defendants with it, yet the conduct of the trial and the order in which the testimony shall be introduced, must rest largely in the sound discretion of the presiding judge, and if at the close of the evidence, every constituent of the offence charged is proved, the verdict resting thereon will not be disturbed. In our opinion the defendants have no just grounds of complaint on account of this action of the court.

It is a rule well established that all who engage in a conspiracy, as well as those who participate after it is formed, as those with whom it originates, are equally liable, and the acts and declarations of each in furtherance of the common

illegal design are admissible against all. *State* v. *Dean*, 13 Ired., 63; *State* v. *Earwood*, 75 N. C., 210.

The doctrine is thus lucidly stated by an eminent author: "Every one who does enter into a common purpose or design" (referring to a conspiracy) "is equally deemed in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others, in furtherance of such common design. Sometimes for the sake of convenience the *acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy*, the prosecutor undertaking to furnish such proof in a subsequent state of the cause. But this *rests in the discretion of the judge*, and is not permitted except under particular and urgent circumstances." 1 Greenl. Ev., § 111.

In a recent case the very objection was made that proof of the conspiracy must precede proof of the guilt of the parties charged, and the reversal of this order in the introduction of the evidence was assigned for error, and the court declared that in this ruling "there was obviously no error committed," and it is added "no authority is cited to show that there was." *People* v. *Brotherton*, 2 Green Cr. Law Rep., 444.

We are unable to see the force of the third exception or any ground upon which it can be sustained. The conviction therefore of the appellants Anthony Cotten and Chaney Utley must stand.

But it was erroneous to refuse to allow the plea in abatement when tendered. The defendants were arraigned at August term and then the opportunity afforded them to set up their defence. An "arraignment," says LORD HALE, "is nothing but the calling of the offender to the bar of the court to answer the matter charged against him by indictment or appeal. 2 Hale's P. C., 216. "If the prisoner hath any matter to plead either in abatement or in bar of the

indictment, *misnomer*, *auter fois*, *acquit*, a pardon, &c., then he pleads it without immediately answering the felony." *Ibid*, 219. The defendant Jackson being denied the right to put in his plea when offered, is entitled to have this erroneous ruling corrected, and to this end a new trial must be ordered as to him.

There is error in the judgment of the court whereby the defendants are sentenced to imprisonment in the state's prison, each for a different term of years, which is unauthorized by law. The only kinds of conspiracy for which a statutory punishment is prescribed are those mentioned in Bat. Rev., ch. 32, §§ 142, 143, 147, 152 and 153, in neither class of which is that described in this indictment included. It is consequently but a misdemeanor at common law for which the offender may be fined and imprisoned in the county prison; though in the present case one of peculiar atrocity in the object aimed at and in the means contemplated and attempted to accomplish that object. "Conspiracy is a misdemeanor even in those cases, when its object is the commission of a felony." 2 Bish. Cr. Law, § 231.

The offence is not embraced in section 120 of the Revised Code, ch. 34, the latter clause of which (changed as brought forward in Bat. Rev., ch. 32, § 108, and adopted to the existing law) provides that "punishment of the pillory shall be used only for crimes that are infamous or done in secrecy and malice or done with deceit and intent to defraud." *State* v. *Christianbury*, Busb., 46.

This section was intended to protect misdemeanors, not of the kind mentioned, from the common law punishment of the pillory and thus to restrain the import of the preceding words. But as all corporal punishment is abolished and imprisonment in the state's prison or county jail substituted in its place, the clause becomes practically inoperative. Bat. Rev., ch. 32, § 29.

The judgment rendered is therefore erroneous, and the

court below will proceed further in the cause in accordance with the law as declared in this opinion, and it is so ordered.

PER CURIAM. Error.

STATE v. R. J. BASS and Samuel Jones.

Discharge of jury before verdict, in felonies not capital.

In misdemeanors and in all felonies not capital, the presiding judge has the discretion to discharge a jury before verdict in furtherance of justice. He need not find facts constituting the necessity for such discharge, nor is his action reviewable.

(*State* v. *Jefferson*, 66 N. C., 309; *Alman*, 64 N. C., 364; *Honeycutt*, 74 N. C., 391; *McGimsey*, 80 N. C., 377; *Morrison*, 3 Dev. & Bat., 115; *Weaver*, 13 Ired, 203; *Tilletson*, 7 Jones, 114; *Johnson*, 75 N. C., 123; *Wiseman*, 68 N. C., 203; *Davis*, 80 N. C., 384, cited, distinguished and approved.)

CERTIORARI granted on petition of defendants at January Term, 1880, of THE SUPREME COURT.

This was an indictment for burglary and larceny tried at Fall Term, 1879, of HALIFAX Superior Court, before *Avery, J.*

A *nolle prosequi* was entered as to the count for burglary, and the defendants were tried on the count for larceny. An appeal was taken from an interlocutory order of His Honor and dismissed in this court. Thereupon on petition of defendants an order was made to have a transcript of the record sent up. The facts material to the question decided are sufficiently stated in the opinion.

Attorney General and *F. H. Busbee*, for the State.

Messrs. Day & Zollicoffer and *Mullin & Moore*, for defendants.

STATE *v.* BASS.

DILLARD, J. In the case now before us the defendants were indicted and put to trial for larceny, and the jury not being able to agree, by order of the court a juror was withdrawn and a mistrial entered without the consent of the defendants, and thereupon they moved for their discharge, which was refused. Failing in that motion, they then requested His Honor to find and have entered of record the facts touching the discharge of the jury, and this being refused, the defendants brought the case to this court by *certiorari.*

The question presented is, whether in a case of larceny punishable by imprisonment in the states' prison or common jail, a jury sworn and charged with the case may or may not be discharged by the court before rendition of a verdict without the consent of the party on trial, and without the necessity, (with the facts found and spread on the record constituting it,) as is required in the case of capital felonies, or may be discharged in the discretion of the judge for reasons satisfactory to him not reviewable in this court.

It is the settled law of this state that in capital felonies a jury once sworn and possessed of the case of a prisoner upon a sufficient bill of indictment, cannot be discharged before verdict, except by consent of the prisoner or upon some great necessity; and not then unless the facts constituting the necessity be found and put on the record so as to be subject to review in this court on the application of the prisoner. *State* v. *Jefferson*, 66 N. C., 309; *State* v. *Alman*, 64 N. C., 364; *State* v. *Honeycutt*, 74 N. C., 391; *State* v. *McGimsey*, 80 N. C., 377.

To the rule thus established in capital cases, we yield our assent and accept the same as definitive and final, without inquiry into the authorities and reasons on which it is founded; so that it is only necessary that we should give attention to and decide how the rule is or ought to be in felonies below the grade of capital, and in misdemeanors.

In these classes of offences, in our opinion, we are equally concluded by the weight of authority in our own state reports; so that we need do no more in the determination of the question brought under consideration by this appeal, than to decide how it has been settled as a North Carolina question.

In the case of the *State* v. *Morrison*, 3 Dev. & Bat., 115, which was for an assault, the jury not being able to agree, a mistrial was had by the withdrawal of a juror, and on refusal of defendant's motion for his discharge and appeal, it was held in this court that the power of the court in case of misdemeanors was analogous to their power in civil cases, and that it was competent to the courts in such cases to discharge the jury "whenever the circumstances of the case rendered such interference essential to the furtherance of justice."

In the case of *State* v. *Weaver*, 13 Ired., 203, citing and approving the case of the *State* v. *Morrison*, which was also for a misdemeanor, it was decided that the court might make a mistrial without the consent of the accused, whenever in its discretion it should judge it necessary to the ends of justice, and that aside from the propriety of the exercise of the power, it being a matter of discretion, no court could interfere; and to this case there has been frequent reference in the subsequent decisions with approval, and conformably to the rules as therein laid down, has been the practice in misdemeanors ever since the decision was made. So we conclude that in the case of misdemeanors also the law is settled with us.

As to inferior felonies, it is true that the judges, in delivering the opinion of the court in cases capital, have sometimes *arguendo* used language broad enough to put the power of the courts to discharge a jury in such cases under the stringent rule adopted in capital felonies. But on a careful examination of the decisions we think it will be found that

the power of the court in inferior felonies is the same as in misdemeanors.

In the case of the *State* v. *Tilletson*, 7 Jones, 114, the defendant was put on trial for larceny, and the jury not having agreed on a verdict at midnight of the last day of the term dispersed without any order of the court, and from the order of the superior court at the next term discharging the prisoner the state appealed, and on the appeal it was held in this court that the restricted range of judicial power in the case of capital felonies had never been applied to offences of inferior grades, whether felonies or misdemeanors, and it was ruled that it did not apply to them.

In the case of *State* v. *Johnston*, 75 N. C., 123, which was a case of larceny, the jury not being able to agree, the court ordered a juror to be withdrawn and a mistrial entered, and at the next term the defendant moved his discharge, as was done in the case before us, on the ground that he could not again be put on trial for the same offence; and this court, speaking through Chief Justice PEARSON, as to this point held that in felonies punished by hanging, the judge could not discharge the jury before verdict, when the prisoner gave no consent, unless he found the fact creating the necessity and had the same spread on the record so as to be subject to review in this court. But that, as to all other felonies and misdemeanors punishable in the penitentiary or in the common jail, there was discretion, as in civil cases, to make a mistrial whenever the judge believed it proper to do so in furtherance of justice, and such discretion of the judge was not reviewable.

This was the last judicial ruling on the point under consideration, and in conformity therewith, has been the practice ever since, as well as before the decision was made, and hence we conclude that in larceny and in all felonies not punished by hanging, the presiding judge has the discretion to dissolve the jury for causes deemed sufficient by him in

furtherance of justice, and that his action is not reviewable and reversible by any other court.

This exposition and settlement of the powers of the courts decides the question made on the defendant's appeal, and it is needless that we enquire whether the rule as established with us is or is not consistent with the rulings in the English courts or in the courts of our sister states. There are no decisions of our courts to the contrary of those cited as establishing the discretionary power of the judge to dissolve the jury before verdict in case of larceny.

In the case of the *State* v. *Wiseman*, 68 N. C., 203, for a felony not capitally punished, the judge made a mistrial on account of tampering with the jury by the officer attendant on them, and on the appeal of the defendant from the refusal of the judge to discharge him from being put on trial before another jury, the facts moving His Honor to dissolve the jury appeared of record, and so the point was not made and not decided as to what would have been the effect of a discharge of the jury without the facts appearing of record. Hence the expression of opinion applying the strict rule in capital cases to inferior offences in a case not raising the point ought not to be considered as reversing the previous decisions in the cases of *Tilletson* and *Johnson* on the very point now made.

So likewise in the case of the *State* v. *Davis*, 80 N. C., 384, the indictment was for a capital felony and the jury having been discharged by the consent of the prisoner, the case called for no decision except as to the power of the judge to discharge the jury under the strict rules applying to capital cases. But the judge speaking for the court, *arguendo* used an expression indicating the extension of the rule to *all* felonies. And in this case, as in *Wiseman's*, the expressions used on a point not under consideration ought not to be received as overruling the decision of the court on a point directly presented and passed on. We hold therefore on a

review of the cases in our reports, that His Honor had the discretion to dissolve the jury and hold the defendants for a new jury, and that the security for the proper exercise of his discretion rests not on the power of this court to review and reverse the judge, but on his responsibility under his oath of office.

PER CURIAM. No error.

STATE v. FURNEY CHASE.

Discharge of jury before verdict, in felonies not capital.

In misdemeanors and in all felonies not capital, the presiding judge has the discretion to discharge a jury before verdict in furtherance of justice. He need not find facts constituting the necessity for such discharge, nor is his action reviewable.

INDICTMENT for Larceny tried at Fall Term, 1879, of EDGECOMBE Superior Court, before *Avery, J.*

Attorney General and *J. L. Bridgers, jr.*, for the State.

Messrs. Phillips & Staton and *W. P. Williamson*, for defendant.

DILLARD, J. The defendant was put on his trial in the inferior court of Edgecombe county on an indictment for larceny, and the jury not being able to agree on a verdict, the court ordered a juror to be withdrawn and a mistrial entered. The defendant moved for his discharge, and on refusal of his motion, he appealed to the superior court, and in that court the judgment below being affirmed, an appeal was taken to this court.

It is insisted in this court that the withdrawal of a juror and a mistrial made in the inferior court before rendition of a verdict without the consent of the defendant and without

the finding and entry of record of the facts constituting a necessity therefor, entitled him to be discharged from being again put on trial for the same offence; and it is assigned for error in the superior court that His Honor affirmed the judgment of the court below refusing to discharge him. The point made in this case is precisely the point that was presented and decided in *State* v. *Bass, ante,* 570, and adhering to our ruling in that case, we here refer to and adopt the opinion filed as governing the present appeal. And for the reasons therein specified we hold that the discharge of the jury before verdict rested in the sound discretion of the judge presiding, and his exercise of that discretion is not reviewable by us.

There is no error. Let this be certified to the end that the case may be proceeded with according to law.

PER CURIAM. No error.

STATE v. BRYSON.

Disturbing Congregation—Variance—Evidence—Practice.

1. Where the charge against the defendant is disturbing a congregation *actually engaged* in divine worship, it is a variance to show merely the disturbance of parties *assembled* for such worship.
2. In order to render indictable the disturbance of persons *assembled* for divine worship, the people, or some considerable number, must be *collected* at or about the time when worship is about to commence, and in the place where it is to be celebrated.
3. It is error for the court to allow a jury to find a verdict upon a bare *scintilla* of evidence.

(*State* v. *Patterson* 78 N. C., 470; *State* v. *Ramsay, Id.*, 448; *State* v. *Williams*, 2 Jones, 194; *Cobb* v. *Fogalman*, 1 Ired., 440, distinguished and approved.)

INDICTMENT for Disturbing a Religious Congregation, tried

at Fall Term, 1879, of GASTON Superior Court, before *Buxton, J.*

The bill of indictment is as follows: The jurors, &c., present that on the first day of April, 1878, &c., a number of citizens were peacefully assembled at Sandy Plain church in said county for religious worship of Almighty God, and the said persons being then and there assembled together for the purpose aforesaid, and actually engaged in Divine worship, P. J. Bryson, well knowing the purpose of the said meeting, with force and arms did then and there by loud talking with oaths disturb, wantonly and intentionally, the worship of the Almighty, and did disturb and molest the citizens then and there assembled for, and actually engaged in Divine worship, to the great contempt of religion, to the common nuisance of the citizens of the state then and there being, against the form of the statute, &c., and against the peace and dignity of the state.

The evidence in support of the indictment, and the exception to the judge's charge, are sufficiently set out in the opinion. Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.
Mr. W. P. Bynum, for the defendant.

DILLARD, J. The indictment charges that while the congregation at Sandy Plain church were assembled for and actually engaged in Divine worship, the defendant disturbed the said congregation by loud talking with oaths.

The facts charged amounted to an indictable offence, and if proved as laid, warranted the conviction of the defendant. At the trial no witnesses were introduced except on the part of the state, and they established that defendant, on the occasion of the alleged disturbance, came up near the church door, and asked aside one Smith, and when they had retired some twenty or thirty steps, he began to quarrel with and

curse him about killing a dog a few days before, in a voice loud enough to be heard by persons in the church, and thereupon the deacons of the church came to defendant and talked with him and he forthwith became quiet. The witnesses further proved that up to the end of the loud talking aforesaid, the people had not assembled in the church, some being in the house, and others, including the witnesses, being outside, and that Divine worship had not commenced; but that on the cessation of the quarrel, the minister being seen at or near the door just before, the congregation assembled in the house, and the worship was commenced and conducted through without any molestation whatever.

Upon this state of the proofs, the defendant asked His Honor to instruct the jury that there was no evidence that he had committed the offence charged in the indictment, and His Honor refused to give the instruction requested, but instead thereof chargad the jury that it was for them to say from the evidence whether the defendant has disturbed the congregation at Sandy Plain church *assembled* for Divine worship, and on this refusal of the charge requested, and in the one given, the assignment of error is made.

The charge in the bill of indictment is for disturbance to the congregation *assembled for and actually engaged in Divine worship*, and the proof taken most strongly for the state shows affirmatively that the service was not commenced, nor the congregation actually engaged in worship until after the loud and profane language was at an end. And thus as it seems to us, the state failed to prove the charge as laid, or to offer evidence from which the constituent facts in the offence as alleged could be reasonably inferred by the jury. In such a state of the evidence not proving or reasonably warranting the inference of the truth of the facts entering into and making up the offence charged, it is uniformly held to be the duty of the judge not to leave it to the jury to pass on such facts, but to guide them by telling them there is no

evidence. *State* v. *Patterson*, 78 N. C., 470; *Cobb* v. *Fogalman*, 1 Ired., 440; *State* v. *Williams*, 2 Jones, 194.

It is our opinion, therefore, that in this view of the offence charged in the indictment the defendant was entitled to the instruction prayed. But His Honor having refused the request, went on and left it to the jury to find from the evidence whether the defendant had disturbed the congregation *assembled for divine worship*. It is claimed that the evidence was reasonably sufficient to authorize a finding of disturbance to the congregation *assembled for worship*, if it failed to establish a disturbance to the congregation *engaged in* worship, and it remains to consider of the correctness of His Honor's ruling in this view of the case.

In every indictment it is required that the facts entering into and composing the alleged violation of law should be stated with reasonable certainty, so that the accused may come prepared for his defence. Archbold's Cr. Pr. and Pl., 778; 1 Chitty Cr. Law, 172. Here no disturbance to a congregation assembled is alleged, but to a congregation assembled and actually engaged in worship. And under the form of the charge it would never occur to the defendant that the state would expect to convict him of a disturbance to a congregation merely assembled and not engaged in worship, and hence he would be surprised and taken at a great disadvantage at the trial.

But suppose it be competent under this bill of indictment to have a conviction of defendant of a disturbance to the congregation *assembled* for divine worship, as we have no doubt is admissible, the question will arise whether the facts proved by the state will any more prove this particular charge than they did the charge of disturbance to a congregation *engaged in worship*. It seems to us the evidence of this charge was of such a character as not to authorize His Honor to submit it to the jury to find a verdict upon it. The evidence did not establish the fact of the people being

assembled for worship at the time of the loud talking of defendant, but showed merely that they were in process of coming together. It showed that the congregation was not gathered together in the house where the worship was to be engaged in, but some were in the house and some outside. In our opinion the people or some considerable number must be collected at or about the time when worship is about to be commenced, and in the place where it is to be had, in order to make a disturbance to them indictable. It may then be said the congregation is assembled for worship and the protection of the law then extends to them.

The case of *State* v. *Ramsay*, 78 N. C., 448, relied on by the state as sustaining the rulings of the court below, is distinguishable from this. There, the congregation was collected and devotional exercises had commenced, the minister being in his place, and the regular worship under the direction of the minister was about to commence and would have been but for the disturbance of Ramsay, while here the people had not assembled in a proper sense, but were merely in the course of coming together.

We hold therefore that His Honor erred in the refusal of the charge asked by defendant, and also in the charge given. Let this be certified.

Per Curiam. Error.

STATE v. JOHN F. GARRELL.

Escape—Erroneous Sentence—Certiorari.

Where an indictment against an officer for an escape was quashed upon the ground that the judgment against the prisoner committed to his charge was illegal; *Held*, to be error. If the sentence of the court be

erroneous, the prisoner may have it reviewed by *certiorari*, but the officer cannot justify under it for negligently permitting him to escape.

Remarks of DILLARD, J., upon the law pertaining to houses of correction.

(*In re Schenck*, 74 N. C., 606; *State* v. *Lawrence*, 81 N. C., 422, cited and approved.)

INDICTMENT for an Escape, tried at November Term, 1879, of NEW HANOVER Criminal Court, before *Mears, J.*

The facts appear in the opinion. The defendant moved to quash the bill on the ground that the judgment of the court was erroneous, in that, the sentence upon the prisoner who escaped from the custody of the defendant, should have authorized his imprisonment in the county jail instead of in the house of correction, of which the defendant was manager. The solicitor insisted that the defendant could not avail himself of any illegality in the judgment against the party who was placed in his custody for safe keeping, but the court sustained the motion, and the solicitor appealed.

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

DILLARD, J. One Andrew Hogan was convicted of larceny, and sentenced to imprisonment at hard labor in the house of correction of New Hanover county by the judge of the criminal court of said county, and after being delivered into the custody of the defendant, the duly appointed manager of said house of correction, the said Hogan escaped from the custody and went at large; thereupon the defendant was indicted upon the charge of an escape allowed or suffered by his negligence as such manager.

The defendant, when called to plead to said indictment, moved to quash the bill, and on consideration of the motion, His Honor adjudged that the bill be quashed, on the ground

that the sentence of Hogan to the house of correction, for whose escape the prosecution was begun, was illegal, and on the appeal of the solicitor for the state the question presented for our determination is whether the escape of the prisoner by the negligence of the defendant can be or is justified in law by reason of error in the judgment of the criminal court of New Hanover.

The legislature, under the power conferred in article eleven, section four, of the constitution, empowered the county commissioners of each county, if by them deemed necessary, to provide for the erection of houses of correction, with workshops and machinery, and one or more farms for the restraint and useful employment therein of such persons as might be sentenced thereto, and to this end authorized them to raise the necessary means by levy of a tax or issuing of county bonds, and to arrange for the conduct and government of such houses by the appointment of a manager and directors to superintend and direct him in the discharge of his duties. Bat. Rev., ch. 27, § 8, (20) and ch. 31, § 8, *et seq.*

It was further provided by law that whenever any person was sentenced to such workhouse, he should be committed by the courts to the sheriff, who should deliver him, together with a certified copy of the sentence to be furnished him by the clerk, to the manager, whose duty it should be to receive, keep and employ him during the time of his sentence according to the rules established therefor. Bat. Rev., ch. 31, §§ 10, 15.

Under these provisions of law His Honor, on the conviction of Hogan by the jury, pronounced judgment of imprisonment in the house of correction, and in obedience thereto the sheriff, as we are to understand from the case of appeal, delivered him with a certified copy of the sentence of the court to the defendant, the manager of the house of

correction, who received him and thereafter suffered him by negligence to escape and go at large.

The judgment pronounced was at most merely erroneous and not void. The court had jurisdiction of the offence and of the person of the prisoner, and on a valid verdict of the jury rendered in a due course of trial it remained for His Honor to add the judgment or sentence of the law. The question of the sentence of the law on the indictment and verdict of the jury was a question as to the kind, *quantum* and plan of punishment, and was one within the jurisdiction and competent authority of the judge to decide.

The judge may have erred in that portion of his judgment which committed Hogan to the house of correction, and we think he did, as such sentences, according to the true intent and meaning of the constitution and statutes on that subject, extend only to vagrants and persons guilty of misdemeanors; but of that question, as of every other arising on the trial, His Honor had jurisdiction, and if he erred in that particular it was an error of law for which the judgment was voidable, but of full force and effect until reversed in the appropriate way. It has always been held that the judgment of a court, in a case within its cognizance, erroneous in law merely, was binding until reversed, and in our state, in cases like the present, it has been held reversible only by appeal or on *certiorari* from this court in the exercise of its supervising power under the constitution. Art. IV, § 10.

In re Schenck, 74 N. C., 606, the party was indicted and convicted of an assault, punishable by fine or imprisonment in the county jail, one or both, and yet he was sentenced to the penitentiary at hard labor, and it was held that not having taken an appeal from the sentence, he was relievable from the illegal imprisonment only by a *certiorari* in the nature of a writ of error, issued from this court in the exercise of its supervisory power. And in the case of *State* v.

Lawrence, 81 N. C., 522, the prisoner was sentenced to the penitentiary for twenty years for horse stealing, according to a statute in such case made and provided, and yet he had not been indicted under the statute, but as at common law; and it was held he could only have the judgmen reversed in the mode pointed out in *Schenck's case.*

From this review of the law it would seem that it was open to Hogan to such relief from the illegal imprisonment adjudged by a court of competent jurisdiction, by appeal, or by *certiorari* as a substitute for appeal, operating in the nature of a writ of error, and no one else could do it for him. Hence it follows that until the sentence of commitment to the house of correction was reversed, it was the duty of the defendant in his capacity of manager to hold and keep the prisoner committed to his custody, and not assume practically to reverse the judgment of one of the courts of the state by allowing the prisoner by his negligence to escape. Every ministerial officer owes the duty of active obedience to a writ issued from a court having cognizance of the subject matter and of the person, and it is not for him to look behind into the judgment to see if there be error or illegality therein, and to obey or not according to his judgment and pleasure.

Such an assumption if tolerated in the defendant, and in the sheriffs, jailors and constables, would lead them to hesitate and refuse to perform the commands of the law, and then the courts would be rendered impotent in the administration of the law.

It is our opinion that the indictment ought not to have been quashed, but the defendant held to a trial on the bill and to abide the sentence of the law on the facts as they may be found by a jury.

Judgment of the criminal court of New Hanover is reversed, and this will be certified to the end that the trial may be proceeded with on the bill of indictment as found.

Error. Reversed.

STATE v. LUCIUS BROWN.

Escape—Variance.

1. An escape from arrest upon a charge for a misdemeanor, and without force, is itself a misdemeanor.
2. The bill charged that the defendant escaped from arrest made under an indictment against him and one A for an affray; the jury found by special verdict that the indictment was for an assault and battery upon A; *Held*, not a material variance, since, first, the gravamen of the charge was the *the escape from custody*, and secondly, one may be convicted of an assault and battery under a bill charging an affray by mutual fighting.

(*State* v. *Allen*, 4 Hawks, 356; *State* v. *Wilson*, Phil., 237, cited and approved.)

INDICTMENT for a Misdemeanor in escaping from the custody of an officer, tried at Fall Term, 1879, of GRAHAM Superior Court, before *Graves, J.*

The defendant appealed from the judgment pronounced upon the verdict.

Attorney General, for the State.

The defendant not represented in this court.

SMITH, C. J. The defendant is charged with escaping from the custody of an officer by whom he had been arrested on a *capias* issued upon an indictment for an affray committed by him and one Wood Dean and returned by the grand jury a true bill as to the defendant only. The jury on the trial found a special verdict, in which the material facts are these: The defendant was indicted at fall term, 1878, of Graham superior court for an assault and battery upon the said Wood Dean and a *capias* issued thereon to the sheriff of that county and was delivered to one Philip

Crisp, his lawful deputy, to be executed. Under this writ the defendant was arrested and while held in custody and before entering into obligation for his appearance to answer the accusation, made his escape without leave and against the will of the said officer.

The defendant moved in arrest of judgment, but the court being of opinion that upon the facts found the defendant was guilty, pronounced sentence and the defendant appealed.

There has been no argument in this court for the defendant; no ground assigned for the motion; no defect pointed out in the record. Upon our unaided examination but two exceptions are suggested, as perhaps the basis of the appeal.

1. An escape from an arrest upon a charge for a misdemeanor and without force is not an offence at common law, nor under the statute. Bat. Rev., ch. 32, § 32.

2. There is a variance between the allegations of the bill and the facts found in regard to the indictment under which the mandate for the arrest was issued, the allegation being that the indictment was against the defendant and the said Wood Dean for an affray, and the finding of the grand jury thereon against the defendant alone, while the facts set out in the verdict is that it was an assault and battery committed by him upon the person of said Dean.

We have had some hesitation in the absence of any direct adjudication upon the point which we have been able to find, in determining an escape by one in custody upon a charge for a misdemeanor, effected without force, to be itself a criminal offence at common law. But upon consideration and after careful examination of standard authorities upon the subject, and upon principle, we have come to the conclusion that such act is a misdemeanor.

"An escape of a person arrested upon criminal process," says Mr. Justice BLACKSTONE, "by eluding the vigilance of his keepers before he is put in hold (that is, in prison) is

also an offence against the public justice, and the party himself is punishable by fine or imprisonment. But the officer permitting such escape either by negligence or connivance is much more culpable than the prisoner; the natural desire of liberty pleading strongly in his behalf, though he ought in strictness of law to submit himself quietly to custody, till cleared by the due course of justice. And this whether he were actually committed to jail or only under bare arrest." 4 Blackstone Com., 129.

"The general principle," says RUSSEL, "appears to be that as all persons are bound to submit themselves to the judgment of the law, and be ready to be justified by it, those who, declining to undergo a legal imprisonment when arrested on criminal process, free themselves from it by any artifice and elude the vigilance of their keepers before they are put in hold, *are guilty of an offence* in the nature of a high contempt and punishable by fine and imprisonment." 1 Rus. on Crimes, 367.

So it was ruled in the case of *Sir Miles Hobert* that "although a prisoner departs from prison with his keeper's license, yet it is an offence as well *punishable in the prisoner* as in the keeper." And again it is declared that "the prison of the King's Bench is not any local prison, confined only to one place, and that every place where any person is restrained of his liberty is a prison." Cro. Char., 209. To the same effect, 1 Hale Pl., 605, note 1; 14 Petersd. Abr., title Prison, § 6, and the same ruling is made in *State* v. *Dowd*, 7 Conn., 384; 2 Whar. Cr. Law, §§ 2613, 2614.

It is needless to make further references. Upon the construction put upon the word "prison" in similar statutes, ours might be held to embrace the case now under consideration if force had been used in effecting the escape. But the language used does not seem to admit of this enlarged scope.

Any person who shall break prison, *being lawfully confined*

therein, shall be deemed guilty of a misdemeanor. Bat. Rev., ch. 32, § 32. This seems to contemplate and to be confined to the act of breaking out the jail or county prison and not from mere personal restraint or imprisonment under law. The purpose and effect of the act are not to create a new offence, but to modify the rigors of the common law and reduce the act of prison breaking in all cases, upon whatever charge the person might be confined, to the grade of a misdemeanor only. This is quite apparent from the enactment contained in the Rev. Stat., ch. 34, § 20, which following the Stat. 1 Ed. II., *De frangentibus prisonam*, declares that "no person that breaks prison shall have judgment of life or member for the breaking of prison only, unless the crime for which he was arrested and imprisoned would have required such judgment if he had been convicted thereof according to law. The offence was still left a felony until reduced to a misdemeanor under the existing law.

2. The second objection rests upon a supposed variance between the bill and the evidence adduced in its support.

The substance of the offence imputed to the defendant is his escape from the custody of the officer who had made a lawful arrest under the authority of the writ issued from a competent court, in which the nature of the misdemeanor with which he was charged was not a material element. The part of the indictment descriptive of the offence committed is but the recital of preliminary matter explanatory of the issue of the precept for the arrest.

But without deciding the point, in our opinion the variance is not a fatal defect to arrest the prosecution and entitle the defendant to another trial. An indictment for an affray as usually drawn includes a charge of mutual assault one upon the other, and hence upon the trial one may be found guilty of the assault and battery and the other acquitted, and judgment will be rendered against the party convicted. *State* v. *Allen*, 4 Hawks, 356.

So one may be tried and convicted of an assault and battery, upon a bill charging an affray by the fighting together of two persons, although the grand jury ignored the bill as to the other party. *State* v. *Wilson*, Phil., 337.

Substantially, by this action of the grand jury the indictment in form for an affray becomes in legal effect one for an assault and battery by him against whom it is found a true bill, and may be so described. The record therefore shows no variance to support the objection and the ruling of His Honor is correct. There is no error, and this will be certified to the end that judgment be rendered on the verdict, and other proceedings be had according to law.

PER CURIAM. No error.

STATE v. CHARLES JOHNSTON.

Evidence—Collateral Matter.

Evidence offered to prove an independent collateral matter affecting the credit of the prosecuting witness on a trial for larceny, not elicited by an inquiry addressed to him, but by the testimony of another person, is incompetent.

(*State* v. *Parish*, Busb., 239; *State* v. *Secrest*, 80 N. C., 450; *Clark* v. *Clark*, 65 N. C., 655; *Hawkins* v. *Pleasants*, 71 N. C., 325; *State* v. *Patterson*, 74 N. C., 157; *Barton* v. *Morphis*, 2 Dev., 520; *Downey* v. *Murphey*, 1 Dev. & Bat., 82, cited and approved.)

INDICTMENT for Larceny tried at June Special Term, 1879, of WAKE Superior Court, before *Eure, J.*

The exception taken in the court below, and the facts applicable thereto, appear in the opinion. Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.
Messrs. Bledsoe and *Badger*, for defendant.

SMITH, C. J. The defendant is charged in the bill of indictment in two counts, one with stealing, the other with receiving, knowing to have been stolen, a gold watch and ten dollars in money from Augustus A. Catlett, and the jury render a general verdict of guilty.

The only exception taken by the defendant is to the exclusion of evidence in answer to a question propounded by him on the cross-examination of a witness. The owner of the watch in delivering his testimony had stated that he had been drinking, but not to such an extent as to prevent him from knowing what he was about, and added, among other things, that he spent the night previous at the house of one Lou Hester, a colored woman. Another witness, one Charles Howard, was introduced, and testified to facts tending to prove the offence, and upon the cross-examination was asked by the defendant if he knew the general character of Lou Hester, and the answer being in the affirmative, his counsel proposed farther to enquire if her reputation was not that of a loose and abandoned woman. The evidence responsive to the question on objection was not received, and to this ruling the defendant excepts, and it is the only point brought up on the appeal.

Lou Hester had not testified, and the use proposed to be made of the evidence was not disclosed when it was offered. This should have been made known, but as it was not, if the testimony was relevant and competent for any purpose, its rejection would be error. *State* v. *Parish*, Busb., 239; *State* v. *Secrest*, 80 N. C., 450. We are not able to see its pertinency unless intended to impeach the witness Catlett, by showing his association with a profligate and corrupt woman, of which the simple unexplained fact of his having spent a single night under her roof would be very slight

evidence. But a fatal objection to its admissibility is that it is offered to prove an independent collateral matter affecting the credit of the witness, not elicited by an enquiry addressed to him, but by the testimony of another person. Had the impeached witness been interrogated as to this collateral fact, his answer would be conclusive, while if the question were allowed to be answered by another, a new issue would be opened and contradictory and corroborative eivdence become admissible. In *Clark* v. *Clark*, 65 N. C., 655, PEARSON, C. J., thus explains the practice: When the cross-examination, instead of being general, descends to particulars, then the party is bound by the answer, and cannot be allowed to go into evidence *aliunde* to contradict the witness, for it would result in an interminable series of contradictions in regard to matters collateral, and thus lead off the mind of the jury from the matter at issue." *Hawkins* v. *Pleasants*, 71 N. C., 325; *State* v. *Patterson*, 74 N. C., 157. As the answer of the assailed witness to such an enquiry is final, and hence may be received, so, as the answer of another may be controverted, it is inadmissible. This is a well settled principle in the law of evidence. "In impeaching the credit of a witness," says Mr. Greenleaf, "the examination must be confined to his general reputation and not be permitted as to particular facts." 1 Greenl. Ev., § 461.

The rule is very clearly and forcibly stated, and the reasons in support of it by HENDERSON, C. J., in *Barton* v. *Morphis*, 2 Dev., 520, thus: When character is not in issue but comes in question *incidentally and collaterally*, as that of a witness' does, the rule is, that *specific charges of criminal or corrupt acts* are not to be heard to impeach it. Two reasons are given for the rule, either of which is, I think, sufficient. The first is, the number of issues such evidence is calculated to create, thereby consuming the time of the court and abstracting the mind from the main issue. The other is that

both the party and witness would almost always be wholly unprepared to meet and repel the charges. But these reasons do not go to exclude proof of bad character by *common report* or reputation, for that is single in its nature and but one issue can arise upon it." The principle thus declared is recognized and approved by RUFFIN, C. J., in the subsequent case of *Downey* v. *Murphy*, 1 Dev. & Bat., 82, and has been followed ever since.

There is no error. This will be certified to the end that judgment be pronounced on the verdict, and other proceedings be had according to law.

PER CURIAM. No error.

STATE v. ANDERSON DRAKE.

Evidence—Confessions—Burglary.

1. Where confessions are made by a prisoner under the influence of hope or fear, those subsequently made are presumed to proceed from the same influence; and until this presumption is rebutted by clear proof, the latter confessions, though induced by no immediate threat or promise, are inadmissible—approving *State* v. *Roberts*, 1 Dev., 259.

2. On trial for burglary it appeared that the prisoner was pursued by armed men, fired at several times and arrested; and in reply to a question then asked, the prisoner confessed the commission of the alleged offence. On the following day, the prosecutor and others had an interview with him while he was fettered and in prison, when the prisoner told how he broke into the dwelling house and stole the goods, &c., no threat or promise being made; *Held*, that the confessions are not admissible. But in such case, what was said by the prisoner as to his disposition of the stolen property, is admissible.

(*State* v. *Dildy*, 72 N. C., 325; *Whitfield*, 70 N. C., 356; *Roberts*, 1 Dev., 259; *Lindsey*, 78 N. C, 499, cited and approved.)

STATE *v.* DRAKE.

INDICTMENT for Burglary tried at Fall Term, 1879, of McDOWELL Superior Court, before *Schenck, J.*

The prisoner was serving out a term of imprisonment at hard labor imposed upon his previous conviction for a criminal offence, and had been sent with other convicts to work on the Western North Carolina railroad. He escaped from the stockade in which the convicts were kept at night, and committed the alleged burglary. Judgment was pronounced upon a verdict of guilty and the prisoner appealed.

Attorney General, for the State.
Messrs. D. G. Fowle and *W. W. Wilson,* for prisoner.

ASHE, J. There were several exceptions taken to the ruling of His Honor in the course of the trial, only one of which is necessary to be considered in the view we take of the case. It was in evidence that the dwelling house of D. A. C. Salsbury, near Old Fort, had been broken open on the night of the fifteenth of June, 1879, and robbed. On the trial it was proposed by the state to prove the confessions of the prisoner, which was objected to by the prisoner's counsel. In order to determine the admissibility of the evidence the jury were required to retire while the court heard the evidence touching the character of the confessions. One Hallyburton was then introduced as a witness by the prisoner, who testified that on Monday after Friday when the alleged burglary occurred, he with others went to a negro house in Morganton to arrest the prisoner; that the prisoner in coming to the door was told, "You are our prisoner"; that the prisoner slammed a door and jumped out of a window and fled; that some ten or twelve shots were fired at him, but none of them took effect, and that he was overtaken and captured without further resistance; that when overtaken he was asked, "are you the negro that broke into Salsbury's house," and he answered, "Yes." He was then put in jail until noon, the

capture being early in the morning; and in the evening, Hallyburton put a hand cuff on him and fastened the cuff to a seat in the car, and carried him to the stockade. That no promises were made to the prisoner nor any inducements offered him to confess, and that no threats were made to him at any time, nor any conversation had with him on the way to the stockade. The prosecutor, Salsbury, then testified that on the next day he and one Crawford went to the stockade and asked to have an interview with the prisoner, when Mr. Troy, the superintendent of convicts at that point, sent for the prisoner and he came to the stockade fettered with his stockade shackles. Mr. Troy said, "Anderson, Mr. Salsbury wishes to interview you; sit down." The prisoner sat down and Mr. Salsbury asked, "What did you do with my overcoat." The prisoner's counsel here objected to the testimony, but the jury were ordered by His Honor to be recalled into the court house, and the objection of the prisoner being overruled, the witness Salisbury was then allowed to proceed with his testimony to the jury, which was to the effect that prisoner told him in reply to his interrogatory, that he had traded his overcoat to one Grier, and then related how he had prized open the window with an axe, and took the overcoat and vest, and had then gone up stairs and entered the back chamber and stolen the pants and then went down stairs, unlocked the back door and left.

We are of the opinion the confessions of the prisoner should not have been received. The confessions of a prisoner, to be competent evidence on a trial for murder, must be voluntary. *State* v. *Dildy*, 72 N. C., 325. "Such is the abhorrence of the common law," said Chief Justice PEARSON in the case of *State* v. *Whitfield*, 70 N. C., 356, "in respect to extorting confessions, that it is a settled rule no confession of one charged with crime shall be admitted in evidence against him, when it appears that the confession was made by reason of hope or fear."

If then it can be inferred that either of these emotions operated on the prisoner to induce him to make the confessions testified to by the witness Salisbury, they were clearly inadmissible. What are the facts? The prisoner was pursued by armed men, how many does not appear, but by several; and he is fired at ten or twelve times before he is overtaken, and then he is asked, "are you the negro who broke into Salsbury's house?" He answered, "yes." Can it be doubted but that that answer was given under the influence of fear? We cannot imagine any circumstance more calculated to excite the fears of a person than that he should be eagerly pursued by a band of armed men, who while in the hot pursuit discharge at him ten or a dozen firearms.

The case of *State* v. *Dildy, supra*, is similar, but not so strong in its facts as this case. There, the prisoner was trying to escape and was twelve miles away when he was overtaken by three armed men who were in pursuit, and when asked by them, "what are you doing here?" he answered, "just walking about." He was then asked, "what made you kill Charles Gay?" The answer to this question was objected to by the prisoner's counsel on the ground that it must appear to the court that the answer was extorted by undue influence or terror, but His Honor overruled the objection, and the witness then testified that the prisoner inquired, "is he dead?" To which witness replied, "you ought to know he is dead when you killed him." The witness then under objection was permitted to give the confessions of the prisoner as the facts of the homicide. The prisoner was found guilty, but this court awarded him a *venire de novo* on the ground the confession was not voluntary.

To admit the prisoner's confession under the circumstances disclosed in our case, would do violence to the well settled principles of the common law, that no confession of

a person shall be used against him when elicited by inducements or threats, or by the influence of hope or fear. And it is as well settled that where confessions have been made under either of such influences, confessions subsequently made will be presumed to proceed from the same influence, until the contrary be shown by clear proof. While this presumption remains unanswered, these latter confessions, though induced by no immediate threat or promise, are not admissible evidence. *State* v. *Roberts*, 1 Dev., 259. Under this authority the confession made the next day after the arrest to Mr. Salsbury was inadmissible. If Mr. Troy, the person in authority over the prisoner, who was then present, had put him upon his guard or had given him a proper caution, the confessions then made might have been considered voluntary, and therefore admissible. But when the prisoner is brought into the presence of Salsbury and the others, he is told by Mr. Troy, "sit down; Mr. Salsbury wishes to interview you." Although there was nothing harsh in the treatment, it was not calculated to reassure the prisoner or dissipate the fears excited by the violent and alarming circumstances attending his arrest on the previous day. What was said by the prisoner in reference to the person who had the overcoat of Mr. Salsbury, (that much of his confession) was admissible, but the rule is it must be strictly confined to such confessions. *State* v. *Lindsey*, 78 N. C., 499.

PER CURIAM. *Venire de novo.*

STATE v. MILES HINSON.

Evidence—Loaded Pistol—Practice.

1. On trial of an indictment under the act of 1877, ch. 4, for shooting at a railroad car, proof that the pistol discharged by defendant was loaded or that the car was struck, is not necessary to a conviction. If it be unloaded and this is relied on as a defence, the fact must be shown by the defendant.
2. An exception not taken in the court below cannot first be taken in this court.

(*State* v. *Cherry*, 11 Ired., 475; *Myerfield*, Phil., 108; *Ballard*, 79 N. C., 627; *Secrest*, 80 N. C., 450; *Green* v. *Collins*, 6 Ired., 139; *Williamson* v. *Canal Co.*, 78 N. C., 156, cited and approved.)

INDICTMENT for a Misdemeanor, tried at Fall Term, 1879, of ANSON Superior Court, before *Seymour, J.*

The opinion contains the facts. Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.
Messrs. G. V. Strong and *Gray & Stamps*, for defendant.

SMITH, C. J. The bill of indictment drawn under the act of December 5th, 1876, charges the defendant with the offence of unlawfully, wilfully and feloniously shooting with a pistol, a bullet "at, against, and into a railroad car on the Carolina Central Railroad" while in motion, with intent to injure the same, and on the trial he was found guilty. The act declares "that if any person shall cast or throw or shoot any stone, rock, bullet, shot, pellet or other missile at, against or into any railroad car, locomotive or train while the said car or locomotive shall be in progress from one station to another, or while the said car, locomotive or train shall be stopped for any purpose, with intent to injure said car, loco-

motive, or any person thereon or therein, the person so offending shall be guilty of a misdemeanor," &c. Acts 1876–'77, ch. 4.

The evidence was, that while the passenger train was moving from the station at Lilesville on its way to Wilmington, the defendant, at twenty-five yards distance, with a pistol in his hand pointing at the passing cars, exclaimed, "hello train," and fired three times. No other testimony was offered. The defendant's counsel asked the court to charge the jury that there was no evidence of the pistol's being loaded, and they should acquit. The court declined to give the instruction and the defendant excepted, and this is the only exception presented in the record. There is no error.

It was properly left to the jury to infer that the pistol was loaded with shot as well as with powder from the explosions and the use made of the weapon. It may be assumed when a gun or pistol is intentionally aimed at a person within striking distance, that it is charged and capable of inflicting injury, for the very act of presenting and pointing it is a declaration to that effect, meaningless without it. If the pistol be unloaded, and this is a defence in an indictment for an assault, the fact must be shown by the party charged. *State* v. *Cherry*, 11 Ired., 475; *State* v. *Myerfield*, Phil., 108. The same rule of evidence is applicable to the present case.

It was argued before us that the allegation being that the bullet was discharged "at, against and into the car," and not in the disjunctive, must be strictly proved, and in the absence of evidence that the car was struck, the defendant should be acquitted. The point was not made in the court below, and it is a settled practice, repeatedly declared, that an exception of this kind cannot be first taken in this court. *Green* v. *Collins*, 6 Ired., 139; *Williamson* v. *Canal Co.*, 78 N. C., 156; *State* v. *Ballard*, 79 N. C., 627; *State* v. *Secrest*, 80 N. C., 450.

But we are not prepared to concede the correctness of the proposition that proof of the hitting of the cars is necessary to a conviction. If the fact may not be inferred, as the offence under the statute is complete and in no sense changed by evidence that the car aimed at was actually stricken by the missile, the jury were warranted in rendering their verdict, and it will not be disturbed.

PER CURIAM. No error.

STATE v. RICHARD CROCKETT.

Evidence—Statement of Third Persons—Practice.

1. Statements of a bystander charging a defendant with crime, when made in his presence and undenied by him, are evidence against such defendant.
2. Exceptions based upon an alleged variance between the charge and the evidence will not be heard for the first time on appeal; they should have been made in apt time on the trial.

(*State* v. *Bullard*, 79 N. C., 627, cited and approved.)

INDICTMENT for an Assault upon and resisting an officer, tried at Special Term, 1880, of WAKE Superior Court, before *Avery, J.*

The facts appear in the opinion. Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.

Messrs. Bledsoe & Bledsoe and *J. C. L. Harris*, for defendant.

SMITH, C. J. The defendant is charged in a single count

with assaulting and beating one George Lane, an acting deputy of the sherriff, with intent to resist the officer and prevent his own arrest for an unlawful assault upon his wife committed in presence of said officer, and upon his trial was found guilty. No complaint was made of the instructions given the jury, and no others asked.

The only point presented in the case which accompanies the appeal is the admissibility of certain declarations made to Lane by a brother of the defendant. The material facts testified to by Lane and others, bearing upon the question, are these: Lane, who resides about two hundred yards from the house of the defendant, heard the sound of blows stricken and cries of defendant's wife, whose voice he recognized, proceeding from that direction, and went over to the gate near the house, met the defendant and asked to be allowed to enter. This was refused, and thereupon a brother of the defendant, also at the gate, said to Lane, in the presence and hearing of the defendant, "Dick," meaning the defendant, "is a bad man; he has been beating his wife; he will kill her; you had better take him up." To this no answer or explanation was made. The evidence of these declarations was objected to by the defendant's counsel, but received by the court. In consequence of these representations and apprehensions expressed by the brother, Lane entered and undertook to make the arrest, but was forcibly resisted and prevented from doing so. Subsequently Lane procured a warrant, surrounded the house, which the defendant had closed up and locked, with a *posse* summoned to his assistance during the night. And the next morning, Lane, after reading the warrant to the defendant, again endeavored to make the arrest and took hold of his person, but the latter again resisted, and forcibly threw off the officer.

No grounds are assigned for the rejection of the evidence and we see none ourselves. It was both competent and pertinent; competent in the absence of contradiction, as an ad-

mission of the defendant to be considered and weighed by the jury; pertinent, as influencing the action of Lane, and showing the need of prompt interposition. The law and practice are two well settled and uniform to require citation or reference in support of the ruling of the court.

The argument before us for the defendant was based upon an alleged repugnancy between the averment in the bill that the beating of the wife was in presence of the officer, and the evidence that it occurred while he was two hundred yards distant. If the exception has force it should have been taken on the trial and an acquittal demanded because of the variance, and it cannot be allowed to be taken for the first time in this court. We cannot depart from a rule so salutary and useful in itself, and sanctioned by long usage. *State* v. *Ballard*, 79 N. C., 627. Nor are we disposed to concede the proposition that the offence was not perpetrated in the presence of the officer, in the sense that it became his duty to interfere and protect a defenceless woman from the further violence and fury of an angry husband, which, as a brother feared, might lead to a fatal result.

The alleged repugnancy of a needless averment, not descriptive of a constituent of the offence charged, which was assaulting and resisting the officer, but of matter outside and entirely immaterial, ought not to have been allowed, had the objection been taken in time to prevent the finding of the jury. There is no error, and this will be certified to the end that judgment be pronounced on the verdict, and it is so ordered.

PER CURIAM. No error.

STATE v. J. W. BAXTER.

Evidence—Trial, examination of witnesses—Larceny—Variance.

1 On trial of an indictment for crime, evidence tending to show the guilt of another in its commission does not disprove the criminality of the party charged, and is therefore incompetent, unless the evidence implicating that other shows that his guilt is inconsistent with the guilt of the defendant.

2. In such case, where the defendant proposed to prove that the prosecutor's agent, who got up the evidence in support of the indictment but himself was not examined as a witness, "sent a proposition to defendant, what that proposition was, and the defendant's answer," and the court refused; *Held*, no error.

3. The failure of the solicitor to examine a certain person as a witness for the prosecution cannot be assigned for error by the accused. The introduction and examination of state's witnesses rest in his discretion, the exercise of which will not be interferred with unless in a case of abuse.

4. Where on trial for larceny, no question is made as to the ownership of the property alleged to have been stolen, an exception taken for the first time in this court that there was a variance between the allegation and the proof, will not avail the defendant.

(*State* v. *White*, 68 N. C., 158; *Bishop*, 73 N. C., 44; *Haynes*, 71 N. C., 79; *Davis*, 77 N. C., 483; *Martin*, 2 Ired., 101; *Stewart*, 9 Ired., 342; *Perry*, Busb., 330; *Hill*, 79 N. C., 656, cited and approved.)

INDICTMENT for Larceny, tried at Fall Term, 1879, of CLEAVELAND Superior Court, before *Buxton, J.*

There was a verdict of guilty, and from the judgment pronounced the defendant appealed.

Attorney General, for the State.
Messrs. W. P. Bynum and *Hoke & Hoke*, for defendant.

SMITH, C. J. The defendant is charged with stealing money of the value of ten dollars in four counts contained

in the indictment, describing it separately as the property of L. W. Sanders and others, P. S. Baker and others, the Southern Express Company, and of persons unknown. There was no dispute as to the ownership of the money, and on the trial the jury rendered a general verdict of guilty. Three exceptions were taken by the defendant's counsel to the rejection of evidence offered:

1. The evidence tended to show that a package of money had been sent by Sanders & Blackwood from Charlotte through the Southern Express Company to Dilling & Baker, at King's Mountain station, and was there received by the agent and locked up in an iron safe for delivery the next morning. The agent put the key in his pantaloons pocket, undressed and went to bed, leaving in an adjoining room the defendant and Nelson Falls, a colored boy about fifteen years of age, and one other person. During the night the key was taken from the agent's pocket, the safe opened and relocked, and the package of five hundred dollars stolen. Soon after, the key was found on the ground about fifty yards west of the station house by one John Harman, who pointed out the place to the agent. During the examination, the defendant's counsel proposed this question to the witness: "Was the key found where the boy Nelson said it was?" The question was excluded. The declaration is offered as a fact showing that Nelson knew where the missing key was, and must have been cognizant of the theft, and therefore he and not the defendant was the guilty party.

We think the evidence was incompetent. The issue before the jury was as to the defendant's guilt, and this must be affirmatively proved by the state to warrant a verdict against him. Evidence tending to show the guilt or complicity of another in the commission of the imputed offence, does not disprove the criminality of the defendant, and if received would direct the attention of the jury from the issue on trial to another and different inquiry, and thus open the

door to other corroborative and rebutting testimony. The objection to such practice is manifest. The evidence to be admissible must not only implicate another, but his guilt, as in a case of disputed identity, must be inconsistent with that of the defendant. This statement of the law is, in our opinion, supported by the adjudicated cases.

Thus the suspicious conduct of one not on trial, his pointing out the place where he put the stolen tobacco, and his subsequent flight, in the nature of the confession of the crime, were ruled out when offered in exculpation of the defendant, the court saying, "there is nothing in the acts or declaration of Brett inconsistent with the guilt of the defendant; *both may have been guilty.*" *State* v. *White*, 68 N. C., 158. So in *State* v. *Bishop*, 73 N. C., 44, where the offence of larceny was also charged and similar testimony pointing to another as the criminal, was offered and refused, the court declaring that "Bryant's guilt or innocence was not necessarily connected with the guilt or innocence of the defendant. The crime charged upon the defendant might be as readily committed by many as by one. Both might be guilty with entire consistency. Proof of the guilt of Bryant would therefore not tend to establish the innocence of the defendant." The cases cited by the defendant's counsel (*State* v. *Haynes*, 71 N. C., 79; *State* v. *Davis*, 77 N. C., 483) are in harmony with this view of the law.

2. A charge had been made and a warrant taken out againt Nelson for the same offence and dismissed, and the witness who prosecuted it was asked, "What statements were made to you by Nelson that induced you to take out the warrant against him?" This question was ruled out, and properly ruled out for the same reasons as the preceding question. It was a proposition to prove the criminality of Nelson by his own declaration, without the support of any co-incident, extraneous fact. The declaration is but hearsay, not under oath, and irrelevant to the issue.

3. The defendant proposed to prove by his father that one Alley, a detective in the service of the Express Company, sent a proposition to the defendant, and to show what that propositton was, and the defendant's answer. Alley had not been examined. The evidence was not received. In the argument, its admissibility is put on the ground that the Empress Company, being responsible for the loss, is prosecutor, and the acts and declarations of its agent in the prosecution are competent as proceding from an adversary party For this is cited one of the responses given by the judges to the questions propounded by the House of Lords in the *Queen's* case, 6 E. C. L. Rep., 112. The proposition is not supported by the reference, and the opinion of the judges is thus condensed in a head note: "If on the trial of an indictment for any crime, evidence has been given upon the cross-examination of witnesses, examined in chief in support of the indictment from which it appears that A. B. (not examined as a witness) has been employed by the prosecutor as an agent to procure and examine evidence and witnesses in support of the indictment, the party indicted is not permitted to examine G. H. as a witness to prove that A. B. has offered him a bribe to induce him to bring A. B. papers belonging to the party indicted, G. H. not having been examined as a witness in support of the indictment." We are unable to see any ground upon which such a conversation as was proposed to be shown could be received from the defendant unless the agent had been examined, and then only to discredit his testimony.

4. The defendant also contended that he was entitled to a new trial because the solicitor had failed to supply a missing "link in the chain of evidence" in not introducing Nelson as a witness for the state, who had been in attendance on the trial, while the other persons present in the room on the night of the larceny, when the express agent retired to bed, had been examined. If any unfair advantage was taken of

the defendant (of which we see no evidence) during the progress of the trial, we must assume it would have been corrected or remedied by the presiding judge, to whom the power is confided, and his refusal to grant a new trial for matters resting in his own discretion is not reviewable in this court. The introduction and examination of witnesses are left to the discreet judgment of the officer who conducts the prosecution for the state and his own sense of official duty, and the court will not interfere with or control the exercise of that discretion, unless perhaps in a clear case of abuse. *State* v. *Martin*, 2 Ired., 101; *State* v. *Stewart*, 9 Ired., 342; *State* v. *Perry*, Busb., 330; *State* v. *Haynes*, *supra*.

5. It is insisted in the argument that the allegations in two of the counts, in one of which the money is charged to be the property of L. W. Sanders and others, and in the other, of P. S. Baker and others, are unsupported by the proofs that there was in both cases but a single additional owner. *State* v. *Hill*, 79 N. C., 656. Several answers may be made to the objection. 1. The case shows that no question was made in regard to the allegation of property. 2. The variance should have been taken advantage of on the trial and by a verdict of acquittal. 3. The second count is supported by the evidence, and defects in the others become immaterial. 4. The objection cannot be made for the first time on the appeal, and it is not founded on an error in law.

Upon a careful examination of the record we find no error, and this will be certified that judgment may be pronounced on the verdict.

PER CURIAM. No error.

STATE v. FRANCIS HOLMES.

False Pretense—Defective Indictment.

An indictment under Bat. Rev., ch. 32, § 67, charging that defendant "did designedly, unlawfully and falsely pretend that a horse in his possession was sound and healthy, whereas in truth and in fact the said horse was not sound and healthy, well knowing the same to be false," by which he obtained goods of another with intent, &c., is defective. There is no averment of any *false pretense*, but only of a falsehood or false affirmation.

(*State* v. *Phifer*, 65 N. C., 321; *King*, 74 N. C., 177; *Jones*, 70 N. C., 75; *Young*, 76 N. C., 258; *Lambeth*, 80 N. C., 393, cited and approved.)

INDICTMENT for obtaining goods by False Pretences, tried at October Term, 1879, of NEW HANOVER Criminal Court, before *Meares, J.*

The bill of indictment is as follows: The jurors for the state upon their oaths present that Francis Holmes, late of the county of New Hanover, with force and arms at and in said county, on the first day of January, A. D. 1879, did designedly, unlawfully and falsely pretend to one Remus Thomas, that a certain horse then in his possession was sound and healthy, and that there was nothing the matter with him, whereas in truth and in fact the said horse was not sound and healthy, but was perfectly unfit for use, well knowing the same to be false, by color of which said false pretense, he the said Francis Holmes did then and there unlawfully and designedly obtain of the said Remus Thomas one horse of the value of twelve pence, the property of the said Remus Thomas, with intent then and there to cheat and defraud the said Remus Thomas, to the great damage of the said Remus Thomas, against the form of the statute in such cases made and provided and against the peace and dignity of the state.

There was a verdict of guilty. The defendant obtained a rule for new trial, the rule was discharged and he then moved in arrest of judgment, and that motion was overruled, from which ruling he appealed.

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

ASHE, J. It is unnecessary for us to consider the question of new trial as we are of the opinion that there was error in the ruling of the court below on the motion in arrest of judgment.

The defendant is indicted under section 67, chapter 32, Battle's Revisal. There have been a good many cases decided by this court of indictments under that section, and while there has been some differences in the interpretations given to it, the court seems to have settled down upon the case of the *State* v. *Phifer*, 65 N. C., 321, as giving the true construction of what is meant by false pretenses. In that case READE, J., in an able and well considered opinion, held the "rule to be that a false representation of a subsisting fact, calculated to deceive, and which does deceive, and is intended to deceive, whether the representation be in writing or words or in acts, by which one man obtains value from another, without compensation, is a false pretense indictable under our statute." And this case has been followed and cited with approval by the cases of *State* v. *King*, 74 N. C., 177; *State* v. *Jones*, 70 N. C., 75 and *State* v. *Young*, 76 N. C., 258. This construction is fortified by the authorities of Archbold and Bishop who hold that an opinion, a falsehood, a false excuse or false affirmation is not a false pretense in the meaning of the English statute of 30 Geo. II, which is similar to ours, but that there must be a false representation of an existing fact made for the purpose of in-

ducing the prosecutor to part with his property. Arch. Cr. Pl., 246, a; Bish. Cr. Law, §§ 408, 431.

For instance, if a man falsely pretends that he is the servant of another and has been sent by his master for certain goods, and obtains them; or one buys goods from a merchant and says he has no money with him, but has a deposit in bank and gives a check for the price, and it turns out that he has no money there; these and such false representations of existing facts are what is meant in the statute by false pretences, and they must be set forth in the indictment with sufficient certainty, and some or all of them must be negatived by specific averments. Arch. Cr. Pl., 246–'47.

In this indictment there is no averment of any false pretense, but only of a falsehood, a false affirmation, for which the defendant is liable in a civil action. If such a falsehood were indictable, then, instead of all the actions which have been brought for deceits and false warranties, the defendant should have been indicted for obtaining goods or property by false pretences.

In *Lambeth's case*, 80 N. C., 393, the judgment was arrested by the court upon the ground of uncertainty in the averments of the bill of indictment, but even in that case if the particulars on which the horse was alleged to be not "all right" had been specifically and definitely set forth, the judgment should have been arrested for the reasons assigned in this opinion.

Error. Reversed.

STATE v. ANDY DAVIS and others.

Fine and Costs—Personal property exemption not liable for.

One committed for the fine and costs of a criminal prosecution, after remaining in jail twenty days, may be discharged upon taking the oath prescribed in Bat. Rev., ch. 60, § 31, that he has no estate above his personal property exemption.

(*State* v. *Manuel*, 4 Dev. & Bat., 20; *Cannady*, 78 N. C., 539, cited and approved.)

INDICTMENT for an Affray, tried at Fall Term, 1879, of WATAUGA Superior Court, before *Schenck, J.*

The defendant was convicted of an affray with one Samuel Brewer, and after sentence of a fine of ten dollars and costs, and committed until the fine and costs were paid, applied to take the oath of insolvency prescribed in section 31, chapter 60, of Battle's Revisal, the ten days' notice having been waived by the sheriff and other officers of the court. It was admitted by the defendant that he owned personal property, but not to the value of five hundred dollars, and upon his refusal to surrender the same for the payment of the fine and costs, the solicitor objected to his taking the oath; and the court, holding that the constitution only applied to debts incurred by civil contract, and executions on such actions were alone contemplated by the constitution, and the refusal to pay the fine subjected the defendant to imprisonment as in bastardy cases, refused to allow the defendant to take the oath, unless he surrendered his personal property, and from this ruling the defendant appealed.

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

ASHE, J. The case presents the question whether a de-

fendant, convicted in a criminal prosecution and sentenced to pay a fine and be committed until the fine and costs are paid, is entitled to his homestead and personal property exemptions against such judgment. The law applicable to the case is to be found in Battle's Revisal, ch. 60, act of 1868–'69, as amended by the act of 1873–'74. It is there provided that "every person committed for a fine and costs of any criminal prosecution, after remaining in prison for twenty days, upon ten days' notice of the time and place of filing his petition, to be served on the sheriff or other officer by whom he was committed, might apply by petition to the court where the judgment against him was entered, praying to be brought before such court at the time and place named in the petition, and to be discharged upon taking the oath prescribed in section 31 of that chapter. It is further provided in section 30 of the act that "at the hearing of the petition, if such prisoner have no *visible estate*, and take the oath prescribed in the next section, the clerk of the superior court or justice of the peace before whom he is brought, shall administer said oath or affirmation to him and discharge him from imprisonment." The oath referred to is as follows: "I ——— do solemnly swear that I have not the worth of one dollar on any worldly substance above such *exemption as is allotted to me by law*, and that I have not at any time since my imprisonment, or before, directly or indirectly, sold or assigned or otherwise disposed of, or made over in trust for myself or my family, any part of my personal or real estate, whereby to have or expect any benefit, or to defraud any of my creditors."

It must be admitted, the question is not free from doubt. There seems to be a contradiction in the description of the person who may take the oath, to-wit, a "prisoner having no visible estate," and the provision in the oath prescribed "that he has not the worth of a dollar above the exemption as may be allotted him by law." The most reasonable con-

struction is, that it means having no visible estate of the value of one dollar above his exemptions. But what exemptions? If the fine imposed by the sentence of a court as a punishment for the offence of which a prisoner has been convicted in a criminal prosecution, is a debt, he would be most clearly entitled to withhold personal property to the amount of five hundred dollars as guaranteed by article ten, section one of the constitution; and if he had no personal property in excess of that amount, he should be admitted to take the oath and be discharged. But a fine is not a debt, as has been expressly decided in the case of the *State* v. *Manuel*, 4 Dev. & Bat., 20, and *State* v. *Cannady*, 78 N. C. 539.

It is manifest, however, that it was in the contemplation of the legislature to allow some exemption to a prisoner committed in default of payment of a fine imposed by the sentence of a court in a criminal prosecution. It was the law before the adoption of the constitution of 1868. In section one, chapter 59, of the Revised Code, it was provided that a person committed for the fine and costs of any criminal prosecution, after remaining in jail for twenty days and giving the notice therein required, might be discharged upon taking the oath that he was not worth ten dollars, either in debts owing to him or otherwise, over and above the articles exempted by law from sale under execution. The oath prescribed in Battle's Revisal is substantially the same with that. The only material change is the phraseology used in regard to the exemptions. The person taking the oath prescribed in the Revised Code was entitled to reserve his exemption under the act of 1848, and in taking that required in Battle's Revisal he must be entitled to the exemption given by article ten, section one, of the constitution, or he is entitled to no exemption whatever; for that was the only exemption of personal property which any one could claim by law at the time that oath was prescribed by the act of 1869 against

a debt contracted after the adoption of the constitution of 1868. And it is reasonable to suppose that the modification of the oath resulted from a purpose in the legislature to adapt it to the change made in the exemptions by the new constitution. Although a fine is not a debt, from the collection of which property was exempted by the constitution, yet it was perfectly competent for the legislature to provide that a prisoner committed for default in paying the fine and costs in a criminal action, might be discharged on taking an oath that he was not worth more than five hundred dollars. In this view of the case it matters not whether a fine is a debt or punishment, the defendant was entitled to an exemption of five hundred dollars' worth of personal property. We have considered this question not because it necessarily arose in the case, but for the reason that it appeared from the record the case was made up with the view of having the questien decided by this court—whether the defendant was entitled to his discharge without surrendering his property.

But the defendant was not entitled to his discharge upon a different ground. He had not remained in jail the twenty days which the law requires before he can take the benefit of the act provided for his relief. In default of his paying the fine, he should have remained in jail twenty days, and then have given the ten days' notice required by the act, unless the notice was waived by the officers to whom it should be given. But the officers could not waive the imprisonment, nor had the judge the power to dispense with it. Whether the defendant had property or not, he must remain in jail the twenty days or pay the fine and costs. The law is imperative. There is no error. Let this be certified.

PER CURIAM. Nor error.

STATE v. LEAKY SHEPARD.

Forcible Entry—Presence and Possession of Proprietor.

1. In an indictment for forcible entry, it is not necessary to charge or to show that the proprietor was in the house or present at the time of violent dispossession.
2. If one leaves his dwelling house, for a merely temporary purpose, in charge of a member of the family, he cannot be said in law to have quit the possession, so as to make the unlawful entry of a trespasser an entry in his absence.

(*State* v. *Fort*, 4 Dev. & Bat., 192; *Caldwell*, 2 Jones, 468; *Walker*, 10 Ired., 234; *Ross*, 4 Jones, 315, cited and approved.)

INDICTMENT for Forcible Entry, tried at Fall Term, 1879, of MADISON Superior Court, before *Graves, J.*

The indictment charged the female defendant and others with the offence of forcible entry, and the grand jury found a "true bill" as to her alone. She was convicted on the trial and appealed from the judgment pronounced.

Attorney General, for the State.
Messrs. M. E. Carter and *J. M. Gudger,* for defendant.

SMITH, C. J. The defendant is charged with forcibly entering the dwelling house of one Matilda Norton and expelling her therefrom, and upon her trial was found guilty. The facts testified to, so far as material to a proper understanding of the points presented in the appeal, are these: The dwelling house was occupied by the said Matilda, and a daughter-in-law resided with her. During her temporary absence, the daughter-in-law remaining at home, the defendant pushed open the door and entered and began to throw the beds and other furniture and effects of the prosecutrix out of the house. Upon the remonstrance of the

daughter-in-law, the defendant agreed not to disturb her goods, and did desist from interfering with them, but continued to throw out such as were the property of the prosecutrix. The latter hearing what was taking place, returned to her house, and attempting to re-enter was confronted at the door by the defendant who with an axe in her hand resisted, swearing she should not come into the house, and did by her violence prevent the prosecutrix from entering. There had been some controversy between the parties about the house, but it had been occupied by the latter for three or more months as her dwelling.

The defendant's counsel asked the court to charge that if the defendant waited and watched until the prosecutrix had gone out, and went in quietly before her return, under a claim of right to the property, she was not guilty of a forcible entry, nor of a forcible detainer, even if she had conducted herself as stated by the witnesses. The court refused to give the instruction, and told the jury in substance that if the conduct of the defendant had been such as the witnesses described, and she had entered the dwelling of the said Matilda, her daughter-in-law being present, and seized and thrown out the goods, and by violence and menace prevented the said Matilda from entering, she was guilty of the offence imputed. The correctness of the exposition of the law is the only question to be considered.

The sanctity of one's dwelling place cannot be violently invaded and wrested from his possession under any pretext or claim of right, real or fancied, and the law extends its protecting power over the houses of its citizens as well during their temporary absence as when they are present. It is a strange proposition that asserts the right of a pretended owner, when the occupant leaves for a brief space and upon the most urgent necessity, to take possession and resist the latter's return, and that his only security against the wrong is to be obtained by his constant personal presence in the

house. Such is not the law, and so the judge properly interpreted and applied it. For the purposes of the indictment the prosecutrix is deemed to have been in actual possession, represented by the member of her family who was present when the forcible entry was made, and this would be the case had she closed the doors with no one else in charge when she left. It is unnecessary to go out of the state in search of authority to support this view of the law.

"In an indictment for a forcible entry," says GASTON, J., in *State* v. *Fort*, 4 Dev. & Bat., 192, "it is not necessary to charge or to show that the proprietor was in the house or present at the time of violent dispossession."

In *State* v. *Caldwell*, 2 Jones 468, the defendant entered the prosecutor's dwelling while he was away, and on his return he found the defendant wrangling with his wife, and his offensive words about their daughter caused the prosecutor to order the defendant out of his house. The defendant at first refused but afterwards went out into the yard where he procured a club and challenged the prosecutor to a fight. The prosecutor was deterred from using force in consequence of the defendant's violence and superior strength. He had been before forbidden to visit the house. BATTLE, J., delivering the opinion, thus defines the law applicable to the defendant's conduct: "The acts of the defendant, from his first entrance into, until his final departure from, the house were one *continuing transaction*, and the presence of the owner during any part of it was sufficient to sustain the charge. If a man leave his dwelling house for a mere temporary purpose, as for instance to attend church, to visit a neighbor, or to work in his own fields, he cannot be said in law to have left it, so as to make the unlawful entry of a trespasser, *an entry in his absence*, and the unlawful and forcible entry will, in contemplation of law, have been in his presence."

So in *State* v. *Walker*, 10 Ired., 234, NASH, J., says: "It

was not necessary in order to constitute the offence intended to be charged that he (the prosecutor) should have been present at the time. The possession of his family was his possession, but their presence was not his presence."

The charge asked for the defendant seems to imply that an entry with force by one claiming, though not possessing, a right to enter, would not involve criminal culpability, and it may have been suggested though not authorized by what is said in *State* v. *Ross*, 4 Jones, 315. Whether that doubt may not be resolved by the statute which declares that "none shall make entry into any lands and tenements, or term for years, but in case where entry is given by the law, and in such case not with strong hand, nor with multitude of people, but only in a peaceable and easy manner; and if any man do to the contray he shall be deemed guilty of a misdemeanor," (Bat. Rev., ch. 49, § 1,) it is not necessary now to enquire. It is sufficient to say the indictment charges an unlawful entry, and in the absence of evidence of a rightful claim it must be assumed not to exist, and an unsustained claim cannot protect the act of violence.

There is no error. This will be certified to the end that sentence be pronounced on the verdict, and it is so ordered.

PER CURIAM. No error.

STATE v. ROBERT OUTERBRIDGE.

Homicide—Juror—Evidence—Venue—Plea in Abatement.

1. A juror who has acted in the inferior court within two years next preceding a trial in the superior court, is not disqualified by the act of

1879, ch. 200, for serving as tales-juror in the latter court. To render him incompetent it must be shown that he acted in the *same* court within the prescribed period.

2. In a case where circumstantial evidence is relied on to convict of murder, and as a link in the chain of such evidence, it is competent to show that a bullet taken from the body of deceased and one taken from a tree near the spot where his body was lying, fitted the moulds found in possession of the prisoner. Nor is it error in the judge to refuse to withdraw such evidence from the jury when the result of interrogating the state's witness by the prisoner's counsel was the exhibition and comparison of the bullets and moulds in view of the jury.

3. Where a prisoner is charged with killing the deceased in the county in which the indictment is found, the state need not prove that the offence was committed in that county. Such allegation is to be taken as true unless the prisoner denies the same by plea in abatement. Bat. Rev., ch. 33, § 70.

(*Meroney* v. *Avery*, 64 N. C., 312, cited and approved.)

INDICTMENT for Murder, tried at Fall Term, 1879, of BERTIE Superior Court, before *Avery, J.*

The prisoner is charged with the killing of one Peter Freeman in the county of Bertie. The first exception touching the qualification of a juror is stated in the opinion of this court. The evidence was as follows: One Seabrill, a witness for the state, testified that on the 17th of September, 1879, (the day on which the homicide is alleged to have been committed) he was engaged in rafting timber on the Roanoke river, and that deceased and four other men were in his employ; that after getting through with their work for the day they got into a small boat to go home, and stopped at a landing where the deceased got off about dark to go to his house, and after rowing up the river about one hundred yards, they heard the report of a gun and the voice of the deceased, saying, "murder," and then another report of a gun. The witness directed the men to row back to said landing, and on reaching it they got out of the boat and went up the road leading to the house of deceased and

found his dead body in the road; they then went to prisoner's house a short distance off, and on approaching it the prisoner said in an excited manner, "who's that?" Upon arresting the prisoner he asked "what for?" and the witness replied "because Peter Freeman was lying dead across the road, and you have the only double-barrel gun in the neighborhood," and prisoner replied, "I have been sick in bed all day. I have not shot the gun since Monday morning." Witness then sent for the gun, and on examination of the barrel and tubes found that it had been discharged in a very short time before. He then found upon the hearth of the prisoner's house fragments of melted pewter which appeared to have been cut from bullets as they were being moulded.

It was also in evidence that a tree near the place where deceased was lying showed marks of two bullets, one of which having entered the tree was cut out; several bullet holes were seen in the back and shoulders of deceased; pieces of yellow paper were found near by, which corresponded with those seen on a table in prisoner's house; prisoner was arrested by a constable, and on the next day his person was searched and a pair of bullet moulds found in his pocket; the ball taken from the tree and one taken from the body of deceased fitted these moulds. After witness made this statement without objection, the prisoner's counsel asked him whether the bullets and moulds were in court, and witness replied he supposed they were in the possession of the solicitor; thereupon they were produced and exhibted to the jury and compared in their presence. After prisoner's counsel asked the question and elicited the answer, he moved the court to withdraw from the jury the statement of the witness that the bullets fitted the moulds. Motion overruled and prisoner excepted.

It was further in evidence that just before the moulds were found in prisoner's pocket he stated to a witness that he had sold them; that prisoner was seen with his gun on

the morning before the homicide, with both barrels loaded; that about a month before the homicide, when prisoner on one occasion saw the deceased whipping his wife and quarrelling with her for receiving presents from the prisoner, he said in an angry manner "that he would put the deceased where the dogs could'nt bite him." There was other evidence of similar threats. But no witness testified that the place where deceased was killed was in Bertie county, and in the absence of such evidence the special instruction set out in the opinion was asked by the prisoner and refused by the court. Verdict of guilty, motion in arrest overruled, appeal by prisoner.

Attorney General, for the State.
Messrs. Oct. Coke and *Gilliam & Gatling*, for prisoner.

ASHE, J. The questions presented for our decision in this case arise from the exceptions taken to the ruling of His Honor in the progress of the trial, and we will consider them in the order in which they were taken:

1. Two of the jurors who were drawn were challenged by the prisoner for cause, and the cause assigned was that they had acted as grand or petit jurors within two years next preceding that court. They stated on their examination that they had served as petit jurors in the inferior court for that county, but had not acted as grand or petit jurors within two years next preceding that term of the court, in the superior court. There was no error in overruling this exception. The act of 1879, ch. 200, under which the exception was taken, reads: "That it shall be a disqualification and ground of challenge to any tales juror that such person has acted in the same court as grand or petit juror within two years next preceding such term of the court." They must have acted in the same court, otherwise there is no disqualification.

2. When one of the witnesses for the state, upon his examination in chief, stated that on the next day after the death of the deceased, the person of the prisoner was searched and a pair of bullet moulds was found in his pocket, and a ball taken from an oak tree near where the body of the deceased was found and one taken from his body fitted the moulds, prisoner's counsel without objection to the statement interrupted the examination and asked the witness if the bullets and moulds were in court, to which the witness replied he supposed they were in the possession of the solicitor; and after they were produced and identified by the witness, and the bullets fitted in the moulds in view. of the jury, the counsel for prisoner then moved the court to withdraw from the jury the statement of the witness that the bullets fitted the moulds, which His Honor properly refused to do. There is nothing in the exception. The evidence was altogether pertinent. The state was relying upon circumstantial evidence to establish the guilt of the prisoner. On the evening of the death of deceased, signs were discovered on the hearth in the house of prisoner of bullets having been recently moulded; his gun bore fresh marks of having been fired; a bullet was found in a tree near where the deceased fell, killed by gun-shot wounds, and one was found in his body. The fact, then, that these bullets fitted in the moulds which were found in his pocket was a link in the chain of evidence that pointed to the prisoner as the perpetrator of the bloody deed, and was clearly admissible; but if it were not, the prisoner's objection came too late, and was waived by his interrogating the witness. *Meroney* v. *Avery*, 64 N. C., 312.

3. No witness having testified that the place where the deceased was killed was in the county of Bertie, the prisoner's counsel prayed for the following instructions, to-wit: "It is the duty of the state to satisfy the jury beyond a reasonable doubt that the offence was committed in manner

and form as charged in the bill of indictment, and as there is no evidence before the jury that Peter Freeman was shot, assaulted or died in Bertie county, it is their duty to acquit." The court declined to give the instruction, holding that under section 70, chapter 33 of Battle's Revisal, the objection could only be raised for the benefit of the prisoner by plea in abatement.

Since the act of 1844, it has not been necessary on the trial of an indictment, either for felony or misdemeanor, for the state to prove the offence to have been committed in the county where the defendant is indicted. The act is very broad in its terms, and the language used is "that in the prosecution of *all* offences it shall be deemed and taken as true that the offence was committed in the county in which, by the indictment, it is alleged to have taken place, unless the defendant shall deny the same by plea in abatement." And the act proceeds to distinguish between felonies and misdemeanors in respect to the effect of the finding of the court upon the plea against the defendant. In misdemeanors judgment will be pronounced against the defendant as upon conviction, but in felonies he will be allowed the right to be tried upon his plea of not guilty. But in felonies, as in misdemeanors, the objection can only be taken by plea in abatement. There was no error in the refusal to give this instruction.

The prisoner finally moved in arrest of judgment on the ground that the bill of indictment did not distinctly and sufficiently charge that the crime was committed in the county of Bertie. Upon a careful perusal of the indictment we find that time and place are laid to every material fact charged, and that there is no ground for the arrest of the judgment for any alleged defect in the bill of indictment or error in the record.

There is no error. Let this be certified to the superior

court of Bertie county, that further proceedings may be had agreeably to this opinion and the laws of the state.

PER CURIAM. No error.

STATE v. ALEXANDER HOWARD.

Homicide—Trial—Juror—Evidence—Res Gestæ.

1. Sunday is not a *juridical* day, hence an adjournment of the court from Saturday night to Monday morning during the progress of a trial for murder is not violative of the act requiring the adjournment to be "from day to day." Rev. Code, ch. 31, § 16.

2. A juror is not disqualified by the act of 1879, ch 209, unless he has served in the *same* court within the prescribed period.

3. Evidence of the declarations of a prisoner made twelve months before the homicide, viz: "Don't you reckon if any one was to run in on old man Autrey (the deceased) he would get a handful of money," (the proof being that deceased kept money about him and was robbed on the night of the murder,) is admissible against *him*, as *tending to affect* him with a *knowledge of the reputation* that deceased kept money in his house. See *State* v. *Norton*, *post*, 628.

4. And where the prisoner offered to prove a conversation with a witness, which proved no part of the *res gestæ*; *Held*, that its rejection was not error.

(*State* v. *Ricketts*, 74 N. C., 187; *McGimsey*, 80 N. C., 377; *State* v. *Thorne*, 81 N. C., 555; *State* v. *Tilly*, 3 Ired., 424; *State* v. *Worthington*, 64 N. C., 594; *State* v. *Hildredth*, 9 Ired., 440, cited and approved.)

INDICTMENT for Murder removed from Sampson County and tried at Fall Term, 1879, of WAYNE Superior Court, before *Eure, J.*

The prisoner was charged with the killing of Babel Autrey, on the 24th of July, 1878. When the case was called for trial, and before a jury were selected and impaneled, the

prisoner's counsel moved to discharge the prisoner on the ground that the transcript from Sampson county showed that the judge who tried the case, in continuing the term for the purposes of the trial beyond the limit of the regular term, had adjourned the court from Saturday night to Monday morning. (On the trial in Sampson the jury could not agree, and a mistrial was had by and with the consent of the prisoner.) And this the prisoner's counsel insisted was not an adjournment "from day to day" in compliance with the statute. Motion overruled and prisoner excepted.

In selecting the jury the prisoner challenged one of the special venire on the ground that he was disqualified by the act of 1879, ch. 200. The facts material to this exception are set out in the opinion of this court.

Evidence.—The state introduced Isaac Williams as a witness, and offered to prove a conversation with the prisoner which took place about twelve months before the homicide. The prisoner objected to this evidence as being too remote. The objection was overruled and the witness testified that the prisoner said: "don't you reckon if any one was to run in on old man Babel Autrey he would get a handful of money"? The prisoner excepted. There was evidence on the part of other witnesses that the deceased was robbed on the night of the homicide of a considerable amount of money, and that he was generally reputed to be a man of property and kept money in his house where he lived and where the homicide occurred.

The state then introduced Carlton Howard, an accomplice, who testified that about a week before the homicide he agreed with the prisoner to meet him on the premises of the deceased on the night of the homicide for the purpose of robbing him, and that in accordance with said previous agreement the witness and the prisoner did meet on said premises on that night, and he, the witness, committed the

robbery while the prisoner was engaged in the murder of the deceased.

Hester Autrey, a witness for the state, testified that she saw the prisoner on the day of the night of the homicide come from the direction of his own house to the house of the deceased through the field, saw him stop near the house of the deceased and have a conversation with deceased (which on account of the distance of the parties from her she did not hear) and then the prisoner passed on through the premises and went out in the direction of the house of Carlton Sessoms, who was subsequently examined for the prisoner. She further testified that the prisoner came to the house of deceased unaccompanied by any one and left the premises by himself.

Carlton Sessoms testified, for the prisoner, that he saw the prisoner on the day of the night of the homicide at his (witness') house, that the prisoner came there about nine or ten o'clock in the forenoon of that day, and remained about a half hour, and that he came to his house from the direction of the house of the deceased. Here the prisoner offered to prove by this witness, that while the prisoner was at his house on that day he had a conversation with him, and in that conversation the prisoner told him the reason why he went to the house of the deceased that morning. The solicitor for the state objected, and evidence of this conversation was ruled out. *Prisoner excepted.*

The jury rendered a verdict of guilty. Rule for new trial discharged, motion in arrest overruled, judgment, appeal by prisoner.

Attorney General, for the State.
Messrs. Guthrie & Carr and *E. T. Boykin,* for prisoner.

ASHE, J. The first exception was to the adjournment of the court from Saturday until Monday while the jury had

the prisoner in charge. Sunday, according to the usages and practice of our courts, is not a *juridical day*, and it was altogether proper that the court should have been adjourned over from Saturday until Monday. There has been some instances in the judicial proceedings in this state where the courts have held their session on Sunday, but the cases are rare, and whenever it has been done, exception, we believe, has generally been taken to the course of the court, upon the ground that it could not legally sit on that day. But this court has held that in special cases *ex necessitate* the court might sit on Sunday. *State* v. *Ricketts*, 74 N. C., 187, and *State* v. *McGimsey*, 80 N. C., 377. The holding court on the Sabbath is not forbidden by the common law or any statute in this state, but it has been the long settled and almost universal practice of our courts, when a term continues so long that a Sunday intervenes, to adjourn over until Monday; and "long practice makes the law of a court," a law which has its origin and observance in a deference to the settled religious habits and sentiments of a large majority of our citizens, a law whose violation is not excused except in case of necessity. The objection is unfounded.

The next exception, that His Honor refused to allow the prisoner's challenge to a juror because he had served on the jury within two years next preceding that term of the court, is equally untenable. The act of 1879, ch. 200, under which the challenge was claimed, provides: "That it shall be a disqualification and ground of challenge to any tales juror that such juror has acted in the same court as grand or petit juror within two years next preceding such term of the court." The juror challenged on his *voir dire*, stated that he had not served as grand or petit juror in the superior court of Wayne county within two years next preceding that term of the court, but had within that time acted as a juror in the inferior court. This did not disqualify the juror. The construction put upon this statute by this court

is, that the juror must have acted in that capacity in the *same* court within the time limited. *State* v. *Outerbridge*, *ante*, 617; *State* v. *Thorne*, 81 N. C., 555.

The next exception is that the court allowed the state to prove, that twelve months before the homicide the prisoner in conversation with one Isaac Williams, a witness for the state, said to him, "don't you reckon if any one was to run in on old man Babel Autrey (the deceased) he would get a handful of money." It was in proof by other witnesses that the deceased was robbed on the night of the homicide of a considerable amount of money, and that he was generally reputed to be a man of property and kept money in his house. The evidence of this conversation was clearly admissible, if for no other purpose, that it tended to affect the prisoner with a knowledge of the reputation that the deceased *kept money in his house.*

The remaining exception, that the court excluded the evidence of the declarations of the prisoner to the witness Carlton Sessoms on the day of the night of the homicide, giving the reason why he had gone to the house of the deceased that morning, we hold was properly overruled. One Hester Autrey, a witness for the prosecution, testified that on the day of the night of the homicide she saw the prisoner, unaccompanied by any one, come from his own house and go to the house of the deceased, and there near his house have a conversation with him, and then went off through the premises in the direction of the house of one Carlton Sessoms, who, on his examination by the prisoner, testified that the prisoner, on the morning of the day of the night of the homicide, about nine or ten o'clock, came to his house from the direction of the house of the deceased and remained about a half hour, and in conversation with witness stated the reason why he had gone to the house of the deceased that morning. It was the rejection of this evidence that formed the ground of the exception. "As evi-

dence, what a party says is received against him but not for him. Unless his declarations form a part of the transaction, they are not receivable in evidence." *State* v. *Tilly*, 3 Ired., 424; *State* v. *Worthington*, 64 N. C., 594.

In the case of *State* v. *Hildredth*, 9 Ired., 440, this court held the rule to be, "that a person's declarations are not admissible for him. The rule is not founded on the idea that they would never contribute to the ascertainment of truth, for very often they might be entirely satisfactory, but there is so much danger, if they were received, that they would most commonly consist of falsehoods fabricated for the occasion, and so would mislead oftener than they would enlighten, that it was found indispensable as a part of the law of evidence to reject them altogether, except under a few peculiar circumstances." We do not see that this evidence falls within any exception. The conversation was not a part of the *res gestæ*. The transaction was past and the evidence offered comes within the rule of exclusion.

There is no ground for a new trial or arrest of judgment. There is no error. Let this be certified to the superior court of Wayne county that further proceedings may be had agreeably to this opinion and the law.

PER CURIAM. No error.

STATE v. JOHN NORTON.

Assault and Battery—Evidence.

In assault and battery, evidence of the declarations of defendant made two weeks before the assault (threatening the prosecutor) is inadmissible. His guilt or innocence depends upon the facts and circumstances immediately connected with the transaction. (This case distinguished

from those where malice, intent, knowledge or motive constitutes an ingredient of the offence. (*State* v. *Howard*, *ante*, 623.)

(*State* v. *Huntley*, 3 Ired., 418; *State* v. *Howard*, *ante*, 623, cited, distinguished and approved.)

INDICTMENT for an Assault, tried at Fall Term, 1879, of MADISON Superior Court, before *Graves, J.*

The defendant was indicted for an assault and battery, and it was charged in the indictment that the assault was made with a deadly weapon and serious damage done to the prosecutor, one Shepherd; but there was no proof that the assault was committed with a pistol or any other deadly weapon, or that any serious injury was done. The state was permitted to prove that two weeks before the assault, the defendant exhibited a pistol and said "it was his friend, and if Shepherd ever crossed his path he would send him to hell," but this was not communicated to Shepherd. This evidence was objected to by defendant, objection overruled, verdict of guilty, judgment, appeal by defendant.

Attorney General and *J. M. Gudger*, for the State.
Mr. J. L. Henry, for the defendant.

ASHE, J. We are not aware of any principle of evidence upon which the declarations of the defendant, made two weeks before the assault, were admitted. We cannot see how they could explain or elucidate the transaction. They certainly were not admissible on the ground of being part of the *res gestæ*. If the defendant had been indicted for murder, for an assault with intent to kill, for a conspiracy or forgery, or any other offence where the *scienter* or the *quo animo* constitutes a necessary part of the crime charged, such acts and declarations of the prisoner as tend to prove such knowledge or intent, are admissible, notwithstanding they

may in law constitute a distinct crime. *Dunn* v. *State*, 2 Ark., 229; *Thorp* v. *State*, 15 Ala., 749.

But in our case neither malice nor intent nor knowledge nor motive forms any ingredient of the offence. It is a simple assault and battery, and the guilt or innocence of the defendant depended upon the facts and circumstances immediately connected with the transaction. And we cannot conceive how the previous threats or declarations of the defendant could affect the trial except to prejudice the minds of the jury against him.

The cases of the *State* v. *Huntley*, 3 Ired., 418, and *State* v. *Howard*, *ante*, 623, are the only authorities cited for the admissibility of the evidence. *Huntley's* case is distinguishable from ours. He was indicted for an affray in going about armed in an unusual manner to the terror of the citizens, and his threats against the lives of different persons were admitted in evidence because they formed a part of the *res gestæ*. And in *Howard's* case the previous conversation of the prisoner was admitted because it affected him with a *knowledge* of the common reputation of a fact, that was material on the trial to show the motive for the commission of the crime.

We are of the opinion the court committed an error in receiving the evidence. A *venire de novo* must be awarded the defendant. Let this be certified to the superior court of Madison county that further proceedings may be had in conformity to this opinion and the law of the state.

Error. *Venire de novo.*

STATE v. WILLIAM H. VANN.

Homicide—Jury—Confessions—Declarations—Insanity, plea of.

1. Where the incompetency of a juror was not ascertained until after he had been passed and accepted by the prisoner, the court may *then* allow a challenge by the state.
2. Whether a prisoner's confessions are voluntary or induced by hope or fear, is a question of fact to be decided by the judge, and his finding is conclusive. What constitutes such hope or fear is a matter of law which is reviewable upon exception taken below.
3. Declarations of a prisoner made after the commission of the alleged crime are not admissible in evidence for him, not even in support of insanity as a defence, unless they form a part of the *res gestæ* to some act which is admitted in evidence.
4. A voluntary killing of a human being by another is taken by the law to be on malice implied, and nothing more appearing, is murder. No extenuation or acquittal from that sentence of the law can be had, except upon matter coming from the prisoner, or by legal inferences from the surrounding circumstances, and shown to the satisfaction of the jury.
5. So that, if the prisoner shall prove, or it be admitted, that he was insane before the homicide, still his insanity at the time of the homicide is yet an open question of fact which must likewise be established to the satisfaction of the jury; and if not, then upon the malice implied, the prisoner is guilty of murder.

(*State* v. *Davis*, 63 N. C., 578; *Willis Id.*, 26; *Andrew*, Phil., 205; *Scott*, 1 Hawks, 24; *Huntley*, 3 Ired., 418: *Tilly, Id.*, 424, cited and approved.)

INDICTMENT for Murder tried at Fall Term, 1879, of HERTFORD Superior Court, before *Gudger, J.*

Verdict of guilty, judgment, appeal by prisoner.

Attorney General and *R. B. Peebles*, for the State.

Messrs. Pruden & Shaw, for prisoner.

DILLARD, J. The prisoner was indicted for the murder of James H. Gatling, and tried and convicted in the superior

court of Hertford, and on the trial he made several exceptions, which we will consider in their proper order.

1. When the jury were being formed, a juror was called and passed by the state without objection, and on being challenged by the prisoner, he said he had not formed and expressed an opinion as to the prisoner's guilt, but that he believed him insane at the time the homicide was committed, and that belief was so firmly fixed that no evidence could remove it. Thereupon the state was allowed to challenge the juror for cause, and the cause was held good. This point has been ruled during this term of the court in conformity with previous rulings, and this exception is untenable. *State* v. *Vestal, ante*, 563.

2. The second exception is as to the admission of certain confessions made by the prisoner to one Pittman at the house of deceased, while in his custody and pending investigation of the case before the coroner's jury: It was shown that many persons were at the house, and some excitement among them, some saying that prisoner ought not to have anything to eat, and others that he ought to be hanged, but none of these expressions, nor the answer of the officer that the prisoner should have something to eat if he had to carry him home to get it, were made in the prisoner's hearing. It was also shown that a number of persons assembled around the prisoner when he was first brought to the house of the deceased, but were separated from him by the officer. That the conversation occurred the next morning at nine or ten o'clock, and after prisoner had remained all night at the house, and while the coroner's jury were sitting on the case, but was not in their hearing. It was proved by the officer that prisoner's hopes and fears were not operated upon. Whether the confessions were voluntary or induced by hope or fear was a preliminary question of fact to the judge below, and he found the fact that there was no hope or fear operating on the prisoner, and his finding is conclusive and

cannot be reviewed by us as to that, and there being no exception to His Honor's opinion as to what constituted such fear or hope as would exclude the confession, there is no matter of law which we can review, and therefore we must hold that there was no error in admitting the confessions made to Pittman. *State* v. *Davis*, 63 N. C., 578; *State* v. *Andrew*, Phil., 205.

3. The officer having the prisoner in charge, who was tied at the time, said to the prisoner in the presence of the coroner's jury, "You have to die as well as Henry Gatling, and ought not to die with a lie on your lips." The prisoner made no reply, and was very soon thereafter on the same day committed to the jail; and nineteen days after that time, one Jones passing the jail said to prisoner, "I suppose you are in here for a bad crime." The prisoner answered "yes." The witness then said, "why did you kill Henry Gatling," and to this the prisoner replied, "because I was mad with him." This confession was received precisely as was the preceding one to Pittman, and for the reason given in relation to that evidence, the admission of prisoner's conversation with Jones was proper.

The prisoner proposed to show by one of the state's witnesses other declarations made by him while in jail in explanation of his statement to Jones, and as tending to show his insanity, to-wit: "I was in great distress. I believed that Gatling was the cause of it, and by killing him I would be relieved." These declarations formed no part of any act admitted in evidence. They were made at a time different from the statement to Jones and had no connection with the conversation had with him, nor with the one had with Pittman, and we understand the rule to be that a party charged with a crime can never put in evidence in his own behalf any declarations of his after its commission, not even in support of insanity as a defence, unless as a part of the *res gestæ* to some act which is admitted in evidence.

In the case of *State* v. *Scott*, 1 Hawks, 24, upon a charge of murder the prisoner set up the defence of insanity, and to prove the truth thereof proposed evidence of his declarations in connection with his conduct on the next morning, and Judge HENDERSON, delivering the opinion of the court, uses this language: "I must submit to the law as I find it written. The declarations of a party cannot be offered in evidence unless they accompany acts. They then become part of the acts and as such may be heard." See also *State* v. *Huntley*, 3 Ired., 418, and *State* v. *Tilly*, *Id.*, 424. For these reasons we hold there was no error in rejecting evidence of the proposed declarations of the prisoner.

It was conceded by the state on the trial that the prisoner was violently insane shortly before the homicide and was then of unsound mind, but it was insisted that at the time of the commission of the offence the prisoner had a lucid interval and was criminally responsible for his acts. The evidence of the mental condition of the prisoner at the time of the killing is not stated, but as to its effect, the following special instruction was prayed by the prisoner: "If the insanity of the prisoner shortly before the homicide be admitted or found by the jury, then before the jury can convict, the state must prove beyond a reasonable doubt that at the time of the homicide the prisoner had a lucid interval and was in such a mental condition as to make him responsible for his acts." The court refused so to charge, but told the jury if the insanity of the prisoner shortly before the commission of the homicide be found by the jury or admitted by the state, then it is the duty of the state to show, not beyond a reasonable doubt, nor by a preponderance of evidence, but to the satisfaction of the jury, that at the time of the homicide the prisoner had such a lucid interval, and was in such a mental condition as to make him responsible for his acts.

The correctness of the charge of the court and the refusal

of the instructions asked for by the prisoner, constitute the principle exceptions on the argument before us.

In an indictment for murder, the two constituents of the crime, to-wit, a voluntary killing and malice aforethought, must be proved by the state, as it makes the charge; and as the accused is presumed to be innocent until the contrary is shown, both of these elements must be proved. The killing being shown, then the other ingredient, malice prepense, is also proved as a fact in the eyes of the law, not by evidence adduced, but by a presumption that the law makes from the fact of the killing. And these two essential facts being thus established, the legal conclusion thereon is, that the offence charged is murder. Foster's Crown Law, 255; East P. C., 224; *State* v. *Willis*, 63 N. C., 26.

But the implication of malice, made by the law and taken as a fact, is not conclusive on the party accused, but may be rebutted. He may show, if he can, by his proofs, that there was no malice prepense and thereby extenuate to manslaughter, or make a case of justifiable or excusable homicide, or a case of no criminality at all by proof of insanity at the time of the act committed, disabling him to know right from wrong. See Foster and other authorities *supra*. The burden lies on the accused to make these proofs, if he can; otherwise, the conclusion of murder, on a malice implied, will continue against him and will call for, and in law, oblige a conviction by the jury. And in the making of such extenuating or acquitting proofs, the law puts on him the *onus* to do so, not excluding all reasonable doubts, but merely to the extent of satisfying the jury. There are respectable authorities which hold that mental competency of the accused is one of the constituent elements of the crime imputed, and that when that is controverted, it must be shown beyond a reasonable doubt in the minds of the jury. But such is not the law of this state. The doctrine with us is well established, that when there is a voluntary killing, as is admitted in this

case, the law presumes malice and makes the crime murder, unless as above explained, the accused can and does repel the same by evidence of his own or by legal inferences from the surrounding and attending circumstances. By our decisions, matters of extenuation and excuse, or discharge by reason of insanity, must be shown by him who sets it up; otherwise, the implied malice continues and the case remains in judgment of law a case of murder. *State* v. *Willis*, *supra*. This case (*Willis'*) was carefully considered and in view of our own decisions and the Crown Law of England, and after commenting on the *Com.* v. *York*, 9 Metc., 93, and the dissenting opinion therein of WILDE, J., a conclusion is reached, in harmony with previous rulings in this court, that matters of mitigation, excuse or justification must always come from him who claims the benefit thereof, and must be proved not beyond a reasonable doubt, but only to the satisfaction of a jury; and to this case we assent as controlling the case under consideration.

Applying the principle above enunciated and established by *Willis'* case, the prisoner, by the voluntary killing of Gatling, admitted by himself, and the consequent implied malice, went to trial with the legal conclusion of murder against him; and to have acquitted himself, it would have been incumbent on him to have proved an habitual or permanent insanity before the homicide. And if the fact of its existence originally, or its presumed continuance at the time of the killing, was controverted by the evidence of the state, he would have had to show, and that by evidence satisfactory to the jury, at least the fact of a continuance of insanity at the time he slew the deceased; or failing so to do the legal conclusion from malice implied would have still remained and his offence would still have been murder.

Now on the trial the state dispensed with proof by the prisoner of an insanity at a day anterior to the homicide by admitting that much for him, and thereby the issue was re-

duced to the single fact of the existence or non-existence of prisoner's insanity at the time of the killing. Upon that point, evidence was introduced by the state tending to show the non-existence of insanity, and the prisoner did or might have introduced testimony in aid of the presumption already in his favor from the admission of insanity before the homicide, in order to satisfy the jury of the existence of his insanity at the time of the killing, and the prisoner failing to satisfy the jury of the truth of his defence, there remained then the fact of the voluntary act of killing and with malice implied, and this in point of law made the crime murder. *State* v. *Willis, supra*; *Coruth* v. *Eddy*, 7 Gray, 583.

After a careful investigation of the several exceptions taken by the prisoner, we are unable to discern any error of law on the trial, and we must so declare, and this will be certified to the end that the sentence of the law may be executed.

PER CURIAM. No error.

STATE v. THOMAS BOON.

Homicide—Jury—Trial—Evidence of near relations—Judge's Charge.

1. An alleged irregularity in the formation of a jury cannot be taken advantage of after verdict.
2. Upon disagreement of counsel as to facts testified to by a witness, it is not error in the court to have the witness re-examined, especially when in the charge the jury are told that they must be guided by their own recollection of the testimony.
3. The credit of a witness related to the party for whom he testifies is

thereby affected, and his evidence must be received with some degree of allowance. But if from his testimony and the other facts and circumstances in the case, the jury believe he has sworn the truth, he is entitled to as full credit as any other witness.

4. The language of a judge in his charge to the jury must be read with reference to the evidence and points in dispute, and construed in reference to the context—approving *State* v. *Tilly*, 3 Ired., 424. Abstract propositions of law not applicable to the case should not be laid down. Nor is a judge in giving an instruction required to adopt the words of the prayer; a substantial compliance is sufficient.

5. The degree of homicide is murder where the prisoner acts coolly and vengefully or with violence out of all proportion to the provocation; and this, whether there be "cooling time" or not; *Therefore*, in an altercation about the payment of an alleged debt, the deceased promising to pay when he got the change, the prisoner threatening to whip him if he did not do so then and there; deceased, unarmed, remonstrated with prisoner and expressed friendship for him; a fight ensued in which deceased was knocked down; they were separated and deceased went off; prisoner at the request of a witness put up his pistol which had been drawn, promising to do no more, followed and overtook deceased and engaged in another fight, deceased crying out "hold him off me," and killed deceased with a deadly weapon; *Held*, to be murder.

(*State* v. *Ward*. 2 Hawks, 443; *Boon*, 80 N. C., 461; *Davis*, *Ib.*, 412; *White*, 68 N. C., 158; *Ellington*, 7 Ired., 61; *Tilly*, 3 Ired., 424; *Scott*, 64 N C., 586; *Brantley*, 63 N. C., 518; *Burton* v. *March*, 6 Jones, 409; *State* v. *Chavis*, 80 N. C., 353; *Curry*, 1 Jones, 280; *Scott*, 4 Ired., 409; *Hildreth*, 9 Ired., 440, cited and approved.)

INDICTMENT for Murder removed from Yancey and tried at Spring Term, 1879, of MADISON Superior Court, before *Gudger*, *J.*

The prisoner was charged with the murder of one Samuel Butner, and from the statement of the case, the following substantially appears: The clerk was directed to furnish prisoner's counsel with a list of the names of the special *venire*, the names of four of whom were by mistake of the clerk left out of the box. Upon suggestion of prisoner's counsel that the names of these four had not been called,

the court directed them to be put in the box and drawn. The prisoner made no exception at the time other than to suggest they had not been called. But after the trial he excepted to the alleged irregularity.

Ten jurors of the special *venire* were stood aside, and in selecting the jury, their names were called from the list in the order in which they had been drawn, and disposed of by the state and the prisoner, the prisoner accepting one of them, who completed the panel. After the verdict, the prisoner excepted, for that the names were not placed in the box and drawn a second time.

John A. Black, for the state, testified that in June, 1878, he went to the bar-room or grocery (where the alleged murder was committed) and soon after he got there the prisoner, the deceased, and some others came there. It was late in the afternoon, and the party were drinking, and after the shop-keeper had closed, they started off. Upon some one's proposing to get more brandy, the deceased said, with an oath, "I've got the money." "Yes, and you know how to keep it," said one of the party. Prisoner then said to deceased, "As you have so much money, pay me what you owe me." Deceased replied, he did not think he owed him anything; if he did, he would pay it when he got the change, and asked the amount, when, after some calculation, the prisoner answered, "five cents," and said he could change the bill of money. After some talk about paying the money, prisoner said, "pay me right here, or I'll whip you." Deceased said he was a friend of prisoner, and did not want any "fuss." Prisoner took hold of deceased; witness separated them, but prisoner got hold of him again, and a fight ensued, the prisoner knocking deceased down, and getting on him on the ground, when they were separated again. Prisoner drew a pistol, and threatened to shoot deceased. Deceased got up and walked off towards the grocery, witness holding prisoner, and trying to get the pistol. Prisoner promised to put his pistol in his pocket, if witness would let him go.

Prisoner then put up his pistol, and also went towards the grocery. Witness soon heard fighting in the direction of the grocery, and on arriving there found the parties fighting again, but deceased was not striking back, and witness did not see what prisoner was striking with. Prisoner was holding deceased with his left hand and striking with his right hand. He attempted to separate them, and said to prisoner, "You ought not to have done this; you have killed Sam," (deceased). Prisoner said "no, I haven't hurt him." Deceased was very bloody. When the blows were struck, witness heard a noise like "a rip" in cloth. It was a cloudy night, but some moon-light. Witness told deceased to get out of the way, and deceased thereupon ran across a creek near by, and fell. When witness got to him he was lying on his back. Prisoner and others came up soon after, and in reply to a remark of witness that Butner was killed, the prisoner said, "he is lying there drunk." A physician was sent for, and in a few minutes they carried the deceased to a mill, on the creek, not far off, and when they got there he was dead. He was cut in the neck, throat, breast and shoulder. On cross-examination the witness stated that both of the parties had been drinking; that before the first fight, deceased said to prisoner that some months before he had got insulted at deceased, and prisoner asked, "Do you intend to insult me?" and deceased replied, "I do not;" that it was a very short time between the two fights; about forty yards from the place where the first occurred to the grocery where the second took place. During the fight the deceased got prisoner by the throat, and held on until witness separated them; prisoner's ear was bleeding a little; no other injury to him; he did not complain of being hurt. Several other witnesses (among them one Hicks) were examined for the state, whose testimony is substantially that of the first witness, and tending to show that at the first fight the deceased remonstrated with the prisoner, telling

him to let him alone, and saying that he was a friend to prisoner, and that deceased, during the difficulty, twice said, "Oh Lord, boys, hold him off me."

A medical expert testified that he was called to see the deceased, and on examination found four wounds; the first, a cut across the heart which penetrated to the cavity, sufficiently large to allow the witness to introduce his hand and lift up the heart; the heart had a shallow incision in it; the second was above the heart, and struck the breast bone; the third, a little above the second, and penetrated the cavity of the body; the fourth, on the neck, commencing at the ear and coming down to the throat, and in the cavity of the throat, about two inches in length, severing the jugular vein; the wounds at the heart and throat were sufficient to produce death. The prisoner admitted that the wounds described caused the deceased's death.

Jane Carroll, a niece of prisoner, testified in his behalf, that she saw him on the night of the murder; his head was badly cut on the right side near the top, also a gash over his left temple, and scratched places on his throat, resembling prints of fingers; the cut on the top of the head looked as if it had been done by a rock; the prisoner remained in the house (his father's where witness was) about an hour, changed his clothes, but did not have his wounds dressed; his clothes were bloody. Caroline Hensley, a sister of the prisoner, also testified that he was wounded as described by last witness, but that the wounds had not been dressed; saw prisoner again two weeks afterwards; the prints were on his throat then, but did not examine his head. And the evidence of a brother-in-law of prisoner was substantially the same as that of the witness Jane Carroll.

Samuel Boon, the father of the prisoner, testified that he examined his wounds the morning after the homicide; his throat was choked; one cut near the top of his head, an

inch or more long; one near the right ear, and one in the temple, not so bad as that on the top of prisoner's head.

Samuel Parrott testified for the prisoner, that he saw him on the night of the killing at his (prisoner's) father's, Samuel Boon; went with him to the house; there was some blood on his head, a little place of blood there. On cross-examination, he stated that he was at the grocery on the night of the fight, and Johnson (the shop keeper) closed up his bar and went to supper; does not remember who were present except the prisoner, the deceased, Black, (the first witness) one Wilson and himself; they went up the road to meet the bar-keeper; prisoner wanted deceased to pay him what he owed him; some quarreling occurred; prisoner took hold of deceased, pulled him about, and struck him; a fight took place between them; they were separated, and deceased walked down the road; the prisoner had his pistol, and Black told him to put it up; prisoner said let me go, "I won't do any more, and will put it up." At the first fight the deceased said he did not want any "fuss"; when witness got to the second fight, prisoner was striking deceased; Black took hold of the prisoner and told deceased to get away, and deceased ran off up the creek, and after crossing it, fell; when they got to deceased, Black said, "go for a doctor," and the prisoner said, "Parrott will go with me"; the prisoner did not complain of being hurt; witness did not see blood or wounds on prisoner, till he got home; saw the place on top of his head, but did not see other wounds, nor scratches on his throat.

It was admitted that the killing was with a deadly weapon, and there was not sufficient "cooling time" between the fights. There was also evidence tending to show that the party had started to go up the road to their homes.

During the argument, a disagreement arose between counsel as to what was sworn to by one of the witnesses, and the court directed the witness to be re-called. He then re-stated

his testimony upon the point in dispute, and neither side was permitted to interrogate him. The prisoner excepted to the re-calling of the witness.

The court told the jury that its rehearsal of the testimony was to aid them, but not conclusive as to what the witnesses said; their own recollection of the testimony should guide them and then; proceeded to charge,

1. Upon a trial for murder, the fact of killing with a deadly weapon being proved or admitted, (and here, it is admitted) the burden of showing matter of mitigation is thrown upon the prisoner, unless it arises out of the testimony produced against him. It is incumbent on him to establish such matter, neither beyond a reasonable doubt, nor by a preponderance of testimony, but to the satisfaction of the jury. Homicide is murder unless attended with extenuating circumstances which must appear to the satisfaction of the jury, and if they are left in doubt on this point, it is still murder. If the prisoner in this case has satisfied the jury he did the act, of necessity, it would make a case of self-defence; if in the heat of blood arising from sudden passion, it would mitigate the offence to manslaughter; but if he has failed so to do, the jury should return a verdict of guilty of murder. Matter of mitigation may appear from the state's evidence or that offered for the defence, but in either case, it was for the prisoner to satisfy the jury of the matters of mitigation or excuse.

2. If the jury find that deceased was unwilling to fight, and if prisoner attacked him, got him down, and they were separated and prisoner got hold of him again, and they were again separated, and prisoner drew his pistol, and being induced by those present so to do, put up his pistol, and then followed the deceased, attacked, and killed him, it is murder.

3. If prisoner struck deceased in the first fight, got him down and got on him, the deceased was justified in defend-

ing himself by choking or otherwise, and such fighting in self-defence would be no provocation for the prisoner in the second fight.

4. That if deceased got away from prisoner at the first fight, and had been told to run and did go down the road, and if he saw the prisoner approaching him soon after, and if he knew the prisoner was armed from his having a pistol, and from these facts, if the jury find them true, the deceased had reasonable ground to believe and did believe that prisoner intended to attack him with the pistol or other deadly weapon, he (deceased) had the right to arm himself with a rock; and if prisoner attacked him with a knife, he had the right to fight back, and if prisoner killed deceased, it is murder.

5. It is true as a general rule, that where two men meet and fight on a sudden quarrel, no advantage being taken, and one kill the other with a deadly weapon, it will be but manslaughter, and it matters not which struck the first blow. The law presumes malice in every wilful killing, and it is the provocation given in the mutual combat that extenuates the offence to manslaughter; therefore in a killing upon a sudden quarrel, the grade of the offence depends upon the character of the provocation; if the provocation be great, the offence is but manslaughter; but if slight, and the killing be done with a degree of violence out of all proportion to the provocation, it is murder.

To these propositions of law, as charged by the court, the prisoner excepted, and requested the following instructions:

First. From all the facts and circumstances, disclosed by the evidence in this case, there is no element of murder in it; that the injuries inflicted upon the prisoner by the deceased in the first fight were a great and grievous provocation, and if the mortal blows were given after the first fight by the prisoner within the time and in the manner disclosed

by the evidence, then this is but a case of manslaughter. Refused and prisoner excepted.

Second. That the grade of homicide depends on the character of the provocation, and prisoner being in a state of great provocation at the moment of the act done, the number and violence of the blows inflicted upon deceased, and the use of the knife as disclosed by the evidence, do not make out a case of *unusual* killing, and do not necessarily imply malice. The court declined to give this instruction in the language requested, but charged the jury that the grade depends upon character of provocation, and if prisoner was in a state of great provocation at the moment of the act done, and if there had been a mutual combat, and a sudden quarrel, the number and violence of the blows inflicted upon deceased and the use of the knife as disclosed by the evidence, do not make out a case of unusual killing and do not necessarily imply malice.

Third. If prisoner were in a state of great provocation at the time of the homicide, then the degree of violence used by him or the number of blows inflicted, could not have been out of all proportion to that provocation, and they form no proper element of the grade of the prisoner's offence. Declined in the language used, but charged as follows: If there had been a mutual combat on a sudden quarrel, and if prisoner was in a state of great provocation at the time of the homicide, then the degree of violence used by him or the number of blows inflicted, could not have been out of all proportion to that provocation, and they form no proper element of the grade of prisoner's offence.

Fourth. If in the progress of a fight begun on a sudden quarrel in which prisoner was the aggressor, he receives severe injuries calculated to place him in a state of legal provocation, and acting upon that provocation he slays his adversary with a deadly weapon, it is but manslaughter. Declined as requested, but charged as follows: If in the

progress of a fight begun on a sudden quarrel in a mutual combat the prisoner receives severe injuries calculated, &c., it is but manslaughter.

Fifth. As to the testimony of near relations, the prisoner requested the court to charge: That the rule which regards the testimony of near relations with suspicion, is not a rule which rejects such testimony or necessarily impeaches it; but if from that testimony, or from it and other facts and circumstances in the case the jury believe that such near relations have sworn the truth, then they are entitled to as full credit as any other witness. This the court modified as follows: The rule of law as insisted on by the state is that such evidence must be taken with some degree of allowance, and the jury should not give it the same weight as that of disinterested witnesses; but the rule which regards it with suspicion does not reject it or necessarily impeach it, &c., (following the words of the request). To these refusals, and the propositions as modified by the court, the prisoner excepted.

The judge also charged the following, some of which at the request of prisoner, and the others not excepted to: If the prisoner pursued deceased, smarting under injuries received and within four minutes after their separation in the first fight, and killed him, it is but manslaughter. If he met deceased by accident and a mutual combat ensued in which he received two severe wounds on the head from a rock or other deadly weapon, no one being present who saw the beginning of the fight, and he killed deceased, it is manslaughter. If two men fight on sudden quarrel, whether each is willing to fight or not at the commencement of the quarrel, and one be killed, it is manslaughter, though the death is caused by use of a deadly weapon. If prisoner was on his way home after first fight and was assaulted by deceased with a rock or other deadly weapon, and two wounds were inflicted on his head as described by witnesses; and if from the attack the prisoner was in great fear of his life or enormous bodily

harm, and on this account he killed deceased, it is excusable homicide and the jury should acquit. And if the jury find the facts as above (in last proposition) and that the prisoner from these circumstances had reasonable ground to believe and did believe he was in danger of great bodily harm or of death, and on this account killed deceased, he would be excusable and the jury should acquit.

Verdict of guilty of murder, judgment, appeal by prisoner.

Attorney General and *John Devereux*, for the State.

Messrs. J. M. Gudger, *M. Erwin* and *T. F. Davidson*, for prisoner.

ASHE, J. There were a good many exceptions taken in this case to the instructions given by His Honor to the jury, and one in regard to the drawing of the jury. The names of four jurors on the list were by mistake of the clerk omitted to be put in the box with the others, but upon discovery of the mistake they were put in and drawn. And ten jurors of the special *venire* when drawn were ordered to stand aside until the panel was exhausted, and then their names were called from the list in the order in which they had been drawn, and were disposed of by the state and prisoner, the prisoner accepting one of them. There was no exception taken at the time, but only after the verdict. The prisoner did not exhaust his challenges, and had the full benefit of his right of challenge to each of the jurors. He was in no way prejudiced by the irregularity, and even if he had been, his exception comes too late after verdict. "When any irregularity in forming a jury is silently acquiesced in at the time by the prisoner, and especially when he partially consents for the sake of a trial to such irregularities, he waives his right to except after conviction, and thereby take a double chance." *State* v. *Ward*, 2 Hawks, 443. See also

State v. *Boon*, 80 N. C., 461; *State* v. *White*, 68 N. C., 158; *State* v. *Davis*, 80 N. C., 412, and cases there cited.

During the argument of the case, there being some disagreement between the counsel as to what one Hicks, a witness for the state, had testified, he was recalled by His Honor and directed to state what he had testified on his first examination. The prisoner excepted to his being recalled. The court had the right to recall him. It was the most satisfactory mode of settling the disagreement, and could not have prejudiced the prisoner, especially as His Honor in his charge to the jury told them that his rehearsal of what Hicks stated was for the purpose of aiding them, but was not conclusive as to what he did say, and their own recollection should guide them.

His Honor in charging the jury, while referring to the wounds alleged to have been received by the prisoner, and proved by his father, sister and niece, told the jury that such evidence must be taken with some degree of allowance, and the jury should not give it the same weight as that of disinterested witnesses, but the rule which regards it with suspicion does not reject it or necessarily impeach it; and if from the testimony, or from it and the other facts and circumstances in the case, the jury believe that such near relations have sworn the truth, then they are entitled to as full credit as any other witnesses. There was no error in the instruction. In the case of *State* v. *Ellington*, 7 Ired., 61, where the mother and sister of prisoner had been examined for him, Chief Justice RUFFIN, in reviewing the instructions of the court below upon the character of their testimony, said: "Nor was there error in telling the jury that their relation to the prisoner affected their credit. * * * All writers upon evidence say, that though it does not make them incompetent, it goes to their credit; because we know that such relations create a strong bias, and that it is an infirmity of human nature sometimes, in instances of great

peril to one of the parties, to yield to the bias produced by the depth of sympathy and identity of interests between persons so closely connected. How far these witnesses adhered to their integrity or were drawn aside by the ties of nature between them and the prisoner, in other words, the degree of relation actually affected their veracity, was a question for the jury. It was proper to let them know that they might legally take the relation unto their consideration in estimating the credit to be given to their testimony, and there was nothing improper in stating also the reason, on which the rule of law rests." The judge below expounded the law on this point of evidence in explicit conformity to this opinion of the Chief Justice.

As to the other instructions:

There can be no objection to the first and fifth propositions. The law is correctly laid down in them.

The second, third and fourth, as abstract propositions may not be free from error, but when we consider them in their application to the evidence before the jury, we must hold they were not erroneous. The language of a judge in his charge to the jury is to be read with reference to the evidence and the points in dispute at the trial, and of course is to be construed in reference to the context. *State* v. *Tilly*, 3 Ired., 424.

The prisoner then asked for certain specific instructions which are numbered in the case as first, second, third, fourth and fifth.

The first in this series the judge declined to give, and the prisoner excepted. There was no error in the refusal, for he could not consistently with the law, as we conceive it to be, as applicable to the facts in the case, have given such instruction.

As to the second, third, fourth and fifth instructions, His Honor gave in each case instructions substantially as prayed for. He was not bound in his charge to use the very lan-

guage in which the prayer for instructions was couched. "A charge which substantially conforms to the instructions asked for by a party is sufficient. The judge need not adopt the words of such instruction." *State* v. *Scott*, 64 N. C., 586; *State* v. *Brantley*, 63 N. C., 518; *Burton* v. *March*, 6 Jones, 409.

Having disposed of the exceptions, we come now to the consideration of the question, "What is the grade of the prisoner's offence?"

No provocation whatever can render homicide justifiable or even excusable; the least it can amount to is manslaughter. If a man kill another suddenly, without any, or without a considerable provocation, the law implies malice and the homicide is murder. If the provocation be great, and such as must have greatly provoked him, the killing is manslaughter only. But in considering whether the killing amounts to manslaughter or murder, the instrument with which the homicide was committed must be taken into consideration; for if it were effected with a deadly weapon, the provocation must be great indeed to extenuate the offence to manslaughter. Archbold's Cr. Pl., 224. Here, the provocation was not very great. The rencounter, it must be noted, was brought on by the prisoner. He threatened in the beginning of the quarrel to whip the deceased if he did not pay him the paltry sum of five cents. The deceased was unarmed, told the prisoner that he was his friend and did not want a fuss, and asked those present not to let him jump on him; but the prisoner seized hold on him, struck him, engaged with him on the ground in a "rough and tumble" fight, was pulled off the deceased, engaged with him again, and when separated the second time drew his pistol and threatened to take his life, the deceased all the while acting on the defensive, and then when he was held to keep him from shooting the deceased, as was his avowed intention, he told those holding him if they would let him go he would put up his pistol and do no more. He did put

his pistol in his pocket, and they let him loose. He was not then hurt; he did not complain of any hurt, only a few drops of blood were seen about his ear. He did not evince any very great excitement—certainly no frenzy—when he said let me go and I will put up my pistol. There was a great deal of deliberation in the remark, and when released he immediately followed the deceased, who had left the scene of the first conflict—no doubt to avoid the vengeance of the prisoner—came up with him on the road, and the next seen or heard of them was the sound of blows, and the deceased twice crying out, "Oh Lord, boys, hold him off me," and when the witnesses approached them the deceased was unresisting, and the prisoner, holding him by the left shoulder, was plunging his knife into his breast, inflicting on him several fatal wounds, one of which severed his jugular vein, and another penetrated to his heart, so deep and broad that the physician who examined them said he thrust his hand in and lifted up his heart. And then when the wounded man fled, suffused with his life blood fast ebbing, and fell down dead from exhaustion, the prisoner approached him, and looking on his bloody work, coolly said, "He is not hurt; he is only drunk.'

When there is such a determined purpose as manifested by the prisoner in this case, to force a fight on a peaceable and unoffending man, it is natural to look for some motive actuating his conduct. Before the first fight, while the prisoner was vaunting his determination to whip the deceased, unless he paid him that five cents "right there," the deceased reminded him that "some two months before, he (the prisoner) had been insulted at him." It must have occurred to the deceased that the prisoner's hostility on that occasion was prompted by that previous affront, or he would not just then have alluded to it. And so trivial was the pretext for assaulting the deceased, that it is most probable he

ascribed the prisoner's conduct to the real motive, that of avenging the supposed insult.

But conceding there was no express malice, how stands the case? The solicitor for the state admitted there was not cooling time between the first and second rencounters, but this court is not concluded by such admission. It matters not whether there was cooling time or not, if the prisoner acted coolly and vengefully or with a degree of violence out of all proportion to the provocation, his crime is that of murder. *State* v. *Chavis,* 80 N. C., 353; *State* v. *Curry,* 1 Jone, 280. Whatever provocation there was, it was brought on by the turbulent conduct of the prisoner himself. He was the aggressor, and from the beginning showed a disposition to take the life of the deceased, and in the last fatal conflict his conduct was marked by the utmost cruelty and brutality. The wounds he received, as testified to by his relations, were probably greatly exaggerated, for the witness Parrott, who went home with him after the homicide, testified that he saw some blood on his head, a little place of blood there, and the prisoner did not complain of being hurt. But admitting that the prisoner received the injuries described by his relations, in our opinion they did not amount to such provocation, under the circumstances of the case, as mitigated his crime to manslaughter.

"Where the deceased intended only a fight without weapons, and that was known to the prisoner, and the prisoner drew his knife without notice to the deceased, even if they actually engaged in the fight, the stabbing of the deceased by the prisoner would be murder." *State* v. *Scott,* 4 Ired., 409. And again, "where persons fight on fair terms, and after an interval, blows having been given, a party draws, in the heat of blood, a deadly instrument and inflicts a mortal injury, it is manslaughter only; but if a party enter a contest dangerously armed and fight under an unfair ad-

vantage, though mutual blows pass, it is not manslaughter but murder." *State* v. *Hildreth*, 9 Ired., 440.

Applying the principles enunciated in these and other cases we might cite, we are constrained to hold that the prisoner is guilty of murder. There is no error. Let this be certified to the superior court of Madison county, that the sentence of the law may be carried into execution.

PER CURIAM. No error.

STATE v. JACOB F. SLAGLE.

Joinder of Counts—Attempt to Commit Crime—Conviction of Misdemeanor on Charge of Felony.

1. An attempt to commit a felony or misdemeanor is, at common law, in itself a misdemeanor; *hence*, an attempt to murder by administering poison is a misdemeanor.
2. Where one is indicted and tried for a felony, yet the facts averred in the indictment constitute only a misdemeanor, the court may give judgment for such misdemeanor.
3. It is a common law misdemeanor to administer a noxious drug with intent to produce an abortion.
4. It is not a demurrable misjoinder of counts to charge in the same bill an attempt to kill by administering noxious and poisonous drugs, and an attempt to produce an abortion by the same means; both offences being misdemeanors of the same grade and punishable alike.

(*State* v. *Upchurch*, 9 Ired., 454, cited and approved.)

INDICTMENT for administering Poison, tried at Fall Term, 1879, of MACON Superior Court, before *Graves, J.*

The defendant demurred to the bill of indictment, demurrer overruled, and defendant appealed.

Attorney General, for the State.
No counsel for defendant in this court.

ASHE, J. The indictment contained four counts; the first two charged the defendant with having *wilfully* and *feloniously* administered a poisonous drug to one Eva Bryson, with intent to kill and murder her, varying only in the description of the drug used. The last two counts charged him with having unlawfully and wickedly administered a noxious potion to the said Eva, then being quick with child, with the intent to cause and procure the miscarriage of the said Eva, and the premature birth of the said child; these two counts only differing as to the nature of the drugs employed to effect the purpose. The defendant when called upon to plead to the indictment, demurred to the same, and assigned for cause of demurrer: 1st. That the facts set forth and charged against him in said bill of indictment do not constitute an offence or crime against the laws of North Carolina. 2nd. That there is a misjoinder of counts in said bill of indictment.

The court committed no error in overruling the demurrer. The facts charged in the bill are admitted by the demurrer. The charge in the first two counts of administering the poison with intent to kill and murder, amounted to an attempt to commit a felony, and every attempt to commit a felony or misdemeanor is at common law, in itself, a misdemeanor. Whar. Cr. Law, § 2686; Roscoe Cr. Ev., 283.

It is a common law offence and the common law is in force in this state. The defendant is therefore charged in the indictment with a crime under the laws of the state. And when one in this state is indicted and tried as for a felony, yet the facts averred in the indictment do not support the charge of felony, but a misdemeanor, the court may give judgment for such misdemeanor. *State* v. *Upchurch,* 9

Ired., 454. As Chief Justice RUFFIN in that case says, "it does not raise the grade of a crime, although an indictment does apply the epithet "*felonice*" to that which is not a felony." Calling it a felony does not make it one.

The second cause of demurrer assigned is not less untenable than the first. We have no statute making it indictable to administer "drugs" to produce abortion, and there is very little to be found on the subject in either the English or American writers on criminal law, but it is held by the highest authority that it is a misdemeanor at common law. Russell on Crimes, 522. And Wharton in his work on Criminal Law, § 1220, says: "There is no doubt at common law the destruction of an infant unborn is a high misdemeanor, and at an early period, it seems to have been murder. * * * It has been said it is not an indictable offence to administer a drug to a woman and thereby to procure an abortion, unless the mother is quick with child, though such a distinction, it is submitted, is neither in accordance with the results of medical experience or with the principles of the common law. See also Hawkins, ch. 13, § 16.

Each of the counts of the indictment then is for a misdemeanor at common law, the punishment for which is fine and imprisonment, or both, at the discretion of the court. And it is well settled that there may be a joinder of counts when the grade of the offence and the punishment are the same. There was then no misjoinder, and no error in the ruling of His Honor upon the demurrer. Let this be certified to the superior court of Macon county that further proceedings be had agreeably to this opinion and the law of the state.

PER CURIAM. No error.

STATE v. JOSEPH WATTS.

Joinder of Indictments—Arresting Judgment—Conviction of Misdemeanor on Charge of Felony.

1. Where two indictments relate to the same transaction, they are to be treated as one bill with two counts, and may be joined wherever a joinder of counts would be authorized.
2. When the same act is charged in one bill of indictment as an assault and battery, and in another as an assault with intent to commit a rape, and the jury convict of a simple assault only, an alleged misjoinder of the charges cannot be taken advantage of by motion in arrest of judgment.
3. Where one is indicted for an offence which the bill terms a felony, but which is only a misdemeanor, he may be convicted of the latter offence.

(*State* v. *Speight*, 69 N. C., 72; *State* v. *Johnson*, 5 Jones, 221; and 75 N. C., 123; *State* v. *Upchurch*, 9 Ired., 454, cited, commented on and approved.)

INDICTMENT for an Assault, tried at Fall Term, 1879, of HAYWOOD Superior Court, before *Graves, J.*

Verdict of guilty, judgment, appeal by defendant.

Attorney General and *J. M. Gudger*, for the State.
Messrs. A. T. & T. F. Davidson, for defendant.

ASHE, J. The defendant was tried on two separate indictments: the first, for an assault and battery, and the second, for an assault with intent to commit a rape. The jury found him guilty of the assault, but not guilty of the assault with intent to commit a rape. The defendant moved in arrest of judgment upon the ground that the two indictments could not be joined, but His Honor overruled the motion and the defendant appealed.

The rule for joining different offences in the same bill of indictment is, that it always may be done when the grade

of the offences and the judgments are the same. Archbold's Cr. Pl., 61; *State* v. *Speight*, 69 N. C., 72.

The offence charged in each of these bills of indictment is a misdemeanor, and are of the same grade, but the punishments are different. Upon conviction on the first indictment, the punishment is fine or imprisonment, or both at the discretion of the court, and upon the last imprisonment in the state prison for not less than five nor more than fifteen years. On account of this difference in the punishment to be inflicted, it is contended that there is a misjoinder and the indictments cannot be sustained. The two indictments relate to the same transaction and are to be regarded and treated as one bill of indictment containing two counts. *State* v. *Johnson*, 5 Jones, 221. In that case where there were two bills of indictment for the same offence, CHIEF JUSTICE PEARSON said, "the effect was simply to add another count to the bill of indictment; the whole constituted but one proceeding, to be treated as if the bill, at the first, had contained three counts instead of one. If the counts be inconsistent, it is ground for a motion to quash, or the state may be ruled to elect upon which the trial shall be had; this is only done to prevent injury to the accused, but never when the counts are only variations in the mode of charging the same offence; and the fact that the counts are all in one bill or in two bills, both being found by the grand jury, makes no kind of difference."

The two indictments then are to be taken as two counts in one bill of indictment, and the question is, can these two counts be joined in the same bill? The authorities are in conflict upon this point. Both Archbold and Bishop, at the foot of the precedents given by them for an indictment for an assault with intent to commit a rape, suggest, "add a count for a common assault." But admitting there is a misjoinder of counts, can it be taken advantage of by a motion in arrest of judgment? The current of authorities, both

English and American, is, that it cannot be done. Archbold, in his criminal pleadings, lays it down that an objection to a misjoinder of counts may be taken before the defendant has pleaded, or the jury are charged, by a motion to quash; or if it be not discovered until after the jury are charged, the judge may put the prosecutor to his election on which charge he will proceed; but it is no objection in arrest of judgment. To the same effect are Wharton on Criminal Law, and Bishop on Criminal Procedure, 202 and notes 1, 2 and 3, and especially note 3, and the American cases there cited in support of the doctrine. All these authorities go to establish the principle that where an indictment charges offences to which the law affixes distinct punishments, it may be bad for misjoinder; but after *verdict* and judgment, the judgment will not be arrested or reversed for that cause. The defect is cured by the verdict. But in this state, in the case of *State* v. *Johnson*, 75 N. C., 123, which was an indictment containing two counts, one for stealing a horse and concluding against the form of the statute, and the other for receiving the horse knowing it to have been stolen, this court arrested the judgment on the ground of misjoinder of counts where the grade and punishment were not the same, and PEARSON, C. J., assigned as a further reason for the arrest, "that upon the 'general verdict' the record did not enable the court to know upon which, in other words, for which offence the prisoner should be sentenced, and no judgment can be given without inconsistency and error upon the face of the record."

But our case is distinguishable from that. Here, that difficulty is put out of the way by the verdict of the jury acquitting the defendant of the assault with the intent to commit a rape and finding him guilty of the assault only. That would have been a good verdict if the indictment had contained only the one count for the assault with intent, for in such cases it is permitted to acquit of the higher of-

fence and find guilty of the lesser. Whar. Cr. Law, 617, and Bishop Cr. Proc., 559.

The verdict then in this case must be taken to be a general verdict on both counts for the assault, to which there is nothing objectionable, upon the authorities.

But it may be objected that the second count in the indictment charges a felony, and that in this state counts for felony and misdemeanors cannot be joined in the same bill of indictment. That is so. But when a person is indicted for an offence as for a felony, when in fact it is no felony but only a misdemeanor, he may be convicted of the latter offence. The use of the word felony in the indictment does not raise the grade of the offence, and make that felony which is no felony. *State* v. *Upchurch*, 9 Ired., 454.

The defect in this indictment was cured by the verdict and there was no ground for the arrest of the judgment. There is no error. Let this be certified to the superior court of Haywood county.

PER CURIAM. No error.

STATE v. SNOW MOORE.

Jurisdiction of criminal offences, concurrent, exclusive. Indictment.

1. Under the provisions of the act of 1879, ch. 92, the superior, inferior and criminal courts have concurrent jurisdiction with justices of the peace of all affrays, assaults, and assaults and batteries, where a justice has not taken jurisdiction within six months after the commission of the offence.

2. And indictments for such offences need not aver that the offence was committed more than six months before the finding of the bill and that no justice has taken jurisdiction. This is matter of defence and may be taken advantage of under the plea of "not guilty."

3. The superior and criminal courts have exclusive jurisdiction of all assaults with intent to kill or commit rape, and where a deadly weapon is used or serious damage done. Inferior courts have like jurisdiction except in assaults with intent to commit rape. And here, the indictment should contain the proper averments of the intent, the character of the weapon and the extent of the injury.

4. Remarks of ASHE, J., upon the effect of omitting the term "exclusive" in section twenty-seven, article four of the constitution of '75.

INDICTMENT for an Affray, tried at Fall Term, 1879, of IREDELL Superior Court, before *Schenck, J.*

The defendants, Snow Moore and William Sloop, were tried and convicted on an indictment for an affray in the usual form. It was in proof that the defendant, Moore, struck his co-defendant with a stick loaded in the end with lead, and knocked out his eye. The counsel for defendants moved in arrest of judgment because the indictment did not allege that a deadly weapon was used nor serious damage done; and because the indictment did not charge that the affray occurred more than six months before the finding of the bill. The motion was overruled, judgment, appeal by defendants.

Attorney General, for the State.

The defendants were not represented in this court.

ASHE, J. This case presents one of the numerous questions of jurisdiction, which are constantly arising from hasty and inadvertent legislation on the subject of the distribution of the judicial powers of the government among the different courts of the state. Judges and justices are in doubt as to their jurisdiction in many cases. Solicitors are at a loss how to frame their bills. And the consequence is,

litigation is increased and expenses incurred by the very legislation which was intended to simplify and cheapen legal proceedings. This very case now before us is an instance of this uncertainty in the construction of the laws.

The constitution in section twelve, article four, declares that the general assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it, as a co-ordinate department of the government; but the general assembly shall allot and distribute that portion of the power and jurisdiction, which does not pertain to the supreme court, among the other courts prescribed in the constitution or which may be established by law, in such manner as it may deem best. And again in section twenty-seven of the same article, it is declared "that justices of the peace shall have jurisdiction of all criminal matters arising within their counties, where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days."

The superior courts by their original constitution had jurisdiction of all criminal offences, and still have, except where it has been restricted by the constitution or some act of the legislature. Under the constitution of '68, justices had *exclusive* jurisdiction of all criminal matters where the punishment could not exceed a fine of fifty dollars or one month's imprisonment. But the term "*exclusive*" is omitted in the constitution of '75, and we think the effect of this omission is to give concurrent jurisdiction to the superior, inferior, and criminal courts with justices of the peace in all cases where the punishment cannot exceed a fine of fifty dollars or thirty days' imprisonment, except in those cases where by the act of the legislature exclusive jurisdiction is given to justices of the peace; but even in those cases, with a qualification in respect to affrays, assaults, and assaults and batteries.

Construing the sixth, seventh and eleventh sections of the

act of 1879, ch. 92, together, we think the superior and criminal courts have exclusive jurisdiction of all assaults with intent to kill or with intent to commit rape, or where a deadly weapon has been used or serious damage done; and concurrent jurisdiction with justices of the peace of all assaults committed within one mile of the place where and during the time such court is held, and of all affrays, assaults, assaults and batteries where a justice of the peace has not within six months after the commission of the offence proceeded to take official cognizance of the same. And inferior courts have like jurisdiction, except in cases of assaults with intent to commit rape.

In framing bills of indictment for such offences, it is not necessary to aver that the offence was committed more than six months before the finding of the bill and that no justice of the peace has taken official cognizance of it. That is matter of defence like the statute of limitations. It is matter which goes to the jurisdiction of the court and may be taken advantage of under the plea of "not guilty." Arch. Cr. Pl., 80. But in indictments for assaults with intent to kill or with intent to commit rape, or where a deadly weapon has been used or serious damage done, there, it would be necessary for the bill to contain the proper averments of the intent, the character of the weapon and the extent of the injury.

In this case there is no averment of the use of a deadly weapon or of any damage done, but the defendants are found guilty of an affray and of mutually assaulting and beating each other, and as it is not made to appear that the bill was found within six months after the commission of the offence and that a justice of the peace has taken official cognizance of the case, the superior court had jurisdiction. There is no error in the judgment of the court below. Let this be certified, &c.

PER CURIAM. No error.

STATE v. JOHN HOOPER.

(Same syllabus as in preceding case.)

INDICTMENT for an Affray, tried at Fall Term, 1879, of JACKSON Superior Court, before *Graves, J.*

The defendant and one Monroe Hooper were indicted in the usual form for an affray, in mutually assaulting and beating each other, and there was evidence that the offence charged was committed more than six months before indictment found. The jury returned a verdict of guilty against the defendant, and his counsel thereupon moved in arrest of judgment on the ground that the bill did not state that a deadly weapon had been used, nor the offence committed more than six months before the bill was found. Motion overruled, judgment, appeal by defendant.

Attorney General and *G. S. Ferguson*, (who also appeared in the preceding case,) for the State.

Mr. Kope Elias, for the defendant.

ASHE, J. It has been decided in *State* v. *Moore, ante*, 659, that the superior courts have concurrent jurisdiction with justices of the peace of all affrays, assaults, and assaults and batteries where a justice has not within six months after the commission of the offence proceeded to take official cognizance of the same; and in framing the bill of indictment it is not necessary to charge that the offence was committed more than six months before the finding of the bill, and that no cognizance has been taken of the same by a justice of the peace; that that was matter of defence which went to the jurisdiction of the court, and like the plea of the statute of limitations might be taken advantage of by the defendant on the trial under the plea of "not guilty." On this

authority there was no error in the ruling of the court below upon the motion in arrest of judgment.

Let this be certified to the superior court of Jackson county that further proceedings may be had agreeably to this opinion.

PER CURIAM. No error.

STATE v. JOHN BENTHALL, JR.

Jurisdiction—Trial—Quashing.

1. Justices of the peace have exclusive jurisdiction of a misdemeanor for failure to list for taxes. Acts 1877, ch. 155, and 1879, ch. 92. (Remarks of ASHE, J., upon the distribution of judicial power.)
2. Wherever a defect of jurisdiction is apparent in any case, civil or criminal, the court may, on plea or *ex mero motu*, stop the proceeding at any stage; *Therefore* it is not erroneous to quash an indictment for want of jurisdiction, after a plea of "not guilty" entered

(*Branch* v. *Houston*, Busb., 85; *Burroughs* v. *McNeil*, 2 Dev. & Bat. Eq., 297; *State* v. *Roach*, 2 Hay., 352, cited and approved.)

INDICTMENT for a Misdemeanor, tried at Fall Term, 1879, of HERTFORD Superior Court, before *Gudger, J.*

This was a motion to quash a bill of indictment. The bill was found at spring term, 1879, and is as follows: "The jurors for the state upon their oaths present, that John Benthall, Jr., late of the county of Hertford, and state of North Carolina, was on the first day of April, 1878, a resident of said county and the owner of property in St. John's township and county aforesaid, subject to taxation, the said John Benthall, Jr., being then and there liable for the tax on said property, and for a poll tax. And the jurors aforesaid, upon

their oaths aforesaid, do further present, that the said John Benthall, Jr., the owner of property in the said township, subject to taxation, the said John Benthall, Jr., being then and there liable for said tax on said property, and for a poll tax as aforesaid, did unlawfully fail to give himself in and to list said property so subject to taxation before the list-taker and county commissioners of said county, on or before the first day of June, A. D. 1878, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state." To which indictment the defendant pleaded "not guilty," and then moved to quash the bill on the ground that justices of the peace had exclusive jurisdiction of all such offences, and that the superior court had no jurisdiction of this case. The motion was sustained by the court, and *Grandy*, solicitor for the state, appealed.

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

ASHE, J. The defendant is indicted under section twenty of the act of 1876-'77, ch. 155, in which it is declared that "all persons who are liable for a poll tax and shall wilfully fail to give themselves in, and all persons who own property and wilfully fail to list it within the time allowed, before the list-taker and the county commissioners, shall be deemed guilty of a misdemeanor, and on conviction therefor shall be fined not more than fifty dollars, or imprisoned not more than thirty days." And it is provided in section seven of the act of 1879, ch. 92, "that justices of the peace shall have exclusive original jurisdiction of all criminal matters arising within their counties, where the punishment now or which shall be hereafter prescribed by law, shall not exceed a fine of fifty dollars or imprisonment for thirty days."

The last act was ratified on the fourth day of March, 1879, and the bill of indictment found on the third Monday after

the fourth Monday in March, 1879. This would seem to settle the question of jurisdiction. The grounds for claiming jurisdiction in the superior court do not appear upon the record, and we are left to conjecture. Possibly the omission of the word "exclusive" in section twenty-seven of article four of the amended constitution, may be held to indicate the intention of the framers of that instrument to authorize the legislature to give concurrent jurisdiction with the superior courts, to justices of the peace in criminal cases where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days. However this may be, the twelfth section of the same article of the constitution provides, that "the general assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a coördinate department of the government, but the general assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the supreme court, among the other courts prescribed in this constitution, or which may be established by law, in such manner as it may deem best," &c. By virtue of this section, the general assembly, in alloting and distributing the judicial powers of the several courts referred to, had the right to define and prescribe their jurisdiction. And when it provided that justices of the peace should have exclusive original jurisdiction of certain criminal actions, where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days, it was in the exercise of a constitutional power, and necessarily deprived all other courts of jurisdiction of such offences.

We are therefore of the opinion that the superior court had no jurisdiction of this case, and that there was no error in the ruling of the court below, unless it be that the objection came too late, and that after the defendant had by his plea put himself upon the country for trial, the court had no right to quash the bill of indictment.

As a general rule a motion to quash on the part of the defendant will not be allowed after the plea of "not guilty," but the courts will entertain a motion by the solicitor to quash at any time before verdict. Archbold Cr. Pl., 67. And if the courts can exercise this power on motion made by the solicitor after not guilty pleaded, we hold it must have the same power *ex mero motu* when it is manifest from the bill of indictment that the case is *coram non judice*. In the case of *Branch* v. *Houston*, Busb., 85, PEARSON, J., in delivering the opinion of the court, held "that the consent or a waiver cannot confer jurisdiction withheld by law, and the instant the court perceives that it is exercising a power not granted, it ought to stay its action; and *ex necessitate* the court may, on plea, suggestion, motion, or *ex mero motu*, when the defect of the jurisdiction is apparent, stop the proceeding." In support of which he refers to *Burroughs* v. *McNeil*, 2 Dev. & Bat. Eq., 297; *Green* v. *Rutherford*, 1 Ves., 471; Tidd's Practice, 516, 960. See also *Davis* v. *Packard*, 6 Pet., 41; *Griffin* v. *Domingues*, 2 Duer, (N. Y.) 656.

It is true the authorities above cited are civil cases, but in civil actions as well as in indictments the regular order of pleading must be observed; as for instance, a plea to the jurisdiction cannot be pleaded after a plea to the person or declaration, and if the court can of its own motion arrest the progress of a civil action at any stage of the pleadings for a manifest want of jurisdiction in the court, there can be no reason why it may not exercise the same discretion in a criminal action. It would be useless for a court to proceed with the trial to verdict, when it is plain no judgment could be pronounced in case of a conviction. 2 Hawk., P. C., 288, and *State* v. *Roach*, 2 Hay., 352, where the indictment was quashed after plea.

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

No error. Affirmed.

STATE v. GEORGE JONES and others.

(Same syllabus as in preceding case.)

INDICTMENT for a Misdemeanor in failing to list property for taxes, tried at Fall Term, 1879, of EDGECOMBE Superior Court, before *Avery, J.*

The defendants moved to quash the bill of indictment for want of jurisdiction. The court allowed the motion and the solicitor for the state appealed.

Attorney General, for the state.
Mr. Frank Powell, for the defendants.

ASHE, J. The facts in this case are almost identically the same as those in the case of *State* v. *Benthall,* at this term, and therefore need not be stated. The questions of law involved are the same, and the opinion delivered in that case is the decision in this. Let it be certified to the superior court of Edgecombe county in this case.

No error. Affirmed.

STATE v. CHARLES W. CRAIG.

Jurisdiction—Failure to work Road.

Justices of the peace have exclusive original jurisdiction of the offence of failing to work the public roads.

(*State* v. *Heidelburg,* 70 N. C., 496, cited and approved.)

CRIMINAL ACTION for failure to work on Public Road, commenced before a justice of the peace and heard on ap-

peal at October Term, 1879, of NEW HANOVER Criminal Court, before *Meares, J.*

The opinion in this case as reported in 81 N. C., 588, was certified to the court below with directions for further proceedings, when on motion of defendant's counsel the judgment was arrested upon the ground of a want of jurisdiction in the justice's court where the action begun, and *Moore*, solicitor for the state, appealed.

Attorney General, for the State.
Mr. A. T. London, for the defendant.

SMITH, C. J. This case was before the court at the last term, and it was held that upon the facts set out in the special verdict, the defendant was not exempt from liability to work upon the public roads. Upon the calling of the cause in New Hanover criminal court for further proceedings, on motion of the defendant's counsel, judgment was arrested and the solicitor appealed. The argument in support of the ruling below is the want of jurisdiction in the justice, with whom the proceedings originated, to hear and determine the subject matter of the charge, and this is the only point presented in the appeal. It thus becomes necessary to examine and ascertain the result of the legislation in respect to the offence.

By the act of February 16th, 1871, it is declared "that if any person liable under existing laws, to work upon the public roads shall wilfully refuse to work upon said roads after being legally summoned for that purpose, &c., the person, so offending, shall for every such offence be deemed guilty of a misdemeanor and upon conviction before a justice of the peace shall be fined not less than two nor more than five dollars." Bat. Rev., ch. 32, § 112.

This act was amended by the act of February 16th, 1874, which provides that "the punishment for this offence shall

not exceed a fine of fifty dollars or imprisonment for one month." Act of 1873-'74, ch. 176, § 7.

In consequence of the recent amendment to the constitution whereby the jurisdiction of justices of the peace is restricted to criminal cases where "the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days" instead of one month, as before, it became necessary, to retain the jurisdiction of these officers, that a different penalty should be prescribed. This is done in the act of February 28th, 1879, act 1879, ch. 92, the first section of which confers upon justices of the peace "exclusive original jurisdiction to hear, try and determine the offences enumerated in sections 43, 85, 112," &c., of chapter 32 of Bat. Rev., as amended by chapter 176, of the laws of 1873-'74; "and the punishment for every such offence shall not exceed a fine of fifty dollars or imprisonment for thirty days."

There would be no difficulty about the question of jurisdiction under this legislation, were it not for the act of March 14th, 1879, entitled "An act to provide for keeping in repair the public roads of the state." Acts of 1879, ch. 82. Section 6 of this act provides that "any person liable to work on the road who shall fail to attend and work, as hereinbefore provided, when summoned so to do, unless he shall have paid the one dollar as aforesaid, shall be guilty of a misdemeanor, and on conviction shall be fined not less than two dollars nor more than five dollars, or imprisonment not exceeding five days, *or both*, in the discretion of the court.

This section, considered without regard to other parts of the enactment, by force of the words "*or both*," withdraws the offence from the cognizance of a justice of the peace, as was decided in *State* v. *Heidelburg*, 70 N. C., 496. But the next section requires the overseer to make a report, verified by oath, to the board of township supervisors, of the "names of hands who failed," after being summoned, "to attend and work," or to pay the one dollar in lieu thereof, and it is

made the duty of the justice administering the oath "to issue a warrant for the arrest of any such hand or hands" and to "put him or them upon trial for the offence."

While the statute plainly contemplates the undisturbed jurisdiction of a justice over the offence described in section 6, and provides for its exercise, the punishment authorized to be inflicted transfers and vests it exclusively in the superior court. These sections are inconsistent, and one or both must give way. If a fine and imprisonment may conjointly be imposed, as prescribed, the superior court has exclusive cognizance of the offence, and yet the intent to retain the jurisdiction of the justice is as plainly expressed as in the act of February preceding. It is the duty of the court to give effect to the legislative will, consistent with the constitution, and whenever practicable, to reconcile the different provisions of the law. When this cannot be done, the prevailing intent and general purposes of the enactment must prevail over particular and repugnant provisions contained in it. Acting upon this rule of interpretation, we are forced to hold the words "or both" perhaps inadvertently introduced, irreconcilable with the jurisdiction expressly conferred, and under the constitution inoperative and void. A part of a statute in excess of power may be null and the rest remain in force, and thus harmony be restored. This construction softens the asperities of a rigorous but perhaps necessary law, while any other would be doing violence to the declared legislative purpose and neutralize its important provisions.

The present proceeding commenced as in other criminal prosecutions by warrant issued upon affidavit and charging a *wilful refusal* to work, (the misdemeanor defined in section 112, Bat. Rev.,) and not in the mode pointed out, nor for the mere failure to attend and work, (the offence described in sections 6 and 7 of the act of 1879). If the latter act does not supersede and displace the former, the jurisdiction may

be sustained independently of the latter. We therefore declare the ruling of the court below erroneous and this will be certified to the end that the court proceed to judgment according to law.

PER CURIAM. Error.

STATE v. J. MARTIN and others.

Larceny—Trial, objection to jury—Jury, challenge to array.

1. Objection to any irregularity in drawing a grand jury must be taken by plea in abatement on the arraignment of defendant and not by motion to quash.
2. In selecting a grand jury, the names of some were drawn and put back in the box and others drawn in their stead to equalize the number among the different townships; *Held*, not to be in strict compliance with section 129 i, of the code, but as the act is directory only, and not mandatory, and no actual wrong was done or intended in this case, a challenge to the array was properly overruled. (The court condemn any departure from the requirements of the statute.)
3. In larceny, several distinct asportations do not constitute different offences where there is a continuing transaction, and the defendant may be indicted for the final carrying away. If there be different kinds of goods enumerated, proof of the larceny of any one is sufficient to warrant a conviction.
4. An indictment for stealing a *hat* need not describe it as a black or white hat, or a felt or beaver.
5. Ten yards of jeans alleged and thirty and a half proved to have been stolen; *no variance*.
6. In a count for receiving stolen goods it is not necessary to aver from whom the goods were received.

(*State* v. *Haywood*, 73 N. C., 437; *Davis*, 2 Ired., 153; *Baldwin*, 80 N. C., 390; *Blackburn*, *Id*., 474; *Liles*, 77 N. C., 496; *Griffice*, 74 N. C., 316; *Trexler*, 2 Car. Law Rep., 188; *Minton*, Phil., 196, cited and approved.)

STATE *v.* MARTIN.

INDICTMENT for Larceny, tried at Fall Term, 1879, of RUTHERFORD Superior Court, before *Buxton, J.*

The special instructions asked for by the defendants on the trial were refused, and after a verdict of guilty they moved for a new trial and in arrest of judgment, both of which motions being overruled, the court pronounced judgment and the defendants appealed. The exceptions taken below are set out in the opinion of this court. The articles alleged to have been stolen were taken from the prosecutor's store at various times during the months of August and September.

Attorney General, for the State.
Messrs. Hoke & Hoke, for the defendants.

ASHE, J. The defendants' counsel challenged the array of regular jurors, on the ground that they were irregularly drawn. The evidence is that they were drawn from box No. 1 by a boy under ten years of age. Some names were drawn and not used, because the county commissioners thought too many were drawn from one end of the county; and wishing to equalize the number among the different townships, they were put back and others drawn in their stead. While the manipulation of the names of jurors as practiced in this case is to be seriously deprecated and condemned, as tending to corruption and the obstruction of the impartial administration of justice, there seems to have been no actual wrong done or intended on this occasion. And as the jury were drawn under the provisions of chapter 17, section 229 of Battle's Revisal (act of August 4, 1868) prescribing how the jury lists of the several counties shall be prepared by the county commissioners, and this court has construed that section to be directory only, and not mandatory, the exception cannot be sustained. *State* v. *Haywood,* 73 N. C., 437. According to the authority of that case, where

there is any informality in drawing or impaneling grand jurors, a plea in abatement on the arraignment and not a motion to quash is the proper practice. On the arraignment in this case the defendants pleaded not guilty; after that it was too late to take objection to any irregularity in drawing the jury. *State* v. *Davis*, 2 Ired., 153; *State* v. *Baldwin*, 80 N. C., 390; *State* v. *Blackburn*, *Ibid.*, 474; *State* v. *Liles*, 77 N. C., 496; *State* v. *Griffice*, 74 N. C., 316. But in this case it really makes no difference when it was taken.

The first special instruction asked was, that the articles charged to have been stolen were taken at different times, and therefore constituted different offences and cannot be united in the same indictment: His Honor very properly refused this instruction, for it was a continuing transaction, and in such cases, though there may be several distinct asportations, the parties may be indicted for the final carrying away, and all who concur are guilty, though they were not privy to the first and intermediate acts. *State* v. *Trexler*, 2 Car. L. R., 188. And it is held "if there be ten different species of goods enumerated and the prosecutor prove the larceny of any one or more of a sufficient value, it will be sufficient although he fail in his proof of the rest." Arch. Cr. Law., 50.

As to the second instruction prayed, that the articles were insufficiently described, the indictment too vague, and does not identify the articles: There is no error in the refusal of His Honor to give that instruction. The articles charged are one hat, one pair of pants, &c. This was sufficiently descriptive. It was not necessary to describe the hat as a black or white hat, or that it was a felt or beaver. See all the precedents in books of forms.

The remaining instruction asked is, that there was a variance between the proof and allegation, because the indictment charged the larceny of ten yards of jeans, and the proof was thirty and a half yards. This is so absurd that it

looks like trifling with the court, and to cite an authority against the fallacy of the position would be attaching too much importance to the exception.

The defendants having failed to obtain a new trial, moved in arrest of judgment, and assigned as grounds for their motion the objections taken upon the motion for new trial, all of which we have held were untenable; and the further ground "that the count for receiving was defective in not stating from whom the goods were received:" His Honor refused to arrest the judgment, in which ruling there was no error. In an indictment for receiving stolen goods it is not necessary to state from whom the goods were received. *State* v. *Minton*, Phil., 196. There is no error. Let this be certified to the superior court of Rutherford county.

PER CURIAM. Nor error.

STATE v. HIRAM RIGHTS.

Larceny—Recent Possession—Judge's Charge.

1. The finding of stolen goods in possession of the accused a week or two after the theft does not raise a presumption of *law* against him, but is a circumstance for the jury to consider, the rule being that the evidence is stronger or weaker as the possession is more or less recent.

2. Discussion of presumptions on "recent possession" by ASHE, J.

(*State* v. *Johnson*, 1 Winst., 238; *State* v. *Williams*, 9 Ired., 140, cited and approved.)

INDICTMENT for Larceny tried at Fall Term, 1879, of Forsyth Superior Court, before *Gilmer, J.*

The defendants, Hiram Rights and Nathan Blum, were charged with larceny and receiving, &c., bacon and pork,

the property of William B. Peterson. It was in evidence that on the 6th of February, 1879, the smoke-house of the prosecutor, Peterson, was broken open and three hams and other pieces of meat stolen; and a week afterwards the house of defendant, Blum, was searched under a warrant for that purpose, and a ham found therein which was identified by the prosecutor as his property and one of the pieces of meat stolen from him; and another ham also identified as one of the same was found in the house of one Sally Stockton, who testified on the trial that defendant Rights, who had engaged her to cook for him, brought it to her house on the night before the search. The defendant Blum, who was present when it was found, stated that he had bought the meat from one Apple, but Apple on his examination as a witness testified that he had never sold any meat to Blum. For the purpose of showing that the prosecutor was mistaken as to the time intervening between the theft and the search, a warrant without any return upon it was offered in evidence by defendants, dated February 20th, 1879, and the prosecutor was asked if that was not the date of the search; he replied that it was not, but that the search was made just one week after the theft.

The defendant's counsel requested the court to charge the jury that there was not sufficient evidence to justify them in finding a verdict against the defendant Rights; and also if they believed that two weeks had elapsed after the loss of the property before it was found, the finding it in the defendant's possession was not a circumstance to raise any presumption at all against Rights; and also that there was no evidence whatever on the second count in the bill.

The court charged the jury that the weight of the evidence was for them; that whether they believed the time elapsing between the larceny and the finding was two weeks or just a week, there was no presumption of law against the defendants; that the finding of the stolen goods in their

possession but raised a presumption of fact and was a circumstance for them to consider, the rule being that such presumption was stronger or weaker as the possession was more or less recent, and that the weight of such presumption was for the jury. Upon the second count for receiving the goods, the court charged that the only evidence of the receiving was the finding of the meat in the possession of the defendants. The defendants were found guilty on the first count for larceny. Judgment, appeal by defendants.

Attorney General, for the State.
Mr. J. C. Buxton, for defendants.

ASHE, J. Larceny is a crime committed in secret, and the state in most cases is necessarily compelled to resort to circumstantial evidence to effect a conviction of the thief. And the possession of the property shortly after the theft is the circumstance most usually relied upon. It is a general rule that whenever the property of one, which has been taken from him without his knowledge or consent, is found in the possession of another, it is encumbent on that other to prove how he came by it, otherwise the presumption is that he came by it feloniously. But in applying this rule, due attention must be paid to the circumstances by which such presumption may be weakened or strengthened, depending on the length of time intervening between the theft and the finding of the goods in the possession of the party accused. 2 Russell on Crimes, 195. Upon an indictment for stealing from a dwelling house, if the defendant were apprehended a few yards from the outer door with the stolen goods in his possession, it would be a violent presumption of his having stolen them. But if they were found in his lodging sometime after the larceny and he refused to account for his possession of them, this, together with proof that they were actually stolen, would not amount to a violent presumption,

but to a probable presumption; and if the property is not found in the possession of the defendant until months after, it is a light presumption and is entitled to no weight. Arch. Cr. Pl., 123. And when the possession is so soon after the theft as to raise a probable presumption, it is a question to be submitted to the consideration of the jury.

The defendants contend that the lapse of two weeks between the theft and the search when the goods were found, was too long to raise more than a light presumption of their guilt, and His Honor should so have instructed the jury. But we are of a different opinion. In the case of *State* v. *Johnson*, 1 Winst., 238, property proved to have been stolen was found in a house, occupied exclusively by the defendant and his wife, six weeks after the theft; it was held that such possession was evidence tending to prove the defendant's guilt. And in the case of *State* v. *Williams*, 9 Ired., 140, Chief Justice RUFFIN in delivering the opinion of the court said, the possession of a stolen thing is evidence to some extent against the possessor of a taking by him. Ordinarily it is stronger or weaker in proportion to the period intervening between the stealing and the finding in possession of the accused; and after the lapse of a considerable time before a possession is shown in the accused, the *law* does not infer his guilt, but leaves that question to the jury under the consideration of all the circumstances. In that case (*Williams'*)there were twenty days between the loss of the property and the finding it in the possession of the prisoner.

Upon these authorities there was no error in the charge of the court to the jury. It was in full accord with the principles enunciated by them; and His Honor laid down the law with great accuracy and precision. He could not have given the instructions asked for because they were not warranted by the facts of the case.

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

PER CURIAM. No error.

STATE v. THOMAS FOY.

Larceny—What the Subject Of—Property Savoring of the Realty.

It being a rule of the common law that larceny cannot be committed of things which savor of the realty and are at the time they are taken a part of the freehold, an indictment charging the larceny of a cabbage standing ungathered in the field of the owner, and concluding at common law, cannot be sustained.

(*State* v. *Sandy*, 3 Ired., 570; *State* v. *Muse*, 4 Dev. & Bat., 319, cited and approved.)

INDICTMENT for Larceny tried at October Term, 1879, of NEW HANOVER Criminal Court, before *Meares, J.*

The facts necessary to an understanding of the case are stated in the opinion. Verdict of guilty, judgment, appeal by the defendant.

Attorney General, for the state.
Mr. J. D. Bellamy, Jr., for the defendant.

DILLARD, J. The defendant was put on his trial at October term, 1879, of the criminal court of New Hanover, on a bill of indictment charging the larceny of a cabbage standing and remaining ungathered in the field or ground where grown, with a second count for receiving, concluding each count at common law.

On objection by defendant at the close of the evidence that he could not be convicted on the bill concluding at common law, the solicitor for the state acknowledged the point well taken, and on his motion His Honor ordered, against the opposition of the defendant that a juror be withdrawn and a mistrial had, and that he be held for trial on a new bill to be sent, concluding against the statute. A new bill was found, and on the arraignment, the defendant re-

lied upon the plea of former acquittal, and the issue joined thereon being decided adversely to him, he was allowed to plead "not guilty," and the issue on this plea was also found against him. Thereupon the court pronounced judgment against the defendant, and from that judgment he appeals to this court.

On the argument in this court, it is assigned as error: 1. That His Honor dissolved the jury in a case of felony, before rendition of their verdict, without the consent of the defendant, and without any necessity therefor as required by law. 2. That His Honor held his plea of former acquittal unsustained by the record of the first bill of indictment and the facts admitted in relation to the trial thereon.

From the view taken by us of the record and case of appeal signed by the judge, it is not necessary to consider and express any opinion on the point argued in this court, as there is a ground on which we are bound to set aside the judgment of the court below.

The first bill of indictment concluding at common law was admitted by the state to be insufficient to warrant any judgment against the defendant, and the jury sworn thereon were discharged and the defendant held, that a new bill might be found concluding against the statute. On examination, the new bill on which the conviction took place, by inadvertence of the solicitor, concludes the count for larceny at common law as did the first bill, and the count for receiving not having been insisted on by the state, it remains to consider whether any, and what judgment, was authorized by law on the verdict finding the defendant guilty of the alleged larceny.

By the common law, larceny can not be committed of things which savor of the realty, and are at the time they are taken a part of the freehold, such as corn and produce of land. 2 Russell on Crimes, 136. Of this description was the article alleged to be stolen by the defendant. It is charged

to be a cabbage standing and remaining ungathered in the field where it was planted and cultivated, and the severance and taking away of the same is at common law no larceny, but only a civil trespass.

It is however made larceny in this state by statute, (Bat. Rev., ch. 32, § 20,) to feloniously take and carry away, amongst other things, any vegetable or other product cultivated for food or market, growing, standing, or remaining ungathered in any field or ground. And a bill for larceny of any of the articles enumerated in this statute must conclude against the statute. It is settled that indictments given by statute must conclude *contra formam statuti* as a means of notifying the accused of what law he is charged with offending, and unless they so conclude, then the charge is at common law, and if by that law the thing done be no crime, there can be no judgment. *State* v. *Sandy*, 3 Ired., 570; *State* v. *Muse*, 4 Dev. & Bat., 319.

We therefore hold that it was error to proceed to judgment at all against the defendant, and the same is arrested. Let this be certified to the court below.

Error. Judgment arrested.

STATE v. JOHN PERKINS.

Misdemeanor—Punishment—Alternative Judgment.

1. An assault with intent to commit a capital felony (here rape) is a misdemeanor, and the punishment on conviction therefor of imprisonment in the penitentiary does not change the grade of the offence.

2. On trial of an indictment for such offence containing a single count and charging its commission with a felonious intent, the jury, upon the evidence and under the instructions of the court, found defendant

guilty of the assault only; *Held*, that the conviction was proper. To charge the offence as a felony does not make it one.

3. Alternative judgments are not allowed either in civil or criminal cases; *Hence* it is error in a judge to sentence one convicted in a criminal action to pay a fine, and in default thereof to be imprisoned.

4. In such cases the rule is to remand the cause to the end that a proper judgment—definite and unconditional—may be pronounced.

(*State* v. *Durham*, 72 N. C., 447; *State* v. *Upchurch*, 9 Ired., 454; *State* v. *Bennett*, 4 Dev. & Bat., 43; *Dunn* v. *Barnes*, 73 N. C., 273, cited and approved.)

INDICTMENT for an Assault with intent to commit rape, tried at Fall Term, 1879, of CAMDEN Superior Court, before *Gudger, J.*

The bill contained one count wherein the defendant is charged with making a violent and felonious assault upon the person of the prosecutrix with intent, her then and there feloniously and against her will, to ravish and carnally know, and upon the trial under instructions from the court, was found guilty of an assault only. Thereupon the defendant's counsel moved for his discharge on the ground that in an indictment for a felony there could not be a conviction for the constituent misdemeanor involved in the charge, and a verdict acquitting of the felony was in law a verdict of not guilty. The motion was refused, and the court adjudged that the defendant pay a fine of fifty dollars, and in default thereof that he be imprisoned for sixty days. The defendant excepted, for that the court erred in telling the jury if they believed the testimony the defendant was guilty of an assault, and the judgment pronounced was alternative. Appeal by defendant.

Attorney General, for the State.

Messrs. Gilliam & Gatling and *J. P. Whedbee*, for defendant.

SMITH, C. J. The defendant's appeal presents two questions to be determined, first, was the defendant entitled to his discharge? and secondly, if not, was the sentence regular and legal?

1. The legal proposition, that upon a single felonious charge contained in an indictment a person cannot be convicted and punished for the misdemeanor involved, is correct upon principle and by express adjudication in this state. In *State* v. *Durham*, 72 N. C., 447, in reviewing an exception of the prisoner to the refusal of the court "to instruct the jury that if they were not satisfied of the commission of the felony as charged" (rape) "they might find the prisoner guilty of an assault and battery," BYNUM, J., thus states the rule: "The rule of the common law is, that in an indictment for a felony, there could not be a conviction of a minor offence included within it, if such minor offence be a misdemeanor; and this is the foundation of the rule, that an acquittal of a felony is no bar to another indictment for the same act, charging it as a misdemeanor and *vice versa*."—Citing 2 Hawk. P. C., ch. 17, § 6; 1 Chitty Cr. L., 251, 679; 1 Lord Ray., 711; 3 Salk., 193. It is equally well settled that if the act alleged to have been done with a felonious intent and set out in an indictment, constitute only a misdemeanor, the imputation of the felonious intent may be rejected as repugnant to the legal import of the offence described. *State* v. *Upchurch*, 9 Ired., 454; 1 Whar. Cr. L., § 400; 2 East P. C., 1028. The offence charged against the defendant is of an attempt to commit rape and not a misdemeanor. An assault with intent to commit rape by a slave or free person of color upon the body of a white woman was formerly a capital offence. Rev. Code, ch. 107, § 44. The statute has been abrogated since the recent amendment made to the constitution of the United States; and by the substituted enactment of April 10th, 1869, it is declared "that every person convicted by due course of law

of an assault with intent to commit rape upon the body of any female, shall be imprisoned in the state prison not less than five nor more than fifteen years." Bat. Rev., ch. 32, § 5. The punishment to be inflicted does not change the grade of the offence, and it remains as at common law, like all other attempts or assaults with intent to commit a felony (capital or otherwise), but an aggravated misdemeanor. There was therefore no error in refusing to discharge the defendant and in proceeding to pronounce judgment upon the offence of which the defendant is found guilty.

2. But the form of the judgment is not warranted by law, and the exception thereto is well taken. It should be, not in the alternative, imposing a pecuniary penalty the discharge of which depends upon the volition of the defendant, and upon his failure to meet it, the imprisonment of his person, but positive and definite in its terms. *State* v. *Bennett*, 4 Dev. & Bat., 43. The same doctrine prevails in civil causes, and where a judgment was rendered for a definite sum in gold or another its equivalent in federal currency, this court held it to be erroneous and "not in accordance with the practice and decisions" in this state. *Dunn* v. *Barnes*, 73 N. C., 273.

But as the appeal vacates the judgment and a new sentence must be pronounced, the error can be corrected, and we advert to it to prevent its repetition.

This will be certified to the end that the court may proceed to judgment on the verdict according to law.

Error. Remanded for proper judgment.

STATE v. PRINCE JONES.

Punishment—Disqualification for office and suffrage—Practice.

1. The disqualification for office and the loss of the right of suffrage imposed by article six of the constitution, upon persons convicted of infamous offences, constitute no part of the judgment of the court, but are mere consequences of such judgment. The sentence of the court is just such as the law prescribed before the adoption of that article.

2. The court suggest, that on trial of an indictment for larceny and receiving, the jury be instructed to specify upon which count they render their verdict, or the solicitor be held to his election, or enter a *nol. pros.* after verdict against defendant as to one of the counts.

INDICTMENT for Larceny, tried at June Special Term, 1879, of WAKE Superior Court, before *Eure, J.*

The bill of indictment contained two counts, one for larceny and the other for receiving stolen goods. The jury returned a general verdict of guilty, and the defendant's counsel moved in arrest of judgment on the ground that the indictment contained two counts charging different offences with different punishments. The motion was overruled and the defendant appealed.

Attorney General and *T. M. Argo*, for the State.
Messrs. Hinsdale & Devereux, for the defendant.

ASHE, J. It is urged in the argument of the defendant's counsel before this court, that the two counts in the indictment cannot be joined because the punishment is different; that by article six, section one, of the constitution, all persons convicted of felony or any other crime infamous by the laws of the state are deprived of the right of suffrage, and by section five of the same article, all persons are disqualified for holding office who shall be convicted of trea-

son, felony or any other infamous crime, and that this disqualification for office and loss of the right of suffrage are punishments affixed by the constitution to the crime of larceny, in addition to the punishment of imprisonment for not less than four months, nor more than ten years, as prescribed by the act of 1868–'69, ch. 167, § 9, because the offence is not only a felony but an infamous crime; and that receiving stolen goods knowing them to be stolen is not a felony, being a misdemeanor at common law and by statute, and not falling within the class of offences held to be infamous.

If the courts were authorized by legislative enactment to pronounce in their judgments upon a conviction of larceny the disqualification of the defendant for office and his deprivation of his right to vote, then the judgments and punishments would be different and there would be much force in the argument, in the absence of any other legislation on the subject. But the courts have no such power. They can only render such judgments as the law annexes to the crimes, and empowers them to pronounce. For the crime of larceny the law has prescribed the punishment, which the courts by their judgments may impose, to be imprisonment in lieu of corporal punishment. This is the only judgment they can pronounce, the only punishment they can impose. In rendering their judgments they cannot look to consequences. They have nothing to do with the disqualifications and penalties, which under the constitution, may result from them. But it may be objected that when after a conviction by general verdict and judgment in a case like this, an attempt shall be made to deprive the defendant of his right of suffrage or he shall be threatened with amotion from office in consequence thereof, it would be difficult to decide what was the effect of the judgment. The answer to that is, it will be time for the courts to consider that question when it shall arise. In this case we hold

the punishment is not different, and the joinder of the counts is authorized by the legislature.

Before closing this opinion, we would suggest that all the difficulties and questions of doubt that might arise in enforcing the disabilities imposed by the constitution, after conviction in this and similar cases, may be prevented by the exercise of a little particularity on the part of the courts in the conduct of criminal actions. In a case like this for instance, the judge might hold the solicitor to his election or instruct the jury to specify upon which count they rendered their verdict, or the solicitor might enter a *nolle prosequi* after verdict against defendant as to one of the counts, which he has a right to do. *Commonwealth* v. *Tuck*, 20 Pick., 356; *State* v. *Smith*, 49 N. H.; *Com.* v. *Gillespie*, 7 Sergt. & R. 469. Let this be certified, &c.

PER CURIAM. No error.

STATE v. L. J. NORMAN.

Superior Court Clerk—Forfeiture of Office—How Enforced.

1. The forfeiture of office incurred by a superior court clerk under Bat. Rev., ch. 90, §§ 15 and 16, by failing to keep open his office on Mondays, can only be enforced by proceedings in the nature of *quo warranto*.

2. Such forfeiture cannot be enforced by judgment of amotion from office as a part of the punishment, where the clerk has been convicted of a misdemeanor, under Bat. Rev., ch. 32, §107, in wilfully neglecting to discharge the duties of his office.

(*Saunders* v. *Gatling*, 81 N. C., 208; *Davis* v. *Moss*, *Ib.*, 303; *People* v. *Wilson*, 72 N. C., 155; *People* v. *Hilliard*, *Ib.*, 169; *People* v. *Heaton*, 77 N. C., 18, cited and approved.)

STATE *v.* NORMAN.

INDICTMENT for Misdemeanor, tried at Fall Term, 1879, of SURRY Superior Court, before *Gilmer, J.*

The defendant, being clerk of the superior court of Surry county, was indicted for neglecting to open his office from the hour of nine o'clock a. m., until four o'clock p. m., on Monday, the 31st day of March, 1879. There was a verdict of guilty, judgment that defendant be fined fifty dollars, and he was further adjudged to have forfeited his said office, and was accordingly amoved. From which judgment the defendant appealed.

Attorney General, for the State.

Messrs. Geo. B. Everitt, and *Reade, Busbee & Busbee*, for the defendant.

ASHE, J. The defendant was indicted under sections 15 and 16, chapter 90, and section 107, chapter 32, of Battle's Revisal. The first two sections read: "15. The clerks of the superior courts of this state shall open their offices every Monday from nine a. m., to four p. m., for the transaction of probate business, and each succeeding day till such matter is disposed of. 16. Any clerk of the superior court failing to comply with the last section (unless such failure is caused by sickness) shall forfeit his office." And section 107, chapter 32, provides: "If any clerk of the superior court, or any other officer in the state who is required on entering upon his office, to take an oath of office, shall wilfully neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided, &c., he shall be deemed guilty of a misdemeanor." If this section had gone on to provide that upon conviction the defendant should forfeit his office and be removed therefrom, the forfeiture and deprivation of office would have constituted the punishment, which the court was authorized to impose; or if there had been added to section 16 of chapter 90, the provision, that

upon conviction in a criminal action the defendant should be removed from his office, then the court would have had the right to deprive the defendant of his office, and there would have been no error in the ruling of His Honor. But this section only declares that the failure to comply with the provisions of section 15 shall be a forfeiture of his office. How does this differ from the forfeiture of an office for any other cause, as for non-user? In such case the parties are not and cannot be removed by a judgment upon conviction on a bill of indictment, but can only be removed by an action in nature of a writ of *quo warranto* as provided by section 366 of the code of civil procedure, which provides that "an action may be brought by the Attorney General, in the name of the people of the state upon his own information or upon the complaint of any private party, against the parties offending in the following cases: * * * 2. When any public officer, civil or military, shall have done or suffered an act which by the provisions of law shall make a forfeiture of his office." It has been held by numerous decisions in this state that a civil action in the nature of a writ of *quo warranto* is the proper remedy to try the right to a public, office. *Saunders* v. *Gatling*, 81 N. C. 298; *Davis* v. *Moss*, *Ib.*, 303; *People* v. *Wilson*, 72 N. C., 155, and *People* v. *Hilliard*, *Ib.*, 169.

If there should exist any doubt that this is the appropriate remedy in this case, it is settled by the decision of this court in the case of the *People* v. *Heaton*, 77 N. C., 18, where the defendant, being clerk of the superior court of New Hanover county, was sued in a civil action in nature of a writ of *quo warranto*, for a breach of official duty, like that alleged in this case, and the court held "that the action was properly brought, as provided in section 366 of the code; and upon objection being taken that the remedy was by indictment or impeachment and not by an action in nature of a writ of *quo warranto*, the court said: "The action was

not brought to punish the defendant criminally, but to vacate an office which he has forfeited by a failure to perform its duties. He is still liable to indictment and punishment for the same or similar offences, both of misfeasance and nonfeasance." The distinction is clearly made in that case between an action to enforce the forfeiture of an office, which is the subject of this prosecution, and the indictment for a wilful omission, neglect or refusal to discharge the duties of an office, which is made a misdemeanor by section 107, chapter 32 of Battle's Revisal. The very next section that follows that, to-wit, section 108, provides that offences made misdemeanors by statute, when a specific punishment is not prescribed, shall be punished as was a misdemeanor at common law;" and at common law, fine or imprisonment or both in the discretion of the court were the only punishment for misdemeanors.

Section 107, chapter 32 of Battle's Revisal is a literal copy of section 119, chapter 34 of the Revised Code, except the words "clerk of the county court and clerk and master in equity," and this section of the Revised Code is a substitute for section 14, chapter 19 of the Revised Statutes, act of 1777, which is as follows: "And if it shall be discovered that any of said clerks, after his appointment, shall have violated his said oath, and willingly and corruptly, has done anything contrary to the true intent and meaning thereof, such clerk shall be deemed on conviction guilty of misbehavior in office, and shall forever afterwards be incapable of holding any office, civil or military within this state." The proviso in this section relating to the incapacity to hold office is omitted in the Revised Code. This act of 1777 has stood upon the statute book of the state for at least eighty years, and we are unable to find any case where a clerk of any court has been indicted for misbehavior in office, and upon conviction removed therefrom under the sentence of the court as a punishment for his offence. The fact that no such

case is to be found through such a long series of years, is a circumstance corroborative of the correctness of the construction we have given to the sections 15 and 16 of chapter 90 of Battle's Revisal.

There is error. The judgment pronounced in the court below is reversed. Let this be certified to the superior court of Surry county to the end that the court may proceed to the proper judgment in the case in conformity to this opinion and the law of the state.

PER CURIAM. Error.

STATE v. EPHRIAM JONES.

Transcript of Record on Appeal.

Where on appeal the "transcript" sent to this court consists of a series of loose, disconnected papers, not amounting to a history of the cause as it was conducted in the court below, the case will be remanded for a more perfect record.

(*State* v. *Guilford*, 4 Jones 83, cited and approved.)

INDICTMENT for failure to work Public Road tried at Fall Term, 1879, of NASH Superior Court, before *Eure, J.*

Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.

Messrs. Bunn & Battle, for the defendant.

SMITH, C. J. We cannot consider and act upon the loose and disconnected papers sent up as a transcript upon this appeal. We have in so many separate half sheets, the bill of indictment and its endorsements; the list of jurors' names;

the verdict and judgment; the defendant's affidavit of his inability to give security on the appeal with certificate of counsel; the bill of costs incurred; the case prepared by the judge on the appeal on a full sheet; and the official certificate of the clerk "that the transcript herewith is a true copy of the record."

There is no memorandum of arraignment and plea, nor copy of the notice given by the overseer of the road to the defendant, the sufficiency of which is a point intended to be presented in the appeal; nor of any fact transpiring at or before trial except as they are described in the accompanying case. This is a loose practice and not in accordance with the rules adopted at June term, 1871. Bailey's Digest, 520. The clerk's authentication should be attached in order to identify the transcript as it leaves the office, and not afford facilities for the abstraction of parts or the surreptitious introduction of spurious matter into the record. We suggest and recommend the form for making up transcripts contained in Eaton's Forms, 624, which has received the approval of this court in *State* v. *Guilford*, 4 Jones, 83. A careful preparation of the record as prescribed in the rules, will lessen our labors and often obviate delays and needless expense, and we must insist on their observance.

This cause and the papers sent up with it must be remanded to the court below, and it is so ordered.

PER CURIAM. Case remanded.

SMITH, C. J. Since the foregoing opinion was prepared, a properly certified transcript has been filed in the office, and with the consent of the attorney general the order remanding the case is, on motion of defendant's counsel, rescinded. The want of original jurisdiction in the superior court to try and determine the offence charged in the indictment, is decided in *State* v. *Craig*, *ante* 669, rendering unnecessary the consideration of the other exceptions taken

in the court below. It is therefore adjudged that there is error, and the motion in arrest of judgment is sustained.

Error. Judgment arrested.

STATE v. BRASWELL.

Trial—Comments of Counsel.

Where an attorney abuses his privilege in addressing the jury and the judge stops him and tells the jury in his charge that they must not be influenced by the objectionable language used, a new trial will not be granted.

(*Cannon* v. *Morris*, 81 N. C., 139; *State* v. *Matthews*, 80 N. C., 417; *State* v. *Caveness*, 78 N. C., 484; *Jenkins* v. *Ore Co.*, 65 N. C., 563, cited and approved.)

INDICTMENT for an Assault with intent to commit rape, tried at Fall Term, 1879, of HALIFAX Superior Court, before *Avery. J.*

Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.

No counsel for defendant.

ASHE, J. In the argument of the case by the state's counsel, he spoke of the defendant as a "fiend," which language was objected to by defendant's counsel, and His Honor then said to the counsel that it was not proper to use abusive epithets about the defendant, though some latitude was often allowed counsel in characterizing the conduct of a defendant as testified to by witnesses, and directed the

counsel to desist from the use of such language, and told the jury they must not be influenced by it.

The jury returned a verdict of guilty. The defendant then moved for a new trial. His motion was overruled and he appealed to this court.

The language which is the ground of exception in this case was an abuse of the privilege of an attorney; and in such cases the law requires the judge to stop the counsel and see that no prejudice is done the defendant by the use of the objectionable language. But it is left to his discretion whether he would stop him *then* and *there*, or wait and correct it in his charge to the jury. If the language is very gross, it ought to be stoped at once. *Cannon* v. *Morriss*, 81 N. C., 139; *State* v. *Matthews*, 80 N. C., 417; *State* v. *Caveness*, 78 N. C., 484; *Jenkins* v. *Ore Co.*, 65 N. C., 563.

The judge fully discharged his duty in this case. As soon as the language was used and objection made, he not only then and there directed the counsel to desist, but in his charge told the jury they must not be influenced by it. This was doing all he could and all the law required. There is no error. Let this be certified that further proceedings may be had according to this opinion and the law.

No error. Affirmed.

STATE v. JOHN SHERRILL and others.

Variance, effect of—New trial.

The effect of a variance between allegation and proof in a criminal action is to vacate the verdict and leave the defendant charged as before and liable to be tried again.

State v. *Keeter*, 80 N. C., 472; *State* v. *Bailey*, 65 N. C., 426, cited and approved.)

STATE *v.* SHERRILL.

Appeal from a judgment refusing to discharge the defendants, rendered at Fall Term, 1879, of CALDWELL Superior Court, by *Schenck, J.*

The defendants were tried and convicted at spring term, 1879, of said court upon an indictment for trespass upon the premises of one Harris, and on appeal to this court it was held that there was a variance between the allegation and proof, in that, the case showed that the premises on which the alleged trespass was committed were in possession of one Lewis. See same case 81 N. C., 550. Upon the certificate of the opinion being transmitted to the court below, the defendants moved their discharge. The solicitor resisted the motion and stated that in setting out the evidence in the case on the former appeal, the name of "Lewis" was inadvertently substituted for that of "Harris," and upon another trial the state could prove the facts as alleged in the bill of indictment. The court refused to discharge the defendants, from which ruling they appealed. And in this court the state moved to dismiss the appeal.

Attorney General, for the State.
Messrs. D. G. Fowle and *W. W. Wilson*, for defendants.

DILLARD, J. As there was no final judgment in the court below, the appeal must be dismissed. *State* v. *Keeter*, 80 N. C., 472; *State* v. *Bailey*, 65 N. C., 426.

But as there seems to have been some misapprehension as to the effect of the decision in this case on the former appeal as reported in 81 N. C., 550, we will say, that the legal effect of the appeal was to vacate the judgment below, and the error adjudged in this court by reason of the variance between the allegation and the proof, operated to put out of the way or vacate the verdict. And so, upon the certified opinion of this court, the defendant stood before the court

below in point of law charged upon a sufficient bill of indictment and is entitled to a new trial. Let this be certified.

PER CURIAM. Appeal dismissed and *venire de novo.*

In *State* v. *Hooks;* from Anson:

DILLARD, J. No bill of exceptions or statement of a case of appeal accompanies the record, and after a careful examination we can detect no error therein. In such case the rule is to affirm the judgment. *State* v. *Powell,* 74 N. C., 270; *State* v. *Murray,* 80 N. C., 364. Let this be certified, &c.

PER CURIAM. No error.

In *State* v. *Walker,* from Columbus:

ASHE, J. In this case there is no appeal bond, nor affidavit of inability to give one, accompanying the record. The appeal is therefore dismissed. *State* v. *Patrick,* 72 N. C., 217; *State* v. *Hawkins, Ib.,* 180; *State* v. *Spurtin,* 80 N. C., 362.

Let this be certified to the superior court of Columbus county than further proceedings may be had in the case according to law.

PER CURIAM. Appeal dismissed.

In *Goff* v. *Pope* and *Boddie* v. *Woodard,* and *Cobb* v. *Morgan:* Remanded for a properly certified transcript. The case of *State* v. *Ephraim Jones, ante,* 691, cited and approved.

In *Troutman* v. *Barkley,* from Iredell: The appellant not insisting on any error in the ruling below, and none appearing, the court here affirm the judgment.

AN ACT RELATING TO WIDOWS' YEAR'S SUPPORT.

Since the decision in *Grant* v. *Hughes*, *ante*, 216, the legislature passed the following act:

1. That section fourteen, chapter one hundred and seventeen of Bat. Rev., be amended by adding to said section the following words: "and said allowance shall be exempt from any lien, by judgment or execution acquired against the property of her said husband"

2. This act shall be in force from and after its ratification. Ratified the 29th day of March, 1880.

INDEX.

JURY:

Page 45 line 23, for "process," read "copy of decree."
" 69 " 18, for "watch-blocks" read "snatch-blocks."
" 96 " 20, for "fined," read "attached."
" 200 " 8, for "securing," read "receiving."
" 283 " 7, for "in other states," read "in this state."
" 299 " 19, for "frustrated," read "forestalled."
" 377 " 14, for "of," read "as."
" 513 " 18, for "evaded," read "created."
" 623 paragraph 4 of head-note, for "proved," read "formed."