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NORTH CAROLINA REPORTS,

VOL. LXXXIII.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA,

JUNE TERM, 1880.

REPORTED BY

THOMAS S. KENAN,

(Vol. 8.)

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1880.

JUSTICES OF THE SUPREME COURT,

June Term, 1880.

CHIEF JUSTICE:

WILLIAM N. H. SMITH.

ASSOCIATE JUSTICES:

THOMAS S. ASHE, JOHN H. DILLARD.

Mr. Justice Ashe was absent during a part of this Term on account of sickness.

CLERK OF THE SUPREME COURT:

WILLIAM H. BAGLEY.

ATTORNEY GENERAL:

THOMAS S. KENAN.

JUDGES OF THE SUPERIOR COURTS.

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

JAMES C. L. GUDGER, 9th Dist.

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.

JUNE TERM, 1880.

Isaac T. Avery,
Frederick P. Barrow,
William R. Booker,
John G. Bunch,
Samuel J. Calvert,
Fleet R. Cooper,
Walter E. Daniel,
Rufus A. Doughton,
William C. Douglass,
William C. Ervin,
Robert A. Flannigan,
James W. Forbis,
James A. Fowlks,
Romulus C. Hawkins,
Thomas W. Hawkins,
Walter R. Henry,
Samuel C. Herren,
Erastus B. Jones,
Wesley N. Jones,
James F. A. Lamond,
Robert S. McCall,
George A. McKeehan,
Lycurgus E. Mauney,
Benjamin F. Mayhew,
Walter H. Neal,
William J. Peele,
James Pender,
Samuel J. Person,
William H. Polk,
Natt A. Reynolds,
Gaston A. Robbins,
William W. Scott, Jr.,
Samuel L. Sheep,
Henry F. Slater,
Charles S. Vann.

CASES REPORTED.

CASES REMANDED AND CASES RETAINED FOR FURTHER ORDERS.

CASES OVERRULED.

CASES CITED.

In *Wall* v. *Covington*, 144, the position of names of counsel representing the parties in this court should be reversed.

In *Bank* v. *Lineberger*, on page 456, sixth line of opinion, read, "that where time or forbearance is given," &c.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

JUNE TERM, 1880.

W. R. GORDON, Admr., *v.* T. L. SANDERSON and others.

Appeal—Requisites of Transcript.

The appellate jurisdiction of this court being derived from that previously acquired in the court from which the cause is removed, no appeal will be entertained here, unless the transcript sent up shows the possession of that jurisdiction and that the cause was properly constituted in the court below.

(*Bradley* v. *Jones*, 76 N. C., 204, cited and approved.)

CIVIL ACTION, tried at Spring Term, 1880, of PASQUOTANK Superior Court, before *Graves, J.*

The case was remanded for the reason set out in the opinion of this court.

Messrs. Gilliam & Gatling, for plaintiff.
Mr. C. W. Grandy, for defendants.

SMITH, C. J. The only portion of the record proper in this case, certified and transmitted from the superior court of Pasquotank, is the entry on the docket at fall term, 1878, in these words: "referred to Walter F. Pool to state account by order of court." The only facts communicated in connection with the defendants' overruled motion are contained in the statement of the case accompanying the appeal which cannot be received as a substitute for the absence of the record. There is no complaint, no answer, no exception from which it can be seen what is the subject matter of the action, or the pertinency of the rulings presented for review. It seems needless to repeat, that inasmuch as our appellate jurisdiction is derived from that previously acquired in the court from which the cause is removed, the transcript must show the possession of that jurisdiction, and that the cause was then properly constituted, or the appeal will not be entertained.

The cause must therefore be remanded, each party paying his own costs, in accordance with the rule acted on in *Bradley* v. *Jones*, 76 N. C., 204.

PER CURIAM. Remanded.

N. W. BODDIE v. F. A. WOODARD, Adm'r and others.

Practice—"Time to Plead"—Appeal.

An entry on the docket, "complaint filed, time to demur or answer;" does not extend the time for pleading to the trial term, and a refusal by the presiding judge, in the exercise of his discretion, to allow a defendant to plead at that term, is not the subject of an appeal.

CIVIL ACTION tried at Fall Term, 1879, of NASH Superior Court, before *Eure, J.*

The facts appear in the opinion. Judgment for plaintiff, appeal by defendant, Moore.

Mr. Chas. M. Cooke, for plaintiff.
Mr. Geo. V. Strong, for defendant.

SMITH, C. J. The summons in this action instituted to recover the amount due on a bond executed by the intestate, A. E. Ricks, and the defendant, Moses Moore, was duly served and returned to spring term, 1879, of Nash superior court. At that term the complaint was filed by the plaintiff's attorney and the following entry appears in the cause upon the docket: "Complaint filed; time to demur or answer." Neither defendant appeared in person or by attorney, nor was there any understanding or agreement with either for an extension of time for making his defence. At fall term following, the defendant, Moore, proposed to put in his answer and therein set up the defence of the statute of limitations, protecting him as a surety from liability for the debt. The court refused to allow this to be done and gave judgment by default against both defendants, from which Moore appealed.

From the facts found by His Honor, and which are fully set out in the case, we extract such only as bear upon the question presented for our determination.

The attorney, who was under a general retainer for Moore, was employed by the plaintiff to bring and prosecute the suit at the instance of Moore and with a view of having the money made out of the estate of the intestate in the hands of the defendant Woodard, his administrator, as principal debtor. The attorney drew the complaint and himself made the entry. Between the two terms, Moore having determined to defend the action, so informed the attorney, at the same time requesting him to retire from the plaintiff's service and represent him. The attorney postponed the mat-

ter until he could see the plaintiff at the next term and then by his consent was discharged and assumed the defence for Moore, and himself and an associate drew up and offered to file his answer.

We advert to the embarrassments resulting from an unwise change of professional service only to say that the entry enlarging voluntarily the time for the answer of the defendants, should not be allowed an effect beyond the fair and reasonable interpretation of its words. It is certainly not of infinite duration, and in our opinion the indulgence cannot be extended beyond such time as will enable the plaintiff, when he knows what facts are controverted, to make preparation for trial at the ensuing term. While we do not undertake definitely to fix the limits of the extension, they cannot be allowed to reach the trial term. His Honor therefore properly denied the defendants' right to put in the answer when it was offered, and, as addressed to his discretion, its exercise cannot be reversed and controlled in this court. As the plaintiff was entitled to judgment for want of an answer at the first term, and the gratuitous indulgence allowed had been exhausted, His Honor very properly directed judgment to be entered for the plaintiff. There is no error in the ruling and the judgment is affirmed.

No error. Affirmed.

W. H. DAIL & BRO. v. R. H. T. HARPER.

Frivolous Pleadings.

1. A frivolous answer is one which is manifestly impertinent as alleging matters which do not affect the plaintiff's right to recover.

2. Where the complaint is upon a bond for the payment of money only, an answer thereto which alleges that the bond was given for store accounts for the years 1875–'76–'77 and '78, upon contracts to pay interest on the account of each year at the rate of eight per cent, without any stipulation in writing as to such rate, and which insists upon the defence of usury, cannot be deemed frivolous.

(*Com'rs* v. *Piercy*, 72 N. C., 181; *Erwin* v. *Lowery*, 64 N. C., 321, cited and approved.)

CIVIL ACTION, tried at Spring Term, 1880, of GREENE Superior Court, before *Avery, J.*

The opinion contains facts necessary to an understanding of the case. Judgment for the plaintiffs, appeal by the defendant.

Mr. W. T. Faircloth, for plaintiffs.
Mr. W. C. Munroe, for defendant.

DILLARD, J. The plaintiffs declare in this action in two counts, one on a bond dated the 5th of February, 1876, for $329.48, and the other on a bond dated the 16th of April, 1879, for $1,282.51, each one containing a stipulation on its face for the payment of interest at the rate of eight per centum per annum from their respective dates. On the filing of the complaint at the return term of the summons, the defendant put in a demurrer to the first count, upon the ground that the bond therein described contained an engagement on its face to pay eight per cent without setting forth in terms, that the same was for the loan of money. His Honor, on the argument, sustained the demurrer and adjudged that the omission to state in the bond that the consideration thereof was money lent, in law worked a forfeiture of all interest thereon, but not of the principal money.

The defence set up by answer to the count on the second bond is, that defendant was indebted to plaintiffs on store

accounts for the years 1875–'76–'77 and '78, upon contracts to pay interest on each at the rate of eight per cent without any stipulation in writing as to such rate, and that said bond was executed for the aggregate amount of said four years dealings, with interest added on each at said rate, and thereby it is claimed that in law the bond is vitiated and made null, so that no recovery can be had thereon either of principal or interest, or if it be not void *in toto*, then upon the said facts, there is an entire forfeiture of the interest, as well as that charged and put into the bond, as that accrued on the bond since its date.

After sustaining the demurrer to the first count, the effect of which was to disallow any interest on the bond described therein, His Honor, on motion of the plaintiffs for judgment on the pleadings, adjudged the answer of defendant as to the second count, to be frivolous, and ordered it to be stricken from the record, and thereupon rendered judgment in favor of the plaintiffs for the aggregate principal of both of the bonds, with interest at six per cent on the first one described in the complaint from the rendition of judgment, and with interest on the second one, at eight per cent from the date of the note.

From this judgment the appeal is taken by defendant, and the only question for our consideration is whether it was error in the court below to hold the answer of defendant to be frivolous, and thereupon, after striking it from the record, to proceed to judgment for want of answer, instead of having the legal sufficiency of the defence set up in the answer tested by demurrer.

In general, when an answer is filed containing facts constituting a defence, and not amounting to a counter-claim, the same is deemed to be controverted, and thus a statute-issue is formed, without the necessity of a reply, and it stands for trial by a jury. But if the matter in defence be thought by plaintiff to be frivolous or irrelevant, there are

two ways open to him. He may demur, which is the more regular course, and thus make the question arising on the facts admitted thereby one of law to the court, or if the facts pleaded be deemed frivolous or irrelevant, the court has the power, in a proper case, to adjudge them to be such, and in disregard of the answer to proceed to judgment. C. C. P., § 120, and *Com'rs of Yancey* v. *Piercy*, 72 N. C., 181.

But when is an answer frivolous? and was the answer stricken from the record in this case so frivolous in the proper legal sense as to warrant its disregard on the plaintiff's motion for judgment?

In *Erwin* v. *Lowery*, 64 N. C., 321, a frivolous answer in a true legal sense is settled to be one "which is manifestly impertinent, as alleging matters which whether true or not do not affect the plaintiff's right to recover," and the rule is therein laid down, that when the answer is filed in good faith and the matter of it is not *manifestly* impertinent, the defendant is entitled to have the facts alleged therein admitted by demurrer or passed on by a jury.

Tested by the rule laid down in the case cited, it seems to us that the matters set up in the answer were not manifestly irrelevant or immaterial to the claim of the plaintiffs on the bond described in the second count. It is averred in the answer, that interest at eight per cent on two of the four accounts included in the bond, to-wit, those between 22nd of March, 1875, and 12th of February, 1877, were debts created with a promise in parol to pay interest thereon at the rate of eight per cent, and that the incorporation of interest at that rate into the bond tainted the entire bond and rendered it entirely void; and whether the bond was thus invalidated in whole or part was a question pertinent to the subject matter of the action.

And it is also alleged that the illegal rate of interest included in the bond, if not calling for the legal conclusion of invalidity of the whole bond, at least worked a forfeiture

of all the interest that was incorporated into the bond, as well as all such as may have accrued on the bond since its execution, under chapter 91, section 3, of laws of 1876–'77, and how the matter in law may be, in the language of the case of *Erwin* v. *Lowery, supra,* is a "serious question and one fit for discussion."

We have not ourselves formed any definite opinion upon the legal questions arising on the defences made, and do not intend to intimate any, but we merely decide that the matters alleged in defence were such that the judge should have let the issues made by statute been tried by a jury, unless the plaintiff by admitting the same on demurrer had chosen to transfer the question of law to the court. The judgment of the court below is reversed and this will be certified that a trial may be had according to this opinion.

Error. Reversed.

CLARA T. JUSTICE, Executrix, v. NATIONAL BANK OF NEWBERN.

Practice—Inspection of Writings.

1. A petition or motion supported by affidavit will be sustained for an inspection and copy of the books of an adverse party, under C. C. P., § 331, where it is made to appear that the party applying for the order cannot obtain the information sought otherwise than by such inspection.

2. The order will be granted before the complaint has been filed when it is averred by the applicant, and not denied by the opposing party, that such discovery is necessary to enable the plaintiff to state with accuracy the facts upon which the action is founded.

(*Fuller* v. *McMillan*, Busb., 206; *Branson* v. *Fentress*, 13 Ired., 165, cited and approved.)

JUSTICE *v.* BANK.

MOTION of plaintiff for an order requiring the defendant bank to permit an inspection of its books containing evidence relating to the merits of the action, heard at Spring Term, 1880, of CRAVEN Superior Court, before *Gudger, J.*

The court allowed the motion and the defendant appealed.

Messrs. Green & Stevenson, for plaintiff.
Mr. W. W. Clark, for defendant.

SMITH, C. J. At the return term following the service of summons, the plaintiff in order to prepare her complaint in the action for the recovery of deposit-moneys alleged to be due her testator, moves the court for an order requiring the defendant to allow her an inspection of, and permission to make copies from, the books of the defendant bank, containing its deposit account with the testator. The application is based upon an affidavit in which the plaintiff alleges her appointment and qualification as executrix; that upon information and belief, deposits were made by the testator with the defendant between the first day of September, 1871, and the same time in 1876, in large sums, the amount and dates whereof are unknown to her; that she has made application to the cashier of the defendant, who denies that the defendant is indebted, and refuses to come to any account, and that she has no specific information of their dealings, nor means of obtaining it except through an examination of the defendant's books. The defendant makes no answer to these allegations, but denies the plaintiff's right to an inspection of the books or any order for their production for the purpose set out in the affidavit, and especially before the cause of action is stated in the complaint. The court ordered the defendant to submit the books containing the deposit account of the testator to the inspection of the

plaintiff, on or before the first day of August thereafter, and the defendant appeals.

The case was hurriedly argued and no authorities cited to guide us in the determination of the point presented, and we are left to pursue our unaided investigation of the subject. The result we announce in a few general propositions:

1. A sufficient basis for the order is laid in the facts stated and not disputed. The plaintiff sues as executrix, and has no personal knowledge of the items of the indebtedness. The bank in its usual course of business keeps, or ought, and is presumed from its silence, to keep a full and detailed account of its dealings with its depositors, with evidence of what has been paid out on the depositor's check. It therefore possesses important and material information of the mutual transactions, out of which the alleged indebtedness arises, to enable the plaintiff to frame her complaint with care and accuracy. The defendant therefore has "books in its possession" containing evidence relating to the merits of the action, of which the court may order an inspection and copy within the very words of section 331 of the code.

It has been ruled under the former law, that a letter written by the plaintiff to the defendant, and in possession of the former, is such evidence as warrants an order for its production. Rev. Code, ch. 51, § 82; *Fuller* v. *McMillan*, Busb., 206.

2. It was competent in the court to make the order before the complaint was filed, in order that the facts be ascertained which are to be embodied in it. This has been ruled in the construction of the same statute by the court of New York, in which we concur. Whit. Prac., 740, note f; 1 N. Y. Prac., 419.

Under the former statute it was held that the books or papers could only be demanded at the trial, by force of the words, "the court shall have full power in the trial of ac-

tions, on motion and due notice thereof, to require the parties to produce," &c.; and because the consequences of a refusal would be, in case of the plaintiff, a nonsuit; and in case of the defendant, a judgment by default; which latter presupposes a cause of action set out in the declaration. *Branson* v. *Fentress*, 13 Ired., 165.

But the provisions of the code are different and have a wider scope, and the order may be enforced by "excluding the paper from being given in evidence, or punishing the party refusing, or both." §§ 274, 331.

3. The order may be allowed on petition, the usual and appropriate mode of obtaining relief, or by affidavit. This has also been held in the courts of New York. 1 N. Y. Prac., 417; *McAlister* v, *Pond*, 2 Duer., 702.

These are the only objections that occur to us, in the absence of argument, upon an examination of the record, and they are in our opinion untenable. It must be declared there is no error in the ruling of the court, and the judgment is affirmed.

No error. Affirmed.

ASA ETHERIDGE, Trustee, and others v. S. S. WOODLEY, Admr.

Process—Appearance by Attorney—Limitations.

1. Where an original summons issued in August, 1871, which was not served, and was not, in three years, followed by appropriate successive processes in order to constitute a continuous single action, the suit cannot be made to relate to the issuance of the original process, (and so avoid the bar of the statute of limitations) by taking out a second summons neither in form an *alias* nor purporting to be such.

2. The foregoing rule is not varied by the fact that an order was made

by the court for the issuance of an *alias*, which was neglected or disregarded by the clerk.

3. While a general appearance by attorney will dispense with process to bring a defendant into court, such appearance has no retrospective effect, and is not equivalent to service in time to avoid the statute of limitations when the statutory period has elapsed before the entry of appearance.

(*Fulbright* v. *Tritt*, 2 Dev. & Bat., 491; *Governor* v. *Welch*, 3 Ired., 249; *Hanna* v. *Ingram*, 8 Jones, 55; *State* v. *Wood*, 3 Ired., 23; *Badham* v. *Jones*, 64 N. C., 655; *Wheeler* v. *Cobb*, 75 N. C, 21, cited and approved.)

CIVIL ACTION tried at Spring Term, 1879, of TYRRELL Superior court, before *Avery, J.*

The complaint alleges that the plaintiffs owned a certain steam saw-mill and fixtures, and demands judgment against defendant for damages for conversion of the same to his own use. The answer denies that plaintiffs are owners of the property, and alleges the action has abated and been discontinued by failure of the plaintiffs to issue the proper processes therein and sets up the statute of limitations in bar. There was a verdict upon the issues in favor of plaintiffs, and thereupon the defendant's counsel moved for judgment *non obstante veredicto*, relying upon the statute of limitations. The court refused the motion and gave judgment for the plaintiffs, and the defendant appealed.

Mr. C. W. Grandy, for plaintiffs.

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

SMITH, C. J. At the trial all the issues of fact necessary to a recovery were found by the jury in favor of the plaintiffs, except that arising out of the defence of the statute of limitations, and the sufficiency of this depends upon the time when the action was instituted. The wrongful act, for

which damages are claimed and assessed in the verdict, was committed some time in the year 1869, and an inspection of the record will determine whether in law the suit was brought within three years thereafter.

The first summons was issued on the 15th day of August, 1871, and returned to fall term following without service. No other process issued until September 16th, 1875, when a second summons issued, not in form nor purporting to be an *alias*, upon which there is no return. At fall term, 1874, is an entry and appearance of counsel for the defendant. At spring term, 1872, is an order for an *alias* extended at the next term to the counties of Washington and Tyrrell, and successive continuances thereunder, until process was served, complaint and answer filed, and the cause tried.

Upon this statement of the record the question is, when in legal contemplation was the suit commenced, whether at the date of the first summons, or at some period subsequent to the year 1872, when the time limited therefor had expired.

If the failure to sue out the proper and successive processes of an *alias* and *pluries* summons works a discontinuance and prevents the application of the rule of relation to the first, the statutory bar prevails and defeats the action.

The cases cited in the argument for the defendant seem conclusively to settle the question, and to determine that the original summons must be followed by appropriate successive processes in order to a continuous single action referable to the date of its issue. *Fulbright* v. *Tritt*, 2 Dev. & Bat., 491; *Governor* v. *Welch*, 3 Ired., 249; *Hanna* v. *Ingram*, 8 Jones, 55.

In the last case, an action for slander, the first writ issued in February, 1857, returnable to spring term following, was not executed. A term then intervened and the second writ in form an *alias*, which was served, was returnable to spring term, 1858. The defamatory words were uttered within six

months of the date of the first writ. It was held, that the latter writ was the initiation of the action, and it was barred. MANLY, J., delivering the opinion, says: "We concur with His Honor below that it (the commencement of the suit) was at the issuing of the last writ, the one from the fall term, 1857, to the following spring. This latter, although denominated an *alias, does not connect itself with the other* so as to make one continuous suit, a term having intervened, from which no process was issued."

It is contended in support of the ruling of the judge in the court below:

1. That the order of an *alias* summons was equivalent to its issue, and the non-compliance of the clerk cannot operate as a discontinuance to the prejudice of the plaintiff; and

2. The appearance of counsel at fall term, 1874, corrects all antecedent irregularities, and puts the defendant in court, as if the appropriate processes had followed the original summons to make a continuous action.

Premising that between the return term of the first summons, and that at which the *alias* is ordered, there is a gap spanned by no order or action of the court, thus precisely assimilating the case to that from the opinion in which we have made the extract, we proceed to examine the correctness of the proposition as stated.

1. While it is the duty of the clerk to obey the directions of the court and issue process and notice when ordered, and his refusal to do so, when application is made by an interested party, may subject him to damages for the resulting injury, it is plain the omission cannot have the effect of supplying the unissued process or paper to the injury of the opposing party to the action.

In *State* v. *Wood*, 3 Ired., 23, land of the defendant had been levied on under a justice's execution, and all the papers returned to the county court without notice of the levy,

and the court made an order in the cause, directing the clerk to issue notice. This he failed to do, and the action was brought on his official bond for the damages occasioned by his neglect. "We believe," remarks DANIEL, J., speaking for the court, "that it has been usual for the clerks of the courts in this state to issue process, notices and copies of orders made in civil causes and place them in the hands of sheriffs to be served and executed, but we are ignorant of any law that *makes it the official duty of the clerk to do so.* Neither the relator nor his agent ever demanded the notice of the clerk. If such a demand had been made, and the defendant had then refused to make it out and deliver to such demandant in a reasonable time, he would have been guilty of a breach of his duty, but not before such demand."

The same principle applies to executions, and hence it became necessary to pass the act of 1850, imposing upon the clerks of the county and superior courts the obligation to issue them, unless otherwise directed, within six weeks after the rendition of the judgment, Rev. Code, ch. 45, § 29, and when the act was repealed in 1866, that duty was removed. *Badham* v. *Jones*, 64 N. C., 655.

But if the plaintiff had applied for and failed to obtain the process from the clerk, the result upon the defendant's rights would be the same; for upon whomsoever the blame for the omission may rest, it cannot be a substitute for the process itself, and the discontinuance would equally follow.

2. Nor can the appearance of counsel in 1874 have the effect of removing the impediment of statutory bar, then in the way of plaintiff's recovery. The appearance *then* puts the defendant in court, and waives any irregularity or defect in the process, if any had been issued returnable to that term, but it has no anterior force upon the action. No process, however, had been issued, and the only consequence of the appearance is to subject the defendant's intestate

thereafter to the responsibilities which would have been incurred by the service of process returnable to that term.

"A general appearance to an action," say the court in *Wheeler* v. *Cobb*, 75 N. C., 21, "cures all antecedent irregularity in the process and places the defendant upon the same ground, *as if* he had been personally served with process," but it does not supply process which never issued. The action was therefore barred by the lapse of time when the action was instituted and the ruling of the court in regard thereto is erroneous. On the finding of the jury the defendant was entitled to judgment that he go without day and recover his costs, and such judgment will be here entered.

Error. Reversed.

JOHN O. HEPTINSTALL v. CHARLOTTE MEDLIN and others.

Breach of Trust—Sheriff—Satisfaction of Execution.

1. Payment of money to the sheriff by an execution debtor does not discharge the latter when he is expressly informed by the officer that he intends to apply the money to the satisfaction of an execution in favor of a different plaintiff and against another defendant, and the latter consents to such misapplication, relying upon the promise of the sheriff to save harmless the party entitled to the money.
2. In such case the entry of satisfaction on the *fi. fa.* by the sheriff is entirely inoperative so far as the execution defendant is concerned.

(*Murrell* v. *Roberts*, 11 Ired., 424; *Codner* v. *Bizzell*, 82 N. C., 390; *Taylor* v. *Kelly*, 6 Jones, 324, cited and approved.)

MOTION to have entry of satisfaction made on an execu-

tion, heard at Spring Term, 1880, of HALIFAX Superior Court, before *Gudger, J.*

The motion was refused and the defendants appealed.

Mr. R. O. Burton, Jr., for plaintiff.
Messrs. Day & Zollicoffer and *J. B. Batchelor*, for defendants.

SMITH, C. J. At May term, 1878, of Halifax superior court, S. F. Larkin, then sheriff, had in his hands returnable to that term, three several executions, of which two were in favor of the plaintiff against the defendants, and the other in favor of William Hunter against N. M. Long. No money had been made on either of them, and Spier Whitaker, the attorney of Hunter charged with the collection of his debt, was pressing the sheriff for its payment. Thereupon Larkin proposed to the defendant, Gooch, that if he would pay off the execution against Long he should be allowed the sum paid as a credit in the settlement of the plaintiff's executions against himself. To this Gooch assented, and paid to Whitaker the sum of fifty dollars in his draft on Norfolk, taking his acknowledgment in the form of a letter, as follows:

HALIFAX, N. C., 17th May, 1880.

Mr. S. F. LARKIN, *Weldon, N. C.:*

Dear Sir:—Mr. J. T. Gooch has paid me fifty-eight dollars, the balance due on account of the claim of William Hunter, g'd'n, against you for balance of amount due on judgment against N. M. Long, collected by you.

Yours truly,

$58. SPIER WHITAKER.

Gooch subsequently paid the residue due on the plaintiff's executions and took the sheriff's receipt for sixty-one dollars and fifty-nine cents in full of both, of which the sum

paid to the attorney was a part. None of the executions were returned to the clerk's office, but on those of the plaintiff an endorsement was made without signature—"Satisfied 21st May, 1878." The term of the court began on the 6th day of May and lasted two weeks. Larkin's term of office terminated in December, 1878, and he and the sureties to his bond are insolvent. The plaintiff, failing to get his money, on the 2d day of May, 1879, sued out other executions by virtue of which the sum of fifty eight dollars was collected of Gooch, and under an order of court, paid in the clerk's office to await the determination of his motion to have satisfaction entered as of May, 1878. On hearing the motion the court refused to make the order and directed the money to be paid to the plaintiff. From this ruling the defendant's appeal brings up the enquiry whether the facts found by His Honor do in law amount to a satisfaction of the plaintiff's debt.

It is plain the moneys due the plaintiff have not been paid to him, nor to any accredited agent of his, nor to the sheriff. The sum which Gooch insists should go in the discharge *pro tanto* of the executions on which he was liable, was paid by him, with full knowledge of the facts, to another and different debt, under an agreement of the sheriff that it should be treated as a partial payment on his own debt, and the proposition is to give the sanction of the court and legal force to a misappropriation known to and concurred in by both, to the plaintiff's injury. If the money had been simply paid over to the sheriff, it could have operated *instanter* as a satisfaction, whatever may have been the disposition of the funds by him afterwards, and the loss, from the insufficiency of the official bond, would fall on the plaintiff. Gooch would not in such case be answerable for the sheriff's default and breach of official duty. *Murrell* v. *Roberts*, 11 Ired., 424. But it is obvious that no money has in this case been paid to the sheriff for the plaintiff, but by

his own order it is directly misapplied by the defendant himself to a debt in which the plaintiff has no interest, and without his knowledge or consent, under an assurance, to which the officer afterwards endeavored to give effect, that it should go in reduction of what was due on executions to which the moneys should have been, but were not applied. To permit this to be done would lead to great and serious abuses which we cannot encourage. *Codner* v. *Bizzell*, 82 N. C., 390. The duty of the sheriff and his limited authority were to accept payment from the debtor in money, and to pay over the same to the plaintiff, and no arrangement by which aught else is received, or any other obligation discharged by his direction, can operate as a satisfaction of the debt or a compliance with the mandate to collect. *Taylor* v. *Kelly*, 6 Jones, 824.

Suppose, instead of applying the money to the debt of Long, it had by agreement with the sheriff been used in meeting his personal obligations, could this be seriously urged as a payment of the execution? And is this distinguishable in principle from the use of the money made in our case? The very statement of the proposition is its own refutation. It is true that the court finds that the defendant, Gooch, "had no purpose of misappropriating the money, nor of aiding the sheriff in doing so," by which we understand that he had no intent to defraud or injure the plaintiff, and expected that Larkin would pay the plaintiff's executions out of other moneys. But this cannot affect Gooch's continued liability, and make in legal effect, that which was not in fact, a payment to the plaintiff, or to the sheriff for him. Interpreted in any larger or more favorable sense, the finding is an inference directly in conflict with the facts upon which it rests. Gooch, although with no improper motive, does directly and knowingly participate in a diversion of moneys belonging to the plaintiff, to other objects, or rather he uses his own moneys thus, and

cannot be heard to say he applied them to the plaintiff's claim.

It is unnecessary to enter into a discussion as to what acts will make one personally liable, who participates in a breach of trust, and thus secures the trust funds for himself. The cases referred to in the argument are of this class. Not only was the trustee dishonest, but the person charged shared in the dishonest act. The case is simply this: He never paid the money to the plaintiff, nor to any one for him; the plaintiff never has been paid, and the facts do not authorize an entry of satisfaction. We therefore uphold the ruling of the court and affirm the judgement.

No error. Affirmed.

CAROLINE V. LUTON v. J. S. WILCOX, Adm'r, and others.

Guardian and Ward—Estoppel—Res Adjudicata—Negligence—Burden of Proof.

1. Where permission is given to a guardian by the judge of probate to file an *ex parte* final account and turn over his guardianship to another, he is not thereby discharged from liabilities connected with his trust and arising before such resignation. He is still bound to account with the ward or the succeeding guardian when so required.

2. A, being appointed guardian, compromises certain debts due his wards at considerably less than their nominal value. Afterwards, by permission of the probate judge, he turns over his guardianship to B. A accounts with B, pays over the amount received from the compromise and takes a receipt in full. Thereafter B resigns the guardianship in favor of one C, who sues B and his sureties and recovers judgment against them *for the amount paid over by A to B*, and no more, which judgment is not collectible by reason of the insolvency of the defendants. In a suit brought by the wards on coming of age on the bonds

of A, the first guardian, for alleged negligence in making said compromise, *held:*

(1) That neither the *ex parte* settlement of A with the clerk, nor the receipt given by B, nor the judgment in the suit against B's bond, precludes inquiry into the propriety and good faith of the compromise, and

(2) That the receipt by A of less than the face value of the claims due his ward did not give rise to a presumption of negligence, but that an issue should have been submitted to the jury as to whether or not diligence and good faith were exercised in making the compromise, with instructions to the effect that the burden was on the relator to prove negligence.

(*Covington* v. *Leak*, 67 N. C., 363: *Freeman* v. *Wilson*, 74 N. C., 368; *Cummings* v. *Mebane*, 63 N. C., 315, cited and approved.)

CIVIL ACTION upon a Guardian Bond, tried at Fall Term, 1879, of PASQUOTANK Superior Court, before *Gudger, J.*

The opinion states the case. Judgment in the court below for plaintiff, appeal by defendants.

Messrs. Gilliam & Gatling, and *C. W. Grandy*, for plaintiff.
Mr. George V. Strong, for defendants.

DILLARD, J. The defendant, Stanton Meads, was duly appointed guardian to the feme relator in the year 1857, and gave bond. He afterwards executed renewals of his guardian bond as required by law, one in the year 1861, and another in the year 1866, with sureties to each bond, who, with the representatives of such as have died, are made co-defendants with him to this action.

The guardian having in his hands two bonds, one for $1,320 on J. B. Shaw and T. D. Pendleton, and the other for $1,530 on William Pailin, John Pailin and Joseph Pailin, both belonging to his ward, placed the same in 1866 in the hands of C. C. Pool, as an attorney at law, for collection, and in November, 1867, the guardian compromised both of the debts, receiving twenty-five cents in the dollar on the first

bond, and thirty-three and a third cents in the dollar on the second bond. Afterwards, to-wit, in the year 1869, the said Meads made an *ex parte* statement of his guardian account before the judge of probate, wherein after debiting himself with the aggregate of the two bonds aforesaid, he took a credit for the amount lost by the compromise, and thus reduced the estate of his ward down to the sum of a thousand dollars, or thereabouts; and thereupon he was allowed to resign his guardianship, and C. C. Pool, the attorney, was appointed and qualified as his successor.

Upon the appointment of Pool as guardian, he receipted Meads for the sums received by way of compromise on the two bonds aforesaid, amounting, with interest added, to the sum of $1,009.29, as in full of the amount due from him as the former guardian of his ward, and he continued to be the guardian until 1873, when he also was permitted to resign and one Cartwright was appointed his successor. Pool having failed to account with and pay over the funds of his ward, Cartwright instituted suit on his bond, and at fall term, 1874, recovered judgment against him and his sureties for the amount (with interest) paid over to him by Meads, and for nothing more; and of this recovery nothing has been collected, or can be.

This action is brought by the feme relator on the three bonds of Meads, the first guardian, with the view to make him and his sureties responsible for the mismanagement of her estate in compromising with those who had her funds in their hands, and the positions are taken in defence: first, that the acceptance by Pool from Meads of the sum realized by the compromise discharged him and shifted the burden on Pool and his sureties; and secondly, that the suit of Cartwright, the last guardian, against Pool and his sureties included the same matter, and that the judgment and recovery therein are *res adjudicata* and conclude the relator from again litigating for the same thing in this action.

In opposition to the defences set up by defendants, the plaintiff replies, insisting on the insufficiency of the matters pleaded in bar, and alleging that the parties compromised with were entirely solvent and able to pay the whole of their debts; that this fact was well known and that they could have been made to pay the entire sum due, if Meads, the guardian, had exercised *bona fides* and ordinary prudence in and about the business of his wards.

On the trial, His Honor reserving the questions of law involved in the defences aforesaid, submitted an issue to the jury as to the solvency of the obligors at the time of the compromise; and the jury having responded that they were "good for fifty cents in the dollar," the court overruled the defences relied on and rendered judgment against the defendants for the difference between the sum received on the compromise and what the jury found the bonds to have been worth. And from this judgment the appeal is taken.

Upon this appeal, the question for our determination is as to the legal sufficiency of the several matters relied on in the answer, to constitute a bar to the maintenance of this action.

By express provision of the statute law, the judge of probate may accept the resignation of a guardian and discharge him, if he shall exhibit his account for settlement, and the judge of probate is satisfied that he has been faithful and has truly accounted, and a competent person can be got to succeed him. But such resignation is authorized with a *continuing liability* in relation to all matters connected with the trust before the resignation. Bat. Rev., ch. 53, § 45.

In accordance with this statute, Meads exhibited his account, (a copy of which comes up to this court as a part of the record) debiting himself with the two bonds of the ward and taking a credit therein for the loss by the compromise, and the same was accepted and filed, and thereupon Pool was appointed and qualified as his successor. In this state

of things, if any liability was incurred by Meads by reason of the compromise, it was the duty of Pool to assert it by action or otherwise; and in case of his default, then the ward had a cause of action against Meads for *his* breach of duty, and also against Pool for his omission to make him responsible therefor. *Harris* v. *Harrison*, 78 N. C., 202. This liability on the part of Meads was not enforced by Pool, but on the contrary, it appears from a comparison of his receipt to Meads with the account settled with the probate judge at the resignation of Meads, and also from the statement of the case of appeal, that the only sum accounted for and paid over to Pool was the amount received on the compromise. If this be so, then, as no accountability for this matter was enforced against Meads, the liability to answer for the alleged breach, if any there was, still continues, and no bar exists to the prosecution of the present action by the ward herself.

The other point made and ruled against defendants in the court below, was, that on the resignation of Pool, Cartwright, who succeeded him in the guardianship, brought suit on the guardian bond of said Pool for an account and payment over of the funds of the ward, and that the loss by the compromise, which is the ground and scope of the present suit, was passed upon and adjudged in that action, and that the legal effect of the judgment therein is to conclude the relator from drawing the same matter into litigation again.

The judgment recovered was between different parties from the present action and the amount thereof is uncollectible by reason of the insolvency of Pool and his sureties. Even if it included accountability for the matters, for which this action is brought, it surely can not be that a fruitless judgment against Pool, the second guardian, will defeat the ward's suit on the bond of Meads who committed the breach of duty complained of and whose liability is expressly con-

tinued, notwithstanding the acceptance of his resignation as guardian. Bat. Rev., ch. 53, § 45.

But the judgment pleaded, if otherwise a good bar, is unavailing, for the reason that it is not shown that the same matter was therein drawn into issue and passed upon. The defendants, on whom it was incumbent to make the proof, do not set out the record of the former action, so that this court can see what was in issue. They merely send up as a part of the case of appeal an extract from the complaint in these words, "that C. C. Pool reduced into his possession all the estate of his ward, to the amount of fifteen hundred dollars, or some large sum, shortly after he qualified as guardian." From this form of allegation it is obvious that the failure of Pool to hold Meads responsible for the loss on the compromise, was not specially assigned as a breach of his bond, but on the contrary the ground of the action was confined to a recovery for what he *had received* from Meads and did not extend to what he *ought to have received.* And in exact consistency with the import of the record, so far as furnished, it is stated in the case of appeal by the judge, that on the former action the recovery was had for the amount received by Pool from Meads, and no more; and that there was no reference in the pleadings, or on the trial to the loss sustained by the ward by the compromise now complained of.

We, therefore, hold that accountability for the sum sought to be recovered in this action was not a matter in issue, and passed upon in the former action of Cartwright against Pool, and that the defence of *res adjudicata* was properly overruled by the court below.

Having seen that the defences urged by defendants are untenable in law, it remains to consider what judgment should have been rendered upon the facts found.

His Honor submitted only one issue to the jury, and that was as to the solvency of the two bonds of the ward at the

time of the compromise, and to that the jury responded that "they were good for fifty cents in the dollar." No issue was put to the jury as to the allegation of a knowledge on the part of Meads of the solvency of the debtors to the ward, equal to the payment of a larger sum than he received, and of his failure to exercise due diligence to secure or collect the whole. So we have no fact in the record on which the legal conclusion of negligence rests, except that the bonds at the date of the compromise were worth fifty cents in the dollar. Does that fact alone warrant the legal inference of negligence?

The rule of diligence established by the decided cases is, that a guardian in the management of his ward's estate must act in good faith, and with that care and judgment that a man of ordinary prudence exercises in his own affairs. *Covington* v. *Leak*, 67 N. C., 363; *Freeman* v. *Wilson*, 74 N. C., 369; *Cummings* v. *Mebane*, 63 N. C., 315.

No fraud is imputed to Meads in the making of the compromise, but it is alleged he did not employ that skill, attention and judgment in the ward's behalf which a prudent man would have bestowed in his own affairs under the same circumstances. The guardian received twenty-five cents in the dollar on one of the bonds, and thirty-three and one-third cents in the dollar on the other, when they were good, as the jury find, for fifty cents in the dollar. The worth of the notes, as found by the jury, should have been received, if by the exercise of ordinary prudence it might have been; the guardian, however, accepted a compromise at a less sum and surrendered up the ward's notes.

The presumption being, as to the matter of the compromise, in favor of the guardian, the burden of proof of negligence was on the relator, and it seems to us that an issue should have been submitted to the jury involving inquiry whether the compromise made at a less sum than the obligors were able to pay, was made in the exercise of ordinary

attention and an honest judgment about the ward's affairs, having regard to the number bound for each bond, their then ability to recover the debts and their prospects of future ability to pay the whole.

Without some further inquiry as to the due diligence of the guardian, we think the legal inference of negligence did not arise upon the fact found by the jury, and the judgment of the court is therefore erroneous.

The judgment of the court must be reversed, and it is so ordered, and this will be certified to the end that a new trial be had in conformity to the ruling of this court.

Error. *Venire de novo.*

JAMES M. CORBIN v. BERRY & McGOWAN.

Supplementary Proceedings—Receiver—Appeal.

1. Under the act of 1877, ch. 223, modified by the act of 1879, ch. 63, motions for the appointment of a receiver may be made before the resident judge of the district, or one assigned to the district, or one holding the courts thereof by exchange, at the option of the mover.
2. While it is the duty of a judge appointing a receiver under section 270, of the Code, to ascertain if other supplemental proceedings are pending against the judgment debtor, and if so, to notify the plaintiffs therein of all proceedings before him, yet a failure to do so does not require the reversal of an order appointing a receiver, where some of the creditors actually appear and make themselves parties, and all have an opportunity to interpose before the final distribution of the fund.
3. An appeal does not lie from an order that several defendants pay over a sum *in solido*, for that, such an order was not founded on a preliminary finding, on competent evidence, that the fund was under their joint control; since ample relief may be had by showing, in answer to a contempt rule against any individual debtor for not paying

over, that the property was not at his disposal; and especially is this so when no exception to the evidence in support of the order is made in the court below.

(*Meekins* v. *Tatem*, 79 N. C., 546; *Whissenhunt* v. *Jones*, 80 N. C., 348; *Bank* v. *Graham*, 82 N. C., 489, cited and approved.)

SUPPLEMENTAL PROCEEDINGS heard at Chambers in Newbern on the 31st of January, 1880, before *Seymour, J.*

The following creditors of the defendants, Reuben H. Berry and John McGowan, partners trading under the name and style of Berry & McGowan, to-wit, James M. Corbin, Wilson, Palmer & Co., P. T. George & Co., and Henry Welsh, after due preliminary steps of executions issued and a return of "unsatisfied" by the sheriff, applied to His Honor, A. S. Seymour, the resident judge of the second judicial district, for proceedings supplemental to execution, on or about the 26th of January, 1880.

The order of examination was issued as prayed for and served on the defendants, and by consent of the said creditors and the judgment debtors, the execution of the order was adjourned to the 31st day of January, at the chambers of His Honor in Newbern, when the parties appeared, and after objection made and overruled of a want of jurisdiction in His Honor over the proceedings, on the ground that he was assigned to hold the spring term of the courts in the 5th judicial district, the examination was proceeded with.

Upon the examination of defendants and other witnesses, (made a part of the judge's statement of the case of appeal) His Honor found as facts that the judgment debtors had on hand on the 1st of September, money and stock of the value of $11,750, that they had sold their goods at cost prices and that after deducting goods transferred to one Wolfenden at $4,200, claimed by the creditors to have been fraudulently assigned, and also for all debts paid, and family expenses, and a personal property exemption of $500 to

each of them, the defendants had in hand at the date of the institution of these preceedings $1,006 in money. And on motion of the creditors His Honor appointed W. G. Brinson receiver, with special duty to institute action to try the validity of the transfer of goods to Wolfenden, and ordered the defendants to pay over to him as receiver the sum of $1,006, so found in their hands as aforesaid.

From this judgment the appeal is taken, and from the statement of the case accompanying the record the material facts above stated appear; and besides these facts, His Honor, at the requests of defendant, states his belief to be that other supplementary proceedings against the defendants were pending before the clerk at the institution of those begun before him, but that no evidence nor statement of the existence of such had been made at and during the trial before him.

Mr. Wm. W. Clark, for plaintiff.
Messrs. Green & Stevenson, for defendants.

DILLARD, J., after stating the case. Several exceptions were taken by the appellant in the argument before us, which do not appear from the record to have been taken in the court below, and we will not therefore consider them, but confine our consideration, according to the well established rule, to such exceptions as are stated in the case of appeal, and such as are allowable for the first time in this court, respecting a want of jurisdiction in the court, or where upon the facts of the case the party has no ground of relief. *Meekins* v. *Tatem*, 79 N. C., 546; *Whissenhunt* v. *Jones*, 80 N. C., 348, and *Bank* v. *Graham*, 82 N. C., 489.

Under this restriction of the appellate powers of this court, the first exception for our consideration is the one taken to the jurisdiction of His Honor, A. S. Seymour, over the supplementary proceedings in this case.

By the act of 1876–'77, ch. 223, jurisdiction was conferred in the matter of appointing receivers and granting injunctions upon the resident judge, while the one assigned to the district was absent therefrom, but with exclusive jurisdiction of such proceedings in the judge assigned to a district or holding courts therein by exchange, when he should be in the district, and by the act of 1879, ch. 63, the foregoing act was modified, so that such proceedings might be had either before the resident judge or one assigned to the district or one holding the courts there by exchange, at the pleasure of the party. Now this court taking judicial notice of the term of the courts, when holden, and by whom, knows that the last term attached to the fall circuit of the second district was held by Judge Avery in Wake, beginning on the first Monday in January, 1880, and necessarily ending the 24th of the month, and also that the first court of the spring terms, 1880, of the same circuit, to which Judge Gudger was assigned, was not held until the second Monday in February; so that there was an interval between the fall riding of 1879 and the spring riding of 1880, of sixteen days. During this interval and before Judge Gudger came into the district, His Honor, A. S. Seymour, the judge residing within the second district at Newbern, took cognizance of the supplementary proceedings and appointed a receiver in this case. It is manifest as it seems to us, that by the express allowance of these two statutes, Judge Seymour had jurisdiction, as he was the resident judge, and the time had not arrived for him to go into the fifth district, nor for Judge Gudger to come into the second district, and we therefore hold there was no error in overruling the defendants' exception on this point.

It was next objected, that supposing the jurisdiction to be in Judge Seymour, there were other creditors who had supplementary proceedings pending before the clerk, and that the appointment of the receiver, without notice to

them, was error. The law prescribes that there shall be but one receiver of the property of a judgment debtor to prevent a conflict of authority between the courts having a concurrent jurisdiction over the subject; and upon the idea that the appointment of a receiver is a taking of the property into the hands of the court, it is held that such receiver holds not for the creditor only on whose application he is appointed, but for all others having similar proceedings, and hence it is provided that the judge making the appointment shall ascertain, if practicable, and notify all such creditors of the application for the appointment, and of all subsequent proceedings in relation to said receivership. C. C. P., § 270.

Unquestionably it was the duty of the judge to ascertain who had pending proceedings, and to notify them to appear before him, and it appears from the statement of the case of appeal that several did appear and consented to have all the cases heard as but one case. The judge acted upon the supposition that he had all before him who were interested, and if it were not so, the defendants knew the fact, and upon their examination or otherwise through their counsel, should have given information of others if any; and still they may protect themselves against such proceedings by motion in the cause pending before the judge, in analogy to the right of a creditor in a suit for the administration of assets of an estate after decree of account, to stop suits at law on their separate demands. We therefore think the omission of the judge to ascertain all the creditors having pending supplementary proceedings does not require the reversal of the order appointing the receiver.

The only remaining exception which we still consider is founded on the form of the order directing the defendants to pay over to the receiver the money found to be in their hands. The error is alleged to consist in that the order puts the obligation to pay jointly on the defendants, with-

out any finding or evidence of a joint holding or control of the funds. A sufficient answer is, that the judge finds as a fact that the defendants sold their stock of goods jointly at cost prices, and no question of joint liability in point of law or fact was made in the court below. Therefore, consistently with the established rule, no exception as to that could be taken for the first time here. But if it were advisable to consider of it, it is not seen that any injury can arise to either of the defendants, for, upon the supposition that either of them is unable to perform the order of payment to the receiver by reason of the fact that the funds may be in the hands of the other, and beyond his control, a day will be had to raise the sufficiency of such fact as cause against attachment for the contempt, on a rule to show cause which must necessarily be served before the attachment will be ordered. We must therefore declare our opinion to be that there is no error in the proceedings and order appointing a receiver in the court below, and this will be certified to the end that further progress be made according to law.

No error. Affirmed.

L. ANNIE WORMELL v. GEO. W. NASON.

Mortgage Sale of Personalty—Where made—Presence of Property.

Where personal property of a ponderous nature (*e. g.* printing presses and stands) are conveyed by mortgage with a general power of sale, unrestricted as to the place of such sale, the purchaser of the property at an auction had in execution of the power, at the court house door, in about fifty yards of the place where the property is located and in use, (the same being accessible to all who might wish to inspect it) passes a title which, if impeachable at all, can only be questioned by

the mortgagor and those claiming under him, and cannot be controverted by a stranger.

(*Hollowell* v. *Skinner*, 4 Ired., 165; *McNeeley* v. *Hart*, 8 Ired., 192, cited and approved.)

CIVIL ACTION tried at Fall Term, 1879, of CRAVEN Superior Court, before *Avery, J.*

Verdict and judgment for the plaintiff, and appeal by the defendant.

Messrs. A. G. Hubbard and *H. R. Bryan* for plaintiff.
Messrs. Green & Stevenson, for defendant.

DILLARD, J. The plaintiff in her complaint alleges that she is the owner and entitled to the possession of two printing presses, stands and printing material of great value, and that defendant detains the same; and the defendant by his answer, not claiming any right in himself, denies the ownership of the plaintiff and the wrongful detention by himself. Upon this state of the controversy, the court below submitted issues to the jury involving inquiry into the plaintiff's ownership of the property, the detention thereof by the defendant, and the value of the same. On the trial, as stated in the judge's case of appeal, it was *admitted* that the title to the property sued for was in one Jesse L. Nason on the first day of May, 1873, and that on that day he conveyed it by a deed of mortgage with power of sale, duly proved and registered in Craven county, to E. S. Wormell to secure a debt to him, and that the said debt with the mortgage as its incident was afterwards assigned by E. S. Wormell, the mortgagee, to Josiah Packard, Jr. And it was in evidence that the articles in controversy were sold by E. S. Wormell by virtue of the power contained in the mortgage, and under a power of attorney from Packard, the assignee, at public auction at the court house door, when and where the plaintiff

became the purchaser, and that said property was not actually present at the sale, being ponderous and difficult to remove, but was near by in a room about fifty yards distant from the court house door, and then being used in printing.

Upon the case of title in the plaintiff thus made, the plaintiff rested, and thereupon the defendant took the position that the sale did not avail to pass title to the plaintiff, for the reason that the property was not present at the court house door at the time of the sale, and he moved the court so to rule and instruct the jury. The court refused to hold and instruct the jury as requested, and defendant excepted.

The defendant, in support of the issues on his part, proposed to show title out of the plaintiff, and to that end offered and was allowed (against the objection of the plaintiff) to put in evidence a deed of mortgage of the same property by E. S. Wormell, the mortgagee in the deed first above mentioned, and by Kilburn and others, to Jesse L. Nason, which said last deed was executed subsequently to the probate and registration of the deed under which plaintiff claims, and after the sale thereunder to the plaintiff.

To combat the force and effect of this matter of avoidance on the part of defendant, the plaintiff introduced evidence tending to show that the deed put in evidence was deposited with the subscribing witness, as an escrow, and had been improperly obtained and registered without the performance of the conditions on which it was to have been delivered; and in turn, the defendant adduced evidence to counteract the plaintiff's impeaching evidence, both sides taking exception to the admission and rejection of evidence in relation to said deed, of which no particular mention need be made, as the decision of the appeal is put upon a point which renders their consideration unnecessary.

The jury, in response to the issue submitted to them, in substance found the ownership of the property sued for to be in the plaintiff, a wrongful detention by the defendant,

and fixed the value of the articles at two thousand dollars, and from the judgment of the court rendered on the verdict, the defendant appeals.

The error in law complained of by defendant, is assigned to be in the refusal of His Honor to instruct the jury as requested, that no title passed to the plaintiff under the sale at the court house door, because the goods were not then actually present at the door of the court house. From the terms of the instruction asked, obviously no question was made of the existence of a valid power of sale in the mortgage, nor of the fact of a sale had in pursuance of the mortgage. And therefore, we are to assume that the sale under which the plaintiff claims had these and all other elements of a sale passing the title, unless the want of the presence of the articles at the door of the court house at the time, as particularized in the request, was a defect which rendered the sale void and not merely voidable. The question then is, was the presence of the presses, stands and material at the court house door an essential, without which the title could not and did not pass to the plaintiff?

It cannot be doubted that a debtor may convey his personal property to his creditor as a security for his debt by what is technically known as a mortgage; or he may, with a view to save from the inconvenience and delay of a resort to court for foreclosure, superadd a power to the creditor in default of payment, to sell and pay himself. The debtor may confer such power in terms special as to the time and place of sale and the manner of the sale, or he may give a power of sale general and unrestricted, which last we take to have been the form of the power in this instance, inasmuch as the statement in the judge's case is of a mere general power. And if it were not so, it was the duty of the appellant to have had it so to appear. Taking the mortgagee in this case to have had such general power to sell, then, having the legal title in him, he could sell according

to his discretion, *en masse*, or separately, at the court house door with the property present, or with it in the room fifty yards distant, where parties wishing to buy could have the advantage of seeing it in position and in actual use; and a bargain struck, whether in the presence or absence of the goods, vested the title at once as between the parties, with the right in the vendee on payment of the price to have the possession delivered to him, or to take the possession, or to sue for it, except, perhaps, when there was an adverse possession in another at the time of the sale. 2 Blackstone, 447; 2 Kent, 492; 2 Jones on Mortgages, § 1902; *Wilson* v. *South Park*, &c., 70 Ill., 46.

The utmost that could be claimed from the sale's being made away from the property, was an equity to avoid the sale and have a resale, as against the mortgagee and the purchaser with notice of, or a complicity in, any unfairness in the sale. And this is a right in the mortgagor or some one claiming under him as assignee or creditor, and extends not to a stranger, in analogy to the rule in execution sales, which excludes all persons other than the debtor and those claiming under or through him, from questioning the transfer of the title by reason of an irregularity in the manner of the sale. *Hollowell* v. *Skinner*, 4 Ired., 165; *McNeeley* v. *Hart*, 8 Ired., 492.

Applying these principles, then we have this case: The plaintiff by her purchase, no one being in adverse possession at the sale, acquired the legal title which was in E. S. Wormell, the mortgagee, voidable at the most only at the instance of the mortgagor, or some one claiming by or through him; and in this action to recover the property, the defendant having no claim as creditor or otherwise under the mortgagor, officiously seeks to defeat the recovery for an alleged irregularity in the sale, of which Jesse L. Nason, the mortgagor, has never complained for himself.

We think the sale as made did not fail to pass the title to

the articles sued for by reason of the fact that the goods were not present at the place of sale at the time thereof, and His Honor was in no error in refusing to charge the jury as requested.

In the progress of the trial, after the refusal of the judge to give the instruction prayed for (as to which there was no error as above mentioned) the defendant introduced a deed of mortgage on the same property, executed by E. S. Wormell, Kilburn and others, subsequently to the probate and registration of the deed under which the plaintiff claims, and after the sale to the plaintiff, and several exceptions were taken to the admission of the same in evidence, and to other evidence bearing upon the question of its delivery as an escrow, and the performance of the conditions on which it was to have been delivered, but it is immaterial now to consider them.

According to the statement of the case by the judge, it was *admitted* on the trial that the title to the presses and other articles was in the mortgagor at the execution of the deed under which the plaintiff claims. And if so, then, it being decided that the sale passed the legal title to the plaintiff, the deed offered in evidence by the defendant to show title out of the plaintiff had not and could not by possibility have any such effect, for the reason that it was subsequent to her purchase, and she was not a party to the deed. It is therefore immaterial, the sufficiency of the previous sale to the plaintiff being established, to consider of the effect of the said deed subsequently executed by E. S. Wormell to show title out of the plaintiff when she was not a party thereto.

There is no error, and the judgment of the court below is affirmed.

No error. Affirmed.

GOVERNOR ex. rel. TRUSTEES OF UNIVERSITY OF N. C. v. R. W. LASSITER and others.

Discontinuance—Reference—Notice—Exceptions—Attorney and Client—Appearance—Excusable Neglect.

1. Under our present practice, a failure to take a judgment by default as soon as the same is allowable does not work a discontinuance.

2. A reference to hear and determine all matters in controversy, under C. C. P., §§ 240, 245, precedes any adjudication by the court of the liability of the parties.

3. When a defendant has been brought into court by the service of process he is charged with notice of whatever action the court may take while the suit is pending.

4. Exceptions to a referee's report may be filed at the term to which it is made.

5. If an attorney appear, and judgment be entered against his client, the court will not set it aside, though the attorney had no warrant, if he be solvent and able to respond in damages for his officiousness.

6. Where a defendant has been served with a summons, but neglects to employ counsel to represent him in the action, remains away from the place of trial, and contents himself with such information as to the progress of the cause as he can get by correspondence with persons under no legal obligation to furnish the requisite intelligence, he is not entitled to have a final judgment in the cause set aside under C. C. P., § 133, as having resulted from excusable neglect.

(*Sparrow* v. *Trustees*, 77 N. C., 35; *Collier* v. *Bank*, 1 Dev. & Bat. Eq., 328; *Stone* v. *Latham*, 68 N. C., 421; *Clayton* v. *Jones*, *Ib.*, 497; *McDaniel* v. *Watkins*, 76 N. C., 399; *Mabry* v. *Irwin*, 78 N. C., 46; *State* v. *Peebles*, 67 N. C., 97; *Waddell* v. *Wood*, 64 N. C., 624; *Sluder* v. *Rollins*, 76 N C., 271; *Hodgin* v. *Matthews*, 81 N. C., 289; *Cobb* v. *O'Hagan*, *Ib.*, 293; *Kerchner* v. *Baker*, 82 N. C., 169, cited and approved.)

MOTION to vacate a judgment heard at January Special Term, 1880, of WAKE Superior Court, before *Avery, J.*

Motion allowed and plaintiff appealed.

Messrs. Battle & Mordecai, G. V. Strong and *A. M. Lewis*, for plaintiff.

Messrs. Reade, Busbee & Busbee and *Merrimon, Fuller & Fuller*, for defendant.

SMITH, C. J. The action to recover funds belonging to the University in the hands of the defendant Lassiter, former treasurer, is brought against him and the other defendants, sureties to his official bond. The summons was served on the defendants Lassiter and Jones in March, 1876, and an *alias* on the defendant Winstead, May 30 thereafter. At the return term of the original process, the plaintiff's complaint was filed, and the defendants, represented by D. G. Fowle, as their attorney, put in their answer, to which there was a replication.

The cause was continued, and at spring term, 1878, referred to E. R. Stamps who made his report to February term, 1879, finding the sum of $4,913.09 due the plaintiff. No exceptions were taken, and at the second term thereafter, held in August, judgment was entered against all the defendants for the amount reported by the referee.

At January term, 1880, the defendant Winstead moved to set aside the judgment against himself for the following reasons: 1. The judgment was irregular and against the course of the court; 2. The failure to make defence was excusable neglect under C. C. P., § 133.

In support of his motion the defendant offered his own and the affidavit of his co-defendant Jones, from which His Honor finds, in addition to what appears upon the face of the record, these facts:

The defendant employed no counsel to appear for him before the court or before the referee. The attorney who undertook to represent the defendants under the belief that his employment was for all, was, in fact, retained by the said Lassiter, but not by Winstead himself. The defendant

labored under the impression that the suit was for a money demand not exceeding $300, and had no disposition to contest the plaintiff's claim thereto.

There are additional matters contained in his affidavit, which not being found by His Honor, are not properly before us, and we are not at liberty to look into the evidence to see what is stated, whether sent up and made part of the case or not, unless the court finds as facts whatever is therein testified. Yet as the defendant may be misled as to the effect of annexing the affidavit to the case prepared for review, we have looked into it to ascertain whether the merits of his application would be materially and injuriously affected by the exclusion, and require a remanding of the cause for a further finding. Upon the examination, we discover no matter averred which, if proved, would change favorably to the defendant the complexion of his case as presented by the judge. Those outside statements are in substance:

That the defendant had no notice of the order of reference, nor of the action of the referee under it; and that upon information it was in part based upon unsworn declarations of witnesses. That he learned from his principal that the dispute was about a small sum retained as arrears of his salary, and that his bank account and the trust fund had been placed at the disposal of his successor, among which were several state bonds, pledged for the re-payment of less than $500 borrowed and held as due him, and to meet the expenses of the suit. That on being served with process, he wrote both to said Lassiter and the new treasurer, enquiring as to the subject matter in controversy, and was informed by the former that it was to recover the money claimed and withheld for the reason mentioned, and from the latter received a brief reply to the effect that he knew little about the suit, and would refer the letter of enquiry to some one who would give the information sought, and that he never

did understand or suppose that the matter involved was of any moment.

It is not suggested that the interests of all the defendants were not diligently looked after by their attorney, and every legitimate defence set up in their behalf, nor that the report of the referee and the judgment thereon are not correct.

The vacation of the judgment is demanded for alleged irregularities in the proceedings thus specified:

1. The failure to take judgment by default worked a discontinuance and put the defendant out of court.

2. An adjudication of liability ought to have preceded the reference.

3. The referee failed to give notice of the time and place of entering upon his duties.

4. He heard and acted on evidence not given in on oath.

1. The strictness of the ancient rules of pleading and practice has not prevailed in this state, and has given place to the new system whose rules and regulations are prescribed by positive law. The reference in this case was not merely to have an account stated between the parties, but to have the entire matters in controversy heard and determined by the referee, as provided in C. C. P., §§ 240 and 245, and precedes any adjudication of the court.

2. The referee's report shows that notice was given to the parties, by which we understand it was given to their common attorney, who was or could have been present during the execution of the order, and then have made objection to the admission of improper evidence.

3. But in legal contemplation, the defendant was in court by the service of the summons, and is charged with notice of whatever action the court has taken during the pendency of the suit. *Sparrow* v. *Trustees of Davidson College*, 77 N. C., 35. "As our terms," remarks RUFFIN, C. J., in *Collier v. Bank*, 1 Dev. & Bat. Eq., 328, referring to the English Chancery practice, "are at certain and short intervals, parties

are charged with the knowledge of all the orders made in the cause, without service of a copy unless specially directed;" and this is cited and approved in *Stone* v. *Latham*, 68 N. C., 421, and *Clayton* v. *Jones*, *Ibid.*, 497. So a defendant, suffering judgment by default, is charged with knowledge of the fact. *McDaniel* v. *Watkins*, 76 N. C., 399, and this proposition is assumed in *Mabry* v. *Erwin*, 78 N. C., 46.

4. Exceptions to the report could have been filed at the term to which it was made, *State* v. *Peebles*, 67 N. C., 97, and the failure of the defendant then to make them is the result of his own inattention and negligence.

5. But the defendants were, in fact, represented by an attorney of record, who, whether with or without authority, alike unknown to the plaintiff, assumed to act as such for all, and if the complaining defendant was ignorant of his appearance, it was because of his persistent absence from the court, and disregard of his own interests, and his position is the same as if he had full knowledge. If an attorney appears and judgment is entered against his client, the court will not set aside the judgment, though the attorney had no warrant, if the attorney be able and responsible. Bacon's Abr. Att. B., p. 486.

Chancellor KENT, then Chief Justice, in *Denton* v. *Noyes*, 6 John., 295, lays down the true rule, with modification, in these words: "An attorney of this court appears for the defendant to a writ which has been sued out, but not served, and he afterwards confesses judgment. If the attorney has acted without authority, the defendant has his remedy against him, but the judgment is still regular, and the appearance entered by the attorney without warrant, is a good appearance to the court."

"If the attorney for the defendant," he continues, "be not responsible or perfectly competent to answer to his assumed client, the court will relieve the party against the judgment, for otherwise a party might be undone. I am

willing to go still further, and in every such case, let the defendant in to a defence of the suit. To carry an interference farther, beyond this point, would be forgetting that there is another party in the cause, equally entitled to our protection."

In *Jackson* v. *Stewart*, *Ibid.*, 34, the court declares: "It is the course of the K. B., said HOLT, C. J., when an attorney takes upon himself to appear, to look no further but to proceed as if the attorney had sufficient authority and to leave the party to his action against him."

The same doctrine is affirmed in *State* v. *McLaughlin*, 28 Cal., 668; *Schirling* v. *Scites*, 41 Miss., 644, and in *Smith* v. *Bowditch*, 7 Allen, 137.

In the last case the court say: "The defendant had a right to look to the record and if the person, whose name is there as attorney, acted without authority and the plaintiff is thereby injured, the remedy is by action for damages."

More forcibly does the doctrine apply to a case where the defendant has been served with process and is thereby in court. Whatever may be said about irregularities permitted during the progress of the cause they are cured by a final judgment, itself in all respects regular, and entered without objection, and the defendant cannot complain of what before transpired.

6. The defendant further contends that under the circumstances his neglect to appear is excusable under C. C. P., § 133, and for this reason the judgment against him should be annulled. Admitting the truthfulness of every statement in the affidavit and the imputation of negligence, the absence of which authorizes relief, remains unremoved. The defendant is sued in May, 1876, reference ordered in the spring of 1878, the report made in February, 1879, and final judgment entered in August of that year. During this whole period the defendant employs no attorney or agent, gives no personal attention to the case, content with

writing two letters of enquiry from neither of which does he derive any definite information of the extent of the plaintiff's claim, and is aroused to activity and diligence only after final judgment. If a party may thus slumber when he should be alert, and make no effort for his own protection, the court will not patiently listen to the suggestion that no legal culpability attaches to such conduct. The construction of the statute has been so often before the court that we will only call attention to some of the many decided cases conclusive upon the point. *Waddell* v. *Wood*, 64 N. C., 624; *Sluder* v. *Rollins*, 76 N. C., 271; *Hodgin* v. *Matthews*, 81 N. C., 289; *Cobb* v. *O'Hagan*, *Ibid.*, 293; *Kerchner* v. *Baker*, 82 N. C., 169.

In our view neither ground upon which the motion is put warrants the vacation of the judgment, and the ruling of the court thereon is erroneous. The judgment below must therefore be reversed and it is so ordered.

Error. Reversed.

J. NICHOLSON, County Treasurer, v. J. H. COX, Sheriff, and others.

Married Woman—Service of Summons.

1. The acceptance of service of summons by a married woman gives the court jurisdiction of the person, and authorizes further proceedings according to the course and practice of the court.
2. Since the act suspending the code, it is not necessary that written acceptance of service endorsed on a summons returnable to a term of court should state the *time* or *place* of such service.

(*Allen* v. *Shields*, 72 N. C., 504; *Moore* v. *Gidney*, 75 N. C., 34, cited and approved.)

NICHOLSON *v.* COX.

MOTION under section 133 of the Code to set aside a judgment, heard at Spring Term, 1880, of PERQUIMANS Superior Court, before *Graves, J.*

The facts in the case are sufficiently stated by Mr. Justice DILLARD in delivering the opinion of this court. The feme defendant, Mrs. Jordan, appealed from the judgment below.

Mr. J. W. Albertson, for plaintiff.
Messrs. Pruden & Shaw, for defendant.

DILLARD, J. The defendant, M. I. Jordan, wife of A. S. Jordan, and her husband, became sureties to the bond of Cox as sheriff, and the execution of the bond by the wife was without the written assent of her husband, and the sheriff having made default in not paying over the county taxes to the plaintiff as treasurer, a suit was instituted and the summons was returned into court with an admission of service endorsed thereon, subscribed by Jordan and his wife in their proper handwritings. The suit went to judgment by default and thereupon the defendant M. I. Jordan moved to vacate the judgment as to herself under section 133 of the code, on the ground of irregularity alleged to consist in the manner of the service of the summons, and upon the ground of surprise and excusable neglect.

His Honor ruled against the ground of irregularity and in favor of the defendant, the *feme covert*, on the ground of surprise and excusable neglect, and from that judgment both sides appeal, the defendant assigning error, in that, His Honor held the acceptance of service of the summons by her as legally sufficient to constitute the cause in court as to her.

Upon the defendant's appeal the questions are: Can a married woman admit or accept service in writing of a summons by which an action is commenced, and if she can, then is her acceptance in this particular case legally suffi-

cient to authorize the court to proceed to judgment thereon. It is argued that an infant cannot accept service of a summons, but that the same must be served personally, in all cases where the infant is without a general or testamentary guardian, and upon the same reason the summons must be served on a married woman. An infant cannot accept or admit service, for the reason that when without a general guardian no proceedings can be had without a guardian appointed *ad litem*, and no such guardian can be appointed by a court except in conformity to our statute, which, as construed by this court, is mandatory, that such appointment can only be made after personal service. Bat. Rev., ch. 17, § 59; *Allen* v. *Shields*, 72 N. C., 504; *Moore* v. *Gidney*, 75 N. C., 34.

Infancy is a disability and extends to all stages of a suit, including admission of service or acceptance of service as a mode of initiating a suit, as well as all ulterior steps in the course of the same, and this proceeds on the theory to prevent fraud. No such reason exists now to hold the admission or acceptance of service of a summons by a married woman as inoperative. She has now the capacity to have and hold her real and personal property, owned at the marriage, as well as her acquisitions during the coverture, as a separate estate, and is competent to contract so as to affect her property within certain limits, under the constitution of 18[illegible] (Art. X, § 6) and under the marriage act, chapter 69 of Battle's Revisal. And a *feme covert* is answerable out of her own estate for her debts and other causes of action before the marriage as well as on the contracts she is authorized to make during the marriage, and in suits to enforce that liability, while it is required that the husband be joined, she is expressly made competent by section fifteen of the marriage act, *supra*, to represent herself, if she will, as a *feme sole*, or with her consent to be represented by her husband.

The ability to defend an action being thus conferred, no good reason can be suggested as it seems to us, why her enlarged capacity in this respect should not be held to extend to any and all things usual and admissible to constitute a cause in court, such as appearing without summons, or the admission and acceptance of the service of a summons, as in the case of all other persons *sui juris*.

It is our opinion therefore that the acceptance of service of the summons by a married woman will suffice to give the court jurisdiction of the person and authorize further proceedings according to the course and practice of the court.

But it is said that although the acceptance of service may in general be sufficient, the acceptance in this particular case was ineffectual for the reason that the statute requires that the certificate or admission of service, in all cases other than service by publication, shall state the time and place of the service, whereas no such statement accompanies the acceptance of service endorsed on the summons in this action. See Bat. Rev., ch. 17, § 88.

In our opinion that requirement has no application to a suit brought returnable to term. Formerly, when all actions were returnable in the clerk's office, the party sued was required to appear within a certain number of days exclusive of the day of service, in no case to be less than twenty days, with one day added for every twenty-five miles distance between the court house of the county in which the service was made, and the court house of the county at which the party was required to appear. Bat. Rev., ch. 17, §§ 73, 74. Then it was material, and still is in special proceedings, to state the time and place of service so that the day of appearance may by computation be ascertained; but now by the act suspending the code (acts 1868–'69, ch. 76) the direction is, that in the cases cognizable at term, the sheriff shall summon the party to the next ensuing term of

the superior court, and shall serve the writ ten days before the term to which the same is returnable. This act operates a repeal of the requisition in the code that the time and place of service be stated, as it is now in such cases not necessary in order to fix the appearance-day, the writ, of which the service is accepted, being on its face returnable to term, and the acceptance, although not dated, implying a service for the required number of days before the return day, leaving of course the provision of the code still in force as to all writs used to begin special proceedings.

We hold, therefore, that the action was well constituted in court by the acceptance of service of the summons by the feme-defendant M. I. Jordan and her husband, and that the proceeding to judgment therein was according to the course and practice of the court, and is not open to the objection of irregularity. The judgment of the court below holding the acceptance of service sufficient is affirmed, and this will be certified.

No error. Affirmed.

J. NICHOLSON, County Treasurer, v. J. H. COX, Sheriff, and others.

Married Woman—Excusable Neglect.

Where a *feme covert*, sued with her husband and others as surety to an official bond, accepts service of the summons at the husband's instance, relying upon him to employ counsel and defend the suit, and because of such reliance on her husband takes no steps in the matter personally, and judgment goes by default, a case of surprise and excusable neglect is presented which entitles her to have such judgment set aside under C. C. P., § 133.

Griel v. *Vernon*, 65 N. C., 76; *Vick* v. *Pope*, 81 N. C., 22; *Harris* v. *Jenkins*, 72 N. C., 183, cited, distinguished and approved.)

NICHOLSON *v.* COX.

MOTION to vacate a judgment under the Code, § 133, heard at Spring Term, 1880, of PERQUIMANS Superior Court, before *Graves, J.*

The court allowed the motion, and the plaintiff appealed. See preceding case.

Mr. J. W. Albertson, for plaintiff.
Messrs. Pruden & Shaw, for defendant.

DILLARD, J. This was a motion to vacate a judgment for irregularity and for excusable neglect, and on the hearing according to the case of appeal made out by the judge the following facts appear:

The defendant M. I. Jordan and her husband A. S. Jordan, both signed the bond of Cox as sheriff, as sureties together with others, and the signature of the feme covert was put on the bond in the presence of the husband without his consent in writing. The sheriff having made default in not paying over to plaintiff the taxes levied for county purposes, action was brought on his said bond, and the case was constituted in court as to Jordan and his wife, by an admission in writing endorsed on the summons in the words "service accepted" with their names underwritten by each.

As to the circumstances of the admission of service, His Honor finds that the husband carried the summons to the wife and told her to write her name upon it, and that she signed it because of the directions of her husband, without having it read or knowing its contents, and at the return term judgment by default was entered against all the obligors, including the feme covert, Mrs. M. I. Jordan.

It is further found that the wife relied on her husband to employ counsel for her, and to see that a proper defence was made for her, and that because of that reliance, she took no action in the matter herself. That no defence was made to

the action by the husband either for himself or his wife, nor did he employ or speak to any attorney for that purpose, and the wife knew not of the rendition of the judgment until shortly thereafter execution was levied on her land.

Upon these facts the only ones deemed material to the view taken of the case by this court, His Honor ruled against the ground of irregularity alleged to consist in the manner of the service of the summons and sustained the motion to vacate the judgment as to the feme covert on the ground of surprise and excusable neglect, and from the judgment both sides appeal, the plaintiff assigning error in the legal conclusion of surprise and excusable neglect, and the defendant M. I. Jordan in the ruling that her admission of service of the summons duly constituted the action in court as to her.

We will first consider and pass upon the appeal of the plaintiff.

The common law doctrines, as to the rights and powers of a husband in and over the property of the wife, and his liability for her contracts and torts before and during the coverture, and as to the wife's capacity to have and hold property independently of the husband and to make contracts and be answerable therefor at law, have been greatly modified by the constitution of 1868 and subsequent legislation. And equally great has been the modification of the old rules regulating suits in court, to which the wife may be a party, in reference to the joinder of the husband therein and their respective capacities and duties in the conduct and management of such suits.

Since the enlarged capacity of a married woman to have a separate property, and to be responsible for liabilities *dum sola*, and on such contracts during the marriage, as by the marriage act (Bat. Rev., ch. 69,) she has power to make, it is provided by statute, that in actions concerning her separate

property, a married woman may sue alone, and also may sue her husband, and be sued by him, but that in all other instances the husband must be joined. C. C. P., § 56. And it is further enacted in the marriage act aforesaid, that in all actions against a married woman, a copy of the summons shall be served on the husband, and on motion to the court the husband may be allowed, with the consent of the wife, to defend in her name and on her behalf, without being subject to have judgment entered against him for any liability of the wife before the marriage or on any contract of hers made during the marriage.

From these changes of our law it results that it was open to question in this action, whether the suretyship of Mrs. M. I. Jordan on the bond of the sheriff was an obligation contracted in such manner and with such requisites as to make it in law binding on her, and it also results that the action brought was of such character as made it imperative to join the husband therein.

The husband was joined with his wife as required by the statute, and the cause was duly constituted in court, as we are to take it on the plaintiff's appeal, but no appearance or defence was interposed by the wife for herself, nor by the husband for her, and the cause went to judgment by default. And now the question is whether, the regularity of the judgment being assumed, and all errors of law in the judgment being concluded as the same stood unreversed, there was any ground of surprise or excusable neglect upon the facts as found by His Honor on which to vacate said judgment and let in the feme covert to make her defence under C. C. P., § 133.

It seems to us that the design and effect of section 15, ch. 69 of Bat. Rev., are to provide that the wife may, if she will, defend herself, and if she does not, then, that the husband may and ought to defend for her, with her consent expressed or implied, and the connection of the husband is

required on the theory that the wife needs his advice and assistance in protecting her property, and that he can and will assist her, if not from interest, at least from duty.

Manifestly it was not expected that the wife, though capable to represent herself in a suit against her, would as a general thing exercise that power, but would commit the management and direction of her defence to the intervention and judgment of her husband. In legal contemplation she would be inclined to trust and could trust, her interests in an adversary suit to her husband.

Now in this action, the attempt was, so far as this defendant was concerned, to subject her separate estate to answer for her contract of suretyship, the validity of which might have been questioned, and no defence as to that or for anything else was set up, and His Honor finds as facts that after procuring the wife's signature to an acknowledgment of the service of the summons on his own direct application, the husband made no appearance to the action, and he further finds as a fact that the wife *relied on him to employ counsel for her and to see that a proper defence was made for her*, and that defendant *because of such reliance* on her husband took no steps in the matter personally.

In our opinion it was natural for defendant to confide in her husband to look after and protect her interests in the action, both from the relation between them and from the disabilities of sex and coverture assumed by the statute to exist as implied from the peremptory requirement of the husband's joinder as a party, and the failure of the husband relied on as he was to make plea for his wife, or have it done, may be considered as a surprise, and the omission of the wife to be attendant to see whether a proper defence was interposed, was in law an excusable neglect.

In *Griel* v. *Vernon*, 65 N. C., 76, cited and approved in many cases since, it was held that a judgment entered against a party who had engaged an attorney to enter his

pleas, which he failed to enter, was a surprise, and that the neglect of the client to examine and see that the attorney had performed his undertaking was an excusable neglect, and it seems to us that the principle of that case applies to and governs our decision in the case under consideration.

It is contended, however, by the plaintiff that the *feme covert* and her husband had their day in court, and as they failed to make defence, the wife for herself or the husband for her, the judgment is a finality and no relief against it can now be had by the wife, and the case of *Vick* v. *Pope*, 81 N. C., 22, is cited as a positive authority. That case in our view is distinguishable from the present one, and is no authority against relief to the defendant here on the grounds on which her application is based. In the case against Pope and wife, the note merged in the judgment was executed by the husband and wife, and the action duly constituted in court, as in this case; and there, the husband retained counsel who appeared in their behalf, and the cause went to judgment according to the course and practice of the court, and no motion being made for relief within the time prescribed in section 133, C. C. P., it was ruled that there was no irregularity, and that the invalidity of the contract of the *feme covert* had been concluded by the judgment and was not open to further controversy on the ground that they had had their day in court.

Under the same state of facts we would so hold in this case, and indeed we would be inclined to go further and hold the *feme covert* concluded by the judgment by default, if it were not for the facts found by the judge, showing a purpose to defend and a reliance on the husband to make the defence, making a case of surprise and excusable neglect, sufficient in law to authorize the court below to vacate the judgment in the exercise of its legal discretion under C. C. P., § 133.

In the course of the argument before us, it was urged that

if the judgment of vacation in the court below could not be supported under section 133, still the married woman was entitled to relief on the ground that her contract of suretyship was invalid, as being entered into without the written assent of her husband, and not charged on her separate estate expressly or by necessary implication, and the case of *Harris* v. *Jenkins*, 72 N. C., 183, was cited as authority for the position. That case was properly decided on its facts. There the judgment was entered on a sheriff's bond upon default of the sheriff to pay into the treasury the state taxes without notice to the obligors, in pursuance of a special law for such cases, and a judgment so entered does not conclude as one rendered in an adversary suit constituted in court by the service of summons, and hence it was admissible, on the motion of Mrs. Harris to annul the judgment, to consider of the effect of her execution of the bond without the written assent of her husband, and for want of a compliance with the statute in that respect to hold the judgment null and void.

In this case, however, the motion is in apt time to have the benefit of section 133, and the husband having commenced to represent his wife by having her to accept the service of summons, and being in fact relied on to employ counsel and to see that a proper defence was made, and failing to give any attention to the matter, it was within the legal discretion of the judge to vacate the judgment and let in a defence of the *feme covert*, and upon these facts the judgment being vacated, we are not able to say there was any abuse of his discretion and his judgment must be affirmed.

Let this be certified to the end that Mrs. M. I. Jordan may be allowed to set up any defence she may have to the action of the plaintiff.

No error. Affirmed.

S. W. ISLER v. ELEANOR KOONCE and others.

New Trial—Foreclosure—Parties.

1. Where an appeal is taken to the supreme court from the decision of the judge passing on the law and facts under section 240 of the code, and his legal conclusions are reversed by the appellate court, and a new trial granted, the court below, when certified of the decision of the higher court, cannot proceed to judgment upon the facts found on the first trial, but the case must be submitted to a jury, unless otherwise agreed by the parties.

2. Where a sale of land is made in execution of a decree of foreclosure in a suit wherein some of the heirs of the deceased mortgagor are not parties, it is not error to allow an amendment, making parties of all the heirs, as well those in possession as those who are not, in an action by the purchaser at the judicial sale to recover possession of the land.

(*Benbow* v. *Robbins*, 72 N. C., 422; *Averett* v. *Ward*, Busb. Eq., 192, cited and approved.)

CIVIL ACTION to recover Land, tried at January Special Term, 1880, of JONES Superior Court, before *Eure, J.*

This was an action to recover real estate upon a claim of title by the plaintiff as a purchaser under a decree of foreclosure of a mortgage executed by J. C. B. Koonce, deceased, against the defendant, Eleanor Koonce, widow of the mortgagor, and her co-defendants, being such of the children and heirs at law as were on the land at the institution of the suit, leaving other children of the mortgagor not joined as parties. At the trial term a jury was waived, and the trial was had by the judge. Upon the record of the foreclosure suit, under which plaintiff claimed, it was found as a fact that the heirs at law of the deceased mortgagor had not been made parties to that action; and thereupon the plaintiff, to obviate the apparent necessity that they should have been parties as taking by descent the equity of redemption, offered evidence tending to show that the equity of

redemption had been divested out of the mortgagor by a sale of the same in his life time under execution, but the court ruled the evidence insufficient to authorize that fact to be found.

Upon these facts, the court adjudged that the equity of redemption at the death of Koonce, the mortgagor, descended to his heirs at law, and that they had not been made parties to the foreclosure proceedings, and that by reason of the non-joinder of said heirs, the decree of sale and deed to plaintiff were ineffectual to pass the title to him. From that judgment the cause came by appeal to this court, and at June term, 1879, the judgment of the court below was reversed and a new trial granted upon reasons set forth in the opinion as reported in 81 N. C., 378. On the going down of the certificate from this court, the plaintiff moved for judgment and a writ of possession on the facts as formerly found by the judge.

The court being of opinion that the cause stood for a trial *de novo* overruled plaintiff's motion for judgment and execution, and allowed new parties to be made with leave to file answers, and continued the case until the next term, and from this ruling the present appeal is taken.

Messrs. Manly & Son, for plaintiff.
Messrs. Green & Stevenson, for defendants.

DILLARD, J., after stating the facts. Upon the appeal, two points of error are urged upon our consideration; first, in the refusal of judgment and execution to the plaintiff on the facts as found on the former trial by the court, and secondly, in the allowance of new parties with leave to file answers.

1. The refusal of judgment and execution on the plaintiff's motion was proper. It was properly refused because the judgment of this court on the former appeal was one of

reversal of the judgment below for error of law as set forth in the report of the case, and in terms it *expressly granted a new trial.* It was also proper to refuse the motion for judgment because when the trial by the court, to which the parties consented, was set aside and a new trial granted, the defendants were remitted to their original legal rights to have a trial by jury. The case of *Benbow* v. *Robbins,* 72 N. C., 422, is a case in point. There, after the reversal of a judgment in favor of the defendant on a trial of the facts and law by the court, (as reported in 71 N. C., 338) the plaintiff, conceiving himself entitled to stand upon the advantage of the facts which had been found by the judge, procured judgment to be entered in his favor, and on appeal to this court that judgment was reversed, as reported in 72 N. C., 422. And there, after setting forth the grounds on which the judgment in that particular case was held erroneous, the court lay down the general rule, that "where the first trial has, by consent, been by the court, the second trial must be by a jury unless there be a new agreement that the court may try." This sustains the judge below on the first point of error assigned by the appellant, and precludes the necessity of any further discussion as to that matter.

2. The second error assigned is that His Honor allowed new parties to be made with leave to file answers; and therein also there was no error. J. C. B. Koonce conveyed the land sought to be recovered in this action, in the year 1857, to W. A. Cox and F. S. Smith in fee as a security for several debts, most of them due to the grantees in the deed, upon a condition that the estate should cease on the payment of the money thereby secured, with power in the grantees at the end of three years from the date of the conveyance in case of default in the payment, to enter and have possession, *but without any power of sale.* In 1877, after the death of Koonce, the grantor, a suit was instituted by one

of the secured creditors to foreclose the equity of redemption to which the trustees, Cox, and the heirs at law of the other trustee, Smith, were the only parties defendant; and it was in that foreclosure suit thus constituted in court that the present plaintiff derived the title on the strength of which he now seeks to recover, and the question is, was it not legitimate, as the present action is against the widow and some of the heirs of Koonce, but not all, to allow the omitted heirs to be made parties with an opportunity to make defence if any they have.

Upon the face of the mortgage, the grantor had the legal right of redemption by paying the debts secured at any time before the end of three years, and after that time he and his heirs as the case may be had the right in equity to pay and have back the land; and assuming the fact to be as found by the judge that the equity of redemption was not divested out of the mortgagor by a sale thereof under execution against him, as claimed by the plaintiff, then upon his death that equitable right descended to his heirs at law. In such a state of the title, the heirs of the mortgagor should have been made parties defendant, (2 Jones on Mortgages, §1414; *Averett* v. *Ward*, Busb. Eq., 192) yet His Honor finds they were not. How could the heirs be foreclosed by a decree of sale of their equity to have the title, upon a payment express or presumed of the debts secured, or by a perception of the profits, or upon a tender and payment of any balance that remained due, when they were not parties to that suit? and therefore had no day to defend their title. The proceedings under the foreclosure suit, it is held, passed the legal title to the present plaintiff, but as the heirs were not parties to that suit it did not conclude them from any defence they might have made whether upon a payment actual or presumptive of the debts, or by a tender of the balance due. 2 Jones on Mortgages, §§ 1395, 1414; Story's Eq. Pl., § 193.

The plaintiff, though a purchaser under decree of the court, and having the legal estate which was in the original grantees as ruled by this court, (there being nothing in controversy in that case except the right of possession) has the title subject to such rights and equities therein as the heirs of the mortgagor may have, for he must be taken to have bought with a knowledge that they were the owners of the equitable estate and were not parties to the suit under which he purchased, and therefore were not concluded.

The rights and equities which the heirs might have set up in the foreclosure suit if they had been parties, must be capable of assertion still, in some form, either as parties to the present action or by an independent action; and consistently with the policy of the code to prevent multiplicity of actions, no reason occurs to us why those of the heirs who are not parties to this action might not be admitted to come in and make their defence, so as to make the judgment in the cause a complete determination of the rights of all persons.

For these reasons we think there was no error of which the plaintiff has a right to complain in admitting the new parties with leave to file answers. This will be certified.

No error. Affirmed.

JAMES T. GOOCH v. J. H. MCGEE.

Execution Against Corporation—What Property Subject to.

The real estate acquired by a public corporation in exercise of a delegated right of eminent domain, and necessary for uses in which the public is concerned, cannot be sold under execution apart from the franchise and its incidents, so as to give the purchaser a title to the

property divested of all the duties and obligations assumed by the company.

(*State* v. *Rives*, 5 Ired., 297, cited and commented on.)

CIVIL ACTION to recover land, tried at Spring Term, 1879, of HALIFAX Superior Court, before *Eure, J.*

Case Agreed: In the year 1812, the legislature granted a charter to the Roanoke navigation company, under an act entitled "an act for improving the navigation of Roanoke river from the town of Halifax to the Virginia line," and a company was duly organized thereunder at a meeting of the stockholders held in the town of Halifax on the fourth Monday of October, 1815; the proceedings of which meeting were ratified by the legislature at its session of 1816. And said corporation has since fully performed and complied with the provisions of its charter and the acts amendatory thereof. On the 23d of October, 1818, a tract of land belonging to the heirs of Daniel Weldon, deceased, (of which the land in dispute is a part) was condemned under the provisions of said charter, and an act subsequently passed (1817). Said land was necessary for the purposes of the company, was then paid for and entered, and has ever since been in possession of said company. The *locus in quo* (which is particularly described in the case) is occupied by the defendant, under a lease from said company. In 1878, judgments were recovered against the company in favor of certain persons, executions issued thereon, and at the sheriff's sale in 1879, the plaintiff became the purchaser. Under the act of 1874–'75, ch. 198, an action was instituted in Halifax superior court (and is now pending) for the dissolution of the company, appointment of a receiver, &c. If upon these facts the court shall be of opinion that the plaintiff is entitled to recover, then judgment shall be rendered in his favor for the possession of the land and for costs; but if otherwise, then a judgment of nonsuit

shall be entered. The court adjudged in favor of plaintiff and ordered a writ of possession to issue, and the defendant appealed.

Messrs. Day & Zollicoffer, Gilliam & Gatling, Mullen & Moore and *J. B. Batchelor*, for plaintiff.

Mr. Thos. N. Hill, for defendant.

SMITH, C. J. The plaintiff purchased at a sale under execution against the Roanoke navigation company, certain land which had been theretofore condemned for its use, under the provisions of the act of incorporation, including the bed covered by the waters of the canal, at its terminus near Weldon, and in this suit seeks to recover possession. The defendant had leased the land from the company for a period which had expired before the day of sale, but still continued in possession, refusing to surrender to the plainiff.

Under an act of the general assembly entitled "an act for the dissolution of the Roanoke navigation company," passed at the session of 1874–'75, ch. 198, proceedings had been instituted in the superior court of Halifax and the complaint filed, but no further action taken at the date of sale. Two objections are urged for the appellant:

1. That the proceeding to annul the corporation and dispose of its property directed by the statute supersedes and renders nugatory the interference of a creditor, and that no title passed by the sheriff's deed; and

2. That the canal bed, as severable from its general property and franchise, is not subject to execution.

We propose to consider the last proposition first. In *State* v. *Rives*, 5 Ired., 297, a sale of so much of the road bed of the Portsmouth and Roanoke railroad company as was within the county of Northampton, under an execution at the instance of a judgment creditor, was held to be legal,

and the purchaser to have acquired title to the land. This was because of the assumed want of any other remedy for the creditor, and by force of the statute which authorized a plaintiff to sue out against a corporation debtor, "a *distringas* or *fieri facias*, as he may think proper, and the said writs of *distringas* or *fieri facias* may be levied as well on the current money as on the goods, chattels, lands and tenements of the said corporation." Rev. Stat., ch. 26, § 5. The result of upholding this diversion of the property from the original and intended purposes of its condemnation to the use of the company, and the injustice done the former owner, whose damages were lessened by the advantages to be derived from the construction of the proposed improvement, conducted the mind of the late Chief Justice, who presided at the trial in the superior court, to the conclusion that the sale was not authorized by law. In delivering the overruling opinion in this court, RUFFIN, C. J., declaring that "the legislature can prescribe what shall or shall not be the subject of execution," proceeds to say: "We agree that the franchise cannot be sold. It is intangible and vested in an artificial being, of a particular organization, suited in the view of the legislature to the most proper and beneficial use of the franchise, and therefore it cannot be assigned to a person natural or artificial, to which the legislature has not committed its exercise and emolument," and he adds: "We regret sincerely that it has hitherto escaped the attention of these companies and of the legislature, that some act was necessary, in order that such sales, when unavoidable, might be made with the least loss to the debtors and with the greatest advantage to the creditors and purchasers, by providing for keeping up the franchise with the estate."

The correctness of the general proposition that the property, real and personal, of corporations formed for the prosecution of objects of personal benefit, as that belonging to individuals, may be seized and by sale appropriated to the

payment of its debts, does not admit of question. Between them the law makes no distinction, as has been repeatedly decided. *Maryland* v. *Bank*, 6 Gill. & John., 205; *Ev. L., &c.*, v. *Buf. Hyd. Association*, 64 N. Y., 561; *Queen* v. *Vict. Park Co.*, 41 E. C. L. R., 544. But so far as the opinion, except by force of the statute, extends the liability to the estate of corporations created for public purposes, indispensable to the exercise of the conferred franchise and to the performance of correlative duties, it is not in harmony with adjudications elsewhere of the highest authority, and we are not disposed to enlarge the sphere of its operation. Some of the cases on the subject will be noticed.

In *Ammant* v. *President, &c., Turnpike Co.*, 13 Serg. & Rawle, 210, the plaintiff bought at execution sale, "all the right, title, interest and claim," of the company, "of, in and to ten miles of its road," with specified limits, and it was held that he acquired no property by his purchase. TILGHMAN, C. J., declaring that "the inconvenience would be excessive, if the right of the company could be cut up into an indefinite number of small parts and invested in individuals," and that the turnpike company "alone were confided in, and they alone looked to, for a faithful performance of the important duties incumbent upon them.

In *Gue* v. *Tide Water Canal*, 24 How., (U. S.) 257, execution had been levied "on a house and lot, sundry canal boats, a wharf and sundry other lots," and an injunction asked to restrain the sale. Chief Justice TANEY delivering the opinion, uses this language: "The property seized by the marshal is of itself of scarcely any value apart from the franchise of taking toll with which it is connected in the hands of the company, and if sold under this *fieri facias* without the franchise, would bring scarcely anything, but would yet, as it is essential to the working of the canal, render the property of the company in the franchise, now so valuable and productive, utterly valueless," and he adds:

"It would be against *the principles of equity* to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders by *dissevering from the franchise property which was essential to its useful existence.*"

In *Coe* v. *R. R. Co.*, 10 Ohio, 372, the rule is thus laid down: "When power is given to acquire an interest in real estate, for the single and exclusive purpose of the exercise of a franchise, and particularly when to acquire such interest there is a delegation of the power of eminent domain, the *interest cannot be separated from the use* to which alone it can be applied, and *if the franchise* cannot be conveyed, neither can the *interest in real estate, with which it is connected.*

A very forcible and clear view of the subject is presented by WOODWARD, J., in *R. R. Co.* v. *Colwell*, 39 Penn., 337. "Lands bought and not dedicated to corporate purposes are bound by the lien of judgments and are liable to be levied in execution and sold by the sheriff in the same manner, and with the same effect as the lands of any other debtor. As to land which has been appropriated to corporate objects, and is necessary for the full enjoyment and exercise of any franchise of the company, whether acquired by purchase or by exercise of the delegated power of eminent domain, the company hold it entirely exempt from levy and sale, and this on no ground of prerogative or corporate immunity, for the company can no more alien or transfer such land by their own act than can a creditor by legal process, but the exemption rests on the public interests involved in the corporation. For the sake of the public, whatever is essential to the corporate functions shall be retained by the corporation. A railroad company could scarcely accomplish the end of its being after the ground on which its rails rest had been sold to a stranger."

"The road, with all its appurtenances," remarks SHARS-

WOOD, J., in the more recent case of *Youngman* v. *R. R. Co.*, 65 Penn., 278, "being necessary to the exercise of the franchise granted by the sale, could not be levied on and sold under execution on a judgment against the corporation."

The distinction between corporate property which can and cannot be reached by a *fieri facias* is well defined and strongly presented in the opinion of THOMPSON, C. J., in a case determined in 1868, (*Foster* v. *Fowler*, 60 Penn., 27,) in which, after discriminating between "those corporations that are agencies of the public, directly affecting it, and those which only affect it indirectly, by adding to its property in developing its natural resources or in improving its mental or moral qualities," he says: "Of the former are corporations for the building of bridges, turnpike roads, railroads, canals, and the like. The public is directly interested in the results to be produced by such corporations, in the facilities afforded to travel and the movements of trade and commerce. It is well settled that this use is not to be disturbed by the seizure of any part of their property, *essential to their active operations*, by creditors. They must recover their debts by sequestering their earnings, allowing them to progress with their undertaking to accommodate the public. This direct benefit to, and accommodation of the public clearly distinguish this class of companies from the second class, viz: private corporations, or those in which the public is but indirectly interested, such as mining and manufacturing, coal and iron companies, libraries, literary societies, schools, and the like."

In our researches we have met with a single case, (*Arthur* v. *Bank*, 9 Sme. & Mar., Miss., 394,) recognizing the authority and approving the decision in *State* v. *Rives*, and in opposition to the current of judicial opinion.

The general words of the statute, which to some extent influenced that decision may without violence to their meaning admit of a narrower scope and be restricted to the

property of private corporations, and to that of public corporations, which may be replaced and is not indispensable to the exercise of their necessary functions and the discharge of public duties, upon the distinction taken in the cases cited. But we are not required to question the correctness of the construction which so widely extends the application of the law. It has since been amended in accordance with the suggestion of the chief justice and the very remedy pointed out has been given. The franchises of a class of corporations, to which that then under consideration belongs, with all the corporate property may now be reached and its profits applied to the satisfaction of the claims of creditors. To the section, remaining substantially unchanged, has been added the following: "And if the judgment or decree be against a railroad, or other corporation authorized to receive fare or tolls, the franchise of such corporation, with all the rights and privileges thereof, so far as relates to the receiving of fare or tolls, and also all other corporate property, real and personal, may be taken on execution and sold, under rules regulating the sale of real estate." Rev. Code, ch. 26, § 9. The amendments further provide for the manner of selling and that the sheriff shall "deliver to the purchaser possession of all the corporate property connected with the franchise belonging to such corporation in whatever county the same may be situated." §§ 10, 11.

In furtherance of the same policy of preserving intact the corporate privileges bestowed for the public benefit, it has been enacted that purchasers of the property at a mortgage sale shall *ipso facto* become a body corporate and "succeed to all such franchises, rights and privileges, and perform all such duties" as the preceding corporation possessed, except that they shall not incur liability for its obligations. Bat. Rev., ch. 26, §§ 46 and 47.

It will be observed that the subjection of the franchise to

execution is confined to such corporations as may "receive fare or tolls," leaving all others to the operation of the pre-existing law, and both acts look to the continued association of the property with the franchise. Thus the public interests remain unaffected by proceedings that result in a change of ownership merely, and a transfer of public duties from one to another party. This legislation springing out of the decision in *Rives'* case, and intended to obviate the inconveniences of a disruption of the company and the loss of those facilities for travel and transportation which it had afforded, must, we think, be deemed an expression of the legislative will, to substitute the new in place of the former remedy. It secures to creditors all their just rights, yet in subordination to the higher public demand for an unobstructed road, and without wrong to those from whom the land has been taken and appropriated to its use. It must therefore be declared that the plaintiff acquired no estate in the land by virtue of the sale and sheriff deed. It is unnecessary to pass upon the other defence. According to the case agreed, a nonsuit must be entered and it is so ordered.

Error. Reversed.

T. L. SANDERSON and wife, Ex'rs, v. DANIEL DAILY.

Motion—Res Adjudicata—Execution on Dormant Judgment—Discharge in Bankruptcy—When to be Pleaded.

1. Motions made in the progress of a cause to facilitate the trial, but which involve no substantial right, and the decision of which is not subject to appeal to this court, may be renewed as subsequent events require: but the doctrine of *res adjudicata* applies to motions affecting

a substantial right, and which may be the subject of appeal, but from the decision of which no appeal is taken.

2. Under the foregoing rule, it is not permissible to renew a motion before the superior court clerk to issue execution on a dormant judgment under section 256 of the code, after a previous unsuccessful motion to the same effect from the decision of which no appeal was taken.

3. Where a defendant obtains his discharge in bankruptcy after judgment and hence has no opportunity to plead it, the defence is available upon a motion for leave to issue execution on such judgment when it becomes dormant.

(*Wilson* v. *Lineberger*, 82 N. C., 412; *Dawson* v. *Hartsfield*, 79 N. C., 334; *Paschall* v. *Bullock*, 80 N. C., 329; *Bell* v. *Cunningham*, 81 N. C., 83, cited and approved.)

MOTION to issue execution under C. C. P., § 256, heard, on appeal from an order of the Clerk, at Spring Term, 1880, of PASQUOTANK Superior Court, before *Graves, J.*

The judge reversed the order of the clerk, and held that plaintiffs are not entitled to have execution issued upon the judgments, and the plaintiffs appeal.

Mr. C. W. Grandy, for plaintiffs.

The defendant not represented in this Court.

SMITH, C. J. The plaintiffs' testator, George W. Charles, in January, 1868, before a justice of the peace, recovered three several judgments against the defendant and another, on which writs of *fieri facias* issued and were levied on his land. At spring term, 1869, the judgments were transferred and docketed in the superior court of Pasquotank. On April 12, 1871, executions were issued, whether they were writs of *fieri facias* or *venditioni exponas* does not appear, and we must assume to have been the former, but no action seems to have been had under them.

On December 25, 1867, the defendant filed his petition in the district court of the United States and was adjudged a

bankrupt, and in January, 1869, obtained his discharge. On July 23, 1878, the plaintiffs applied to the clerk for leave to issue execution under C. C. P., § 256, and in opposition thereto the defendant set up his discharge in bankruptcy and the statute of limitations. The application was denied. On February 9th of the present year, (1880) after notice and on affidavit under the act, the plaintiffs renewed their motion before the clerk for leave to issue execution, which was allowed and the defendant appealed. On the hearing before the judge, the defendant relied, as he did before the clerk, mainly on two grounds of defence:

1. The matter was *res adjudicata*, and the former decision being upon the merits, was conclusive, and, except by appeal, not reviewable.

2. The debt was discharged by the decree in bankruptcy and no process to enforce it was allowable.

The ruling of the clerk was reversed and the plaintiffs appealed to this court.

It is somewhat difficult to draw the precise line which separates the class of motions which notwithstanding a denial may be afterwards renewed, upon the discovery of new evidence, or for causes afterwards supervening, from the class in which a decision upon the merits is final, but we have no hesitancy in assigning the present application to a place among the latter class. In substance and effect this proceeding to give life to a dormant judgment is a new action and must be governed by the same rules in respect to the present question. As the granting of the motion would be decisive of the defences interposed, so the denial must be equally conclusive against the right of the plaintiff to have the process demanded.

Motions made in the progress of a cause to facilitate the trial, but which involve no substantial right and the decision of which is not subject to appeal to this court, may be renewed as subsequent events require, and are not obstructed

by the former action of the court. But if the decision does affect a substantial right and may be reviewed and corrected on appeal, and the complaining party acquiesces, we see no reason why the decision should not be as conclusive of the matters decided as the determination of the action itself would be of the whole controversy. Without pursuing the discussion further we refer to what is said in *Wilson* v. *Lineberger*, 82 N. C., 412.

It becomes unnecessary to consider the effect of the discharge in bankruptcy, further than to say that, as it had not been granted when the justice's judgments were rendered and was not then available, the omission to ask a stay of the actions as contemplated by the bankrupt act, in order that the discharge when obtained might be used to defeat the actions, does not debar the defendant from bringing it forward when subsequent proceedings are instituted to enforce the debt. *Dawson* v. *Hartsfield*, 79 N. C., 334; *Paschall* v. *Bullock*, 80 N. C., 329; *Bell* v. *Cunningham*, 81 N. C., 83.

It seems to have been relied on in the first application which was refused, and no reason exists for not allowing now a defence which was effectual then, as no negligence can be imputed to the defendant in offering it in bar in each case.

There is no error in the ruling of the court and the judgment must be affirmed and it is so ordered.

No error. Affirmed.

A. H. DAVIS v. NELSON DAVIS.

Landlord and Tenant--Estoppel--Summary Ejectment--Parties--Intervention.

1. One who gains possession of land as the property of another cannot resist an action for the recovery, brought after the termination of the lease, by showing a superior title in a third person or in himself acquired before or after the contract. He must surrender possession to his lessor before he will be allowed to controvert his title.
2. This rule, which estops the tenant from contesting his lessor's title, precludes all controversy as to the *title* to the land demised (save in some exceptional cases involving equitable elements) and supports the jurisdiction of justices of the peace over summary proceedings in ejectment.
3. The question of title which arrests further proceedings before the justice is between the original parties to the action, and jurisdiction once acquired cannot be divested by the intervention of a stranger to the suit, asserting a paramount title in himself.

(*Smart* v. *Smith*, 2 Dev., 258; *Callender* v. *Sherman*, 5 Ired., 711; *Heyer* v. *Beatty*, 76 N. C., 292; *Abbott* v. *Cromartie*, 72 N. C., 292; *Turner* v. *Lowe*, 66 N. C., 413; *Forsythe* v. *Bullock*, 74 N. C., 135; *Foster* v. *Penry*, 77 N. C., 160; *Rollins* v. *Rollins*, 76 N. C., 264; *Lytle* v. *Burgin*, 82 N. C., 301; *Rollins* v. *Henry*, 76 N. C., 269, cited and approved.)

SUMMARY PROCEEDING in Ejectment, instituted before a justice of the peace, and tried on appeal at Spring Term, 1880, of HALIFAX Superior Court, before *Gudger, J.*

The plaintiff claimed to have leased the land in question to the defendant on the first of January, 1879, for a term ending on the 31st of December of that year, and alleged that defendant had refused to surrender possession after the expiration of said term. The plaintiff testified on cross-examination that one Edwin Schenck, of Baltimore, held a title to the land, but that he (plaintiff) had a written agreement of Schenck to hold the title as security for about thir-

ty-two hundred dollars due him by the plaintiff. The defendant introduced one Hardie as a witness, who testified that he was the agent of Schenck, and as such, in January, 1880, he demanded possession of the plaintiff, and plaintiff thereupon surrendered the same; that he (witness) then leased the land to defendant for the year 1880, and defendant was holding possession as tenant of Schenck. The plaintiff denied that he surrendered possession to Hardie. The following are the issues submitted to the jury, and their findings thereon:

1. Did plaintiff rent the land to defendant for the year 1879? Answer: Yes.

2. Does defendant hold over after the expiration of his term and after being ordered to quit? Answer: Yes.

3. Is Hardie the agent of Edwin Schenck, the mortgagee of the land? Answer: Yes.

4. Did Hardie, as such agent, rent the land to the defendant for the year 1880? Answer: No.

After the return of the verdict, and before judgment was rendered, the defendant produced in court a paper writing, signed by Hardie as agent of Schenck, authorizing defendant to hold possession of the land for the year 1880, as tenant of Schenck, and directing him to pay the rent to Schenck. And thereupon the defendant moved the court for judgment against the plaintiff, dismissing the proceedings, which motion was refused. Judgment rendered in favor of the plaintiff, and the defendant appealed.

The plaintiff was not represented in this court.
Messrs. Gilliam & Gatling, for defendant.

SMITH, C. J. The defendant entered into possession of the land under a contract of lease from the plaintiff for the year 1879, and refuses to surrender at the expiration of his term. No defence is set up by the defendant, but the recovery is

resisted by one Edwin Schenck, a stranger to the action, on the allegation contained in the affidavit of his agent, that he is the legal owner of the land, and has himself leased it to the defendant for the present year, and seeks to protect his occupancy from disturbance. The jury negative this claim and say no such contract was entered into. After verdict, the defendant introduced a written authority from said agent to him to remain in possession, and moved that the action be dismissed. This was refused, and judgment entered for the plaintiff, and thereon by appeal the case comes to this court.

It is well settled doctrine that one who, as tenant, gains possession of the land of another, cannot resist an action for its recovery, brought after the termination of the lease, by showing a superior title in another or in himself, acquired before or after the contract. The obligation to surrender becomes absolute and indispensable. "Honesty forbids," says RUFFIN, C. J., "that he should obtain possession with that view, or after getting it, thus use it." *Smart* v. *Smith*, 2 Dev., 258. "Neither the tenant nor any one claiming under him," remarks DANIEL, J., "can controvert the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord." *Catlender* v. *Sherman*, 5 Ired., 711.

"If he entered as tenant, or after entry had become such," is the language of RODMAN, J., "he was estopped from asserting his title, until he had restored the possession to the plaintiff." *Heyer* v. *Beatty*, 76 N. C., 292. Even a homestead right cannot be asserted in opposition to the recovery. *Abbott* v. *Cromartie*, 72 N. C., 292.

The rule does not preclude the tenant from showing an equitable title in himself on such circumstances as under our former system would call for the interposition of a court of equity for his relief, and which relief may now be obtained in the action, as is held in *Turner* v. *Lowe*, 66 N. C.,

413. Yet the force of the general proposition remains unimpaired, that where the simple relation of lessor and lessee exists without other complications, the latter cannot contest the title of the former. *Forsythe* v. *Bullock*, 74 N. C., 135.

The obligation to restore a possession thus obtained, before any enquiry into the title is permitted, although springing from the contract, rests upon the foundation of good faith and honest dealing among men.

The jurisdiction conferred upon justices of the peace to afford the summary remedy asked by the plaintiff, is confined to cases in which "the title to real estate shall not be in controversy," and hence by virtue of the estoppel embraces the demised premises of a tenant holding over. When such controversy does arise, the jurisdiction ceases, and this fact must be therefore preliminarily determined. Bat. Rev., ch. 63, § 17. *Foster* v. *Penry*, 77 N. C., 160.

The question of title which arrests further proceedings before the justice is between the parties to the action and a jurisdiction once acquired cannot, upon a reasonable construction of the law, be divested by the intervention of a stranger asserting a superior title in himself, the only effect of which would be to put an end to the action and defeat the statutory remedy altogether. This would seem to be conclusive against the right to intervene, except in aid of and to defend the tenant's possession, under the rules of practice applicable in such cases.

While an interpleader is allowed to come in and assert his claim to property in dispute in the superior court, as was done in *Rollins* v. *Rollins*, 76 N. C., 264, and more recently in *Lytle* v. *Burgin*, 82 N. C., 301, and it is said this may be done in *Rollins* v. *Henry*, 76 N. C., 269, a case removed by appeal from a justice's court, the learned and accurate judge who delivers the opinion seems not to have directed his attention to the difference in this respect between an original and an appellate jurisdiction, and to the conse-

quences of allowing the collateral enquiry in the latter. It is obvious that if an issue involving the title to land can be superadded to the pending controversy, in the exercise of appellate jurisdiction, there would be constituted in a court where jurisdiction is derivative and dependent on the appeal, a case of which the court of original and primary jurisdiction would not have had cognizance. Still less can an intervention be sustained in the proceeding before the justice, as proposed in the present case, to protect the occupancy of an estopped tenant by the dismissal of the action. The tenant cannot thus avail himself of the proffered service of one not his landlord as the jury declare.

The plain and simple rule to which we must adhere, is to compel the restoration of possession to him from whom it was obtained, and then leave all the parties exposed to the just claims of each, and of others against either or both. There is no error and the judgment is affirmed.

No error. Affirmed.

COTTEN & WARREN v. JOHN B. WILLOUGHBY.

Grant of Property Not In Esse.

Under the rule that one may grant a thing not *in esse* of which he is the potential owner, a valid mortgage, at common law, may be made by the owner of land of a crop sown thereon but not yet growing.

(*Robinson* v. *Ezzell*, 72 N. C., 231, cited and approved.)

CLAIM AND DELIVERY, tried at Spring Term, 1878, of PITT Superior Court, before *Henry, J.*

The defendant, to secure certain debts due the plaintiffs and to obtain supplies for carrying on his farming opera-

tions for that year, on May 26, 1876, executed to them a mortgage deed conveying a mule and other articles of personal property, "and a lien upon each and every of the said crops to be cultivated and made upon the said land or farm during the present year, with full power to take possession of the said crops at any time and place after their maturity," and further providing for the exercise of the power, in case of default in payment after the 1st day of November. The plaintiffs furnished supplies under the mortgage to the value of $41, and refused to make further advances.

The defendant failing to pay any portion of the moneys due, the plaintiffs, on November 3rd of that year, brought their action for claim and delivery, under which the sheriff seized and placed in their possession the said mule, cart and two plows, and corn, fodder and cotton, the product of the farm, of the aggregate value as estimated by the jury of $319.37. The answer sets up a counter-claim for losses sustained in cultivating the land for want of the supplies the plaintiffs were to advance, and alleges the deed to have been obtained through false and fraudulent representations which render it inoperative and void, and that upon its face the lien intended to be created depends for its efficacy upon the plaintiffs' compliance with their obligations arising out of it. The only issues submitted to the jury were as to the value of the property taken from the defendant and of the plaintiffs' advancements.

On the trial the plaintiffs proposed to show in explanation or excuse for their failure to advance the full amount specified, that when the mortgage was given, the defendant represented that he then had two bales of cotton which in a few days he would deliver to them, the proceeds of which were to be applied in reduction of the secured note, and upon this assurance they were induced to enter into the arrangement to aid in the cultivation of the crops, and if this had been done, the mortgaged property would have been

amply sufficient to secure the residue of the indebtedness, including the advances, and that he refusing to deliver the cotton, they declined to increase the debt. The evidence on objection was rejected by the court and the plaintiffs except. Upon the findings of the jury the court adjudged that the defendant recover against the plaintiffs the full value of the goods seized and the costs of suit, from which the plaintiffs appeal.

Messrs. W. B. Rodman and *Reade, Busbee & Busbee*, for plaintiffs: Cited *Clark* v. *Farrar*, 74 N. C., 686; Benjamin on Sales, 63; Story on Sales, § 185; *Butt* v. *Ellett*, 19 Wall., 744; 32 Ark., 598; 54 Miss., 351; 95 U. S. Rep., 16, and other cases.

The defendant was not represented in this Court.

SMITH, C. J., after stating the case. The purpose of the present suit is to recover possession and control of the property in order to the execution of the trusts with which it is clothed, and if under the deed the title and right of possession are vested in the plaintiffs, as trustees, the action has been well brought, and the judgment rendered is wholly erroneous. The first enquiry then is as to the effect of the deed upon the property therein described.

No doubt whatever can be entertained as to the transfer of the legal title to such articles as were then *in esse* and upon which the conveyance could directly operate. The words used are appropriate to the object intended and the possession is necessary to the discharge of the trusts.

In our opinion, for the purposes of the suit, the same results must be ascribed to the operation of the instrument upon the growing or to be grown crops upon the farm. The lien given upon them, to be effective, requires control and possession in the mortgagees; for how otherwise could they be sold and the proceeds applied to the debt? And

this is rendered manifest by the very authority given to take possession after the first day of November. 1 Jones Mort., § 60. As this is the intent of the deed, can it have that effect upon a planted crop, (for it must be assumed that the planting was prior, according to the course of husbandry, to the making of the conveyance) and does a possessory right thereto vest in the trustees at or before the maturity of the crops?

The authorities referred to in the brief of the plaintiffs' counsel fully support the affirmative of the proposition involved in the enquiry. While it is true that what has no existence, and whose future acquisition is uncertain and contingent, cannot be assigned by words of present conveyance, and a contract relating thereto is entirely executory, there is an exception in the case of the future products of a substance which has ownership, and, as to incidents, have a potential and prospective existence, admitting of transfer by the owner of the property from which they spring.

"So also, although the subjects of sale have no present existence," says Judge STORY, "yet if it be the natural product or expected increase of something to which the seller has a present valid right, the sale will be good. Thus a valid sale may be made of the wine a vineyard is expected to produce, or the *grain that a field is expected to grow*, or the milk that a cow may yield during the coming year; or the future young that may be born of the sheep owned by the vendor at the time of the sale, or the wool that shall grow upon them." Story on Sales, § 185. To the same effect, Benj. on Sales, 63, 64.

In *Butt* v. *Ellett*, 19 Wall., 544, the supreme court of the United States declared that while the mortgage clause in the instrument "could not operate as a mortgage because the crops to which it relates were not then in existence, when the crops grew the lien attached and bound them effectually from that time." And the doctrine has been car-

ried so far as to hold the future acquired property of a railroad company embraced in a grant of "all present and future to be acquired property" of the corporation, incident to the use of the road. *Pennoc* v. *Coe*, 23 How., (U. S.) 128; *Dunham* v. *Railway Co.*, 1 Wall., 254; *Robinson* v. *Ezzell*, 72 N. C., 231.

As then the plaintiffs by the terms of the deed were "lawfully entitled to the possession" of the goods and can maintain the action for claim and delivery under section 177 of C. C. P. the judgment rendered must have been based on the opinion that the deed in its inception was void by reason of the fraud superinducing its execution, or became so afterwards by the plaintiffs' non-compliance with their stipulation for supplies operating as a defeasance of the grant.

While we do not concede that the plaintiffs' previous false assurances and unfulfilled promise (and such is in substance the averment in the answer) can have this annulling effect upon an executed contract by which property passes, and still less that a mere subsequent violation of the promise can restore it to the assignor, it is sufficient to say that the imputed fraud has not been found by the jury nor facts stated in the case from which it can be inferred, and its existence rests entirely upon the disputed assertions of the defendant alone. The verdict simply ascertains the deficiency in the amount of the supplies that ought to have been provided, a breach of the plaintiffs' contract only, and this does not authorize the conclusions upon which the judgment depends for support. As the facts of the case presented in the appeal do not raise the question perhaps intended to be presented on the appeal, nor warrant the judgment, it must be reversed and the cause remanded in order to the further necessary findings to determine the rights of the respective parties.

It may not be amiss to observe that if the plaintiffs recover, they will hold as trustees, and as all interested in the

fund are before the court we see no reason why in the present proceeding the mortgage may not be foreclosed, the equities involved adjusted and the whole matter finally adjudicated in the action. It is unnecessary to consider the question of evidence in this aspect of the case. Judgment reversed and new trial granted. Let this be certified.

Error. *Venire de novo.*

VICK & MEBANE v. J. & K. A. SMITH.

Mortgage Securities—Appropriation of Payments.

1. Where a new note is given in substitution of a former one secured by mortgage, the presumption is, in the absence of countervailing evidence, that the new note retains the security of the old one.

2. Where there are two separate and distinct debts, if the debtor does not, the creditor may, appropriate a payment made by the former, and if neither has done so, the law makes the appropriation to the most precarious, that is to an unsecured in preference to a secured debt.

3. Where a mortgagee holding a secured and unsecured debt, sells the mortgaged property under a power, he is a trustee for himself to the extent of the mortgage debt, and for the debtor as to the balance in his hands.

(*Hyman* v. *Devereux*, 63 N. C., 624; *Kidder* v. *McIlhenny*, 81 N. C., 123; *Jenkins* v. *Beal*, 70 N. C., 440; *Moss* v. *Adams*, 4 Ired. Eq., 42; *Jenkins* v. *Smith*, 72 N. C., 296; *Boyden* v. *Bank*, 65 N. C., 13, cited, distinguished and approved.)

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

The opinion states the facts. The matter in controversy was, whether the mortgage had been discharged. Verdict and judgment for defendants, appeal by plaintiffs.

Messrs. Duncan Rose and *McRae & Broadfoot*, for plaintiffs.

Messrs. T. H. Sutton and *Hinsdale & Devereux*, for defendants.

SMITH, C. J. On June 10, 1874, the defendants executed their note to the plaintiffs in the sum of $600 for money loaned to pay the purchase money of certain articles of personal property, for the possession of which the action is brought, and to secure the debt, on the same day, by mortgage deed conveyed the same to the plaintiffs. Some months thereafter, a new note for the same sum and without an endorser, was given by the defendants to the plaintiffs, and the first cancelled. The plaintiffs were commission merchants and kept a running account with the defendants of their mutual dealings, and there was always due from the defendants $600 or more, from the making of their mortgage to the commencement of this action, or as we understand the statement, outside of the mortgage debt, there never was an excess of payments to the credit of the debtors.

The only point in controversy is whether the consignments made by the defendants have discharged the secured debt, leaving an unsecured balance of about the same amount, and thus exonerate the property from the lien of the mortgage.

There was conflicting testimony as to an alleged understanding or agreement between the parties, when the mortgage was given, that it was to be a collateral security for all the advances made or to be made. The court charged the jury that if such was the agreement, the plaintiffs would be entitled to their verdict, but that in the absence of any such understanding and of any agreement that the renewal note should be protected by the mortgage, the proceeds from defendants' consignments were to be applied in exoneration of the mortgage, and if sufficient, in discharge of the secured

debt. There is error in the instruction, and there must be a new trial.

The second or substituted note for the same debt was, equally with that cancelled, protected by the mortgage, unless the parties otherwise intended, and the burden of proof rested, not upon the plaintiffs, but upon the defendants, to show that common intent. "When a new note or bond is given for an antecedent debt, the presumption is that it was not given as an extinguishment, unless there be proof that such was the intention; still less can it be presumed in the absence of proof that a creditor who takes a note in the place of a former one, intended to discharge the mortgage." *Hyman* v. *Devereux*, 63 N. C., 624; *Kidder* v. *McIlhenny*, 81 N. C., 123.

We think there is also error in the charge as to the application of the defendants' successive payments or consignments, and while it does not appear in the case that the note is charged in the general account, it would make no difference in the operation of the rule if it did. The note subsists as an independent security for money loaned, and has no proper place as an item in a general running account, and if so entered on the plaintiffs' books to show the resulting indebtedness and for convenience of reference, the fact does not impair their legal rights, nor change their relations as creditors of the defendants. The principle, so well settled, then applies, and if the debtor does not, the creditor may appropriate the payment, and if neither has done so, the law makes the appropriation to the most precarious, that is to an unsecured in preference to a secured debt. *Jenkins* v. *Beal*, 70 N. C., 440; *Moss* v. *Adams*, 4 Ired. Eq., 42.

Whether the plaintiffs have not in the very act of entering the debits and credits of a continuing account applied the one to the other, it is quite certain they have made no such application to the mortgage debt. That, so far as the

case shows, remains uncanceled in their hands and with no payments endorsed, and subsists as an original obligation.

The case relied on for defendants (*Jenkins* v. *Smith*, 72 N. C., 296,) does not support the rulings of the court, for there were not two separate and independent sources of indebtedness, and the Chief Justice declares that the case of *Jenkins* v. *Beal, supra*, does not apply, for "here there are not distinct debts and a distinct payment, but a running account in which the money advanced is charged as items of debit, and the proceeds are entered as items of credit without any reference to the fact that the plaintiff held the bond sued on as a collateral security for the first items of debit." The bond referred to was a guaranty that moneys advanced within a specified period should be met by adequate consignments of cotton to be sent within a limited time, and the fund was thus appropriated, the court holding that the restricted quantity of part of the moneys advanced did not affect the nature of the debt itself, or remove it from its proper place in the account as one of its items.

In regard to running accounts and their adjustment, the rule is very concisely stated in *Boyden* v. *Bank*, 65 N. C., 13, thus: "The first money paid in is the first money paid out," and the true debt consists of the difference between the remaining items. But while the plaintiff may be entitled to the possession of the property, and the aid of the court in obtaining it, they will hold it only for the security of what may be due on the mortgage debt, and with a resulting trust for the debtors, and should they retain, as these purposes can only be accomplished unless the property be redeemed by a sale, we see no reason why, as we have already intimated in a similar case decided at the present term, (*Cotten* v. *Willoughby, ante* 75) the sale may not be made, or the plaintiffs charged with the value of property and of its use, and the equities adjusted under the direction of the

court in the pending action. The judgment below is reversed and a new trial granted. This will be certified.

PER CURIAM. *Venire de novo.*

JORDAN WOMBLE v. M. T. LEACH.

Complaint—Conversion—Jurisdiction—Practice—Evidence—Marshalling—Agricultural Supplies—Estoppel.

1. A complaint for converting a mortgaged crop which avers title to such crop raised by the mortgagor and by him conveyed to the plaintiff, its delivery to the defendant, its value, and its appropriation by the defendant to his own use after demand by the plaintiff, is a concise and definite statement of every material fact upon which the right to recover depends, and complies with section 93 of the code.
2. An action for damages for converting a crop, of greater value than fifty dollars, is not founded on an implied contract, and hence is not within the cognizance of a justice's court.
3. Exceptions will not be heard in this court, alleging a defect of evidence on points not in issue in the court below.
4. In this action *to determine the ownership of the cotton*, it is not competent for the court to adjust the equities between the parties growing out of the fact that the plaintiff has also a mortgage on the land which produced the cotton.
5. One who gives a mortgage on a crop to obtain supplies, under the provisions of Bat. Rev., ch. 65, § 19, is estopped from asserting that articles which he receives as a compliance with the contract are not "supplies" within the meaning of the statute; and a second mortgagee who acquires an interest in the crop after such advances are made, stands in no better plight, and is likewise bound by such admission.

(*Moore* v. *Hobbs*, 77 N. C., 65; *Winslow* v. *Weith*, 66 N. C., 432; *Clark* v. *Farrar*, 74 N. C., 686, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of WAKE Superior Court, before *Gudger, J.*

Verdict for plaintiff, judgment, appeal by defendant.

Mr. A. M. Lewis, for plaintiff.
Messrs Reade, Busbee & Busbee, for defendant.

SMITH, C. J. The plaintiff's claim to the cotton, the recovery of which, or its value, is the object of this action, is derived under an agricultural lien created by a mortgage made March 2, 1877, by one Sandy Williams, pursuant to the provisions of the act of 1867 (Bat. Rev., ch. 65, § 19,) which cotton he alleges has been appropriated by the defendant to his own use.

The defendant's counsel moved that the action be dismissed, and being overruled, put in his answer denying the plaintiff's right and asserting title in himself under a similar instrument executed on the 20th day of the same month.

Issues involving the matters in dispute were submitted to the jury and their responses are all favorable to the plaintiff, and judgment being rendered thereon, the defendant appealed.

The record shows various exceptions taken during the progress of the trial, which will be considered in their proper order:

1. The refusal of the motion to dismiss the action: This is put on the grounds, first, that the complaint does not contain a sufficient statement of a cause of action, and if it does, secondly, that it is not within the jurisdiction of the court. We think neither proposition can be maintained. The complaint avers title to the crop raised by the said Sandy Williams and conveyed by his mortgage to the plaintiff, its delivery to the defendant in the fall of the same year, its value and its appropriation by the defendant, after demand, to his own use. This is a concise and definite statement of every material fact upon which the right to recover depends,

and complies with the requirements of C. C. P., § 93, construed in *Moore* v. *Hobbs*, 77 N. C., 65.

The action is for a tortious taking and withholding of the plaintiff's property, and the damages claimed therefor are for more than fifty dollars, of which the superior court has exclusive jurisdiction. Acts 1876–'77, ch. 251. The defendant's counsel argued that as the value of the property was sought the obligation of the defendant to account therefor arose out of an implied contract, and under the authority of *Winslow* v. *Weith*, 66 N. C., 432, was cognizable only before a justice of the peace. This is a misconception of the principle of law recognized and acted on in that case. The rule is this: When one wrongfully takes the personal property of another and sells it, the owner may waive the tort, affirm the contract of sale and sue for the proceeds, as money received to his use, and this would be an action upon an implied contract.

2. During the trial, evidence was offered and, on objection, admitted to prove that a part of the advances required by the plaintiff's mortgage was made by him under an order of the mortgagor. The exception was not pressed in this court, and is clearly unavailing. The delivery upon an order is a delivery for all legal purposes to the person who gives the order. It was not necessary for Williams to go in person for the articles needed, his order answers the same purpose and the authority, whether in writing or parol, justifies the delivery. Nor was the plaintiff bound to see that the property went to Williams and was used on his farm. The plaintiff's duty was discharged by furnishing them.

3. There were also exceptions taken to the refusal of the court to give certain instructions to the jury, as follows: (1) There was no evidence that the cotton converted by defendant was raised on the land of Williams, nor (2) That it was of the crop of 1877, nor (3) That the advances were made

by the plaintiff after the execution of his mortgage, and (4) That the articles furnished were of the kind required to create the statutory lien, not being "*money* or *supplies*" advanced "to be expended" in the cultivation of the crop.

The identity of the crop conveyed to the plaintiff with that delivered to the defendant is averred in the complaint, not denied in the answer, and is not an issue submitted. The plaintiff in section 2 of his complaint says "that the said Sandy Williams made of the crop of 1877 aforesaid" (referring to the previous allegation of the mortgage of the crop to himself) "one and a half bales of cotton and delivered the same to the defendant on or about the latter part of the year 1877, which said cotton was worth at the time of delivery to the defendant, about sixty-five dollars." The defendant replies: "As to the allegation in the second section of the quantity of cotton made by Sandy Williams, defendant has no knowledge or information sufficient to form a belief," and then proceeds to assert his own title thereto. The second issue is drawn to meet this point only—"What amount of cotton raised by Sandy Williams upon the land mentioned in the mortgage in the year 1877, did the defendant receive from him?" The identity of the cotton was not in controversy, and the jury were only to ascertain as to its quantity and value. The instruction asked was not therefore pertinent to any enquiry and was properly rejected. We do not mean however to intimate that there was not sufficient evidence of the fact if it had been litigated.

The second exception rests upon the same basis and for the reasons given is equally untenable.

The exception that there was no evidence of the delivery of the articles advanced antecedent to the making of the mortgage is equally without support. We are not prepared to say that its validity is at all dependent upon their being furnished after the actual execution of the mortgage deed.

They were furnished the same day and were delivered and accepted as a compliance with the provisions of the mortgage and this would seem sufficient to sustain the conveyance and authorize the recovery. But the plaintiff testifies upon cross-examination that while the advances made by himself, in value $78, were on the same day, and he could not say whether it was before or after the execution of the instrument, it was his practice in such cases, not to deliver till the security was given, and he adds: "*I think I did so in this case.*" This testimony in connection with the transaction itself was sufficient to warrant the jury in finding the delivery of the supplies to be after the making of the deed.

4. The court was also requested and declined to charge that the plaintiff was bound first to apply the land conveyed to him in satisfaction of his debt before the crop upon which the double lien rested. This question does not arise and the adjustment of the equities among different creditors is not before the court. The contention is as to the ownership of the cotton, and if the plaintiff's deed is effectual, as it is prior in time, he has the preferable right.

5. The court was asked to instruct the jury that the mule, collar and harness and wagon were not supplies within the meaning of the statute, and hence the conveyance was inoperative to convey the crop.

There may be and often is, much difficulty in defining the scope and extent of the terms employed in the statute, and in determining whether articles advanced can be properly said to have been used or expended in cultivating the crop. While the body of the mule is not necessarily worn out in the summer's work, his physical energies are employed and "expended" in its production. So plows and other agricultural implements, undoubtedly comprehended in the act, are not often worn out by use for a single season, and may, like the horse or mule, last for several years. The

need of force to draw the plow is as essential as the plow itself to the making of the crop. Where between them will the line of distinction be drawn? We are not willing therefore to concede, in giving effect to the manifest policy of the law, that the services of the mule and if so the mule itself as well as the wagon and harness, are not supplies, expended within its meaning.

In *Clark* v. *Farrar*, 74 N. C., 686, the act is carefully analyzed, and its requirements, in order to the constituting an agricultural lien pointed out and explained, but the construction does not exclude such articles as we have mentioned, and leaves that an open question still. But whether the articles are strictly supplies expended under the statute or not, they are advanced and accepted as a compliance with the contract by the mortgagor, before any interest is acquired by the defendant in the crop, and this removes any objection to the conveyance on that ground. As the mortgagor must determine his own needs in conducting his farm, and the articles are themselves appropriate, and perhaps indispensable to his operations, the acceptance must be deemed conclusive between the parties, and not less so upon the claim of a subsequently derived title. Had the mortgagor refused to take them, or preferred such supplies as are within the restricted sense in which the words are understood by the defendant's counsel, they might with equal convenience have been furnished by the mortgagee, and now to permit the repudiation of the instrument for such reasons would be a fraud upon the plaintiff.

"A mortgage or judgment may be taken and held," says Chancellor KENT, "as a security for future advances and responsibilities to the extent of it, when this is a constituent part of the original agreement, and the future advances will be covered by the lien, in preference to the claim under a junior intervening incumbrance with notice of the agreement." 4 Kent Com., 197. In the note it is said: "The

proposition in the text, it is believed, must be understood with the qualification that the advances must be made before the junior incumbrance is created."

That the crop planted or to be planted upon one's land is *in esse* in the sense that when it springs up, the title vests in the mortgagee, and that the instrument may operate as a mortgage, we will only refer to *Cotten* v. *Willoughby, ante* 75, and to the authorities there cited.

It is suggested that while this may be the effect of such an instrument between the parties to it, it does not extend to a subsequent purchaser or mortgagee of the same property. We think the doctrine is not thus limited, and that the conveyance is equally effectual against both.

This action is prosecuted by the owner of the cotton against one who takes and converts it to his own use, of which the demand and refusal, although not themselves a conversion, are full evidence of such conversion.

There is no error, therefore, in the rulings of the court, and the judgment must be affirmed.

No error. Affirmed.

J. W. TYSON v. J. A. WALSTON, Adm'r, and others.

Executors and Administrators—Settlement of Estates—Who Responsible for Debts.

1. A testator, after certain specific devises and bequests to his sons, left the residue of his estate, real and personal, to his three daughters, charged with the payment of his debts and certain pecuniary legacies. He further directed that the daughters should live on the land until the majority of the youngest, when all the property should be divided. The executors, who were also appointed by the will guardians of the daughters, were empowered by the testator to purchase "farming im-

plements, teams, and such other things as may be necessary," and "to employ laborers by paying them wages in money or a portion of the crops," in order to raise a sufficiency from the land for the support and education of the daughters. The executors, A and B, both died before the estate and guardianship had been settled and determined, but A, in his life time, had obtained from the plaintiff labor and supplies for making crops on said land devised to the daughters: *Held*, that the executor or administrator of A, and not the administrator *d. b. n.* of A's testator, was responsible *to the plaintiff* for such indebtedness.

2. Where the will does not create a trust for the payment of debts, an executor is liable personally, and not in his representative capacity, on demands originating wholly after the death of his testator.

(*Kerchner* v. *McRae*, 80 N. C., 219; *Hailey* v. *Wheeler*, 4 Jones, 159; *Devane* v. *Royal*, 7 Jones, 426; *Kessler* v. *Hall*, 64 N. C., 60; *Hall* v. *Craige*, 65 N. C., 51; *Fessenden* v. *Jones*, 7 Jones, 14, cited and approved.)

CIVIL ACTION, tried on appeal from a justice of the peace, at Spring Term, 1878, of PITT Superior Court, before *Henry, J.*

Jeptha Walston left a last will and testament wherein after devising and bequeathing lands and personal property to his two sons, Joseph A. Walston and John J. Walston, he devised and bequeathed his home tract of land, containing four hundred and forty acres, and all the residue of his estate, not given to others, to his three daughters, Martha, Amanda and Della, charging the personalty (within the residuary gift) with the debts of the testator, with a pecuniary legacy of five hundred dollars to a son of his wife by a former husband, and with a legacy of one thousand dollars to his wife. And among the clauses of the will material to the decision of the question presented on the appeal, are the following:

"I give and devise to my three daughters (above named) their heirs and assigns forever, the tract of land on which I now reside in Pitt county, containing four hundred and

forty acres, more or less. The residue of my property and estate of every description after paying my debts, funeral expenses, and settling my estate, the bequest of five hundred dollars to my step-son, Charles Taylor, and one thousand dollars to my wife, as secured to her by a written agreement entered into between us before our intermarriage, I give and bequeath unto my said three daughters, their executors and administrators.

"It is my will and desire, and I do hereby direct, that the land and other property and estate herein devised and bequeathed to my three daughters, be kept in common and not divided between them until the youngest one of them shall attain the age of twenty-one years; that until then, they may be permitted to reside on the land and be supported and educated out of the annual income which may arise from the sale of the surplus crops made on the land under the management and direction of their guardians hereinafter appointed, provided however, that in case either of my daughters should marry before the time arrives for the division to be made, she shall not be permitted to live on the land after such marriage, but shall be entitled to receive annually one-third of the income arising from the land, to be ascertained by deducting from the gross sales of surplus crops the expenses incurred in producing the crops, and the expenses incurred in the support and education of the unmarried daughters. And for the purpose of enabling the guardians to carry on the farm-property, I hereby authorize and empower them from time to time to purchase farming implements, teams, and such other things as may be necessary for that purpose, and to employ laborers by paying them wages in money or a portion of the crops as they, the guardians, may deem best for the interest of my daughters."

The testator appointed his brother, W. Walston, and his son, J. J. Walston, executors of his will, and the same per-

sons guardians of the person and property of his three daughters. Both of the executors are dead, (of whom J. J. Walston was the survivor,) and thereupon Joseph A. Walston was appointed administrator *d. b. n.* of Jeptha Walston, and B. W. Brown became administrator of J. J. Walston, and J. R. Thigpen qualified as guardian of Della, all of whom are parties defendant, the other two daughters, Martha and Amanda, having sold and assigned all their interest under the will to J. J. Walston, one of the guardians.

The claim of the plaintiff is for work and labor done on the lands devised to the three daughters and advances in money to J. J. Walston, and the account sued on is charged to J. J. Walston as executor of Jeptha Walston. And it is stated in the case of appeal that the services and money sought to be recovered were rendered and advanced when J. J. Walston was living on the land with his ward, Della, and after the death of his co-guardian, and after the purchase of the shares of the other two daughters.

The question presented for decision in the court below, and for review in this court on appeal, is on whom the liability rests for the plaintiff's claim? whether on the estate of Jeptha Walston, or on the estate of J. J. Walston, during whose guardianship the debt was contracted, or on the estate of Della, the ward, in the hands of J. R. Thigpen, her present guardian?

The court below held that the liability was on the administrator *d. b. n.* of Jeptha Walston, and the appeal by him presents the question of the legal accuracy of that judgment.

Mr. W. B. Rodman, for plaintiff.
Messrs. J. B. Yellowley and *J. B. Batchelor*, for defendants.

DILLARD, J., after stating the case. The intention of the testator was, and such we think is the legal effect of the will,

to dispose of his estate of every kind. After giving real and personal property specifically described to his sons, Joseph A. and J. J. Walston, he devised his home place and all the residue of his estate not given to them, to his three daughters, charged with his debts and two pecuniary legacies, one to his step-son and the other to his wife. This being done, clearly there would be no debts or liabilities contracted by the testator to pay, and nothing left in the hands of the executors as such to pay with. Hence it would seem to have been the purpose of the testator to put his entire estate as soon as possible in the devisees and legatees respectively, including the residuary fund to the daughters after paying his debts and the two pecuniary legacies, and not to have continued it as a trust in the executors to be answerable out of his general assets for the possible debts contracted on behalf of his daughters in the conduct of the farm devised to them, which might come as a burden on property specifically willed to others.

This view of non-liability of the estate of the testator for the possible debts contracted for labor on the farm devised to the daughters, is put beyond question, when regard is had to the manner of the devise and the special directions given by the testator in reference to the management of their property. The gift is of the home tract of land of four hundred acres, presently enjoyable by the daughters as an actual residence, and to be kept in common until the full age of the youngest, with the support and education of each from the annual income from the sale of crops to be made under the management and direction of their guardians, who are appointed in the will and are the same persons who are named executors therein. And to the end that there may be income from crops raised on the farm, the testator empowers the guardians "from time to time to purchase farming implements, teams, and such other things as may be necessary for that purpose, and to employ laborers

at wages in money or a portion of the crops, as they may deem best." From this provision of the will, we take the intention to be clear that the land was to vest in possession at the death of the devisor, and to pass at once into the management of the guardians, and be worked under their control and direction; and that the expectation was, that the crops raised after paying all expenses in producing them, including the payment of wages to laborers, would yield a surplus adequate to educate the daughters. We think therefore the true intent and meaning of the will is, that the trust of conducting the farm and paying expenses thereby incurred was put on W. Walston and J. J. Walston in their characters as guardians, and that the means for such purpose was to be derived from the sale of crops, or money in their hands as the net surplus of the residuary fund belonging to the daughters.

Seeing then that the plaintiff cannot look to the personal representative of Jeptha Walston, on the notion that the will created a trust for the payment of his and such like debts, there can be no action against him in any other view, because no executor or administrator can be subjected in his representative capacity on any demand created or originating wholly after the death of his testator or intestate. *Kerchner* v. *McRae*, 80 N. C., 219; *Hailey* v. *Wheeler*, 4 Jones, 159; *Devane* v. *Royal*, 7 Jones, 426; *Kessler* v. *Hall*, 64 N. C., 60; *Hall* v. *Craige*, 65 N. C., 51.

How then is the plaintiff to be paid? He ought to be paid his debt by some one. The labor and advances of the plaintiff for which this action is brought, were rendered and furnished on the land devised to the three daughters; but it was at the time when J. J. Walston, the surviving guardian and then the owner by purchase of the shares of Martha and Amanda, was living on the land with Della, now the ward of J. R. Thigpen, and therefore it is to be taken that the debt was made upon an express or implied

contract with J. J. Walston, who was then occupying and conducting the farm for himself and Della.

J. J. Walston being in possession and conducting the farm for himself and Della, and contracting with the plaintiff as we have seen, the liability was on him in his life time, and on his administrator since his death to pay the plaintiff, with the right in accounting with Della in respect of her third interest in the crops sold and other assets embraced in the residuary fund, to take a proper credit on account of the plaintiff's debt, that is, for one-third thereof. Della being in wardship is not herself personally responsible, nor Thigpen, her present guardian, but only the administrator of J. J. Walston. Where there is a guardian, the infant cannot contract even for necessaries. And hence the contract of the plaintiff, express or implied, must have been made with J. J. Walston, her then guardian, and his cause of action was against him in his life time, and against his administrator since his death. *Fessenden* v. *Jones*, 7 Jones, 14, and cases cited.

The conclusion then is, that His Honor erred in adjudging Joseph A. Walston, as administrator d. b. n. with the will annexed of Jeptha Walston, to be responsible for the plaintiff's demand, and the judgment below to that effect is reversed.

Error. Reversed.

J. A. POLLARD, Executor, v. ELIAS POLLARD and others.

Construction of Will.

A testator, after devising to his wife a life estate in the lot on which his dwelling stood, and providing for her a life annuity, to be raised by the

rents of another tract, devised to his daughter, son and grandson, a third tract, "equally, to be by them held in common" during the life of his wife. The will further directed that after the wife's death the executor should sell the last mentioned tract "and also the piece directed to be leased and let" for the benefit of said wife, and that the proceeds therefrom should be equally divided between such children and grand-child and their children, "the children to take the share of the parent who may die before my (the testator's) death." In the concluding clause of the will. the one acre dwelling lot was directed to be sold after the death of the wife and the proceeds distributed in the same manner as the proceeds of the realty;

Held, that the children and grand-children took vested estates in the land and its proceeds, each one-third, and that the children of either who might die before the testator succeeded to the share of their deceased parent.

(*Coakley* v. *Daniel*, 4 Jones Eq., 89; *Moore* v. *Leach*, 5 Jones, 88, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of PITT Superior Court, before *Avery, J.*

This action was brought by the plaintiff as executor of Benjamin Pollard to obtain a construction of the last will and testament of his testator. The facts are set out in the opinion. The plaintiff appealed from the ruling of the court below.

Messrs. J. B. Yellowley and *J. B. Batchelor*, for plaintiff.
Messrs. Latham & Skinner, for defendants.

SMITH, C. J. Benjamin Pollard died in 1877, leaving a will in which he devises the one acre lot on which his dwelling stands to his wife for life, and bequeathes to her an annuity of $150 while she lives, to be raised from the renting of a certain tract of land, and also devises another tract lying on the south side of the road to his daughter Henrietta Coggins, his son Elias Pollard, and his grandson Joseph A. Lewis, "equally to be held by them in common during the

life of his wife Phebe," and then proceeds: "After her death I direct that my executor sell said piece of land, and also the piece herein directed to be leased and let for the benefit of said wife, and the proceeds arising therefrom to be equally divided between my daughter Henrietta, my son Elias, and my grandson Joseph A. Lewis, and their children, the children to take the share of the parent who may die before my death."

In the concluding clause of his will he says: "I devise the one acre in the same manner that I have the balance of the house tract, or piece that is to be rented, and direct my executor after the death of my wife to sell the said one acre that I have given to my wife for her life-time, and distribute the proceeds in the same manner, to be sold as part and with the said piece that I have directed to be rented out."

The wife died and the executor has sold the lands described, the proceeds being in his hands, he asks the advice of the court as to the distribution thereof under the will.

The son Elias and the grandson Jos. A. Lewis, are still living, and the daughter, who was living at the testator's death, has since died, and the said Elias has become her administrator. The other defendants are the children of the three legatees named, and the administrator of a deceased child of said Henrietta, who are asserting their respective claims to share in the fund held by the plaintiff, under different interpretations of the will. Three possible constructions are suggested:

1. That the shares go to the legatees mentioned for life and at the death of either, his or her share in remainder to his or her children including representatives of deceased children as aforesaid.

2. The fund is to be distributed *per capita* among the three named legatees and their children, including among the latter such as were living at the death of the widow, and

the representatives of such as were living at the testator's death and died before the life tenant.

3. That the children and grandson take vested estates each one-third, and the children of either who may die before the testator succeed to the share of their deceased parent.

The first construction is inadmissible because it is in conflict with the language employed, or else excludes altogether the concluding clause of the bequest. No succession of estates or interests is indicated in the money fund, into which the land is converted, and which character it bears, in contemplation of the conversion, in the will itself. The bequest is to the children of the share of their parent who may die before the testator himself. They do not succeed at the death of the testator, whenever that event may occur, but only in case their parent dies in his life-time

The cases called to our attention in support of a construction by which the parent and his children take in succession are all decided upon the force of the context and a general purpose declared which would most effectually be carried out by so dividing the estates. In many of them the husband was excluded from his wife's share and yet she was obviously the primary object of the testator's bounty, and the testator's aim was accomplished by giving her a full life estate, and a remainder to her children. Thus BATTLE, J., in *Coakley* v. *Daniel*, 4 Jones Eq., 89, where the bequest "to my sisters and their children" was followed by the words, "that no property of which I am now possessed or may hereafter fall heir to, shall go to any but my sisters and their progeny, and not their husbands," says: "Most of the children were unmarried and without children, and in case of the unmarried sisters the intention of the testator in favor of any children they might have, could only be carried out by giving the sisters estates for life, with remainder to their children respectively."

There are no qualifications annexed to the bequest to vary the import of the words used by the testator, and no indication of a different intent elsewhere expressed, and hence the authorities relied on do not support the construction of successive divided interests.

2. The second interpretation which gives equal undivided parts to the legatees named and their children, in the absence of the expression, "the children to take the share of the parent who may die before my death," is sustained by the decision in *Moore* v. *Leach*, 5 Jones, 88. There the legacy is to my beloved daughter, Eliza Ann Leach, (wife of J. Q. A. Leach,) and her children, the lawful heirs of her body," and the devise, "my house and lots in the town of Pittsboro, wherein the said Leach now lives, together with, &c., to her, the said Eliza Ann Leach, and her children forever." BATTLE, J., referring to the rule at common law whereby a devise of land to one and his children or issue, and there is then issue, vests a joint estate in all for life, adds: "The same rule applies to bequests of personalty to a mother and her children, and if there be children living at the death of the testator, she and her children will take equally, unless there be something peculiar in the will indicative of an intention on the part of the testator that she should take for her life, with a remainder to her children."

3. But there are here superadded words qualifying and explanatory, by which we must understand the testator to say, that by using the words "their children" he means that they shall take and take only upon the contingency of their parent's death before that of the testator himself, and in order to prevent a supposed lapse. While it is true no lapse would take place if issue were living by force of the statute, it is not less apparent that the testator, without perhaps being aware of the change in the law, intended to guard against such an apprehended result of the death of any of them. This construction satisfies all the require-

ments of the will, without violence to any of its provisions, and must be considered as the correct one. But we find further corroboration of the intent in other parts of the instrument. The three named, son, daughter and grandson, are evidently the primary and principal objects of the testator's bounty. In a preceding clause, he gives his land lying on the south side of the road and the sale of which produces part of the fund in dispute, to my daughter Henrietta Coggins, to my son Elias E. Pollard and to my grandson Joseph A. Lewis, equally to be held by them as tenants in common during the life of my wife Phebe, without mention of their children at all. And in a later clause he gives the residue of his estate to "my daughter Henrietta, my son Elias and my grandson Joseph A. Lewis and their children equally, the children to take the share of the parent who may die before my death."

Again, he devises the Teil land to his "daughter Henrietta and her children born in wedlock, the children to take if she dies before my death." The careful and studied use of the same expression, in connection with the mention of children, manifests a distinct purpose to confine the gift to them, when and in the event only that the testator survive the parent, and it would alike violate the testator's intent to leave out altogether these operative words or any portion of them.

The three legatees named had each children living at the testator's death, and two of them had children living at the time of making her will. The death of the daughter since transmits her share to her administrator. It must therefore be declared that the legatees, Elias, Joseph A. Lewis and the said Elias administrator of the legatee Elizabeth, are entitled each to one third part of the fund in the hands of the plaintiff, his executor. There is no error.

No error. Affirmed.

STATE ex. rel. R. B. PEEBLES v. JOHN M. FOOTE and others.

Execution Against Person—Affidavit for Arrest.

1. Section 260 of the code, providing for arrest of defendants under execution, contemplates three classes of cases: (1) Where the cause of arrest is not set forth in the complaint: (2) Where the cause is set forth in the complaint, but is only collateral and extrinsic to the plaintiff's cause of action: (3) Where the cause set forth in the complaint is essential to the plaintiff's claim.
2. In cases within the first class, the defendant can only be arrested by an order founded upon a sufficient affidavit setting forth the sources of information when it is based upon information and belief. And in such cases no execution can be issued against the person without such order previously had and served.
3. In cases of the second class, the statement of the cause of arrest in the complaint will answer in place of an affidavit, but the statement must be as explicit as if set forth in an affidavit and properly verified. In such cases there must be an order of arrest before execution against the person of the debtor.
4. In the last class of cases, where the facts stated in the complaint as causes of arrest are essential to, or constitute plaintiff's cause of action, there no affidavit for the order of arrest is needed and no such order is required before execution may be issued against the person of the defendant, provided the complaint has been duly verified. But a verification on information and belief will not answer, unless it gives the sources of information, &c.

(*Hess* v. *Brower*, 76 N. C., 428; *Hughes* v. *Person*, 63 N. C., 548; *Clark* v. *Clark*, 64 N. C., 150; *Wood* v. *Harrell*, 74 N. C., 338; *Paige* v. *Price*, 78 N. C., 10, cited, distinguished and approved.)

MOTION to vacate an order of arrest and discharge the defendant from custody, heard at Spring Term, 1880, of NORTHAMPTON Superior Court, before *Gudger, J.*

The plaintiff in the year 1878 brought an action in the superior court of Northampton county upon the official bond of one Larkins, sheriff of the county of Halifax, against the defendants, his sureties on said bond. The

breach assigned was the non-payment of one hundred dollars with interest and costs, which the plaintiff had theretofore recovered as an amercement against said Larkins, for having failed to make due return of process placed in his hands by the plaintiff. The complaint contained a clause as follows: "That he is informed and believes that John M. Foote has disposed of his property with intent to defraud his creditors," and was verified in the usual manner. The defendants made no appearance, and judgment by default was taken against them at spring term, 1879, of said court, for the sum of ten thousand dollars, to be discharged on the payment of the said sum of one hundred dollars with interest, &c. Writs of *fieri facias* were then issued to the counties of Northampton and Halifax, and were returned to fall term, 1879, of Northampton superior court, with the sheriff's endorsement on each—"no property to be found to satisfy this execution." Thereupon a writ of execution against the person of said Foote was issued returnable to spring term, 1880, of said court; and by the authority of the said execution, the sheriff of Halifax county, to whom the writ was directed, executed the same by taking the said Foote into custody. And at said spring term, 1880, upon motion of defendant, Foote, he was discharged from custody by order of the judge, and the plaintiff appealed.

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

ASHE, J. The question presented by the record is, whether in a case like this an execution can be issued against the person of a defendant without an order of arrest having been served before the judgment. It is one of those new questions of practice that are constantly and unexpectedly springing up from the code, that unfailing source of so many perplexing questions.

The defendant was taken in execution by virtue of section 260 of the code of civil procedure, which reads: "If the action be one in which the defendant might have been arrested, as prescribed in section 149 and section 151, an execution against the person of the judgment debtor may be issued to any county within the state, after the return of an execution against his property, unsatisfied in whole or in part. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as in this act provided, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 149."

This section has never received a direct interpretation from this court, though there have been several approaches to it. In the case of *Hess* v. *Brower*, 76 N. C., 428, this court held that an affidavit for an attachment (where the requirements are substantially the same as in an order for arrest) which sets forth "that the defendant has departed from the state with intent, as affiant is informed and believes, to avoid the service of a summons," was sufficient because it stated a fact accomplished, to-wit, that the defendant has departed from the state, and then concludes with the averment that it was "with the intent to avoid the service of a summons" as the affiant is informed and believes, recognizing the distinction taken by this court in several cases cited, between *things done and things which the party believes are about to be done*, in which latter case the affidavit for the order of arrest must state the grounds of belief, in order that the court may judge of the reasonableness thereof. *Hughes* v. *Person*, 63 N. C., 548; *Clark* v. *Clark*, 64 N. C., 150; *Wood* v. *Harrell*, 74 N. C., 338. In the case of *Hess* v. *Brower, supra*, the departure of the defendant from the state is stated as a fact, *a thing done*, within the knowledge of the plaintiff, and it is only the intent which is stated upon information and belief; and in that respect that case differs

from this, for here the complaint sets forth the fact of the disposition of the property, as well as the intent to defraud, upon information and belief. The court seems to have had its attention directed more particularly to the distinction between *things done and things to be done*, than to another distinction between facts stated upon knowledge and those stated upon *information and belief*.

In the more recent case of *Paige* v. *Price*, 78 N. C., 10, the question arose upon the sufficiency of the statements in an affidavit for an order of arrest. The affidavit among other things contained two averments that were important to the determination of the motion to vacate the order of arrest: 1. That said defendants have been guilty of fraud in contracting the debt for which this action is brought, the particulars of which are set forth in the complaint of the plaintiffs; and, 2. That the defendants have as this affiant is informed and believes removed and disposed of their property with the intent to defraud their creditors. This court very properly held the affidavit sufficient. The first clause of the affidavit above cited, which alleged fraud in contracting the debt for which the action was brought, and that the particulars thereof were set forth in the complaint, was a sufficient cause for the order of arrest, and we suppose the opinion of the court was based upon that statement in the affidavit, and not upon the other, that the defendants as the affiant is informed and believes had removed and disposed of their property with intent to defraud their creditors, which if it had stood alone would have been defective, for not stating the sources of information and grounds of belief.

The section (260) under which the defendant was arrested contemplates three classes:

1. Where the cause of arrest is not set forth in the complaint.

2. Where the cause of arrest is set forth in the complaint,

but is only collateral and extrinsic to the plaintiff's cause of action.

3. Where the cause of arrest set forth in the complaint is essential to the plaintiff's action.

In the cases falling within the first class, the defendant can only be arrested by an order of arrest founded upon a proper and sufficient affidavit, setting forth the sources of information when it is founded upon information and belief. And no execution in such cases could be issued against the person without such order previously had and served.

In cases of the second class, the statement of the cause of arrest in the complaint will answer in place of an affidavit, but the statement must be as explicit as if set forth in an affidavit and properly verified. But in such cases there must be an order of arrest before execution against the person of the debtor.

In the last class of cases, where the facts stated in the complaint as causes of arrest are essential to or constitute plaintiff's cause of action, there no affidavit for the order of arrest is needed, and no order of arrest is required before an execution may be issued against the person of the defendant, provided the complaint has been properly and sufficiently verified. But a verification upon information and belief will not answer unless it gives the sources of information, &c.

Although this court, at the first adoption of the code in this state, was disposed to repudiate the decisions of the courts of New York upon questions of code-practice, and undertook to chalk out an independent practice, we think the decisions of her higher courts may be resorted to in cases of doubtful construction, with great advantage and satisfaction.

In the case of *Blossom* v. *Bruno*, 33 Barb., 520, which was a motion to vacate an order of arrest, the court held the affidavit was defective in stating the principal matters relied upon to be on information or belief; where such facts are

not within the actual knowledge of the plaintiff or his witnesses, information may be stated; but in such cases the sources of information must be stated, so that the court can see to what extent the information can be relied on. And so it has been there held in several cases (17 How., 481, and 11 Abb., 62) that where the allegations of the causes of arrest are merely collateral and not essential to the plaintiff's cause of action, a judgment by default does not establish such collateral facts sufficiently to justify the issuing an execution against the person of the defendant; and it is further held that an order of arrest would be necessary where the facts justifying an order are set forth in the complaint, but are extrinsic of the cause of action itself, and the defendant suffer default.

We hold that the cause for the arrest, when set forth in the complaint, must be stated with as much explicitness as when set forth in an affidavit.

In our case the action is for a money demand and the allegation set forth in the sixth article of the complaint, namely, "that he is informed and believes that John M. Foote has disposed of his property with intent to defraud his creditors," is a collateral matter and extrinsic of the plaintiff's cause of action. It is in no way essential to the plaintiff's action. The complaint would have been good and complete if that article had been omitted. The case then falls within the second class of cases above mentioned, and the plaintiff has no right to issue an execution against the person of the defendant, Foote, without having first obtained an order of arrest and its service before judgment.

There is no error in the ruling of the court below, and the judgment is affirmed.

No error. Affirmed.

RACHEL JONES v. R. C. HOLMES and another.

Loss of Court Papers—New Trial.

It was agreed between the parties to an appeal that the judge who presided at the trial should settle the case notwithstanding he had gone out of office, but he failed for more than a year to do so, (by reason of his absence in a foreign country) and finally the papers were lost: *Held*, that a motion by the appellee, after that lapse of time, to allow the same judge to make out the case was properly refused by the appellant on the ground that he could not recall the facts attending the trial without the aid of the lost papers; and that, under the circumstances, the appellant was entitled to a new trial.

(*Isler* v. *Haddock*, 72 N. C., 119: *Sanders* v. *Norris*, 82 N. C., 243, cited and approved.)

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

Messrs. J. L. Stewart, B. Fuller and *Guthrie & Carr*, for plaintiff.

Messrs. Merrimon, Fuller & Fuller, for defendants.

DILLARD, J. This was an action to recover real property, and was brought to trial and a judgment recovered by the plaintiff before Judge Moore at the spring term, 1878, of Cumberland superior court. The defendants appealed from the judgment and perfected the same by entry thereof on record, by notice and by the execution of bond to secure the costs on appeal, and for stay of execution as required by the law in that case made and provided, and they prepared a statement of the case and served the same on the plaintiff.

To this statement of the case the plaintiff did not assent, but returned the same with specific amendments and objections, and the parties being unable to agree on a case, they sent the papers to the judge, whose term of office very

soon thereafter expired, with an agreement that notwithstanding he should settle the case for the supreme court. But the judge failed to do so, and was absent from the country for some time on a visit to Europe, and by the time of his return the papers sent him were lost or mislaid, so that he could not make out a statement.

In this state of things the plaintiff served on defendants' counsel in September, 1879, a written motion of her readiness to accept a new case and inviting them to prepare one so that if it was not acceptable, Judge Moore might still make out the case as originally agreed on, but defendants failed to do as requested. And now on the record being brought up to this court upon a writ of *certiorari*, all the facts above recited being admitted, the defendants moved for a new trial, alleging that they have lost their appeal without any default on their part, and the plaintiff resists the motion on the ground of the refusal of the defendants to make out a new case as requested.

In this situation we would be inclined to remand it and put the duty on the defendants to serve another case on the plaintiff and have the judge to settle it, in case of disagreement of the parties, but the judge having gone out of office, it cannot now be so done. The defendants appear to have been diligent to perfect their appeal, and the failure to make out a new case, when notified to do so, at the distance of more than a year after the trial, ought not to deprive them of the favorable consideration of the court, as by that time it may be reasonably supposed, and so the counsel of appellant stated to be the fact, the papers furnished the judge being lost, that they had forgotten the incidents of the trial and could not so make out a case as to fairly present their exceptions.

All we can do is to award a new trial upon the precedents of *Isler* v. *Haddock*, 72 N. C., 119, and *Sanders* v. *Norris*, 82

N. C., 243, and the cases therein cited, and it is so ordered. Let this be certified.

PER CURIAM. *Venire de novo.*

R. D. JOHNSTON v. G. D. PATE.

Complaint in Ejectment—Frivolous Pleading.

1. A complaint in an action to recover land which alleges that the plaintiff is the owner in fee, describes the same by metes and bounds, and alleges that the defendant wrongfully withholds possession, concluding with a demand for judgment for the possession, for damages for withholding the same and for costs, is amply sufficient under the code.
2. A demurrer to such complaint, assigning for cause: (1) A failure of the plaintiff to set forth his claim of title, or (2) to allege an ouster by defendant, or (3) to aver a demand for possession and damages before action brought, or (4) to allege a notice to quit before suit entered, or (5) to assert a possession in the plaintiff or those under whom he claims within twenty years before the action was instituted, raises no serious question of law, and should be overruled as frivolous.

(*Swepson* v. *Harvey*, 66 N. C., 436; *Erwin* v. *Lowery*, 64 N. C., 321, cited and approved.)

CIVIL ACTION to recover Land, tried at Fall Term, 1879, of CRAVEN Superior Court, before *Avery, J.*

The case was heard upon issues of law raised by demurrer to the complaint. Demurrer overruled, judgment for plaintiff, appeal by defendant.

Messrs. A. G. Hubbard and *W. B. Rodman,* for plaintiff.
Mr. W. J. Clarke, for defendant.

ASHE, J. The complaint is in the usual form, alleging that the plaintiff was the owner in fee simple of the land

which is specifically described by metes and bounds, and that the defendant wrongfully withholds the possession of the land from the plaintiff; and a demand for judgment for the possession of the premises and for damages for withholding the same and for costs.

The causes of demurrer assigned are that the complaint is vague, uncertain and insufficient, in that,

1. It merely alleges generally that the plaintiff is owner of two certain described tracts of land and that the defendant wrongfully withholds the possession of said lands from the plaintiff, but fails to set forth the plaintiff's title thereto, so as to inform the defendant thereof, that he may admit the same or traverse the allegation.

2. The complaint fails to allege ouster of plaintiff by defendant.

3. The complaint fails to allege a demand by the plaintiff for possession or a demand for the damages claimed before this action was commenced.

4. The complaint fails to allege a notice to the defendant to quit and surrender to the plaintiff the possession of the premises before the action was brought.

5. Plaintiff fails to allege possession by himself or those under whom he claims, within twenty years before the action was brought.

His Honor overruled the demurrer, and holding it to be frivolous rendered judgment in favor of the plaintiff for the land in dispute, and ordered a writ of possession to be issued, but retained the action upon the civil issue docket until a jury could be impaneled to inquire and ascertain what was plaintiff's damages for the unlawful detention of the land or for rents and profits.

No one of the causes of demurrer can be sustained: The first cannot, because the complaint is in the usual form used and approved by the courts of this state ever since the adoption of the code of civil procedure, and is in strict conform-

ity to the precedents established and followed by the courts of New York from which we have derived our code. The second, third and fourth cannot, because there is nothing in the complaint showing that this was one of the cases where an ouster was necessary to be proved, or a demand for possession made, or notice given to quit, before action brought. Questions of this nature usually arise on the trial as matters of defence. Nor can the fifth be sustained, for it is not necessary that a plaintiff in an action to recover land should allege in his complaint that he had possession within twenty years before action brought. For if he establishes on the trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action. C. C. P., ch. 17, § 25. (Bat. Rev.)

We have not been able to discover anything in the demurrer worthy of the serious consideration of this court, and we must therefore hold it to be frivolous. *Swepson* v. *Harvey*, 66 N. C., 436; *Irwin* v. *Lowery*, 64 N. C., 321. The demurrer was properly overruled by the court below, and being frivolous and for the purpose of delay, the judgment rendered was not erroneous.

The judgment of the court below is therefore affirmed, and the case is remanded that the damages sustained by the plaintiff by reason of the detention and occupation of the land by the defendant, may be ascertained by a jury. Let this be certified to the superior court of Craven county that further proceedings may be had in conformity to this opinion and the law.

No error. Affirmed.

H. E. McCORMICK and others v. C. D. NIXON and others.

Injunction—Waste.

1. Where plaintiff, claiming the ownership of certain land, brings an action to recover the same and (as auxiliary to the main relief) seeks to enjoin the defendant in possession from cutting timber and turpentine trees thereon for building and fencing, he must *show* that the defendant is unable to respond in damages for such injury.
2. Where the plaintiff's affidavit merely alleges the defendant's insolvency on information and belief, and the defendant denies the allegation, supporting his denial by affidavits of the sheriff and county surveyor, the injunction will not be continued to the hearing.

(*Thompson* v. *Williams*, 1 Jones Eq., 176: *Gause* v. *Perkins*, 3 Jones Eq., 177, cited and approved.)

MOTION by defendants to dissolve an injunction, heard at Chambers on the first day of April, 1880, before *Eure, J.*

The action in which this motion was made is pending in the superior court of Cumberland county. The motion was granted and the plaintiffs appealed.

Messrs. Guthrie & Carr, for plaintiffs.
Mr. N. W. Ray, for defendants.

DILLARD, J. The plaintiffs claim to be owners of the two tracts of land described in the complaint, and they seek in their action to recover damages for a trespass thereon against C. D. Nixon and his co-defendants, alleged to consist in the entering upon and the building of a cabin on said land and in the cutting down and splitting into boards and rails of one hundred timber trees.

Upon the institution of the suit, an injunction pending the action was applied for and an order to show cause was granted at a time named, with a temporary restraint in the meantime, upon the allegation that the lands trespassed

upon were chiefly valuable for turpentine and timber purposes, and that the acts done and the threatened continuance of the same were an injury irreparable, as amounting to a destruction of the substance of the estate, and such as defendants could not answer for in damages on account of their insolvency. At the return day of the rule to show cause, the defendant, Nixon, admitted the said alleged acts of trespass as done by his co-defendants by his authority and justified on the ground of a claim of title in himself, and denied insolvency and averred his ability to pay ten times more than the value of the whole land over and above all exemptions.

Affidavits were filed on each side and the material facts to be gathered therefrom and from the admissions of defendants, are, that the defendants entered upon the *locus in quo* and built the cabin and cut the timber-trees alleged, and threatened to continue such acts; and as to the alleged inability of defendants to pay damages, that fact was averred by the plaintiffs only on *information and belief* and no evidence was adduced in support, whilst the defendant Nixon, confessing his liability to pay the damages, should any be recovered, averred that he was able to pay much more than the value of the whole land independent of his exemptions and supported himself as to his worth by the evidence of the sheriff and surveyor of the county, who testified to his reputed solvency to the extent of from three to five thousand dollars, exclusive of exemptions and all liabilities. Upon this showing the court below refused to continue the injunction to the hearing, and the question is, was there error in the refusal.

There was undoubtedly jurisdiction in the court in the course of the action, the title to the *locus in quo* being claimed both by plaintiffs and by the defendant Nixon, to take care of the property in controversy until the question of the title could be tried and settled, provided the acts threatened

were of such character as to work an irreparable injury. But the kind of injury to justify such interposition, as decided in our state, is not created by the mere fact of the building of the cabin and cutting and splitting into rails and boards the timber-trees as distinguished from ornamental trees, which would be a ground of injunction in the English law, but to become such, there must be the further fact of not being compensable in damages by reason of the insolvency of the trespasser. This rule of non-interference in cases like the one under consideration, without insolvency disabling the party to answer in damages, is established by divers cases in this court, pre-eminent among which are the cases of *Thompson* v. *Williams*, 1 Jones Eq., 176, and *Gause* v. *Perkins*, 3 Jones Eq., 177. In the latter case, the injury was alleged to consist in the fact of the defendant's being about to commence to box and work the trees for turpentine, and to cut down and rive the timber into staves on land fit only for those products, just as the land in one case is valuable only for turpentine and timber purposes, and it was held not to be a case of irreparable injury without the additional fact of inability to respond in damages. And the decision, ever since recognized as good law, was put on the ground of justice to the party, and of public policy which favors the use to which lands are adapted as a means of developing the resources of the country.

The rule established by these cases applies to the question presented for our determination and furnishes a guide to us. Here, the plaintiffs have one of the essentials to the special injunction they sought to have continued to the hearing in the building of the house and the cutting and splitting of the timber-trees, and the other necessary fact of insolvency is stated to exist with no positiveness but only from information and belief, and that without any statement of the facts on which their belief is founded or proof of the truth thereof, either by themselves or others. This fact is a con-

stituent in the plaintiffs' equity to have the injunction, and it was their business to have proved it, or at least shown a probability of its truth, as they might easily have done, if Nixon was in fact or by reputation insolvent. But supposing the allegation on information and belief, unsupported, to be sufficient *prima facie*, the defendant Nixon denies it and avers his ability outside his exemptions to pay ten times more than the value of the whole land in controversy, and he establishes, by the oath of the sheriff and surveyor of his county, his reputation to be that of a solvent man from three to five thousand dollars exclusive of exemptions and all liabilities. Upon the state of the proofs laid before His Honor as to this essential fact in the alleged case of irreparable injury, it does not seem to us that he erred in refusing to continue the injunction to the hearing. The case made is a controversy over the title with the defendants in possession and making that use of the land for which it is fit, and the plaintiffs furnish no evidence to establish or excite a suspicion of insolvency in Nixon.

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

No error. Affirmed.

ELIAS L. TAYLOR v. ELIJAH D. TAYLOR.

Execution—Seal—When Requisite.

Where execution issues to a county other than that in which the judgment was rendered, it must bear the seal of the superior court, without which it and all proceedings under it are nullities.

(*Findley* v. *Smith*, 4 Dev., 95; *Shepherd* v. *Lane*, 2 Dev., 148; *Seawell* v. *Bank*, 3 Dev., 279; *Governor* v. *McRae*, 3 Hawks, 236; *Freeman* v. *Lewis*, 5 Ired., 91, cited and approved.)

TAYLOR *v.* TAYLOR.

CIVIL ACTION to recover land tried at Spring Term, 1880, of POLK Superior Court, before *McKoy, J.*

The plaintiff claimed title to the land under a deed made by the sheriff of Polk county, by virtue of a sale had by him under an execution issued from the superior court of Rutherford county, on a judgment rendered in that court in the year 1869, in an action commenced in 1867, in behalf of the present plaintiff against E. D. Taylor, a resident of Polk county, and others, at which sale the plaintiff became the purchaser.

The plaintiff in support of his title produced in evidence a transcript of the superior court of Rutherford county, which showed that the execution, which issued from the superior court of Rutherford to the sheriff of Polk under which he sold the land in controversy, was without a seal attached. For that and for other causes of exception, His Honor intimated the opinion that the plaintiff could not recover, and in deference thereto the plaintiff submitted to a nonsuit and appealed.

Mr. D. G. Fowle, for plaintiff.
Mr. W. J. Montgomery, for defendant.

ASHE, J. In making up the case for this court, the transcript of the superior court of Rutherford was assumed by the counsel of both parties to contain a correct statement of the facts it purported to set forth, and we must presume that they are truly stated.

There were a good many points raised by the counsel for the defence, but it is only necessary for the purpose of this appeal that we should notice one of them. The fact that the execution which was issued from the superior court of Rutherford to the sheriff of Polk county was without a seal of the court, is fatal to the plaintiff's action.

By the common law, every writ issued by a court of rec-

ord must be authenticated by a seal of the court affixed to the writ. And in this state, the legislature by the act of 1797, has dispensed with this essential form of authentication only in cases where the writ is confined within the county from the court of which it issues. When the writ is issued to a different county, it is void without the seal and confers no power upon the sheriff of such county to act. As was said in the case of *Findley* v. *Smith*, 4 Dev., 95, the seal of a court is as indispensable to its writ as the seal of a party is indispensable to his bond. See *Shepherd* v. *Lane*, 2 Dev., 148; *Seawell* v. *Bank*, 3 Dev., 279; *Governor* v. *McRae*, 3 Hawks, 226; *Freeman* v. *Lewis*, 5 Ired., 91. In this case the execution which was issued from the superior court of Rutherford to the sheriff of Polk county, having had no seal of the superior court of Rutherford affixed to it, was a nullity and conferred no power upon the sheriff to sell the land in question and the purchaser acquired no title by the sale.

There is no error, and the judgment of the court below is affirmed.

No error. Affirmed.

WILLIAM S. PETERSON, Adm'r, and others v. JOHN VANN, Trustee, and others.

Petition to sell Land for Assets—Jurisdiction—Final Decree—Suit to Reverse.

1. The special *quasi* equitable jurisdiction conferred upon the late court of pleas and quarter sessions to order a sale of the land of a decedent to pay his debts was exercised and came to an end upon a decree of sale and confirmation thereof, followed by an order to collect the purchase money and make title.

2. Such final decree can only be reversed or modified by an action in the

superior court commenced by summons, as a substitute for a bill of review or for a bill to impeach the decree for fraud.

3. A failure to adjudicate upon the question of costs does not affect the character of the decree as a final one.

(*Thompson* v. *Cox*, 8 Jones, 311; *Evans* v. *Singletary*, 63 N. C., 205; *Gibson* v. *Partee*, 2 Dev. & Bat., 530; *Barnard* v. *Etheridge*, 4 Dev., 295; *Covington* v. *Ingram*, 64 N. C., 123; *Thaxton* v. *Williamson*, 72 N. C., 125, cited and approved.)

MOTION to set aside a judgment and order of sale, heard at January Special Term, 1880, of SAMPSON Superior Court, before *Gilmer, J.*

The plaintiff filed his petition in the court of pleas and quarter sessions of Sampson county at November term, 1866, for a license to sell the land described in the petition to pay the debts of his intestate; and on this petition a summons was issued returnable to May term, 1867, against John Vann, styled agent of Mary Boney, and against the heirs at law of Chester R. Vann, without description of them by name and in this respect the summons pursued the petition. Upon the petition thus begun, the following proceedings were had:

At May term, 1867, the summons was returned "executed" and at the same term, W. A. Matthis, the clerk, was appointed guardian *ad litem* to the heirs at law of the plaintiff's intestate, and he accepted service of his appointment.

At August term, 1867, John Vann filed an answer, wherein he set up that the land, though once the property of the intestate, was sold under execution for his debts in 1862, when he purchased the same and took the sheriff's deed therefor, and afterwards, in 1864, conveyed it to his grandchildren, the heirs at law of Chester R. Vann, and by this means he insisted the intestate had no interest or title liable to be sold for his debts. And at the same term of the court, Matthis, guardian as aforesaid, filed an answer, referring to

and relying on the matters of defence contained in the answer of John Vann.

At said August term, 1867, an entry was made on the record in these words: "ANSWER filed; replication; ordered by the court that issues be submitted to a jury." At November term, 1867, the cause is marked "continued." At February term, 1868, there is this entry: "Order of sale, for decree see minutes." At May term, 1868, this entry: "Report of sale confirmed and decree for title." At fall term, 1869, of the superior court, the cause was entered on the docket of that court and there was this order: "Judgment against petitioner for costs," and the cause was dropped from the docket.

After these proceedings, the heirs at law of the intestate, claiming as grantees of their grandfather, John Vann, on notice to the plaintiff moved before the clerk to set aside the order of sale of the land at February term, 1868, of the county court and also the order of confirmation and for title to the purchaser at May term of the same court; and the same being denied, on appeal to the superior court, the judge remanded the cause to the probate court for additional parties.

In pursuance of the order remanding the cause for new parties, after notice to the petitioner, to the heirs of A. M. Matthis and to William Sutton and wife, the present claimants of the land under the administrator's sale, the probate court overruled the motion to set aside the decree of sale and order of confirmation and for title; and on the appeal to the superior court at said January special term, 1880, the judgment of the probate court was affirmed, and the defendants appealed.

Mr. D. J. Devane, for plaintiffs.
Mr. J. L. Stewart, for defendants.

DILLARD, J., after stating the case. Upon this appeal, the error assigned is the affirmance by the superior court of the refusal of the probate court on the facts above recited to set aside the decree of sale, order of confirmation and for title in the county court at February and May terms, 1868.

The late court of pleas and quarter sessions, by the act of 1846, (Rev. Code, ch. 46, § 44,) was clothed with a jurisdiction to order the sale of land of deceased debtors for payment of their debts on the petition of their personal representatives, to be exercised in the mode and to the extent limited in the statute conferring the jurisdiction. It was a *quasi* equitable jurisdiction, created for a special purpose and with enumerated powers, and hence the courts settled it, that upon a decree of sale, confirmation thereof and an order to collect the purchase money and make title, the jurisdiction conferred was exercised and at an end. *Thompson* v. *Cox*, 8 Jones, 311; *Evans* v. *Singletary*, 63 N. C., 205.

From the statement of the case of appeal by the judge, in connection with the clerk's transcript from the record of the county court, it appears that no regular memorial was made up and entered of record, but that the proceedings throughout are indicated by mere memoranda and informal entries from which a record in form might be drawn out and which in legal intendment is to be understood as existing. *Gibson* v. *Partee*, 2 Dev. & Bat., 530; *Barnard* v. *Etheridge*, 4 Dev., 295.

Taking the record then to be what the loose entries of the clerk would authorize to be made up, from the entry "*order of sale, for decree see minutes*" at February term, 1868, and the entry "*report of sale confirmed and decree for title*" at May term, 1868, the legal conclusion is, that the court of pleas and quarter sessions exercised fully the jurisdiction it had over the subject and that the decree then rendered was a final one, as held in *Thompson* v. *Cox* and *Evans* v. *Singletary*,

supra. So that there was no occasion for any further action in the matter, either in the county court or any other.

If the decree in the county court at May term, 1868, was final and the same was fully executed by payment of the money and the execution of title to the purchaser, as is to be taken to be true from the fact of the purchaser's being made a party to defendant's motion in the cause, then by the 25th day of January, 1879, when the motion in the cause was made, there was no cause pending in which to make the motion and the only remedy of defendants was, as settled by a series of decisions in this court, by an action in the superior court commenced by summons as a substitute for a bill of review, or for a bill to impeach the decree for fraud. *Covington* v. *Ingram*, 64 N. C., 123; *Thaxton* v. *Williamson*, 72 N. C., 125.

But it may be said that the decree of the county court was not final, for the reason, that after confirming the sale and ordering title, it did not adjudge upon the matter of costs. We do not think the finality of the decree was affected by that circumstance. The giving of costs in equity and in cases of this kind in the courts of pleas and quarter sessions would not necessarily have followed the decree confirming the sale and ordering title to the purchaser. But it would have been a matter of discretion in the court. And as no reservation of the question of costs was contained in the decree of May term, 1868, which disposed of the whole merits of the proceeding, the import of the decree, otherwise certainly final, is that the court exercised its discretion and refused costs; or, the cause not being retained for further orders and directions, that the costs were waived and lost. Daniel Chancery 15, 16. Neither did the entry of the cause on the docket of the superior court at fall term, 1869, followed by the memorandum, "*judgment against the petitioner for costs*," alter the case. The whole object of the petition was accomplished and the suit at an end, and the

docketing of the case in the superior court was therefore not authorized by section 400 of the code, and availed not to disturb the finality of the decree of the county court at its May term, 1868.

We must therefore declare our opinion to be, that the remedy of the defendants, if any they have, is not by a motion in the cause, but by an action with proper parties thereto in the superior court in the nature of a bill of review, or a bill impeaching the decree for fraud or other sufficient cause. There is no error in the judgment of the superior court affirming the judgment of the probate court disallowing defendants' motion.

No error. Affirmed.

GOFF, CRANSTON & CO. v. CARTER POPE.

Description in Deed—Evidence—Construction.

1. Where an object conveyed is sufficiently identified by the terms used, a false mention of some particulars, not producing obscurity as to the intention of the parties, will not defeat the operation of the instrument, upon the maxim, "*falsa demonstratio non nocet*," &c.

2. A mortgage conveyed a "portable steam engine, grist and saw mill and forty horses now on"—a certain plantation, "also a second portable steam engine used for ginning and shelling corn"; *Held*, under the foregoing rule,

   (1) That parol evidence was admissible to show that the engine first mentioned was intended to be included in the mortgage, though misdescribed as to location;

   (2) That the dealings and declarations of the parties with respect to such engine were receivable in evidence on the question as to whether or not it was included in the mortgage.

Held further, that, to advance the true intent of the parties, the word "portable" may be treated as synonymous with movable.

(*Bryan* v. *Faucet*, 65 N. C., 650; *Johnson* v. *Nevill*, *Ib.*, 677, cited and approved.)

CLAIM AND DELIVERY, tried at Fall Term, 1879, of NASH Superior Court, before *Eure, J.*

The plaintiffs claimed a portable steam engine, grist and saw mill, and the appurtenances thereto, which were located on the land of W. D. Harrison, in the county of Nash, and conveyed to them by Charles W. Smith of Pitt county, in the manner described in the opinion of this court. Under the charge of the court, the jury rendered a verdict for the plaintiffs; judgment, appeal by defendant.

Messrs. G. V. Strong and *G. M. Smedes*, for plaintiffs.
Messrs. Bunn & Battle and *Davis & Cooke*, for defendant.

SMITH, C. J. The plaintiffs derive title to the articles mentioned in their complaint under three successive mortgage deeds from C. W. Smith to them, the first executed in September, 1869, and describing the property conveyed, as do the others, in the following language: "The growing cotton and corn crops on plantation situate on Tar River in said state of North Carolina, formerly known as the 'Penny Hill plantation,'" with full boundaries; "also including in this conveyance the portable steam engine, grist and saw mill, and forty horses now on said plantation; also a second portable steam engine, used for ginning and shelling corn." At the date of the first deed there was a small steam engine on the plantation used in ginning cotton and shelling corn, and another larger in size and of forty horse power (that now in controversy) in the woods, eight miles distant from the plantation. The latter was originally put on land near Greenville in Pitt county, then conveyed towards

Bethel, and finally removed to the farm of W. D. Harrison, where it remained unworked until the defendant took possession, shortly after which the present action was brought.

There was conflicting evidence offered on the trial to show what was a *portable* as distinguished from a *stationary* engine, and to which class this properly belonged. The plaintiffs introduced as a witness an agent of theirs who testified that he advertised a sale of the steam mill to take place in April, 1876; that before the day of sale, the defendant made him an offer of five hundred dollars which was refused, and that they went on the premises and examined the condition of the mill. At the day appointed, in the presence of the mortgagor, the defendant and others, the mill was offered for sale as the property of the plaintiffs and no objection was made or claim asserted by any person. The bids were not satisfactory and the sale was stopped. It was again offered in like manner after advertisement in November of the same year and withdrawn for a similar reason. The defendant did then object, saying the property was not his and declining to tell who made claim. At the same time in a private interview the defendant offered three hundred and fifty dollars for it.

Several instructions to the jury were asked for defendant, which the court declined to give, the substance of which is condensed in two propositions: First, if the engine, grist and saw mill was a stationary and not a portable engine, the title thereto did not pass under the mortgages; and secondly, if it was not on the Penny Hill plantation when the deed was executed, it was not within the words of description and was not conveyed.

The only question then is as to the sufficiency of the descriptive words contained in the deed to convey the steam mill to the plaintiff. Numerous authorities are cited in the brief of the defendant's counsel to show that under the rulings of this court the same accuracy in the statement of the

cause of action is required under the present as under the former system of pleading; that the proofs and allegations must correspond in order to a recovery; and that it is the duty of the judge to respond directly to a request for directions to the jury by giving or refusing them. The references do not meet the aspect of the case presented in the record.

The description of a thing intended to be conveyed may be so vague and indefinite as not to admit the aid of parol proof whose only office is to identify by fitting the descriptive words to the object described. It is a rule equally well established, that if the object is sufficiently identified by the terms used, a false mention of some particulars not producing obscurity as to the intention of the parties will not defeat the operation of the instrument, upon the maxim "*falsa demonstratio non nocet, cum de corpore constat.*" 1 Greenl. Ev., § 301.

I. We do not understand the words "now on said plantation" as applying to the steam mill previously mentioned, but as confined to the "horses" then on the premises and used in cultivating the land. This construction is required by the ascertained fact that *this mill* was not then on the Penny Hill plantation, but several miles distant, while the small engine employed in ginning and shelling, and mentioned without regard to locality, was then upon the land and used in farming operations. The mortgagor owned and obviously meant to convey both engines and it cannot be supposed that he intended to attach to either a known false description to defeat his own deed.

II. The large engine was movable and has been worked at three different places, and the synonymous prefix, portable, would not be improperly applied to it.

III. The presence of the mortgagor at the first proposed sale when the engine was offered as the property of the plaintiffs, and the assent implied from silence, although not

an estoppel as it might have been in favor of an innocent purchaser, is an indirect admission that by his deed the title had passed to the plaintiffs, and in confirmation of a construction giving it that effect.

IV. The identity of an assigned article of property and the means of ascertaining it are largely dependent upon extrinsic proofs, of the force and sufficiency of which the jury must judge, and the submission of this inquiry to them is in accordance with the ruling in *Bryan* v. *Faucett*, 65 N. C., 650. How otherwise could it be determined which of many goods falling within the description was intended to be conveyed? A horse, a buggy or a cow is sold, how can the article be separated from many others of the same class, except by the aid of parol testimony? The generality of the description, in many cases unavoidable, is latent ambiguity, discoverable when the object is sought and removable by outside evidence of intent. Wigram on Wills—*Proposition* VII.

The same observation may be applied to the criticism upon the obscurity and uncertainty in the complaint. "It has never been customary," says RODMAN, J., "in actions for the recovery of specific goods, to give any more than a general description, although a plaintiff may do so if he chooses, at the risk of a variance." *Johnson* v. *Nevill*, 65 N. C., 677.

We think His Honor did not refuse a direct and distinct response to the prayer for instructions. He peremptorily declined to rule that the deed was too vague in terms to admit the aid of any evidence, and left to the jury to fit the description to its object and identify the article intended to be conveyed. In this there is no error. The judgment must therefore be affirmed, and it is so ordered.

No error. Affirmed.

JOHN BROWN v. CAROLINA CENTRAL RAILWAY COMPANY.

Nuisance—Receiver.

1. The private nuisance which equity will abate by injunction must be one occasioning a constantly recurring grievance from its nature insusceptible of adequate compensation in damages.

2. In determining upon the propriety of injunctive relief against such nuisances, the court will be influenced against ordering an abatement by the facts that the structure from which the nuisance arises is useful to the defendant and the public, and the injury to the plaintiff trifling.

3. The superior court of one county will not order the abatement of a nuisance erected by a railroad corporation (such nuisance caused in the defective construction of a certain trestle and culvert on the line of the road) when all the corporate property is in the hands of a receiver appointed by the superior court of another county.

(*R. & A. Air-Line* v. *Wickers*, 74 N. C., 220; *Hyatt* v. *Myers*, 71 N. C., 271; *Eason* v. *Perkins*, 2 Dev. Eq., 38; *Skinner* v. *Maxwell*, 68 N. C., 400, cited and approved.)

CIVIL ACTION removed from Cleaveland and tried at Fall Term, 1879, of LINCOLN Superior Court, before *Buxton, J.*

The plaintiff alleges that the Wilmington, Charlotte and Rutherford railroad company (now the Carolina Central) by the unskilful construction of a trestle and falling in of a culvert across Muddy Fork creek, just below his lands situate on both sides of the creek, caused an obstruction to the natural flow of the water in said creek, whereby it was thrown back and ponded on his land, and the same was rendered unfit for cultivation; that defendant company thereafter, to wit, in April, 1873, became the owner of said railroad with all its rights, property and privileges, and as such have maintained and allowed to exist ever since their purchase the same trestle and obstruction in said creek and thereby continued the injury to plaintiff's land.

The action is brought to recover damages for injury to

plaintiff's land from overflow and absorption occasioned by the said obstruction allowed by defendants to continue in the creek since their purchase, and for abatement of the nuisance. At the trial, it was admitted that the ownership of defendant company began in 1873, and that their said road was duly placed in the hands of the defendants, Grainger, Stout and Porter, as receivers, on the first day of April, 1876, by a decree of the superior court of New Hanover county, under whose control and management the same has ever since been, and is now. Upon issues submitted to the jury, it was found that the trestle and fallen culvert were an obstruction to the natural flow of the water when the defendant company bought the road, and had continued to be and remain ever since, and that thereby the plaintiff sustained an annual damage of twenty-five dollars.

Upon the admission of the parties and facts found by the jury as above, the court adjudged that plaintiff recover damages for three years next before the institution of his suit, to wit, the sum of seventy-five dollars, but refused the motion for the further judgment of abatement of the nuisance, and from such refusal the plaintiff appealed.

Messrs. Hoke & Hoke, for plaintiff.
Mr. John D. Shaw, for defendant.

DILLARD, J. In *Raleigh & Augusta Air-Line* v. *Wicker*, 74 N. C., 220, it is decided that in cases of ponding water by a railroad by obstructing a natural or artificial drain-way, the injury is not one taken into the estimate in measuring compensation to a land owner, and therefore the company in constructing its road must leave a space sufficient for the passage of the water without injurious obstruction; or in default thereof it will be answerable in damages by a repetition of suits until the obstruction is removed, or in a

proper case it may be abated by the corrective powers of a court of equity.

So it was the duty of the company which originally built the trestle and culvert across Muddy Fork creek to have erected them with such care and skill as not to obstruct or throw back the water on plaintiff's land and to have kept them so, and equally incumbent on the defendant company since their purchase to do the same thing; or failing so to do, it was responsible for any consequent injury in one or more actions for damages merely, or be subject to abatement if the injury were such as to call for such remedy, consistently with the principles which govern courts of equity in such cases.

Now here the injury to the plaintiff is fixed by the jury at twenty-five dollars annually for three years next before this suit was begun; and upon the finding of damages in so trifling a sum and the other facts in the case, was it or was it not obligatory as a matter of law to order the abatement? or might the court have left the plaintiff to his actions for damages as at law?

The usual and only remedy at common law and under our former system for a private nuisance was by an action on the case to recover damages, with a right to repeat for any continuance of it, until the party from a motive of interest voluntarily removed it; and while a court of equity might interpose to prevent or abate such a nuisance, it was not every case in which the right to recover damages existed that would constitute a ground of jurisdiction in equity to exercise its powers. The injury to call for and justify compulsory abatement, it is held, must be such as is not from its nature susceptible of adequate compensation in damages, or such as will occasion a constantly recurring grievance, which cannot be otherwise relieved against. 2 Story's Eq., § 925; Adams Eq., 211; 3 Dan'l Chancery 1587.

Upon the establishment of the nuisance, as the plaintiff insists is done in this case by the verdict of the jury, the grant of process of abatement does not follow as a matter of course, but in that event will depend on circumstances of which the following will be influential. The chancellor in such case will consider whether he will leave the party to his common law remedy or order an abatement, and as connected therewith, his determination will and ought to be influenced against ordering abatement, by the fact that the structure from which the nuisance arises is useful to the defendant, and the injury therefrom to the plaintiff trifling and susceptible of adequate compensation in damages; and by the further fact of a great public benefit overbalancing the private injury, in which case the private interest should, as established by the authorities, be subordinated to the public good. *Hyatt* v. *Myers*, 71 N. C., 271; *Eason* v. *Perkins*, 2 Dev. Eq., 38.

In this case the injury alleged is the unfitting some of the plaintiff's lands for purposes of cultivation. And the jury say the damages thereby annually suffered is twenty-five dollars. And it does not appear either by averment or otherwise that the damages cannot or will not be paid, nor that the grievance can only be relieved against by abatement by the court. Upon this view by itself, His Honor as it seems to us might have properly pronounced the judgment he gave, and refused to order abatement as moved by the plaintiff. But when the fact is superadded that the road and its operation and general management were in the receivers appointed by decree of the superior court of New Hanover the correctness of the refusal to order an abatement cannot, as we think, be questioned.

The effect of appointing receivers was to take the road into the hands of the court, to be operated and managed, expenses paid and proceeds distributed, and to answer for damages incurred, and be abatable in any part of its track

or works creating a nuisance to a private person under the rules, regulations and orders of the court having the custody. High on Receivers, §§ 1, 2; *Skinner* v. *Maxwell*, 68 N. C., 400.

In such situation, the property and its proceeds in the hands of the superior court of New Hanover could not be taken away or applied to the payment of the damages adjudged against the defendant company, by any execution or order of the superior court of Lincoln; nor could the trestle and fallen culvert constituting a part of the track be pulled down by the orders of any other court of equal jurisdiction than of the one now in the occupancy and control of the road. It was proper in order to avoid a conflict of jurisdiction for the court in Lincoln to have refused the order of abatement and thus have left the plaintiff to repeated actions, or to go, as he might, with his judgment to the court of New Hanover for payment of his damages assessed, and also for the proper action of that court upon his claim of equitable right to abatement.

There is no error, and the judgment below must be affirmed.

No error. Affirmed.

LOUIS LAFONTAINE v. SOUTHERN UNDERWRITERS ASSOCIATION.

Supplementary Proceedings—Contempt—Questions incriminating Witness—Refusal to Answer.

1. When in the course of proceedings supplementary to execution a witness is examined by a referee under section 268 of the code, no *trial* can be said to take place before the referee, and a contempt in refusing

to answer questions on such examination must be punished by the court making the reference.

2. The essential and inherent common law power of the courts to punish as a contempt the refusal of a witness to answer proper questions is expressly confirmed by Battle's Revisal, ch. 24, § 7 (4).

3. Where a witness refuses to answer a question on the ground that such answer will tend to convict him of a crime, it is the province of the court to determine whether a direct response to the question will have that tendency.

4. Since by the provisions of section 264 (5) of the code the answer of one examined under proceedings supplementary to execution cannot be used against him in any criminal proceeding or prosecution, a witness called to testify on such an examination as to his dealings in behalf of a defunct corporation of which he was an officer cannot excuse himself on the ground that the evidence thus elicited might be used on the trial of indictments pending against him and others, for conspiring to cheat and defraud divers persons in the management of the affairs of such corporation.

5. *Semble*, that if the witness himself states his belief that such indictments are prosecuted solely for black-mailing purposes, as to which he could only thus speak on the supposition of his entire innocence, no truthful answer of his could have any possible tendency to convict him of crime.

(*Pain* v. *Pain*, 80 N. C., 322, cited and approved.)

RULE upon a witness to show cause why he should not be attached for contempt in refusing to answer certain questions, heard at January Special Term, 1880, of WAKE Superior Court, before *Avery, J.*

This was a proceeding supplementary to execution, and on the 10th of April, 1878, an order was made by the judge of the superior court, requiring George W. Blacknall, the treasurer and managing agent of the defendant association, to appear before a referee who was appointed to take and certify the examination of said Blacknall and such other witnesses as may be brought before him, to make discovery concerning the property and effects of the defendant. And it was further ordered that the referee be vested with such

powers in the conduct of the examination as are conferred upon him by law. After due notice, the said Blacknall appeared before the referee, and was sworn and examined as a witness. He declined to answer the questions set out in the opinion of this court, and for the reasons therein stated. The referee ruled that the questions (except one) were proper, but that he had no power to compel the witness to answer, and certified the same to the court to the end that the witness may be dealt with touching his refusal to answer. And upon motion before *Eure, J.*, at June term, 1879, the witness was ordered to show cause why he should not be attached for contempt. In answer to the rule, the witness stated in his affidavit, in substance, that his refusal to answer was based solely on the ground of his privilege as a witness, that is, that he could not be compelled to give evidence which might tend to self-crimination. The hearing of the matters set forth in the answer to the rule was continued until January term, 1880, when the plaintiff's counsel moved to make the rule absolute and declare the witness in contempt. His Honor held that the witness should be compelled to answer the question in reference to the possession of the books of the defendant association, and how he had disposed of the same, and also that he should answer question No. 8, in reference to the existence of any assets of the association, and that he was not compelled to answer the other questions. The referee was ordered to proceed with the examination, and the witness to appear on Wednesday of the next term and show that he had obeyed the order of the court, or show cause why he should not be attached for contempt. From this ruling the plaintiff appealed.

Messrs. Hinsdale & Devereux and *A. W. Haywood*, for plaintiff.

Messrs. Merrimon, Fuller & Fuller and *R. C. Badger*, for defendant.

SMITH, C. J. In executing the order under which the referee is directed "to take and certify the examination of George W. Blacknall and such other witnesses as may be required to appear before him" to make discovery and to examine concerning the property and rights of the said defendant, certain interrogatories were propounded to the witness named, which he declined to answer. These interrogatories, numbered consecutively from 2 to 22 inclusive, omitting those numbered 3 and 4 as not material, are as follows:

2nd question. "Have you the books mentioned in the subpœna and belonging to the Southern Underwriters' Association in your possession?" The witness answers "I have been indicted with two other persons in the superior courts of Bertie and Cumberland counties, N. C., for conspiring to cheat and defraud, which indictments are founded on an alleged connection and management of the business and affairs of the Southern Underwriters' Association, the defendant herein. These indictments are still pending. I believe they are and were prosecuted for the purpose of black-mailing. But as they are still pending, I object and decline to answer the question asked me, on the ground that such answer might tend to criminate me." The referee required this question to be answered.

5th question. "Have you ever had possession of the books referred to?"

6th. "Do you know who now have them in possession; if so, who?"

7th. "When and where did you last see them?"

8th. "Do you know of the existence of any assets of the Southern Underwriters' Association?"

9th. "Did the S. U. Association ever own any U. S. bonds; if so, what has become of them?"

10th. "Did the S. U. Association ever own any North

Carolina R. R. bonds, or any county or city bonds; if so, where are they now?"

11th. "Has the S. U. Association ever owned any mortgages upon real estate in North Carolina, if so, please give me an account of the same?"

12th. "In whose names were the mortgages taken, if any?"

13th. "What disposition has the company aforesaid made of these mortgages, if it ever had any?"

14th. Were you ever treasurer of this company?" Ruled out.

15th. "Did these bonds or any of them, or any of the securities referred to, come into your hands as treasurer of said company, or at all since the organization of the company?"

16th. "Have you been treasurer at any time since the organization of the S. U. Association, of that company?"

17th. "If the S. U. Association has at any time since its organization been in possession of any United States bonds, from whom did it obtain them, when and upon what terms?"

18th. Were any United States bonds and other securities exhibited to the secretary of state of North Carolina at any time since the organization of the company as the property of the company; if so, when, where, what bonds and securities, from whom obtained, upon what terms, and where are they now?"

19th. "Were you one of the original subscribers to the company; if so, how much stock did you take, and did you pay it up?"

20th. "If you paid your subscription, how did you pay?"

21st. "Do you know where the cash account was kept; if so, where?"

22d. "Do you mean to swear that it might criminate you

to tell where the company kept their cash account?" Ruled out, no answer.

To all these questions the witness replied in substance: "I decline to answer upon the ground that it might criminate me."

The referee reported the refusal of the witness to the court, and thereupon His Honor decided that the witness should answer questions numbered two and eight, and should be excused from answering the others, for the reasons assigned by him. From this ruling the plaintiff appeals to this court, and its correctness is the only reviewable matter presented for our consideration.

1. It is insisted on behalf of the witness that his contumacy can be corrected and controlled only by the referee, and that the court has no cognizance thereof: The referee has power to enforce obedience to his rulings, on the trial of the issues before him, just as the court would have upon the trial before it by virtue of the express provisions of C. C. P., § 246. But this is not a trial, and the scope and purpose of the reference is alone the collection of the evidence and the relief of the court from the delay and trouble of taking it, and in such cases the authorities cited are decisive of the regularity of the course here taken. Ed. Ref., 40; *Forbes* v. *Willard*, 37 How. Prac. Rep., 193; *Lathrop* v. *Clapp*, 40 N. Y., 328.

2. It is again objected that an attachment for disobedience of an order of the court is not authorized by the act of 1869. Bat. Rev., ch. 24. The power is expressly conferred upon every court of record by par. 4, § 7, which declares that such court shall have power to punish for contempt "all persons summoned as witnesses in refusing or neglecting to obey such summons to attend, to swear, or *answer as such witness.*" It is moreover an essential attribute of a court to enforce by proper process its own lawful orders, and without this power

its essential functions would be paralyzed or destroyed, as was said in *Pain* v. *Pain*, 80 N. C., 322; C. C. P., § 274.

These objections being removed, we are now brought to the consideration of the question as to the obligation of the witness, and his right to refuse to answer the enquiries because, as he states, it may tend to criminate himself.

The proceeding against the defendant is to ascertain if it has assets, where they are and in what they consist, with a view to subject them to the plaintiff's judgment, and the information is refused on the ground that the witness is charged with a conspiracy with others, in fraudulently disposing of the assets. The plaintiff has a clear legal right to all the evidence tending to elucidate the enquiry and aid him in subjecting the property of his debtor to the satisfaction of his claims, and the refusal is only admissible when the disclosure of the witness tends to prove his connection with crime and contravenes the immunity guaranteed in the constitution, Art. I, § 11.

In all criminal prosecutions every man has the right to be informed of the accusation against him, &c., "and shall not be compelled to give evidence against himself." The fair interpretation of this clause seems to be to secure one who is or may be accused of crime, from making any compulsory revelations which may be given in evidence against him on his trial for the offence.

So it is held, that if he has been tried or has been pardoned, or the prosecution is barred by the lapse of time, so that he is no longer exposed to a prosecution, he cannot ask to be protected from making a disclosure material to the pending investigation. In such case the evidence can never be used against him, because he can never be put on trial, and never incur any peril thereby. 1 Whar. Cr. Law, § 808.

While it is extremely difficult to discriminate the cases where the witness may and may not be compelled to testify,

there is a general concurrence of the authorities that the matter is not left to the decision exclusively of the witness. The court must, in the first instance, determine whether the question is such that it may be reasonably inferred that the answer may be self-criminating, and the nature of the answer, necessarily known to the witness alone, he alone must decide. If the information sought may be self-accusing and the witness says it is, he need not answer.

In the trial of Burr, Chief Justice Marshall lays down the rule, which most of the text writers adopt, as the correct, practical rule, in these words: "It is the province of the court to judge whether any direct answer to the question that may be proposed will furnish evidence against the witness. If such answer may disclose a fact, which forms a necessary and essential link in the chain of testimony which would be sufficient to convict him of any crime, he is not bound to answer it, so as to furnish matter for that conviction. In such case the witness must himself judge what his answer will be, and if he says on his oath he cannot answer without accusing himself, he cannot be compelled to answer."

"Whether it (the answer) may tend to criminate or expose the witness, is a point which the court will determine under all the circumstances of the case." 1 Greenl. Ev., § 451. And the same view is taken in Ros. Cr. Ev., and in other authorities.

The principle is very accurately stated by the court in *People* v. *Mather*, 4 Wend., 299, thus: "My conclusion is that when a witness claims to be excused from answering because his answer will have a tendency to implicate him in a crime or misdemeanor, or will expose him to a penalty or forfeiture, then the court are to determine whether the answer he may give to the question can criminate him directly or indirectly, by furnishing direct evidence of his guilt or by establishing one of many facts which together

may constitute a chain of testimony sufficient to warrant his conviction, but which one fact could not of itself produce that result." A very elaborate opinion is given by the court in *Ward* v. *State*, 2 Mo., which is largely extracted and set out in a note to 1 Whar. Cr. Law, § 807.

There, a witness before the grand jury was asked in these words: "Tell who bet at the game of faro, not naming yourself." This game is played with cards by one person as banker against any number of persons, each playing for himself without any common interest among them. The question was held proper and the witness required to answer it.

In the opinion the court say: "The rule then is that the court must judge whether a direct answer would furnish matter for his conviction. If the witness answer that he saw no one bet, or that he saw B and C bet, he furnishes no matter that would be a necessary link in the chain of testimony to convict him of betting at faro." * * Let us put a case where a direct answer to a question would implicate a witness. Thus, did you set up and keep a faro table? Now, here the court can clearly see that if the answer be "yes," the witness would subject himself to the penalties for setting up and keeping a faro table, and if the answer be "no," he cannot so subject himself. But whether the answer be "yes" or "no" is unknown to the court, and in this case the witness must be the judge whether his answer will be yes or no, and he may say he cannot answer the question without criminating himself."

So Cockburn, C. J., says: "It was contended that a bare possibility of legal peril was sufficient to entitle a witness to protection; nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law and that the statement of his belief to that effect, if not manifestly made *mala fide*, should be received as conclu-

sive. With the latter of these propositions, we are altogether unable to agree."

Upon a review of the authorities, we are clearly of opinion that the view of the law propounded by LORD WENSLEYDALE, 10 EX., 701, in *Osborn* v. *The London Dock Co.*, and acted upon by Vice Chancellor STUART in *Side-bottom* v. *Adkins*, 3 Jurist. N. S., 631, 632, is the correct one; and that to entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is no reasonable ground to apprehend danger to the witness from his being compelled to answer." Best. Ev., 125; *Forbes* v. *Willard*, 37 How. Pr. Rep., 193.

But it is contended that a disclosure of the names of persons present engaged in the criminal acts, may furnish the means of procuring testimony to show the witness' own criminal participation, and thus to be made to give evidence or the means of obtaining evidence equivalent in effect to prove his own guilt. The learned opinion of the supreme court of Missouri meets this aspect of the question also and we again quote from it:

"But it is said the witness is bound to tell who bet at the game, without naming himself, when those persons who are named will be examined as to the fact whether he bet, and if the witness is not compelled to name who did bet, then they will remain unknown to the grand jury and cannot be examined whether the witness bet. I understand this doctrine to be grounded more on the fear of retaliation than on any sound principle of law. Will the law permit a man to keep offences and offenders a secret, lest the offenders should, in their turn, give evidence against him? I have looked into the cases cited at the bar and am unable to perceive any principle which ought to vary the foregoing opinion."

It is quite obvious from the principle established that much of the information responsive to the questions, and especially such as does not involve any alleged fraudulent appropriation of the debtor's property, to which the witness may have been privy, the plaintiff is entitled to have. But it is unnecessary to separate that which may not from that which may be withheld, as imputing criminality to the witness, since we are clearly of opinion that as he is protected from the consequences of the discovery and the facts elicited can be given in evidence in no criminal prosecution to which they are pertinent, the plaintiff is entitled to full answer and to all the information which he possesses; and this whether it does or does not implicate himself in the fraudulent transaction. In this we are fortified by decisions upon the same statute *mutatis mutandis* of the court of the state of New York, from which ours is derived. "Whenever the party or witness interrogated," says DANIEL, J., in *Forbes* v. *Willard, supra*, "may have committed a fraud, whether solely or united and combined with others, it is still a fraud within the intent and meaning of the language used in this section, and the necessary disclosure of it by the answer required to be given in the course of the examination for the discovery of the debtor's property, constitutes no legal justification for the party or witness, who on that account refuses or declines to answer the questions propounded to him for that purpose." * * "Neither the debtor nor any witness produced by him or the creditor is at liberty to shield himself from answering, because the answer required will lead to that disclosure." 38 How. Pr. R., 193.

Again, in considering the very section of the code now under examination in *Lathrop* v. *Clapp*, 40 N. Y., 328, the court of appeals say: "The object of this act was to give a judgment creditor, who had been unable to collect his debt by ordinary process of law, a relief in this summary way to

discover his debtor's property, if any he have. This right of discovery was intended to be made full and complete, as is apparent from subsequent portions of the act. The section declares that on examination under this section either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as any other witness. And if there is any force in language, the legislature have intimated in clear and unmistakable terms this examination was not intended to be restricted as here claimed, but that the fullest scope was intended to be given to ferret out fraudulent transfers of property. Else why did they close up this section by "that no person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict of the commission of a fraud, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution."

It is clear that the act contemplates a thorough and searching examination into all fraudulent dispositions of property made to defeat creditors and does not allow the enquiry to be evaded upon any ground of the self-criminating answer which may follow. It must be answered, whatever its bearing upon the witness and however strongly tending to show his fraudulent conduct, because this is necessary to the creditors relief, and fraud finds no favor in the law. But the answers of the witness cannot be used against him in any criminal proceeding whatever, and his constitutional right not to "be compelled to give evidence against himself" is maintained intact and full.

How can this immunity be invaded by requiring disclosures, rendered inadmissible as evidence against him, and when any attempt by subsequent legislation to make the evidence competent would be an *ex post facto* enactment and in conflict with the constitution of the United States?

It is not inappropriate before concluding this discussion

to advert to the fact that the witness characterizes the prosecutions as black-mailing attempts to extort money, of which he could only thus speak upon the supposition of his innocence of the charge preferred, and if he is innocent, it is difficult to understand how any truthful disclosure could harm him or tend to his conviction of crime.

We are therefore of the opinion that the witness must answer the questions, and he cannot shield himself behind his declaration that they involve self crimination. The ruling below is erroneous and is reversed. This will be certified.

Error. Reversed.

WALL and LEAK, Ex'rs, v. J. A. COVINGTON, Ex'r.

Judgment on Official Bond—Amendment.

1. The judgment in a suit on an official bond should be for the penalty of the bond, to be discharged by the payment of the sum found to be due from the principal obligor.
2. Where, by oversight or mistake, judgment is entered in such case for the sum due by the principal obligor to those putting the bond in suit, the error may be corrected on motion at a subsequent term of the court more than twelve months after the rendition of the judgment.

(*Wolfe* v. *Davis*, 74 N. C., 597; *Galloway* v. *McKeithan*, 5 Ired., 12; *Pendleton* v. *Pendleton*, 2 Jones, 135; *Phillipse* v. *Higdon*, Busb., 380; *Farmer* v. *Willard*, 75 N. C., 401, cited and approved.)

MOTION to amend a record heard at Fall Term, 1879, of RICHMOND Superior Court, before *Seymour, J.*

In this action, which was founded on the bond of James A. Covington as administrator of J. P. Covington and Ann C. Leak as executor of John W. Leak, a surety thereto, to recover the distributive shares of the next of kin, a report

of the account of the administration showing assets for distribution to the sum of $5,453.69 was made to the court, and being confirmed, judgment was entered therefor instead of for the penalty of the bond to be discharged on the payment thereof. And more than twelve months after the rendition of the judgment aforesaid, in pursuance of notice from defendant, a motion was made in the cause to amend the entry of judgment on the record so as to make it a formal one for the penalty of the administration bond to be discharged upon the payment of the amount due. The motion was resisted by the plaintiffs, and the judge having drawn up and ordered it to be entered as the judgment that was intended to have been entered, an appeal is taken to this court.

Mr. Platt D. Walker, for plaintiffs.
Mr. John D. Shaw, for defendants.

DILLARD, J. The motion made was not within section 133 of the code, as the proposed amendment *nunc pro tunc* was of an informal judgment entered through no mistake, inadvertence or neglect of the defendants, and the relief asked is not within apt time as prescribed in that section. It could not be for the correction of an error in law in the judgment; for, taking it as a regular judgment, it was not within the power of the court to correct such error after the end of the term at which it was entered. *Wolfe* v. *Davis*, 74 N. C., 597.

Neither can the motion be considered as made to vacate an irregular judgment, which is settled to be one rendered contrary to the course and practice of the court. It was according to the course and practice of the court on confirmation of the report of the referee finding the net surplus for distribution in the hands of James A. Covington as administrator, to render the sentence or judgment of the law upon

the facts found or admitted on the record and conformably thereto, for the recovery of the sums respectively due to the plaintiffs, and the judgment so to be entered is usually entered for the penalty of the bond as a security for the said shares and to be discharged on the payment thereof and the costs of the action. Bingham on judgments, vol. 13, Law Lib., p. 63; 1 William Saunders, 58.

Just such a judgment His Honor finds as a fact was intended to have been entered by the court, and by this we must understand that the judge omitted to make any judgment in writing (which it has been decided is not necessary) as no such claim is disclosed in the statement of the case, and further that he omitted to deliver orally any judgment at all, or if he did, that its terms were misconceived by the clerk and his entry thereof is incomplete and not true. And taking either of these suppositions to be the fact, had not the judge the power to make the amendment complained of?

In *Galloway* v. *McKeithen*, 5 Ired., 12, it is held that a court may amend any omission in the record of a previous term whether it be by act of the court or clerk.

In *Pendleton* v. *Pendleton*, 2 Jones, 135, it was allowed, in a petition for the sale of land of a ward to pay outstanding debts of the ancestor, to draw up and enter in proper form the orders and decrees of the court of which the clerk had only kept loose minutes; and in *Phillips* v. *Higdon*, Busb., 380, it is held that after a suit is determined, a court may allow an amendment when the same is for the purpose of correcting the omission and oversight of an officer in not making an entry as he ought to have made, as a matter of course and as a part of his duty.

Upon these authorities it follows, that if all other things were transacted in the action according to the course and practice of the court except the pronouncing of judgment by the court, it was competent to the judge *nunc pro tunc* to

have entered the proper sentence of the law, or if in fact a judgment was orally delivered and not entered at all or mistakenly entered by the clerk, it was within the power and duty of the court at a subsequent term, by way of making up the record so as to speak the truth, to amend by inserting the judgment which was delivered, or amend the one on the record by making it conform to the terms in which it was pronounced.

The existence of power in the court thus to amend is necessary, because it being decided that the requisition that the judge should sign his judgments is but directory, the entry of judgments by the clerk on the minutes or record of the court is, in legal import under our present system as it was under our former system, not the record or memorial of what the court did, but only as a memorandum from which a record can be made; and therefore in this case, the particular entry of judgment on the record ought not to conclude on the motion to amend, but be merely evidence to enable the court to make up the true record of what was transacted by the court.

In this case the judge finds that the judgment as entered is not the judgment intended by the court, and while it is not seen how the amendment can benefit the defendants or work any detriment to the plaintiffs, we think His Honor had the power to make the record speak the truth, and to that end might draw up and order to be entered on the record a judgment for the penalty of the bond declared on to be discharged on the payment of the sums found due the next of kin and interest thereon and the costs of the action, as was intended. According to the conclusion at which we have arrived, this court ordered in the case of *Farmer* v. *Willard*, 75 N. C., 401, an informal judgment to be corrected and formally entered several terms after its rendition.

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

No error. Affirmed.

DENNIS SIMMONS and others v. BABEL TAYLOR and others.

Removal of Cause to Federal Court.

Under the several acts of congress now in force relative to the removal of causes, a non-resident defendant, sued together with several resident defendants for trespass on land, may have the cause removed, so far as he is concerned, to the circuit court of the United States, leaving the trial to proceed in the state court against the resident defendants.

PETITION for removal of a cause to the circuit court of the United States, heard at Spring Term, 1880, of BERTIE Superior Court, before *Gudger, J.*

The motion was refused, and the defendant appealed.

Mr. Jas. E. Moore, for plaintiffs.

Mr. E. G. Haywood, for defendant.

SMITH, C. J. The defendants, one of whom is a citizen of Virginia and the other of this State, are sued by the plaintiffs, all of whom are citizens of North Carolina, for trespasses alleged to have been committed upon their lands. The defendants in separate answers deny the plaintiff's right to the land in dispute, and assert title in the defendant Taylor, by whose authority and in whose service the defendant Robeson was acting.

At the return term of the summons Taylor applied by petition for the stay of proceedings in the cause and its re-

moval to the circuit court of the United States, on the ground of his own citizenship in Virginia, and because the principal controversy is between the plaintiffs and himself, and setting out the other facts material to the motion. No objection is made to the form of the application, and the simple question, ruled adversely to the defendant in the court below, is presented—whether the entire cause, or so much of it as involves the controversy between the plaintiffs' and himself, is removable under the acts of congress.

The 12th section of the judiciary act of 1789 authorized a defendant under the limitations therein mentioned, when sued in a court of the state of which the plaintiff was a citizen and himself a citizen of another state, to have the same removed to the circuit court of the United States, if he made his application at the return term of the writ or process.

The act of July 27, 1866, extended the right of removal to one of several defendants, although the others might be citizens of the same state with the plaintiff, if application was made before the trial, when, so far as it relates to him, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy so far as concerns him, without the presence of the other defendants as parties in the cause. But the suit as to the other defendants remains in the state court and may be prosecuted there.

The amendatory act of March 2, 1867, authorizes a removal whenever there is a suit depending in the state court between one of its citizens and a citizen of another state, whether the latter be plaintiff or defendant, when he files an affidavit stating that he has reason to believe and does believe that from prejudice or local influence he will not be able to obtain justice in the state court. Rev. Stat. of U. S, § 639. So the law remained until the passage of the act

of March 3, 1875, the second section of which is in these words:

"That any suit of a civil nature at law or in equity, now pending or hereafter brought in any state court, when the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming land under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the circuit court of the United States for the proper district. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the circuit court of the United States."

In his analysis of the act of 1866, Judge DILLON in his monogram or short treatise on the Removal of Suits (19) says the conditions of removal are these:

1. The suit in the state court must be by a plaintiff who is a citizen of the state wherein the suit is brought.

2. It must be against a citizen of the same state and a citizen of another state as defendants.

3. The amount in dispute must exceed the sum or value of five hundred dollars besides costs.

4. The removal must be applied for before the trial or final hearing in the state court.

And that in such case the non-resident defendant may have the cause removed (not wholly) but only so far as it

relates to himself, if it be a suit brought to restrain or enjoin him, or is a *suit in which there can be a final determination of the controversy* so far as concerns him without the presence of the other defendants as parties in the cause. In the opinion of the author referred to, the act of 1875, which repeals the former acts in conflict, does not repeal the substantial provisions of the act of 1866, and that a case coming under its operation may be removed as before. *Ib.*, 28.

If we accept this as a correct interpretation of the state of the law, the defendant Taylor is clearly entitled to remove so much of the action as relates to himself, as he, a citizen of Virginia, is sued by citizens of North Carolina with his co-defendant a resident of the latter state in an action several in its nature, and which can be maintained against either, and therefore in the language of the act "there can be a final determination of the controversy as to him without the presence of the other, and the suit may proceed against the latter." *Sewing Machine Cos.*, 18 Wall., 583; same case, 110 Mass., 70.

The next enquiry is whether under the act of 1875, the whole cause is removable at the instance of the non-resident defendant entitled to remove it as to himself.

The operative and distinguishing words of this enactment are that the entire suit may be removed when there is a "controversy which is wholly *between citizens of different states*," and that although there may be other distinct controversies with those who, if they were the only plaintiffs or only defendants, would not be entitled to the removal.

This act came under review in the case of *Taylor* v. *Rockefeller*, in the United States circuit court for the western district of Pennsylvania, reported in 18 Am. Law Regr., 298, before Mr. Justice STRONG of the supreme court and Judge MCKENNON, in which an elaborate opinion concurred in by both, is given. After remarking that the act adopts the

language of the constitution and goes to the extreme limit of the jurisdiction authorized to be conferred, he proceeds to discuss the provisions of the act and says: "In many writs there are numerous subjects of controversy, in some of which one or more of the defendants are actually interested, and other defendants are not. The right of removal is given when any one of these controversies is wholly between citizens of different states and can be fully determined as to them, although there may be other defendants actually interested in the controversies embraced in the suit."

In *Peterson* v. *Chapman*, 13 Blatch., 395, the action was brought by citizens of New York against parties, one of whom resided in New York and the other in Connecticut, and the cause after removal was remanded to the state court on the ground that the controversy was not between citizens of different states.

In *Carrahan* v. *Brennan*, in the circuit court of the northern district of Illinois, it was held that the removal is allowable only when the controversy is so completely between citizens of different states that its termination as to them will settle the whole suit, and not a part of it can be removed.

And so Mr. Justice BRADLEY expressed the opinion (*Gerardy* v. *Morse*, 4 Am. Law Times, 387,) that under the act of 1875, all the plaintiffs need not have a different citizenship from all the defendants, and if some of the plaintiffs and defendants are citizens of the same state, the removal must be sought by all the plaintiffs or all the defendants, and that one alone could not remove the cause; but if all the plaintiffs and all the defendants are citizens of different states, any one of them may remove.

Amidst these diverse views and in the absence of any authoritative construction of the act to guide, we are required ourselves to ascertain its meaning and effect. The action before us is in its nature severable and for trespasses of

which both, neither or only one defendant may be guilty; and the disposal of the issue as to one in no manner affects the liability of the other, when they are allowed separate trials. The case is clearly within the contemplation of the act of 1866 and admits of severance and removal of so much of the cause as relates to the non-resident defendant. The application does not seem to fall within the meaning of the latter act, which authorizes the removal of the entire cause, when there shall be a controversy which is "*wholly between citizens of different states.*" This is not such a controversy; it is one and the same and equally with both defendants divisible into parts, but the same against each. While then the non-resident may have his motion granted for himself, the resident defendant is left to combat the plaintiffs claim in the jurisdiction first attaching. The cases in our own reports do not aid us in the enquiry.

We are therefore of the opinion that the refusal of the court to remove on the application of the defendant Taylor the case as to him was erroneous and it is reversed. This will be certified to the court below.

Error. Reversed.

O. R. HOLLINGSWORTH v. JAMES A. HARMAN and wife.

Married Woman—Power of Attorney—Registration.

A power of attorney, given by a married woman to dismiss an action concerning her land, need not be registered to give it validity.

Boylston Ins. Co. v. *Davis*, 74 N. C., 78; *Sims* v. *Goettle*, 82 N. C., 268; *Day* v. *Adams*, 63 N. C., 254; *Petteway* v. *Dawson*, 64 N. C., 450, cited and approved.)

HOLLINGSWORTH *v.* HARMAN.

MOTION to dismiss an appeal, heard at June Term, 1880, of THE SUPREME COURT.

Mr. D. J. Devane, for plaintiff.
Mr. E. G. Haywood, for defendants.

SMITH, C. J. To the complaint filed for a judgment of foreclosure and sale of the mortgaged lands therein described, the feme defendant interposed a demurrer, assigning certain causes therefor, which was overruled and she appealed. Upon the hearing of the cause, the plaintiff's counsel produced an instrument under the hand and seal of both defendants and proved before the clerk of New Hanover, with the privy examination of the wife, asking that the action may be dismissed at their costs, and stating that the subject matter of the contest had been compromised and settled between the parties. The introduction of this paper is objected to by the counsel of record for the appellant for want of registration, which, as he insists, is necessary to its validity under the law. Bat. Rev., ch. 35, §§ 14, 15; ch. 69, §§ 27, 28.

No objection is made to the genuineness of the instrument, or want of proof of its due execution, but its admission is opposed on the sole ground that it has not been registered. We think the objection untenable. "Every attorney who shall claim to enter an appearance for any person shall, upon being required to do so, produce and file in the clerk's office of the court in which he shall claim to enter an appearance, a power or authority to that effect, signed by the persons or some one of them for whom he is about to enter an appearance, or by some person duly authorized on that behalf; otherwise he should not be allowed to do so." Rev. Code, ch. 31, § 57 (16). This rule of practice not being inconsistent with the present system, is still in force. *Boylston*

Ins. Co. v. *Davis*, 74 N. C., 78; *Sims* v. *Goettle*, 82 N. C., 268, and is recognized in *Day* v. *Adams*, 63 N. C., 254.

A similar intervention was proposed in *Petteway* v. *Dawson*, 64 N. C., 450, but was disallowed because the plaintiff's counsel produced a later and contradictory authority from the client.

As there are cases where a feme covert may sue or be sued alone, and need in no case prosecute or defend by guardian or next friend, (C. C. P., § 56) and her husband on leave of the court and with her consent defend in her name and behalf, (Bat. Rev., ch. 69, § 15,) it would seem unavoidably to follow that she has capacity to accept or refuse his proffered aid to employ an attorney to prosecute her action and to make her defence. This power is necessary and incidental to her capacity to sue and be sued. Here, both her husband and herself unite in asking for the dismissal of the suit upon grounds sufficient when made known to the court in any other manner, for the court will not pass upon a controversy which has been settled and ended.

The writing does not confer nor profess to confer any authority to dispose of or affect her land, but simply to put an end to a pending suit, and the same legal competency which where her interest requires may prolong the litigation is also sufficient to terminate it.

The action must therefore be dismissed at the defendants costs, as requested, and it is so adjudged.

PER CURIAM. Action dismissed.

CHLOE POWERS v. VIRGINIA KITE and LAWSON POWERS.

Canons of Descent—Inheriting from Illegitimates.

Upon the death of an illegitimate son (intestate, married and without issue) leaving a legitimate half-sister, born of the body of the same mother, his real estate descends to such sister by operation of rule eleven, Bat. Rev., ch. 36, to the exclusion of the widow of such son. By rule eight, the widow is his heir *only* when there is no one who can claim as heir to him.

(*Arrington* v. *Alston*, N. C. Term Rep., 310; *Flintham* v. *Holder*, 1 Dev. Eq., 345; *McBryde* v. *Patterson*, 78 N. C., 412, cited and approved.)

CIVIL ACTION to recover Land, tried at Spring Term, 1880, of CURRITUCK Superior Court, before *Graves, J.*

The case was submitted to the judge upon the following facts agreed: Silas Powers, being the owner of the land in dispute, in 1850 married the plaintiff and died in 1862. He was the illegitimate son of Nancy Powers, who died before the said Silas. The defendant Virginia Kite was the legitimate daughter of the said Nancy; and Lawson Powers, the other defendant, claimed a part of the land in controversy, by purchase from the said Virginia. His Honor being of opinion with defendants, rendered judgment accordingly, and the plaintiff appealed.

Mr. C. W. Grandy, for plaintiff.
Messrs. Pruden & Shaw, for defendants.

ASHE, J. The only question presented by the record is, who is entitled to the land? the plaintiff who is the widow of Silas Powers, or Virginia Kite, his legitimate half-sister by the mother? The plaintiff, as widow of Silas Powers, claims that she is entitled to the land under the 8th rule of

descents, which is as follows: "When any person shall die, leaving none who can claim as heir to him, his widow shall be deemed his heir, and as such shall inherit his estate." Bat. Rev., ch. 36.

If this were the only law applicable to the case, the plaintiff would be clearly entitled to recover, but the defendant says she is the rightful heir of the said Silas, and has the right to his estate by virtue of the 11th rule, which declares that "illegitimate children shall be considered legitimate as between themselves and their representatives, and their estates shall descend accordingly, in the same manner as if they had been born in wedlock, and in case of the death of any such child or his issue, without leaving issue, his estate shall descend to such person as would inherit if all such children had been born in wedlock." This rule has received an interpretation by repeated decisions of this court, which it is now too late to controvert. The construction given to the rule is, that if an illegitimate or natural born child shall die intestate without leaving any child or children, his or her estate shall descend to and be equally divided among his or her brothers and sisters, born of the body of the same mother and their representatives, whether legitimate or illegitimate, in the same manner and under the same regulations and restrictions as if they had been born in wedlock. This construction was first given to the act of 1779 by the decision in the case of *Arrington* v. *Alston*, Term Rep., 310, and the rule is substantially the same as the act, only modified to make it applicable to real property by omitting so much of it as has reference to personal property. This case was followed by *Flintham* v. *Holder*, 1 Dev. Eq., 345, in an able and exhaustive opinion by that eminent jurist, Chief Justice RUFFIN, who reconsidered the above case and affirmed the decision therein made, holding that when there are children of the same mother, some born in wedlock and others illegitimate, the latter class may inherit

to each other, and the former from the latter. And this case was again followed by the more recent decision of this court in the case of *McBryde* v. *Patterson*, 78 N. C., 412, in which the two above cases are cited, commented on and approved; and they clearly establish the principle, that a brother or sister, born in wedlock, is heir to an illegitimate brother or sister, born of the body of the same mother, who dies intestate and without issue. And if that be so, then Virginia Kite is the heir at law of Silas Powers, and it follows that the widow of Silas must be excluded from the inheritance, because the rule by virtue of which she claims the land expressly provides that she shall be heir *only* when there is no one who can claim as heir to him.

The judgment of the court below, being in accordance with this principle, is correct and must be affirmed.

No error. Affirmed.

GEORGE HOWARD v. OLD DOMINION STEAMSHIP COMPANY.

Contract of Affreightment—Place of Delivery—Liability of Carrier.

In an action for damages against a steamboat company it appeared that the plaintiff put on board one of defendant's boats certain iron to be conveyed to one W at Greenville; that there was an understanding between the defendant's agent and W (of which plaintiff was ignorant) that all freight transported for him should be landed at a place on the river bank near his house, and that the iron was landed there; that shortly after W refused to pay the freight bill and notified defendant's agent that he should not take the goods away; that afterwards one B without authority from W was permitted to pay the freight bill, and

took the iron away; that the plaintiff never received any information as to the disposition of the iron; *Held*, that plaintiff was entitled to recover.

CIVIL ACTION for Damages, tried at Spring Term, 1880, of EDGECOMBE Superior Court, before *Gudger, J.*

Judgment for defendant, appeal by plaintiff.

Messrs. Howard & Nash, for plaintiff.
Mr. W. B. Rodman, for defendant.

SMITH, C. J. In January, 1878, the plaintiff put on board the company's steamer, a passenger and freight boat running on Tar river between Tarboro and Washington passing the town of Greenville, certain irons to be conveyed and delivered to William Whitehead at the last named place. There was an understanding between the defendant's agents in charge of their steamer and Whitehead that all freight transported on the boat for him should be landed at Clark's banks on the river, near which he resided, and notice given by three blasts from the steamer's whistle, and the articles were put ashore in accordance with this agreement. Whitehead a few days after, on being presented by a collecting agent of the company with bills for the goods and for freight, refused to pay either, saying he had ordered no such goods, should not take them nor pay for their transportation. The iron was then at Clark's landing and remained there a week longer when one Butts without authority from Whitehead or the plaintiff, called on the captain of the boat, paid the freight charges and took and carried away the goods. No information was given to the plaintiff of the disposition of the iron, nor did he know of the special arrangement with Whitehead as to the manner and place of delivery of goods intended for him. The

action is for damages for the loss of the irons and the breach of the contract of carrying.

The only question to be decided is whether the variation in the place of delivery, under the special arrangement with the consignee, of freight intended for him is admissible against the owner and relieves the defendant from liability to the plaintiff. The irons did not belong to Whitehead, were not sent by his order, nor consigned by his consent, and can scarcely come within the provisions of an agreement applicable to his own property only. The contract of affreightment was not under his control, nor any deviation from its terms allowable without the plaintiff's assent. It was made with the plaintiff alone, and explicitly required the transportation and delivery at Greenville and not at any intermediate point. The defendant's agent knew of the consignee's refusal to receive the goods and to pay for them or the freight due, and makes no communication of the fact to the plaintiff, nor any effort to secure the safety of the goods, although the boat made trips on alternate days between the termini of its established route. The freight is at last received from a stranger and the goods, after remaining an entire week on the river bank unprotected, pass, without objection, into his possession, are taken away and converted to his own use. Had they been carried to Greenville and refused, it would have been the clear duty of the carrier to deposit them in a warehouse or other place for safe keeping. This security was not afforded on the river shore where they were left and suffered to remain, exposed and without any protection.

In our opinion the private and special arrangement with Whitehead as to his property (and that the irons were not his was made known when he repudiated the consignment) cannot excuse the defendant in his thus dealing with what belonged to the plaintiff, from the obligation of the contract with him, and still less for the subsequent inat-

tention and negligence in providing for its safety, or giving information to the plaintiff to enable him to do so. When the consignee cannot be found or declines to receive the goods conveyed, the carrier must still take care of them, at least for a reasonable time and communicate with the owner. 2 Redf. Rail., 66.

The case of *Sweet* v. *Barney*, 23 N. Y., 335, seems to be repugnant to the views we have expressed and the court there say: "The consignee is the presumptive owner of the thing consigned, and when the carrier is not advised that any different relation exists, he is bound so to treat the consignee."

In this case the package of money was not placed in charge of the officers of the bank at their banking house, but was put in possession of the porter at another place in conformity with its usages and an often recognized agency of the porter to receive and deliver funds sent to the bank, and it was stolen from him. It is held after three arguments, by a majority of the court, that the defendant did not deliver the money over and was responsible in damages for the loss. There is a strong dissenting opinion of Judge DAVIES, in which, referring to the defence set up and sustained by the other judges, he says: "It would seem to be a sufficient answer to the defence to say that such was not the contract made by the defendants with the plaintiffs, and that they have no legal right to make a new contract, or do something which they contend is equivalent to that undertaken to be done by them. There is no pretence that the plaintiffs were parties to any such modification of the contract made, or had any knowledge of it, or in any manner assented to it. Nor can it be alleged that the custom of the defendants in delivering packages to the parties at places other than the bank can have any effect on the rights of the plaintiffs. As between the defendants and the bank it has significance, as to the parties to the contract it is *res*

inter alios acta, and the plaintiffs are not deprived of any of their rights by reason of it."

This is a forcible presentation of the matter, and without giving it full concurrence, we may say that our case has an essential and distinguishing feature in that there has been no delivery to any one, but an abandonment upon an exposed river bank, without a provision then or afterwards, where its perils were known, for the preservation or safety of the property, and we will add almost an implied assent to its removal and conversion by a stranger. The unreasonable pretext for this violation of duty and utter indifference to the owner's interests is put upon an arrangement with one who disavows the entire transaction in regard to his own transported property.

We think upon every principle of law and for reasons of sound policy, the defendant is responsible in damages to the plaintiff. The judgment is reversed, and judgment will be entered for the plaintiff for the agreed value of the lost goods as stated in the case.

Error. Reversed.

JACOB McCRAW v. MAGGIE GILMER, Adm'x.

Claim and Delivery—Unconditional Sale.

A practising attorney offers to the plaintiff that if he will send him a cow, he will perform certain professional services for him (plaintiff); before the services can be performed the attorney dies; *Held*, that it was an unconditional sale, and in an action of claim and delivery for the cow against the personal representative of the attorney, the plaintiff could not recover.

McCRAW *v.* GILMER.

CIVIL ACTION of claim and delivery, begun before a justice of the peace and tried on appeal at Spring Term, 1880, of SURRY Superior Court, before *Buxton, J.*

A jury trial was waived by the parties and by consent the case was tried by His Honor upon the following state of facts: The intestate of the defendant was a practising attorney in the county of Surry and sent to the plaintiff a letter as follows, to-wit:

Oct. 25th, 1877. Mount Airy, N. C.

MR. JACOB McCRAW—*Sir:*

If you will send me the cow I will save you eighteen dollars in the settlement of the case against your son, and I think with some effort and trouble I can save you even more than that, which I will do for you. Your wife told me that was what you wanted with the money.

(Signed) Yours respectfully,

James C. Gilmer.

In consequence of the offer made in this letter, the cow within a few days after its receipt by McCraw, was sent to the house of J. C. Gilmer, who by reason of sickness of which he shortly afterwards died, was unable to attend the next term of the court, and failed to take any steps towards reducing the costs referred to in the letter, and the costs in full were collected out of the plaintiff by due process of law.

The cow was worth eighteen dollars and is still in the possession of the defendant, who claims her as belonging to the estate of her testator, J. C. Gilmer.

After paying the costs, the plaintiff demanded the cow of the defendant before bringing suit, and offered to take eighteen dollars for her, but failing to get either cow or money, instituted this action. The estate of Gilmer is insolvent.

The plaintiff claimed that the sale was conditional, dependent upon the performance of services by Mr. Gilmer, which were never performed, and that he was entitled to recover possession of the cow. The defendant, on the other hand, contended that the sale was absolute and that the title passed with the delivery, and that she was entitled to retain the possession. Judgment was rendered in behalf of the plaintiff, from which the defendant appealed.

No counsel for plaintiff.
Messrs. Watson & Glenn, for defendant.

ASHE, J. This court cannot take into its consideration the fact of the insolvency of the defendant. The sole question is, did the title to the cow pass absolutely to the defendant's intestate with the delivery of her to him, or was the sale conditional, and did the title remain in the vendor.

There is error in the judgment of the court below. We are unable to discover the conditional character of the transaction. It is an absolute unconditional sale of the cow. The defendant says to the plaintiff, send me your cow and I will perform for you certain services. The cow is sent, is delivered upon this contract into the actual possession of the defendant's intestate. There is no more condition in this sale than in the ordinary sale of a chattel on a credit; as where one buys a horse and promises to pay the price at a future day, and the horse upon the faith of the promise is at once delivered into the possession of the vendee, it never has been contended that on failure of the vendee to pay on the day agreed upon, that the vendor could retake the horse or maintain an action for it, for it is well settled in such a case that by the delivery of the horse into the actual possession of the vendee, the title of the vendor is gone and the horse has become the property of the vendee, and the vendor has agreed to take for it the vendee's promise to pay the

price. So that if the vendee fail to pay at the time agreed, the vendor's remedy is limited to an action for the breach of that promise, the damages for the breach being the amount of the price promised with interest. Benjamin on Sales, 622, 625.

There is error. The judgment in the court below is reversed. Let this be certified to the superior court of Surry county, that further proceedings may be had in conformity to this opinion and the law.

Error. Reversed.

SAMUEL WATKINS v. WARREN OVERBY.

Lien of Attachment—Homestead.

The lien of an attachment levied upon the land of a non-resident debtor is paramount to the right of homestead therein acquired by the debtor by becoming a citizen of the state prior to the rendition of judgment in the action.

(*McKeithan* v. *Terry*, 64 N. C., 25; *Ladd* v. *Adams*, 66 N. C., 164, cited and approved.)

MOTION in the Cause, heard at Spring Term, 1880, of GRANVILLE Superior Court, before *Seymour, J.*

At the commencement of his action, the plaintiff sued out a writ of attachment against the estate of the defendant, who had removed from the state and was then residing in Virginia, and it was levied on November 8th, 1875, upon certain real estate in Granville. At spring term, 1876, the defendant appeared and put in his answer to the complaint, and at spring term, 1880, the plaintiff recovered judgment for his debt. After the levy, the defendant returned and be-

came and was again a resident of said county at and before the rendition of the judgment.

The plaintiff moved the court for a writ of *venditioni exponas*, to sell the attached lands free from any claim of homestead on the part of the defendant. The court refused the motion and ordered the clerk to issue the writ authorizing and directing the sheriff to sell the excess only after an allotment, from which judgment the plaintiff appeals.

Mr. M. V. Lanier, for plaintiff.

Messrs. Reade, Busbee & Busbee, J. B. Batchelor and *L. C. Edwards*, for defendant.

SMITH, C. J. The only question presented for our determination, is whether the right of homestead acquired by the return and residence of the debtor is paramount and displaces the lien of the precedent attachment. The constitution and the laws pursuant to it exempt from sale under execution or other final process for debt, the homestead of the debtor, not exceeding in value the sum of one thousand dollars, owned and occupied by any resident of this state." Art. X, § 2; Bat. Rev., ch. 55.

The right to the exemption is inseparable from residence and not existing at the time of the levy, the lands of the debtor were then liable to seizure and sale for the satisfaction of the plaintiff's debt, and equally to the process of attachment by which they are appropriated and secured to meet his recovery. Under the repeated adjudications of this court prior to the reversal by the supreme court of the United States of the decision in *Edwards* v. *Kearzey*, the homestead provision was declared to be retrospective as well as future in its application to debts. Previous to the reversal, this court held that while the lien of an execution running back to its teste, but which was levied after the adoption of the constitution did not defeat the debtor's

homestead, the specific lien created by a prior levy did have that effect. *McKeithen* v. *Terry*, 64 N. C., 25; *Ladd* v. *Adams*, 66 N. C., 164.

In the absence of more direct adjudications upon the point, we have extended our enquiries to those of other states whose laws are substantially like our own, and vary in requiring selection and actual occupancy of the land as a homestead by the insolvent debtor. The results of the examination we propose to give in citations from some of the adjudged cases.

In *Elston* v. *Robinson*, 21 Iowa, 531, it is decided that the judgment created a lien upon the land of the debtor which he could not divest by subsequently using and occupying for the purpose of a homestead.

In *Bullen* v. *Hiatt*, 12 Kan., 98, VALENTINE, J., thus expresses the opinion of the court: "The main question in this case seems to be whether the homestead right defeats the attachment lien. We think it does not. The attachment lien existed nearly three months before the homestead right was created, and while homestead laws are everywhere to be considered favorably, yet they are not to be so construed as to destroy pre-existing rights. Of course the defendant in this case had a right to make the land his homestead, but he could do so only in subjection to the attachment lien. An attachment lien, like other liens, though not an estate in the land, is such a valid interest therein that it cannot be affected by any subsequent act of the debtor."

In a later case the debtor acquired a homestead right after the attachment was levied, and within four months after the levy he was adjudged a bankrupt. The court was of opinion that the land covered by the homestead being exempt under the laws of the state, did not pass to the assignee, but remained under the lien to be enforced in the courts of the State. *Robinson* v. *Wilson*, 15 Kan., 595.

The doctrine is explicitly laid down and sustained by forcible reasoning by Chief Justice GILFILLAN in the supreme court of Minnesota, as follows: "The proposition that property may be seized, attached or levied upon to answer the debts of the owner includes the further proposition that such seizure, attachment or levy may be made effectual by a sale or any subsequent acts necessary for that purpose. The liability to seizure implies the liability to sale. The right to sell is fixed by the seizure. Such right is from the time the lien attaches by the seizure a *vested right and property.* In this respect there is no difference between a lien secured by a levy of attachment and one secured by the docketing of a judgment or the levy of an execution, except that it may be defeated by a dissolution of the attachment or a failure to obtain judgment." *Kelly* v. *Dill*, 23 Minn., 435.

From numerous adjudications cited, the author of a recent work on this subject declares this result: "A valid lien placed on land before it acquires the character of a homestead will not be afterwards impaired by the debtor occupying such land as his homestead. If the legislature of a state cannot divest such a lien, it is clear that a private individual cannot." Thom. on Hom. and Ex., § 317.

This is in our opinion a concise and correct exposition of the law and needs no further illustration in its support. The constitutional exemption looks to the protection and preservation of the land upon which the debtor has made or may make his home for himself and family against the consequences of his own improvidence or the vicissitudes of business, and that his home may be cherished and improved, and this policy finds favor in the past adjudications of the court. But the right of the creditor to subject property not thus exempt, vested and fixed by the levy of the process of the law, and thus set apart and appropriated to his debt is as sacredly guaranteed in the same constitution

and in the sense of natural justice. We are not at liberty to subvert or disturb the one in order to let in the other right.

There is therefore error in the ruling of the court below and the plaintiff is entitled to his motion. Judgment is reversed and this will be certified.

Error. Reversed.

JAMES A. POPE v. WILLIAM A. MATTHIS.

Tenants-in-Common—Eviction—Statute of Limitations.

1. An action by one tenant in common for partition is barred by seven years adverse possession by an alienee of the other tenant in common under a deed purporting to convey the whole land.
2. Where the alienee of one tenant in common evicted his co-tenant by action of ejectment and thereupon the evicted tenant entered into possession of the land as the lessee of the other; *Held*, that the statute of limitations began to run from the date of the eviction and the evicted tenant was barred after seven years.

(*Covington* v. *Stewart*, 77 N. C., 148; *Day* v. *Howard*, 73 N. C., 1; *Black* v. *Lindsay*, Busb., 467; *Burton* v. *Murphy*, N. C. Term Rep., 259; *Murray* v. *Shanklin*, 3 and 4 Dev. & Bat., 289; *Reed* v. *Earnhart*, 10 Ired., 516; *White* v. *Cooper*, 8 Jones 48, cited and approved.)

(SMITH, C. J., *dissenting.*)

SPECIAL PROCEEDING for Partition of Land heard on appeal at January Special Term, 1880, of SAMPSON Superior Court, before *Gilmer, J.*

The plaintiff alleged that he and defendant are tenants in common of the land, and the defendant sets up sole seizin and title in himself. Upon the facts stated in the opinion of this court, the judge below gave judgment for the plain-

tiff, and ordered a *procedendo* to issue to the probate court, and the defendant appealed.

Mr. J. L. Stewart, for plaintiff.
No counsel for defendant.

DILLARD, J. From the special verdict in this case we collect the following facts material to our decision: One Waters being seized of the land conveyed it in 1822 to Stephen Pope. Stephen Pope conveyed in 1833 to Sampson Bennett. Sampson Bennett conveyed in 1842 to the plaintiff James A. Pope and Bennett Pope. In 1856, under a judgment and execution against Bennett Pope and Stephen A. Pope, the interest of Stephen and Bennett Pope in said land was sold and conveyed by a sheriff to Rice P. Matthis, and in 1866 Rice P. Mathis conveyed to Henry A. Bizzell in trust several tracts of land, and among them one described as "one undivided moiety of one other tract of one hundred and twenty-five acres, both tracts purchased at sheriff's sale, as by reference to the sheriff deed therefor will more fully appear." On the 1st day of February, 1869, Rice P. Matthis conveyed to defendant under the description "all the land known as the Pope land and conveyed by Geo. W. Crumpler, former sheriff, to Rice P. Matthis, being all that is not conveyed in a deed of trust to Dr. Henry A. Bizzell, made by said Rice P. Matthis, and being one undivided moiety of said tract of one hundred and twenty acres," and to this is added a further description of the whole tract by metes and bounds, containing the whole land. On the 19th of February, 1869, Henry A. Bizzell conveyed to defendant the same moiety of land which Rice P. Matthis had conveyed to him in trust in 1866 and by the same description "one undivided moiety of one other tract of one hundred and twenty-five acres, both tracts purchased at sheriff's sale as by reference to the sheriff deed therefor will more fully ap-

pear," and in this deed also, there is a further description by metes and bounds containing the whole tract. James A. Pope was in possession from the date of Sampson Bennett's deed to him and his brother Bennett Pope in the year 1842 until he was ejected on the 7th of May, 1870, under an action of ejectment begun by defendant in 1867, and after that day he rented and still occupied as tenant to defendant up to 1st of May, 1872, when he abandoned the possession, and within seven years thereafter, but after seven years from the 7th of May, 1870, brought this action for partition, claiming to be a tenant in common with the defendant.

Upon the verdict the court below held the plaintiff to be a tenant in common with defendant, and as such to be entitled to partition, and ordered a *procedendo* to issue to the probate court to carry out the partition, and from that judgment defendant appeals.

It is established that as between the original tenants in common, or between one and the alienee of another by a deed purporting to convey the whole, the possession of one is in law the possession of all, and in such case neither can acquire a sole ownership by mere presumption of ouster and of title upon a possession short of twenty years, nor then except it be adversary and without acknowledgment of the title of the co-tenant, and without demand or claim by the co-tenant of rents, profits or possession, such co tenant being free from disability. *Covington* v. *Stewart*, 77 N. C., 148; *Day* v. *Howard*, 73 N. C., 1; *Black* v. *Lindsay*, Busb., 467.

In this case the claim of a sole title by defendant is not based and could not be, on the idea of a title by presumption, because less than twenty years, the period presented in such case, has not elapsed since the 7th day of May, 1870, when the plaintiff was put out by the sheriff, and therefore our attention is confined to the enquiry, whether the lapse

of seven years of adverse possession by the defendant, who is an alienee of Bennett Pope, the original companion of plaintiff, under color of title, counting the two years for which plaintiff occupied after being ejected by the sheriff, is a bar to plaintiff's present claim.

It is settled that a seven years adverse possession by the alienee of one tenant in common, under color of title following continuously upon an actual ouster of his companion, is a bar to the ousted party. *Burton* v. *Murphy*, N. C. Term Rep., 259; *Murray* v. *Shanklin*, 3 and 4 Dev. & Bat., 289; *Day* v. *Howard, supra.*

Such a possession, the title being out of the state, is not only a bar to all remedy of the former co-tenant of the alienee, but of all others, being of course free from disabilities, and it is a title sufficient in law to defeat any action against the possessor, or maintain any action by him. *Reed* v. *Earnhart*, 10 Ired., 516.

Here the defendant had the requisite color of title in deeds executed to him by Rice P. Matthis and Dr. H. A. Bizzell, in 1869, and he turned plaintiff out of possession and himself was put in under his writ of possession on the 7th day of May, 1870. So that it is apparent that more than seven years elapsed from the day the defendant was put in possession before the institution of this action. But on the same day the defendant was put in possession by the sheriff, the case of appeal states the plaintiff rented the land of defendant, and under the lease occupied until the 1st of May, 1872, when he abandoned the possession, and from that time to the beginning of this suit there has been less than seven years, and so the plaintiff is not barred unless the defendant, for the two years that plaintiff occupied by agreement with him, can be considered as holding in hostility to the plaintiff.

The statute of limitations fixed on seven years as a reasonable time, at the end of which the title being out of the

state, the person in possession claiming adversely to others and exclusively for himself under color of title, should be quieted in his title against the true owner and all others, if free from disability. And in order to ripen possession into title under this statute, it is necessary, title being out of the state, that possession be taken upon a claim of right, adversely to others and exclusively for the possessor in his own person or by tenants and servants, and so continued for the statutory period, and under circumstances to invite the assertion of claim by others by entry or action.

Here a recovery was had against the plaintiff in an action of ejectment brought by defendant, and plaintiff was put out and defendant put in possession on the 7th of May, 1870, and from and after the instant of delivery of possession to defendant on that day, the defendant's possession began, adverse and exclusive in its character, (for plaintiff was put out,) and in hostility to plaintiff's claim as half owner in fee and so known unto him, and the statute of limitations *eo instanti* began to run, and at the end of the time prescribed barred this action, unless plaintiff can bring himself within some of the exceptions to the statute, which are infancy, coverture, insanity, imprisonment or absence beyond seas. There is no claim that plaintiff is within either of these exceptions, and the only reason urged by him to prevent the complete bar of the statute, is that for two years of the seven he was in possession under a lease from the defendant, and that because during those two years he could not sue himself or make entry, they are not to be estimated as a part of the statutory period. It is a rule of law without exception, that the statute of limitations, when it once begins to run, runs on and is not stopped by disabilities of any sort which occur after the statute is put in motion.

When plaintiff was ejected by defendant, he was put upon notice of a claim hostile to him and exclusive, and defendant was forthwith exposed to his action or entry as a means

of regaining his possession. The acquiescence of the plaintiff in such possession, whether by non-action or admission of its rightfulness, for the period of seven years, in our opinion, tolled his right of entry and barred his action. The statute had said to defendant, having a color of title, that a possession for seven years for himself and hostile to all others, should bar the owner, being free from disability, and thus perfect his title; and here the plaintiff seeks to defeat the statute, not in the legitimate mode by action or entry, but by his own act of leasing from the defendant for a part of the time necessary to complete the bar. If this can be, then plaintiff might have rented and continued to do so all his life, and then his heirs, or abandoning the possession, might claim to share with defendant in the land as a tenant in common, and there the policy of the law in providing for quiet and repose to defendant at the end of seven years adverse possession would be completely defeated.

The defendant's entrance into the possession was adverse and exclusive, and the statute then began to run, and the only mode by which plaintiff could restore himself to his possession, as a tenant in common, was by an action of ejectment, or by an entry. And if by the latter mode, then only by an entry of claim of right in himself. *White* v. *Cooper*, 8 Jones, 48.

But he did neither. In place thereof he went into and held possession in recognition of the right of defendant, and thus in legal effect his possession was the possession of defendant, and therefore is to be estimated as a holding by defendant upon his sole title and as a part of the time required to complete the bar of the statute. The voluntary act of plaintiff in renting of defendant instead of suing him or entering on him, ought not in reason to delay the ripening of defendant's title under his color intended for him by the law.

The conclusion is, that the title of the plaintiff is barred

by the adverse possession of the defendant for seven years under color of title, and the judgment of the court is reversed and this will be certified to the end that judgment be entered for defendant on the issue sent up from the probate court conformably to this opinion and a certificate thereof be sent down to the probate court in which the petition for partition is pending.

SMITH, C. J., *dissenting.* I am constrained to enter a dissent to so much of the opinion of the court as declares title to have been acquired by the defendant by means of a possession for seven years under a deed professing to pass the entire estate. His entry upon the land by virtue of the writ was an undoubted assertion of sole ownership, and the expulsion of the co-tenant an ouster which, continued for the prescribed time, would have the effect of completing the title. But upon the day of recovering possession and soon afterwards it was restored to the plaintiff under a contract of lease, and he held the land for nearly two years. A tenant let into possession as lessee is not allowed to withhold it from the lessor by virtue of any superior right in himself, but when the possession has been surrendered he may assert his own and contest the title of the other in any subsequent action between them. "The relation and the rights growing out of it," says BYNUM, J., referring to the lessee's occupation, "can be destroyed only by surrendering the possession to the landlord, as it existed prior to the lease, *when that is done and not before, the defendant is at arms length and can assert his title by action or otherwise. Abbott* v. *Cromartie,* 72 N. C., 292; *Gilliam* v. *Moore,* Busb., 95.

The statute requires an uninterrupted adversary occupation for the whole period of seven years under color of title, during which the party is exposed to the action and the land subject to the re-entry of the owner and the effect of his neglect to do either is to bar his claim and vest title in

the occupant. "The rule of law," remarks PEARSON, J., in *Reynolds* v. *Cathens*, 5 Jones, 437, "is when one holds possession and exposes himself to an action for twenty years without color of title, or for seven years with color of title, as between individuals, and supposing the land to have been granted, so as to oust the state, we think acquires a good title," and this he defines as constituting *adverse possession* under the law.

During a part of the required seven years the plaintiff, a co-tenant with the defendant and entitled to an undivided moiety, is in possession of the common property with the assent of the latter, and could not maintain his action; and to allow this to enure to the benefit of the defendant and be counted as part of the time, is in my opinion, not only to dispense with the provisions of the statute, but involves also the absurdity of *one's holding adversely to himself.* In this action the plaintiff, being freed from the lease, was at liberty to assert his own better right to the premises, and that his own possession in the judgment of the law was in support of a superior rather than an inferior and subordinate title.

PER CURIAM. Reversed.

A. B. CURRIE, Admr., v. MALCOLM MCNEILL, Ex'r and others.

Executor—Settlement of Estate—Statute of Limitations—Husband's Interest in deceased Wife's Share—Failure to Collect—Confederate Currency—Exceptions to Referee's Report.

1. Where two slaves belonging to an estate were put in the possession of the plaintiff (who was the then husband of one of the heirs-at-law and distributees) and converted by him to his own use, and afterwards, in

an action by the executor against him to recover their value, an entry was by consent made on the docket, "By consent of parties suit dismissed at costs of defendant;" *Held*, that, in an action against the executor by the plaintiff as administrator of his deceased wife for a settlement of the estate, the statute of limitations was a bar to any claim by the executor on account of said slaves;

Held further, that the conversion being a tortious act of the plaintiff and not of his wife, cannot impair her claim to a share of the estate; and it does not matter that the plaintiff suing as her administrator is the equitable owner of her estate.

2. An executor is not chargeable with the face value of securities which might have been collected in full before the war, but the collection of which was not required by the exigencies of the estate, and if collected, must have been re-invested, but he is chargeable only with the amount actually collected after the war, there being no imputation of a want of diligence in then making the effort to collect or that an effort then would have averted the result.

3. Where in the settlement of an estate, the collections made by the executor during the war are not scaled, neither should the disbursements then made be scaled.

4. Where an executor collected in Confederate currency less than he disbursed, part of the disbursements being of his individual funds, he is not entitled to credit for the excess of the disbursements over the collections.

5. An exception to a referee's report "that the sum for distribution is incorrect and should be larger," is too indefinite to be considered.

(Observations by SMITH, C. J., upon the irregularity of permitting two accounts of an administration to be stated, one in the probate court and the other under reference in the superior court.)

(*Holliday* v. *McMillan*, 79 N. C., 315; *Ransom* v. *McClees*, 64 N. C., 17; *Drake* v. *Drake*, 82 N. C., 443; *Whitford* v. *Foy*, 71 N. C., 527; *Chastain* v. *Coward*, 79 N. C., 543; *Suit* v. *Suit*, 78 N. C., 272; *Overby* v. *Fayetteville*, 81 N. C., 56, cited and approved.)

SPECIAL PROCEEDING for the settlement of an estate, commenced in the probate court and heard on exceptions to a report, at Fall Term, 1879, of MOORE Superior Court, before *Seymour, J.*

The defendants appealed from the ruling and judgment of the court below.

Messrs. Hinsdale & Devereux, for plaintiffs.
Messrs. J. D. McIver and *Geo. V. Strong*, for defendants.

SMITH, C. J. This action instituted in the probate court has for its object the settlement of the estate of Daniel McNeill in the hands of the defendant, Malcolm McNeill, his executor, and after many successive amendments in the pleadings, the issues arising thereon were eliminated and certified to the superior court where by consent they were to be referred under the code subject to exceptions and the right of appeal. At the same time the clerk of the superior court proceeded to state an account of the executor's administration. The referee and clerk make their separate reports, and various exceptions to each are filed on behalf of the several interested parties on which the judge has passed, and from his rulings the executor appeals.

The only matters therefore before us for review are such exceptions of the plaintiff and others, entitled to the residuary legacy, as are decided adversely to the executor, and his own disallowed exceptions. The exceptions to the report of the referee, Black, will be first considered.

Exceptions of plaintiff A. B. Currie, sustained by the court.

3 Ex. The referee allowed the executor, as an off-set or claim, the value of two negro slaves belonging to the estate and sold by the plaintiff A. B. Currie in 1859, to which two defences had been interposed—the bar of the statute of limitations and the estoppel of a previous adjudication.

The slaves were put in possession of the plaintiff with two others, bequeathed by the testator to his wife Caroline, and converted to his use. The action to recover their value brought by the executor terminated at spring term, 1866, in an entry on the docket in these words: "By consent of parties suit dismissed, at costs of defendant and the defendant has paid the costs." The present suit was commenced on October 21st, 1874.

The court held the statute to be an effectual bar to the claim and in this opinion we concur.

The argument for the defendant is, that the delivery of the slaves was in payment of the wife's legacies to their value, and the statute has no application. This theory has no support in the facts of the case, and is contradicted by the suit brought for their recovery and its adjustment. It was a tortious act of the defendant, not of his wife, and cannot have the effect to impair her claim to a share of the residuary fund.

It is insisted again that the plaintiff suing as the administrator of his wife is the equitable owner of her personal estate, and it should be applied in discharge of his individual liability to it, and the value of the slaves sold treated as an advanced payment of her legacy. But the lapse of time is a barrier against the assertion of the claim, and being relied on admits of no such adjustment. Besides the plaintiff must dispose of her personal property in a due course of administration and is only entitled to the distributable surplus remaining. "We do not know what may be the liabilities of the wife's estate," remarks READE, J., in answer to a similar argument, "and we cannot administer it in this action. The claims of the defendants are not against the wife's estate, *but against the husband plaintiff* in his individual capacity, and they are neither sets-off nor counter-claims in this action." *Holliday* v. *McMillan*, 79 N. C., 315. This is not in conflict in with the decision in *Ransom* v. *McClees*, 64 N. C., 17, which rests upon entirely different grounds.

Ex. 4. This exception depends upon the second defence, to-wit, the adjudication in the action for the value of the slaves converted, which is also held to be a bar. This need not be considered because the preceding exception disposes of the claim.

Exceptions of the plaintiff and others to the report of the clerk sustained by the court.

1 & 3 Exs. The executor is not charged with the sums mentioned, but only with the sum realized from a sale of the securities under the order of the probate judge. The court rules that he should account for the face value of the securities upon the ground that they "were good and might have been put in judgment and collected before the first stay law and that they were lost by the negligence of the defendant."

In our opinion the ruling is not warranted upon the facts stated. The collection was not required by the exigencies of the estate, and the fund, if collected, would have to be reinvested. If retained, it would have become worthless, and why change an investment already made and apparently entirely safe? The largest debtors were of ample present means, and their insolvency is due to causes a trustee is not bound to foresee and provide against. Wherein then lies a culpability entailing upon him the personal loss? It might with equal if not greater propriety, be insisted that his collection of funds safely invested was an act of negligence, subjecting him to responsibility for the loss. Nor does it appear that reducing the demand to judgment would have added to its security, and if it would have done so, that already possessed seemed to be abundant and the fiduciary might rest content with its preservation. There is no imputation of a want of diligence in making the effort to collect after the war, or that an effort would have averted the result. This ruling of the court is reversed and the exception disallowed.

5 Ex. That certain sums paid for taxes should be scaled.

The ruling of the court upon this exception must be also reversed. The collections seem to have been largely in confederate currency. These are not reduced by the scale. Why should the disbursements be put upon a different footing? As the executor is charged with the currency received at its face value, it is but fair he should be credited

in like manner with what he pays out. *Drake* v. *Drake*, 82 N. C., 443.

7 Ex. The executor is improperly allowed the sum of $680 in confederate currency and $800 in confederate bonds, with interest from January 1, 1863, of the trust fund remaining on hand and worthless: The court upholds this exception and assigns as a reason for the ruling that the executor collected less of this money than he has paid out and now holds, and cannot be permitted to use his own moneys to the detriment of the estate. It is not alleged or suggested that he did not collect and keep separate from his own, the moneys of the estate of which these sums constitute a portion, but that some of the aggregate amount (that heretofore paid out) was his own individual property. We do not agree in the conclusion that the whole credit should be stricken out, while we do agree in disallowing so much thereof as measures the excess of the disbursements over the receipts. *This excess* is not a part of the trust fund and should be deducted from the aggregate and the residue only admitted as a credit.

9 Ex. There are many exceptions similar to this. For that the sum for distribution is incorrect and should be larger; the shares of each being by the report $295.55

This is not properly an exception, but a declared consequence of the correctness of the account before demanded, and if it were in substance as well as in form, the exception is too indefinite to be considered. *Whitford* v. *Foy*, 71 N. C., 527; *Chastain* v. *Coward*, 79 N. C., 543; *Suit* v. *Suit*, 78 N. C., 272; *Overby* v. *Fayetteville B. & L. A.*, 81 N. C., 56.

The same disposition must be made of exception 1 of A. B. Currie, administrator of his deceased wife Catherine, as administrator of Ann Gillis, and as administrator of Alexander McNeill, and of Neil D. McNeill and Daniel McNeill, all of which are of the same kind and obnoxious to the same objection.

The disallowed exceptions of the executor to the referee's report, except as their subject matter has been already considered and decided, do not bear materially upon the result and for the reasons given by the court, the rulings thereon are affirmed.

The account rendered by the clerk will be corrected and reformed as required by the unreversed rulings of the court below and the rulings in this court, and in order thereto there must be a reference.

We have overlooked grave irregularities in the record certified to the court in order to a solution of the questions intended to be presented and a determination of the controversy upon its merits. The record shows that after transmitting the issues to the superior court the probate judge retained the cause and proceeded to take and state the administration account. The matters involved in the reference are no obstacle to an order for an account and properly belong to the account. The only defences which need to be previously determined are such as discharge the party altogether, as a release or accord and satisfaction, or a full and final settlement before had, and those which upon the taking the account may show nothing to be due.

The matters of defence set up in the answer tend in this direction and may be passed on in taking the account, and there was therefore no necessity for the appointment of the referee. The two reports must therefore be consolidated and treated as one, though the practice of a double reference is calculated to introduce confusion and embarrassment and is strongly disapproved; and this we do the more readily, because no objection was made on the trial and the validity of both reports are recognized in the filing of the numerous exceptions to each of them. The numerous cases cited for the defendant, in regard to references under the code, were decided before the recent constitutional changes enlarging the appellate jurisdiction of this court under

which the practice must be modified. We have already said that in references for an account similar to that which prevails in a court of equity, the judge must pass upon the whole case presented in the report and the evidence as well upon which the findings of fact are based without the necessary intervention of a jury, and so must this court upon the appeal according to the former equitable usages.

The court therefore considers the appeal from the same point occupied by the judge below and must correct all his erroneous rulings upon a full review.

Upon the confirmation of the report directed to be made, final judgment will be entered, until which the cause is retained.

PER CURIAM. Judgment accordingly.

SAMUEL BRIGHT v. HAYNES LENNON and others.

Co-Sureties—Action for Contribution—Notice.

1. In an action by a surety of an insolvent guardian for contribution against other sureties, it is proper to include in the sum adjudged to be raised by contribution costs which were paid by plaintiff in an action against him as a condition for leave to plead the statute of limitations.
2. It is not necessary to entitle a surety to maintain an action for contribution that the amount of his liability which was paid by him should be fixed by a judgment.
3. The waiver or withdrawal of a plea of the statute of limitations by a surety in an action against him does not affect his right afterwards to maintain an action for contribution.
4. In an action for contribution by a surety against four different guardian bonds, with different penalties and different sureties, some solvent and some otherwise, it is not necessary that notice should be given before the action is brought.

(*Bell* v. *Jasper*, 2 Ired. Eq., 597; *Jones* v. *Hays*, 3 Ired. Eq., 502; *Jones* v. *Blanton*, 6 Ired. Eq., 115; *Street* v. *Com'rs*, 70 N. C., 644; *Craven* v. *Freeman*, 82 N. C., 361; *Sherrod* v. *Woodward*, 4 Dev., 360, cited and approved.)

CIVIL ACTION, heard upon exceptions to a referee's report at Spring Term, 1880, of COLUMBUS Superior Court, before *Eure, J.*

In 1854, Robert McKackan became guardian to Thomas F., James J., Luther, Archibald, Frances M., and Albert F., minor children of A. F. Toon, deceased, and qualified as such by giving bond in the penalty of $30,000, with Absalom Powell, Richard Wooten, Shadrack Wooten, Haynes Lennon and D. F. Williamson as sureties. In November, 1857, he renewed his bond in the penalty of $25,000, with David George, sr., Richard Wooten, Haynes Lennon and D. T. Williamson as sureties. In 1861, the guardian gave another bond in the sum of $25,000, with James Smith, John A. Maultsby and Josiah Maultsby as sureties thereon. And in February, 1867, the said guardian executed his last bond on behalf of but two of the wards, Albert Toon and Francis M. Toon, (the others by this time being dead or of full age) in the penalty of $6,000, with Josiah Maultsby and the plaintiff, Samuel Bright, as sureties thereto. In 1875, three actions were instituted on the last two bonds aforesaid, to wit, the one dated in 1867, and the other executed in 1861, against McKackan, the guardian, and Samuel Bright and John A. Maultsby, individually and as administrator of Josiah Maultsby as sureties, one of said actions being on the relation of Albert Toon, one on the relation of Archibald Toon as administrator of Francis M. Toon, and the other on relation of T. F. Toon as administrator of James J. and Luther Toon, deceased, and on answer filed denying any indebtedness to the wards and alleging a full settlement had with them, it was referred to D. P. High to audit and state and report to court the account of the guardian-

ship of the said McKackan. The referee filed his report at fall term, 1876, showing a balance of $2,014, to be due to Albert Toon, and $1,908 to be due to the estate of Frances M. Toon, deceased, and thereupon, on leave of the court, the sureties, Samuel Bright and John A. Maultsby, personally and as administrator of Josiah Maultsby, on the payment of the costs, then amounting to $141, required of them as a condition precedent, amended their answer by pleading the lapse of three years after the majority of the several relators before suit brought as a bar to the actions.

Afterwards, to wit, at fall term, 1877, on the minutes and records of the court, there appeared to be entries of judgment in the several actions about the regularity and validity of which there is controversy, for $1,300 in the case in favor of Albert Toon, for $500 in the case on the relation of Archibald Toon, administrator of Frances M. Toon, and $200 in the action brought on relation of T. F. Toon, administrator of James J. and Luther Toon, and pursuant to these entries, the guardian being insolvent, the sureties, Samuel Bright and John A. Maultsby as administrator of Josiah Maultsby, paid off the several sums, the said Bright paying his half of the recovery, namely, $1,000 to Albert Toon, and also one-half of the $141 of costs incurred by the leave to amend answer, and the said John A. Maultsby as administrator, paying $300, the balance due to Albert Toon, $500 in full of the sum recovered by Archibald Toon as administrator of Frances M. Toon, and $200 in full of the sum due to T. F. Toon as administrator of James J. and Luther Toon, and also his half of the costs aforesaid.

Upon the payment of these sums, the plaintiff brings the present action, (the guardian being insolvent,) against the solvent surviving sureties and the personal representatives of the solvent deceased ones, on all three of the guardian bonds anterior to the last one, seeking to have contribution from the several sets of sureties proportionally to the several

penalties thereof, and making his co-surety, John A. Maultsby, a party to the cause that he may have such relief as he may be entitled to in respect of the sums paid by him as administrator of Josiah Maultsby.

The defendant Maultsby, by his answer, claims contribution on account of the $1,070 paid out of the assets of his intestate, and the other defendants the sureties file answers and resist contribution on the allegation that the guardian had settled with and paid his wards in full, and so owed them nothing before plaintiff and his co-surety were sued, and on the further defence, that the plaintiff and his co-surety were not compellable to make the payment by reason of the statute of limitations which they had pleaded, and that they were not entitled to have contribution towards a sum recovered by their waiver or failure to insist upon the bar of the statute.

By consent of the parties, all the issues in the action were referred to W. S. Norment, Esqr., his findings of fact to be conclusive, and his report of the facts and conclusions of law thereon being filed, the defendants except thereto, and from the judgment of the court overruling the exceptions the appeal is taken.

Mr. A. T. London, for plaintiff.
Mr. T. H. Sutton, for defendants.

DILLARD, J., after stating the case. The only question for our consideration is the legal correctness of the referee's conclusions in point of law on the facts as found.

1. The first exception in substance is that the referee directed judgment to be entered against the sureties on the several bonds for their proportional parts, without first crediting the guardian against the sums due to the several relators for $1,500 found as a fact to have been paid to the wards before their actions were brought. The answer is

that the referee finds that the guardian was indebted to Albert Toon in $1,514, to Archibald Toon as administrator of Frances M. Toon $1,408, and to T. F. Toon as administrator of James J. and Luther Toon $65 each, at fall term, 1877, when the several judgments were entered; and by comparing the sums thus found due with the report of D. P. High, the referee in the suits of these two wards, it will be seen that the land conveyed by the guardian, valued by himself at $2,000, if divided and equally applied on the four shares sued for will precisely make the sums reported by Norment as due to Albert Toon and Frances Toon, and the same or nearly the same sums reported as due to James J. and Luther Toon. In this way the land which is the payment alluded to in the exception, may have been and most likely was applied in reducing the amounts below those found by D. P. High. However this may be, referee Norment finds the sums respectively due the wards at the rendition of judgment in their suits, and that is a mere question of fact not reviewable by us under the terms of the reference in this case, and therefore there was no error in overruling this exception.

2. This exception assigns error in that the referee included in the sum adjudged to be raised by contribution the sum of $141 paid by plaintiff and Maultsby, administrator of Josiah Maultsby, as a condition for leave to plead the statute of limitations. The sureties to the successive bonds of a guardian stand in the relation of co-sureties, one bond to the other or others, and are liable, in case of insolvency of the guardian, to contribution in proportion to the amount of the several penalties of the bonds given. The risk they take is a joint risk, and there is an implied engagement or obligation, each set of sureties with the other, to bear any loss which may fall on them proportionally as above stated; or if it is borne by one class, to contribute by way of reimbursement. *Bell* v. *Jasper*, 2 Ired. Eq., 597; *Jones* v. *Hayes*, 3

Ired. Eq., 502. The costs incurred by one surety or one set of sureties are not always to be regarded as a loss borne to which in equity contribution may be had, but it would seem to depend on the prudence and *bona fides* of the defence by which they were incurred. As a general rule, upon the default and insolvency of a principal, a surety should answer for the default and not unnecessarily let cost be run up where the liability and amount thereof is clear. But where, as in this case, the guardian claimed to have settled with and paid the wards, it was prudent in plaintiff and Maultsby in regard to their own interests and as an act of justice to their co-sureties on other bonds, to incur costs to the point of developing how the fact of alleged settlement was, and to this effect are the authorities. Brandt on Suretyship, § 248; *McKinnon* v. *George*, 2 Rich. (S. C.) Eq., 15; *Fletcher* v. *Jackson*, 23 Vt., 593. In our opinion the costs complained of were properly estimated in adjudging the sums to be contributed, for the result was that the wards recovered and would have recovered that sum any way.

3. The third exception is to the direction that judgment be entered against the defendants, for that the guardian had fully settled with his wards before the actions were brought. This is but a question of fact, and the referee having found as to it, no review can be had of his finding.

4. The fourth exception is, for that the referee should not have found that the entries on the judgment docket at fall term, 1877, constituted a judgment in law against the plaintiff and Maultsby. The referee found that judgment was rendered in the several actions of the wards, and in our view, it is immaterial whether they were or were not judgments in legal contemplation. The sureties had the right, on the default and insolvency of the principal, with or without a judgment to pay off the liability; and this right is implied from the obligation, which each set of sureties is under to the other, to protect against the defaults of the

principal. Judgments, if formally and regularly taken, would not fix the liability of other sets of sureties not parties thereto, but at most they would only be evidence of the amounts paid, and here the fact of the amount due and also paid is fixed *aliunde*. Brandt on Suretyship, § 246; 1 Greenl. Ev., § 527.

5. The fifth exception is, for that plaintiff and defendant, after pleading the statute of limitations, waived the plea or failed to insist upon it. The answer to this exception is, a surety to a guardian when sued is not bound to plead the statute of limitations, but may or may not according to his discretion. *Jones* v. *Blanton*, 6 Ired. Eq., 115; *Street* v. *Comr's of Craven*, 70 N. C., 644; *Craven* v. *Freeman*, 82 N. C., 361. And if so, the withdrawal of such a plea or a waiver of it ought not to affect and does not affect the right to contribution. The design of that plea is to protect against a false and unjust claim or one of whose discharge the evidence is lost, but it is not obligatory in morals or law to use it to defeat a just debt. In this case the utmost good faith appears. It was greatly to the interest of the sureties sued, in a mere pecuniary sense, to defeat the claims altogether, but at the time of the plea pleaded the report of High, the referee, had found a liability for Albert Toon of $2,414, and for Frances M. Toon of $1,908, with two years interest due on each, and by means of this plea perhaps it turned out that the cases were put off the docket at the sum of $1,300 for the first and $500 for the latter, when in point of fact, as found by Norment the referee in this action, there was due larger sums with interest. In such a state of things it was not inconsistent with duty to the other sets of sureties to quit the controversy at these reduced amounts rather than run the hazard by relying on the plea to have it found against and thereby a very heavy sum fixed on them and those bound on other bonds of the guardian.

6. It is lastly assigned for error that referee held plain-

tiff entitled to sue and recover, as it was found as a fact that no notice was given to defendants before suit brought. In cases of a simple character, such a bond with several sureties, on payment by one, the principal being insolvent, an obligation is implied by law on the part of the others to pay him their *aliquot* parts according to the number of the sureties, and in an action at law to recover such *aliquot* share, it was material to the party seeking contribution to notify his fellows and demand payment, as a prerequisite to his action so as to enable him to pay and save costs. *Sherrod* v. *Woodward*, 4 Dev., 360. The recovery at law was for an *aliquot* share only and there was no power in that court to distribute round the share of an insolvent on the others and hence it was not unreasonable in that court to require notice before action brought. But when there are four different bonds by a guardian, as in our case, with different penalties and different securities, some solvent and some otherwise, all cumulative securities to the wards ex- except the last one, and that a security for two only of the wards, the rate of contribution upon the principles of a court of equity would be troublesome to ascertain, and to hold it a prerequisite in such a case, that a surety bearing the burden should notify those liable to contribute, before he could sue, would be practically a denial of justice. We therefore hold there is no necessity in such a case to give notice and demand payment before action.

There is no error and the judgment of the court below is affirmed.

No error. Affirmed.

R. W. THOMAS, Exr, v. ANNA LINES and others.

Construction of Will—"Capital"—Evidence—Declaration of Testator—Agreement of Partnership.

1. A testator by his will devised as follows: "I give unto my beloved wife A, all the household and kitchen furniture, &c., with all the growing crops on the farm, &c.; also one-third part of my entire interest in my capital invested in the firm of C. M. & G. Lines (except my interest in the buildings and machinery used and occupied as store and shoe manufactory) to have and to hold as her own property in her own right. I also give unto my beloved wife A during her natural life the use of the dwelling-house and lot where I now live, * * * and also the use of the Dodson farm with its minerals, &c., during her natural life. I also give unto C one hundred dollars and to M fifty dollars; the above bequests to be taken out of my capital invested in the firm of C. M. & G. L.; the residue of my capital invested in the firm, after paying my individual debts and funeral expenses, I give one-third to my daughter H, one-third to the children of my deceased son C, and one-third to the daughter of my deceased son R. I also give to the daughter of my deceased son R, the twenty-four acre lot bought of T, * * * . At the death of my beloved wife A, I desire and will that the Dodson farm be sold and equally divided between the children of my deceased sons C and R. All the residue of my property * * * I give unto my daughter H, subject to the use of the dwelling-house and lot to my beloved wife A, during her natural life; *It was held*,

(1.) That the accumulated earnings of the firm of C. M. & G. L. which remained invested in its business equally with the sums originally put in constitute its capital, and the widow is entitled to one-third part of the aggregate amount to which the testator would be entitled upon a settlement.

(2.) That the legacies to C and M must be taken from the remaining two-thirds of the capital.

(3.) That a certain sum of money found in a drawer in the safe belonging to the firm, (the key to which drawer the testator kept) and which corresponded in amount precisely with the sum charged against him in his cash book, and which was found by the court below to be the property of the firm, must be deemed part of the assets of the firm and of the capital disposed of in the will.

(4.) That the growing crop on the Dodson farm belongs to the widow.

(5.) That the growing crop on the twenty-four acre lot does not belong to the daughter of R, but vests in the executor.

(6.) That the money arising from the sale of the Dodson farm after the death of the widow must be divided among the children of C and R *per capita*.

(7.) That the machinery in the shoe manufactory as well as the buildings belonging to the firm are embraced in the words "the residue of my capital invested &c.," and after the deduction of debts and funeral expenses are devised in three equal parts to the testator's daughter H, the children of C and the daughter of R.

2. A memorandum of a declaration, made by a testator intermediate between the making of his will and his death, is not admissible in evidence to show an intent different from that expressed in the will.

3. A tacit understanding among partners contravening the agreement (which then subsisted) on which the firm was formed is not admissible in evidence to modify and impeach its terms.

(*Donaldson* v. *Benton*, 4 Dev. & Bat., 435; *Reynolds* v. *Magness*, 2 Ired, 26: *Miller* v. *Derr*, 69 N. C., 137; *Hester* v. *Hester*, 2 Ired. Eq., 330; *Cheeves* v. *Bell*, 1 Jones Eq., 234; *Lane* v. *Lane*, 1 Winst. Eq., 84; *Waller* v. *Forsythe*, Phil. Eq., 353, cited and approved.)

CIVIL ACTION for construction of a will, tried at January Special Term, 1880, of DAVIDSON Superior Court, before *Schenck. J.*

The defendants appealed from the judgment below.

No counsel for plaintiff.

Messrs. J. M. Clement and *J. M. McCorkle*, for defendants.

SMITH, C. J. The object of the action instituted by the plaintiff, executor of Charles M. Lines, deceased, against the defendants, his legatees and devisees, is to obtain an authoritative construction of certain provisions of his will in order to the proper discharge of its trusts. The testator died in June, 1877, having in April preceding, made his will in due

form to pass his estate, the material facts of which relating to the subject matter in controversy, are as follows:

1. "I give unto my beloved wife Anna Lines, all the household and kitchen furniture, with all the horses, cattle, sheep and hogs, my wagon, carriage and all the harness, the plows and all farming implements, with all the growing crops on the farm, and all the grain and provisions on hand at the time of my death; also one-third of my entire interest in my capital invested in the firm of C. M. & G. Lines, (except my interest in the buildings and machinery used and occupied as store and shoe manufactory) to have and to hold as her own property in her own right. I also give unto my beloved wife Anna Lines, during her natural life, the use of the dwelling house and lot where I now live, (except so much as is occupied for store and shoe manufactory) and also the use of the Dodson farm, with all of its minerals, whim, gold mill and fixtures, during her natural life.

I also give unto Anna Coltrain, daughter of Alice M. Coltrain, one hundred dollars; and to Mahala Marshall fifty dollars, if she should be living with us at the time of my death. The above bequests to be taken out of my capital invested in the firm of C. M. & G. Lines; the residue of my capital invested in the firm of C. M. & G. Lines, after paying my individual debts and funeral and burying expenses, I give one-third to my daughter Harriet G. Harris, one-third to the children of my deceased son Charles L. Lines, one-third to the daughter of my deceased son Royal J. Lines.

I also give to the daughter of my deceased son Royal J. Lines, the twenty-four acre lot bought of L. L. Thomas, in the year 1865 or 1866, also my half interest in the house owned by brother George and myself.

If Henderson Coltrain should pay my executor two hundred and fifty dollars, including what I may be owing him

at the time of my death, in one year after my death, I wish my executor to give him a deed for the house and lot where he now lives.

At the death of my beloved wife Anna Lines, I desire and will that the Dodson farm be sold and equally divided between the children of my deceased sons, Charles L. and Royal J. Lines. All the residue of my property, whether personal or real, I give unto my daughter Harriet G. Harris, subject to the use of the dwelling house and lot to my beloved wife Anna Lines, during her natural life."

The facts explanatory of the will, admitted or found by the judge with consent of parties instead of a jury are these: The partnership of C. M. & G. Lines, consisting of the testator C. M. Lines, who contributed to the capital stock $4,089.10, Geo. Lines, who contributed $3,916.18, Harriet G. Harris, who contributed $1,068.97, and M. R. Tyler, who contributed $701.57, was formed and commenced business the beginning of the year 1874, under written articles, in which it was agreed that each member may draw from the common fund only for necessary family expenses, unless with the consent of the others; that an annual inventory of the effects shall be taken and no profits distributed until the debts are paid and the original sums paid in restored to the respective partners; and that each shall share equally in the profit and loss.

The moneys arising from sales were received by the three members first above named, (the defendant H. J. Harris acting for his wife Harriet G. Harris,) each of whom kept a cash book and entered therein the several sums received and paid out in conducting the business.

After the testator's death, his cash book was balanced by said H. J. Harris as of June preceding, and showed the testator's indebtedness to the firm to be $1,851.25.

There are also balances in different sums against the two survivors on their respective cash books, and besides these, there are accounts against the partners for goods and mer-

chandise on the books of the firm. There has never been an adjustment of partnership matters, nor any distribution of profits.

The business of the firm was the manufacture and sale of shoes in one house and general merchandise in the other.

In one of the houses was an iron safe in which were two locked drawers, the key opening one of which was kept by the testator, and the key of the other by the agent, H. J. Harris. In the drawer kept by the testator was found, after his death, in money the sum of $1,851.25, and at his house about $50. The testator commonly placed his own individual money in the drawer and deposited therein about $45 about two months prior to his death in an envelope. The moneys of the firm collected by H. J. Harris were kept in the drawer of which he had the key, and those collected by George Lines in his pocket. The several cash books were open to the inspection of all the members, and the firm owed no debts.

There was no express agreement that the testator nor any other member should withdraw any of the partnership assets, nor were any withdrawn by either of them. The sum found in the testator's drawer belonged to the firm.

Besides the personal the firm owned real estate in the town of Thomasville, known as the "store" and the "shoe manufactory" with the machinery and fixtures used with the latter.

The questions propounded by the executor and arising out of the contentions in the answers are these:

1. Does the legatee and devisee Anna Lines take one-third part of the testator's entire interest in the partnership property, the accumulations as well as the original capital put in, except as reserved in the will, or only one-third of the latter sum?

2. Are the legacies of $100 to Anna Coltrain and of $50 to Mahala Marshall to be taken out of the partnership prop-

erty before the said Anna Lines' share is withdrawn, or out of the remaining two-thirds?

3. What property is embraced in the gift of "the residue of my (his) capital invested in the firm of C. M. & G. Lines, after paying my (his) individual debts, and funeral and burying expenses," and is the money found in the drawer a part of the capital?

4. Does the crop growing on the Dodson farm at the time of the testator's death belong to the said Anna, the devisee of the land?

5. Does the crop on the tract of twenty-four acres devised to Minnie R. Lines pass with the land to her, or does it vest in the said Anna, or in the executor?

6. Are the proceeds which may be derived from the sale of the Dodson farm, after the expiration of the life estate, and which the testator directs "to be equally divided between the children of my (his) deceased sons Charles L. and Royal J. Lines" to be divided *per capita* or *per stirpes?*

Upon the trial before the court two exceptions were taken on behalf of the defendant Harriet G. to the rejection of evidence offered which are necessary to be considered before entering upon the enquiry as to the legal import and operation of the clauses of the will out of which the conflicting claims arise.

I. In support of a construction favorable to the legatee, she proposed to introduce a memorandum of a declaration made by the testator to the witness his executor, intermediate between the making of the will and his death, written down at the time by the latter and read over to and approved by the former, which is in these words:

THOMASVILLE. N. C., May 26, 1877.

A Statement of C. M. Lines to R. W. Thomas.

"It is our custom on the first of the year to take an inventory to see how the firm stood, which at the last taking

showed there was due me $3,000 on hand to my credit, of my own individual property. It was charged to me in cash book, which made it mine; or in other words it went to make up the balance against me in my cash account. I have made the statement to you to prevent the loss of that amount to my estate. I have received some since that time and have paid out some more than I have received, which will — the $3,000."

The declarations of the testator are admissible as evidence of facts upon which the will is to operate, as would be any other competent testimony to the same effect, and to fit the words of the will to their appropriate and intended objects. But no evidence of the kind will be heard to show an intent modified and different from that expressed in the instrument itself. To permit this would be to break down the safe-guards provided in the statute of frauds and subvert the well settled rule that a written instrument, disposing of property or constituting a contract, cannot be altered, impaired or explained by parol proof of a different purpose or understanding from that contained in the writing. The memorial of the declarations of the testator after making his will, although giving greater assurance of accuracy that when reproduced from an unaided memory, is of no higher grade and is equally inadmissible. The declarations were offered to show the testator's own subsequent interpretations of his will in restricting its operative words so as to exclude the money found in the drawer from the bequest of the capital invested in the partnership, and for such purpose they are entirely inadmissible. *Donaldson* v. *Benton*, 4 Dev. & Bat., 435: *Reynolds* v. *Magness*, 2 Ired., 26; *Miller* v. *Derr*, 69 N. C., 137. "The intent is to be gathered from the will only." O'Hara Const. Wills, 30; *Hester* v. *Hester*, 2 Ired. Eq., 330.

II. It was also proposed to prove a tacit understanding

among the partners that each might take and use the funds collected for his personal benefit, notwithstanding the partnership articles. The evidence was disallowed as contravening the agreement on which the firm was formed, and tending to modify and impeach its terms. While undoubtedly the articles may be modified by a subsequent arrangement among the members, a disregard of their obligations, while subsisting in full force, by one or more, cannot be allowed to have such effect. The testimony was properly rejected.

These exceptions being removed, we proceed to consider the difficulties suggested in the questions relating to the construction of the will.

1. The accumulated earnings of the firm which remain invested in its business, equally with the sums first put in, constitute its enlarged capital and become the basis of its extended operations, and from this aggregate amount to which the testator would be entitled upon a settlement, his widow is entitled to one-third part. The testator makes no distinction between the primary fund and its accretions, all of which is his "capital invested in the firm of C. M. & G. Lines," and subject to the specified deductions, given to the said Anna and to his daughter Harriet G. and the children of his deceased sons Charles L. and Royal J. Lines, in the proportion and on the terms annexed to the respective legacies.

Capital is defined by Webster as "a stock employed in trade, manufactures, &c.," by Worcester, "the stock invested in any business, company or institution," and by Bouvier in his law dictionary, "money or other property, which a merchant trader, or other person, adventures in an undertaking or which he contributes to the common stock of a copartnership," and in this general sense the word is used by the testator.

2. The legacies to Anna Coltrain and Mahala Marshall

must be taken from the remaining two-thirds of the capital after the withdrawal of the share of the said Anna.

3. The money discovered in the drawer, the key to which the testator kept, corresponding precisely with the balance charged against him in his cash book, is found by the court to be the property of the firm, and the accompanying facts do not warrant the inference of an intended or actual appropriation of the sum to his own separate use. This would involve a breach of partnership obligation and the intention to do this cannot be drawn from its place of temporary deposit, with the explanations of the manner in which the partners were accustomed to act in receiving and disposing of the moneys of the firm. The sum must then be deemed part of its assets and of the "*capital*" disposed of in the will.

4. The growing crop on the Dodson farm is given to the devisee of the land for life, in express words of description, "with all the growing crops on the farm," by which the testator's intent is manifest and controls the statute. Bat. Rev., ch. 45, § 31.

5. The devise of the twenty-four acre tract bought of L. L. Thomas, does not convey with it the crop growing thereon, to the devisee Minnie R., but it vests in the executor by force of the said statute.

6. The moneys arising from the sale of the Dodson farm after the death of the life tenant must be distributed equally among the children of Charles L. and Royal J. Lines, to-wit, one-fourth to the personal representatives of Minnie R., since deceased, and only child of Royal J. Lines, and one-fourth to Alice Elmore, Mary Lines and Sallie Lines, each children of Charles M. Lines. *Cheeves* v. *Bell*, 1 Jones Eq., 234; *Lane* v. *Lane*, 1 Winst. Eq., 84; *Waller* v. *Forsythe*, Phil. Eq., 353.

7. The machinery used in the shoe manufactory as well as the buildings belonging to the firm, are embraced in the words "the residue of my capital invested in the firm of C.

M. & G. Lines," and after the deduction for "debts and funeral and burying expenses," are devised and given in three equal parts, one to the defendant Harriet G., one to the three children collectively of Charles L., and the remaining third to Minnie R., the only child of Royal J., which by her death vests in her representatives and heirs at law.

The rulings of His Honor are in accordance with this opinion as to the construction and operation of the will, and are therefore affirmed. By consent of parties in the court below the costs of the action were adjudged to be paid by the executor out of the assets of the estate, and this judgment will not be disturbed. The costs incurred by the appeal to this court must be paid by the appellant. A decree may be drawn in conformity with this opinion, and the clerk will certify the same to the superior court of Davidson to the end that further proceedings be had therein according to law.

No error. Affirmed.

HUGH SOUTHERLAND and Wife v. GEORGE W. F. HARPER.

Injunction—Practice.

One in possession of land and claiming as owner is not entitled to restrain by injunction a sale of such land under execution sued out by a creditor of his grantor under the assumption that the title of the party in possession is fraudulent as to creditors. The *bona fides* of the conveyance can be fully tested and the rights of all claimants settled in a suit to recover the land by the purchaser at such execution sale.

(*Black* v. *Sanders*, 1 Jones, 67; *Houston* v. *Bogle*, 10 Ired., 496; *Thigpen* v. *Pitt*, 1 Jones Eq., 49; *Dameron* v. *Gold*, 2 Dev. Eq., 17, cited and approved.)

SOUTHERLAND *v.* HARPER.

Appeal from an order vacating an injunction made on the 18th of February, 1880, at Chambers (in an action brought to Spring Term, 1880 of CALDWELL Superior Court) by *Avery, J.*

James Mobley of Fairfield district in South Carolina died in 1852 intestate, leaving him surviving Elizabeth Mobley his widow and nine children, of whom the feme-plaintiff, then an infant of tender age was one, and seized of a comfortable real and personal estate of which the widow and S. F. Mobley, one of the sons, became administratrix and administrator, and in a short time they paid off the debts of the estate and settled their final account, showing a share to the plaintiff in the net surplus for distribution of twelve hundred dollars.

On the 31st of December, 1855, the said widow of intestate and mother of plaintiff, became guardian to her and the other children under age, and from and after that time, she had and held in her hands as such guardian the said sum of twelve hundred dollars, together with four hundred dollars received as her share of the proceeds from the sale of the lands descended from her father.

Upon the marriage of plaintiff, her mother at her request purchased in 1875 the tract of land in the pleadings mentioned at two thousand dollars, situate in Caldwell county of this state, and afterwards, it is alleged, she conveyed the same to the feme-plaintiff, in payment of her indebtedness to her as her late guardian, then and ever since having other property of value sufficient and available to pay all her debts.

It is further alleged by the plaintiffs that the defendant, having a debt against the said Elizabeth Mobley, has recovered judgment and now threatens to sell and will sell the tract conveyed to her prior to the rendition of the said judgment, and that if he be allowed to sell it will greatly embarrass the feme-plaintiff, cast a cloud upon her title and

do her an irreparable injury, and the relief demanded is an injunction to prevent defendant from selling the said land *until he shall have established that the same is liable to the debts of Elizabeth Mobley.*

Upon the application of the plaintiffs, on the foregoing facts, a temporary injunction with an order to show cause was granted till a day named, with restraint in the meantime; and at the time appointed, defendant appeared and for cause alleged that his debt was contracted with Elizabeth Mobley before the conveyance of the land to her daughter and on the credit thereof, that said conveyance was founded on voluntary consideration and not in payment of any debt to plaintiff as her late ward and was void as being executed with intent to hinder, delay and defraud her creditors, and he denied that Elizabeth Mobley retained then, or has now, sufficient property liable in law to pay his debt.

On consideration of the cause shown by defendant, and the affidavits on both sides in support of their respective allegations, sent up with the case of appeal, His Honor without any finding of facts vacated the injunction and from that order the plaintiffs appeal.

No counsel in this court for plaintiffs.
Messrs. Reade, Busbee & Busbee, for defendant.

DILLARD, J., after stating the case. From the view taken of the case by this court, it was not necessary that His Honor nor that we should find from the affidavits any facts other than those hereinbefore recited as we are of opinion that the plaintiffs on their own showing were not entitled to a continuance of the injunction.

It is a fact shown by the plaintiffs and admitted by defendant, that the tract of land mentioned in the pleadings was conveyed by Elizabeth Mobley before the recovery of

judgment by defendant, and this being so, the deed was good between the parties and had the operation to pass the legal title to the feme plaintiff, as against the grantor and all volunteers by, through or under her, and also as against the then existing creditors of the grantor, unless they had ground to treat the same as void under the 13th of Elizabeth copied in our laws, or to put it out of their way by decree of a court as in equity. The plaintiffs say the deed was made to the female plaintiff *bona fide* and in consideration of a true debt from the grantor to the grantee equal to the value of the land, and defendant denies this and alleges it was executed *mala fide* in respect to creditors and upon voluntary consideration, and the validity or invalidity of the conveyance as against creditors depended on how the facts were.

If the grant were *bona fide* and on the consideration contended for by the plaintiffs, the title was entirely good against any sale by defendant under his execution against the grantor; but if executed with intent to hinder, delay and defraud creditors, or upon voluntary consideration, as contended for by defendant, then in either case it was void as against an existing creditor, provided in the case of the voluntary consideration since the act of 1840, the donor at the time of the gift retained property sufficient and available to pay existing creditors and had in that case no intent to defraud, to be submitted as an open question of fact to the jury. *Black* v. *Sanders*, 1 Jones, 67; *Houston* v. *Bogle*, 10 Ired., 496.

The creditor, as before remarked, when courts of law and courts of equity were separate, had his election to reduce his debt to judgment and by execution take hold of and sell property given away by the debtor and on purchase and sheriff's deed, to bring ejectments and to have the title of the donee held as void and the full legal title as vested in the purchaser, or he might instead go into the court of equity

and on the notion of bringing the property to sale under fair circumstances, have the fraud adjudged and a sale had by a decree of that court. *Thigpen* v. *Pitt*, 1 Jones Eq., 49.

This right of the creditor to proceed at law and to sell the property of the debtor conveyed on voluntary consideration was a legal right under the statute of Elizabeth and when once exercised no court of equity would interpose at the instance of the purchaser to pass upon the legal title of the donee on the idea of removing a cloud from his title, nor at the instance of the donee on the idea that the deed to the purchaser was any cloud on his title. It was but a controversy between legal titles to land, to the trial of which courts of law were adapted and hence equity did not interfere. The practice of non-interference for the purchaser to adjudge upon the alleged fraudulent title of the donee was expressly decided in the case of *Thigpen* v. *Pitt*, *supra*, and non-interference at the instance of the donee to declare the purchaser's title a cloud on his title and remove the same, was settled in the case of *Dameron* v. *Gold*, 2 Dev. Eq., 17. In the last case, Chief Justice RUFFIN says: "a person in possession under a legal title cannot sue another out of possession upon the ground of a pretended distinct title and to have it declared invalid, unless there be a fraud imputed to it or some other matter peculiarly within this jurisdiction. These are pure questions of law and the party in possession may well be content with the advantage that possession gives him."

Just so we think it is under our present system where the superior courts exercise both legal and equitable powers. The creditor has the right to sell the land of his debtor, Elizabeth Mobley, by execution, and if he does and buys it himself or another, then there will be the case of conflicting claims to the same property upon distinct legal titles, and the purchaser will soon have the title settled by an action to recover the land; or if he do not, the plaintiff, in the lan-

guage of Judge RUFFIN, may well be content with the advantage of her present possession, or in case of a danger of the loss of evidence to sustain her title, or of the use of the sheriff's deed by the purchaser to hinder the sale of the property, she may possibly make a case of equitable intervention by way of perpetuating evidence or a decree against the validity of the purchaser's title under the head of removal of cloud upon the title. But the plaintiffs' rights have not been interfered with, and may never be in any other way than is legitimate by the purchaser when there shall be one.

Granting it to be admissible for the court to adjudge upon the title deed of a purchaser after the sale is had, if instead of speedily asserting his title by action, he shall use it to impair the value of the land to the plaintiffs in the sale of it or otherwise, still we must hold there is no such case made by the complaint in this case. The embarrassment and irreparable injury alleged cannot at present be more than a mere expression of evil, as no sale has been made, and it may be the evil will never come, but whether it shall come or not, it is not in our opinion competent to restrain defendant from selling the land, as he has a right to do, lest a rival title may grow up.

There is no error, and the judgment of the court below is affirmed.

No error. Affirmed.

VARNER & DORSETT v. PENNEL ARNOLD and others.

Military Orders—Public Law.

The orders of military commanders exercising authority under the federal government in North Carolina immediately after the war between the states, relating to the administration of civil affairs, had no further efficacy than such as they drew from the superior force which upheld them.

(*Barnes* v. *Barnes*, 8 Jones, 366; *Davidson* v. *Sharpe*, 6 Ired., 14; *Broughton* v. *Haywood*, Phil., 380; *McCubbins* v. *Barringer*, *Ib.*, 554; *Isler* v. *Kennedy*, 64 N. C., 530; *State* v. *Kent*, 65 N. C., 311; *Paul* v. *Carpenter*, 70 N. C., 502, cited, commented on and approved.)

CIVIL ACTION to recover Land, tried at July Special Term, 1879, of RANDOLPH Superior Court, before *Avery*, *J.*

The plaintiffs appealed from the judgment of the court below.

Messrs. Scott & Caldwell and *J. N. Staples*, for plaintiffs.

No counsel for defendant.

SMITH, C. J. The land in dispute belonged to William Varner, who, with his wife, on November 22d, 1870, conveyed to the plaintiff Andrew J. Varner, and the latter soon afterwards to his co-plaintiff, Sarah Dorsett, for whose benefit the recovery of possession is sought. The defendant Pennel Arnold (the others named being his co-tenants) deduces title under a judgment recovered before a justice of the peace by one Hezekiah Fuller, against the said William Varner, a writ of *fieri facias* levied on the land, the return of the proceedings to the county court at February term, 1868, the award of *venditioni exponas*, the sheriff's sale and deed to the defendant, Pennel, executed May 8th thereafter.

The determination of the question of title, under the con-

flicting claims set up to the land, depends upon the force and effect of certain military orders emanating from the officers assigned under the act of congress to the command of the military district of which this state formed a part. These orders were issued—No. 10 on April 11th, 1867, by Gen. Sickles; No. 64 on December 31st, 1867, modifying the first, by Gen. Canby, his successor; and the last, No. 57, on April 2d, 1868, by the same officer. The provisions of the superseding order of Gen. Canby, (No. 64,) so far as they bear upon the present enquiry, are as follows:

"Judgments or decrees for the payment of money on causes of action arising in North Carolina between the 20th day of May, 1861, and the 29th day of April, 1865 * * shall not be enforced by execution against the person or property of the defendant.

After the passage of the ordinance of the state convention and its ratification on the 14th day of March, 1868, "respecting the jurisdiction of the courts of this state," order No. 57 was issued declaring that the ordinance "is hereby approved and will have the force and effect of law in said state until the question of the ratification or rejection of the constitution, framed by said convention of the people, shall have been determined by an election held, &c."

It is needless to discuss the compatibility of the ordinance as an act of the legislative authority of the state, with the constitution of the United States, in undertaking to discriminate between different classes of debts of equal binding obligation, and to restrain creditors, whose claims arose before a fixed arbitrary date, from pursuing the remedies for their enforcement open to others; or subjecting them to delays for the relief of debtors, and we only refer to the adjudication of this court in *Barnes* v. *Barnes*, 8 Jones, 366, and of the supreme court of the United States in *Edwards* v. *Kearsey*, 96 U. S., 595, as settling the law. The sole question is as to the legal effect of these military edicts, and the

force imparted by the last to the ordinance of the convention. The state had just emerged from a severe and unsuccessful struggle for a separation from the United States, and congress deemed it necessary for a time to place it under military control. It was accordingly enacted that the President assign a military commander to each district with a sufficient force to enable him "to perform his duties and enforce his authority within the district," and he was required "to protect all persons in their rights of person and property, to suppress insurrection, disorder and violence, and to punish or cause to be punished all disturbances of the public peace and criminals," and to this end to "allow local civil tribunals to take jurisdiction of and to try offenders, or where in his judgment it may be necessary for the trial of offenders," he may "organize military commissions or tribunals for that purpose."

It is manifest that the power conferred aimed mainly at the preservation of the public peace, the repression of hostility to the re-established federal authority, and the protection of persons and property in their ordinary and legitimate pursuits. It was not intended that the quiet and regular execution of the laws in force, not hostile to the policy of the general government, should be obstructed by military interference, and still less that laws should be promulgated and enforced in the administration of internal civil government. The power to do this was possessed and exercised, and submission demanded and yielded, and yet the constitution of the United States, which retained an unbroken union during the war, was asserting its sovereign authority over the state with all its guaranties in unimpaired strength.

When the orders were issued, civil government was in full operation in this state, although declared provisional and subject to the paramount authority of congress, the laws were enforced through the constituted judicial tribunals as

before the war, and the legislature had exercised its law-making functions. The supervising and controlling authority conferred by the reconstruction acts (as this legislation is called) acquiesced in by the people from necessity, was not intended to be asserted for the objects contemplated in the orders, and those orders, in our opinion, had and have no legal efficacy, except as obedience was compelled by the use of force. RUFFIN, C. J., uses this language: "The decree operates *in personam* only and proposed to do no more. It is to be enforced only by process of contempt. It does not render this bond less the obligation of the plaintiff in law than it was before the decree. While it is in existence unpaid and uncancelled, a court of law is obliged to hold it to be the plaintiff's deed, leaving the court of equity to act on its suitors as it is quite able, effectually to do."

An analogy may also be found in that principle of the law of war which gives effect to such orders of the commander of an invading army, so far only as they can be and are enforced by the means at his disposal and no further, and all property rights not destroyed revive when it is withdrawn. Thus the proclamation of the President, giving freedom after January 1st, 1863, to all the slaves within the revolting territory, operated only as the national army advanced, and emancipation was afterwards accomplished by the action of the states themselves. Dana's Wheaton, § 347, note 8. So far only and as acts of force have the military orders referred to been recognized in the decisions of this court heretofore.

In *Broughton* v. *Haywood*, Phil., 380, READE, J., compares order No. 10 to an injunction restraining the court from issuing execution.

In *McCubbins* v. *Barringer*, *Ibid.*, 554, the court undertakes to construe the order, but refrains from the expression of an opinion as to its intrinsic legal efficacy.

In *Isler* v. *Kennedy*, 64 N. C., 530, the attempt was made

to hold the sheriff responsible for not proceeding under an execution on which he returned that he had made no sale "in obedience to order No. 10 from Gen. Daniel E. Sickles, and it was held that "as the state was then under military control, the sheriff was bound to obey general orders."

So again in *State* v. *Kent*, 65 N. C., 311, READE, J., avoiding the recognition of any right of interference on the part of the military authorities with the execution of our own laws in the punishment of crime, remarks that "whatever force there was in the military order, it was not more than to suspend the law, and as soon as the order ceased, the law was restored to be administered as before."

In *Paul* v. *Carpenter*, 70 N. C., 502, where the privy examination of the wife touching her voluntary execution of a deed was taken before the provost marshal at Newbern, then in the occupation of the United States troops, where civil government had been suppressed, the acknowledgment before the officer *de facto* clothed with authority to take it by the officer in command was sustained and the probate declared sufficient.

The federal constitution, the only bond of union among the states, though its voice was hushed and its power suspended amid the din of arms, at the close of the conflict reasserted its supremacy over all the states as amply as before the attempted rupture. Whatever necessity may have been supposed to exist for placing these states in their transition from war to peace under the supervisory control of military commanders, it would be difficult to find any warrant in the constitution for conferring the powers, had congress so intended, they assumed to exercise over the legitimate action of the civil authorities. Self-government is the vital principle of our institutions, national and state, and the theory of both governments, in the language of Mr. Justice MILLER in *Loan Association* v. *Topeka*, 20 Wall, 655,

"is opposed to the deposit of unlimited power any where." We cannot, therefore, allow to the orders interfering with the due and peaceful administration of the laws by the courts of the state, any other operation than such as results from the exercise of force, and they are insufficient to invalidate the legitimate action of the courts or to impair rights thence derived.

The ruling of the court below must be sustained and the judgment affirmed.

No error. Affirmed.

W. O. COBB, Ext'r, v. JOHN T. MORGAN.

Payment—Usury—Pleading.

1. Payment is an act of volition, requiring the assent of both debtor and creditor, and hence, the transfer of money by the former to the latter, under a contract for usurious interest, cannot be treated by the courts as a payment on the principal debt, when it was not so intended by the parties at the time.

2. Under the acts of 1874-'75, ch. 82, the payer of usurious interest may recover the same in an action for money had and received to his use, or by way of counter-claim when action is brought for the balance due on the usurious contract.

3. Where the payee of a note which is good as it originated makes a special contract for a usurious rate afterwards, to forbear enforcing payment, it is the special contract of forbearance which is usurious, while the original note remains untainted.

(*Bank* v. *Lutterloh*, 81 N. C., 142; *Godfrey* v. *Leigh*, 6 Ired., 390, cited and approved.)

CIVIL ACTION tried at Fall Term, 1879, of NASH Superior Court, before *Eure, J.*

Judgment for plaintiff, appeal by defendant.

Messrs Bunn & Battle, for plaintiff.
Messrs. Connor & Woodard, for defendant.

SMITH, C. J. The action is on a bond for $800 executed by the defendant to the plaintiff's testator on January 4th, 1875, payable, with interest from date, on the first day of January, 1876, and secured by a mortgage upon land, and the demand is for judgment for the debt and the sale of the land for its payment. The defendant in his answer admits the giving the bond and mortgage as charged, alleges that two payments have been made on the debt, one of $311 and the other of $77, sets up the defence that the bond is usurious and was given for $600 only loaned by the testator, and submits to the payment of the sum loaned, less the credits of $388.

It was conceded by the plaintiff that the consideration of the bond was $600, and only that sum without interest was claimed. No issue was proposed in reference to the alleged partial payments, the only remaining disputed matter, but certain others, wholly extraneous to the pleadings and the pertinency of which nowhere appears, were submitted to the jury, which, with the answers, are as follows:

1. What were the two notes for $120 paid off in Wilson, N. C., given for? and the response is for interest on the $800 bond.

2. What was the amount paid to Sorsby in Wilson? Answer $559.50.

3. What was the amount of the Wills debt? Answer, $354.

The only controversy in the court below was as to the effect of the giving the two small notes for usurious interest on the money loaned, and whether it was either an extinguishment or reduction of the debt. The defendant insisted that thereby the bond itself became void and none of the money due thereon could be collected, and if this was not

so, then the effect was to reduce the debt to $212, the difference between the principal and the payments. His Honor ruled adversely to the defendant on both points and gave the plaintiff judgment for $600.

In relation to the assigned errors, it would seem to be sufficient to say that the subject matter to which they relate is not set up as a defence in the answer, nor is there any reference to the existence of the two usurious notes, and consequently the effect of their execution and payment was outside of the controversy made in the pleadings. But as perhaps upon application the court would have allowed an amendment admitting of their introduction, we will proceed to consider the questions as if properly arising in the case.

1. The sums paid on the two notes cannot be appropriated to the reduction of the debt, for the reason that the payment was neither made nor received to be thus applied, and the intent of the parties will control. These notes being usurious and void and constituting no legal demand against the debtor, he may regard the money as received by the testator to his use, and it may be recoverable on an implied promise, or used as a counter-claim against the plaintiff's demand, but for the reason that no counter-claim is asserted in the answer, the defence is unavailable to the defendant that form.

In *Bank* v. *Lutterloh*, 81 N. C. 142, it is decided that under the former law, usurious interest paid might be reclaimed by action against the lender, while it could not be under the act of 1866, and that the only remedy afforded the debtor under this law was in a refusal to pay and in resisting the action to enforce payment. The defendant, however, gave the two notes under the stringent provisions of the superseding act of March, 1875, and might as a counter-claim, if his defence had been so framed, have reduced the plaintiff's demand by the amount paid on them.

2. The second exception is that the $800 note, though

valid in its inception for the sum of $600 and void as to the excess, was vitiated and annulled by virtue of the agreement to take and taking the usurious interest represented by the two notes for forbearance thereon after the later act went into operation. This exception is equally untenable and in direct conflict with the statements and submission of the answer itself. The act of March, 1875, avoids "all bonds, contracts and assurances whatever for the payment of any principal money to be lent, or covenanted to be performed, upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of six dollars or eight dollars on the hundred as aforesaid," and it declares that "whoever shall take or receive a rate of interest greater than hereinbefore specified shall forfeit and lose for every such offence the double value of the moneys," &c., lent, &c. Acts of 1874–'75, ch. 84, § 2.

The force of the statute is spent upon the contract entered into in violation of its terms, that is the notes given for the forbearance, and in subjecting the receiver of the usury to the forfeit of a sum double that forborne; but the pre-existing legal obligation is not infected by giving the indulgence for which the usury is taken. This is the uniform construction put upon similar statutes which avoid the entire debt and impose penalties upon the receiver for taking interest in excess of that allowed by law. In *Ferrall* v. *Shaw*, 1 Saund., 294, it is said by the court: "The bond was good when made. Then an usurious contract afterwards cannot make the bond void which was good at the time when it was made. But it is true that by such usurious interest the plaintiff has forfeited in treble value, but the bond will not be therefore void."

"When the payee of a note," remarks a recent writer, "which is good as it originated, makes a special contract for a usurious rate afterwards to forbear enforcing payment, it is the special contract of forbearance which is usurious,

while the original note remains untainted." 1 Schm. Per. Pro., 325.

The special contracts entered into as aforesaid after the maturity of the note to obtain further time in the payment thereof do not in law relate back to the date of the original contract so as to infect its validity. *Mallett* v. *Steem*, 17 Iowa, 64; *Dreury* v. *Morse*, 5 Allen, 445. And in harmony is the case of *Godfrey* v. *Leigh*, 6 Ired., 390, wherein RUFFIN, C. J., says: "If the contract was not for usurious interest, but the lender afterwards received it, he forfeits double the sum lent."

But as we have already said these questions are not raised in the answer, and so on the other hand the defendant admitting his liability for the sum loaned, submits to pay it after an allowance of what he claims as credits and of which there was no proof, nor indeed any issue to admit proof. The judgment must be affirmed and it is so ordered.

No error. Affirmed.

S. W. ISLER, Ex'r, v. D. A. MURPHY, Ex'r.

Estoppel—Evidence.

1. A judgment can only estop as to matters which were adjudged or admitted in the record of a previous suit or proceeding.
2. The entry of satisfaction made opposite to a judgment, though erased from the record by order of the court (the court not passing upon the question of payment), is *evidence* against the plaintiff as an admission of payment on the hearing of a subsequent motion for leave to issue execution on such judgment.

(*Rogers* v. *McKenzie*, 81 N. C., 164; *Ferebee* v. *Ins. Co.*, 68 N. C., 11; *Brown* v. *Brooks*, 7 Jones, 93; *Wade* v. *Carter*, 76 N. C., 171; *Wilson* v. *Derr*, 69 N. C., 137, cited and approved.)

SPECIAL PROCEEDING in the nature of a creditor's bill commenced before the clerk, and heard on appeal at Spring Term, 1880, of WAYNE Superior Court, before *Avery, J.*

The opinion contains the facts. The plaintiff appealed from the judgment of the court below.

Messrs. W. A. Allen & Son and *Battle & Mordecai*, for plaintiff.

Mr. W. T. Faircloth, for defendant.

DILLARD, J. The testatrix of the plaintiff recovered a large judgment in the superior court of Wayne on the 25th day of January, 1869, against the testator of the defendant, and thereafter, to-wit, on the 14th day of August, 1869, Stephen W. Isler, the general agent and attorney at law for B. M. Isler in said action, entered upon the judgment docket a receipt to J. T. H. Murphy in full of the amount of said judgment, his fee and the costs of the plaintiff, signed S. W. Isler attorney for plaintiff.

J. T. H. Murphy died in 1873, and defendant D. A. Murphy qualified as the executor to his will, and at spring term, 1874, plaintiff moved in the cause on notice to defendant as executor and to the heirs at law of J. T. H. Murphy deceased, to amend the record by striking from the judgment docket the receipt of S. W. Isler and the entry of satisfaction opposite to the statement of the judgment on said docket and for leave to issue execution. The defendant appeared to the motion and resisted it on the ground, first, that the infant heirs of his testator were not made parties; and secondly, that the judgment had been discharged. On consideration of the affidavits, His Honor

found as a fact that the judgment had not been paid and ordered the record to be amended by erasing the receipt of the attorney and the entry of satisfaction and further ordered execution to be issued.

Defendant appealed to this court from said order at spring term, 1874, and on the hearing of the errors alleged, the ruling of His Honor directing the amendment of the record was approved in this court, but the judgment was reversed and the cause remanded on the grounds of the refusal of a jury trial demanded by defendant as to the issue on the plea of payment or accord and satisfaction, and the further ground of no defence being made for the infant heirs of defendant's testator. See *Isler* v. *Murphy*, 71 N. C., 436.

After the decision in this court, an entry was made on the pending motion in the court below at January term, 1876, in these words; "Motion for execution withdrawn. Tax costs of motion against plaintiff. Entry of satisfaction ordered to be stricken out, by consent issues for jury withdrawn, neither party desiring to present any issue;" and from and after that term no further proceedings were taken in the cause in which the judgment was rendered.

The proceedings being thus ended, this special proceeding was begun on the 26th July, 1876, by the plaintiff, suing for himself and all others, the creditors of the testator of defendant, alleging the said judgment to be still due and unpaid and making the defendant D. A. Murphy the executor and the heirs of the defendant's testator parties defendant, and the defendant, by way of defence, alleged, as he had done in opposition to the motion for amendment of record and for execution, that the judgment had been paid, on which averment plaintiff in his reply made issue and also set up an estoppel to such defence the orders of amendment and for execution made on the motion in the original action at spring term, 1874, and at spring term, 1876. An issue being thus made in the probate court, the same was certified up to

the superior court for trial, and accordingly at spring term, 1880, a trial was had by a jury of this issue: "Has the judgment mentioned in the pleadings been paid and satisfied," to which they responded in the affirmative.

On the trial of the issue the plaintiff read in evidence the original judgment recovered in 1869 as a case on his behalf, and the defendant in support of the issue on his part offered to put in evidence the receipt of S. W. Isler, the attorney, still appearing on the judgment docket, which was objected to by the plaintiff as being destroyed as evidence by the judgment on the motion in the cause at said spring terms of 1874 and 1876, and on the further ground that the orders of the court at said terms were an estoppel on defendant to show payment and satisfaction in that way. His Honor overruled the objections, and let in the evidence and therein is the error complained of.

On the appeal to this court from the judgment on the motion in the original cause, as reported in 71 N. C., 436, it was held to be competent to the court below to make up its own record, and not to be error to order the erasure of the receipt or entry of satisfaction on the docket, if the same were not entered as parts of the court's proceedings or by its direction. Hence, after the record was ordered to be amended, it imported a judgment in plaintiff's favor, without the impediment of the *receipt and entry of satisfaction thereon* to the issue of an execution, and thus on the trial of the issue as to the alleged payment, the record was a good *prima facie* right to recover, but liable to be overcome by proof to come from defendant.

The record after the order of amendment, if formally made out, would not contain any mention of the receipt or entry of satisfaction, but still the receipt, admitted on the trial to be in the proper handwriting of S. W. Isler, who was then the attorney at law and now the executor, of B. M. Isler, appeared on the judgment not erased, and why was it

not admissible as evidence of the alleged payment and satisfaction of the judgment? S. W. Isler was the attorney of record of his testatrix when the receipt was entered by him on the judgment docket, and it is settled that such an attorney is authorized to receive payment of a debt in his hands for collection and to discharge the debtor. *Rogers* v. *McKenzie*, 81 N. C., 164, and the authorities therein cited. The receipt still extant on the docket, though not admissible nor received by the judge as a record or any part thereof, was an admission of payment by defendant's testator, and as such proper to be laid before the jury, open to any legitimate proof to be explained, or to be shown that the payment therein acknowledged was in fact never made. *Ferebee* v. *Insurance Co.*, 68 N. C., 11; *Brown* v. *Brooks*, 7 Jones, 93; *Wade* v. *Carter*, 76 N. C., 171; *Wilson* v. *Derr*, 69 N. C., 137.

It is urged, however, that the receipt of plaintiff's attorney, though ordinarily receivable to establish a payment to him, was not receivable in this case, because it was adjudged as a fact that the judgment was still due and unpaid when the receipt and entry of satisfaction were ordered to be stricken from the judgment docket. It appears to us this objection is founded on a misinterpretation of the record as it was made by the last order on the motion at spring term, 1876. According to that entry, the judgment was left on the record cleared of the entry of satisfaction but still dormant, and the withdrawal of the issues left the alleged discharge of the judgment undecided and without any agreement as to its truth. And thus the parties were placed *in statue quo* with liability at any future attempt to enforce the judgment to encounter the defense of payment or accord and satisfaction as before. A judgment can only conclude and estop from subsequent litigation matters which were adjudged or admitted in the record of a previous proceeding. And here the alleged payment of the judgment does not appear to have been passed upon by the court nor admitted

to be untrue by defendant, and therefore there was no estoppel to set up and insist on the defence of payment in this proceeding as heretofore.

It is our opinion, therefore, that the receipt as still existing on the record was admissible as evidence on the issue submitted to the jury and the orders made on the motion in the original cause at spring term 1874 and 1876 were no estoppel to its introduction as such.

There is no error, and judgment of the court below is affirmed.

No error. Affirmed.

State on relation of L. E. DUDLEY, Guardian, v. THEOPHILUS BLAND and others.

Covenant not to Sue—Equitable Release.

Where a creditor receives from one of a number of joint and several debtors, by successive guardian bonds, a sum considerably less than the aggregate amount due from all such debtors, and gives him an instrument under seal releasing all claims against him or his representatives and covenanting to execute any and all instruments which may be necessary to relieve the party making such payment from all liability to the other joint debtors, such instrument will have the effect of an equitable release to the other debtors of all in excess of their *aliquot* portion of the joint indebtedness.

(*Allen* v. *Wood*, 3 Ired. Eq., 386; *Wharton* v. *Woodburn*, 4 Dev. & Bat., 507; *Russell* v. *Adderton*, 64 N. C., 417; *Evans* v. *Raper*, 74 N. C., 639; *Craven* v. *Freeman*, 82 N. C., 361; *Bell* v. *Jasper*, 2 Ired. Eq., 597; *Jones* v. *Hays*, 3 Ired. Eq., 502; *Jones* v. *Blanton*, 6 Ired. Eq., 115, cited and approved.)

CIVIL ACTION upon a Guardian Bond, tried at Spring Term, 1880, of PITT Superior Court, before *Avery, J.*

The case was heard upon complaint and answer, and the exceptions to a referee's report. The facts necessary to an understanding of the decision of this court are stated in its opinion. The defendants appealed from the ruling and judgment of the court below.

Messrs. Latham & Skinner, for plaintiff.
Messrs. J. B. Yellowley and *J. B. Batchelor*, for defendants.

SMITH, C. J. The object of the suit is the recovery of the relator's estate in the hands of his guardian, the defendant Theophilus Bland, and the action is against him and the sureties to his several bonds. During his administration of the trust the guardian executed four successive bonds, as follows:

One August 2, 1859, in the penal sum of $800, with Benjamin Hazzleton, testator of the defendant Phil. Williams, and the defendant W. A. Quinerly, his sureties. A second February 4, 1862, in the penalty of $9,000, with Jesse Nobles, the intestate of the defendant Fred. Harding, and Guilford Smith, the intestate of the defendant Mary Cox as sureties. A third, August 7, 1866, the penalty being $5,000, with the defendant F. Haddock and said Jesse Nobles sureties. And a fourth, November 8, 1872, the penalty being $1,500, with defendants Samuel Smith and W. Nelson sureties.

A reference was ordered and the referee reported at spring term, 1879, as due the relator, $1,971.62, to which various exceptions were taken.

The defendants set up and relied on in reduction of the indebtedness ascertained in the report, a payment made to the relator of $450 since the action was commenced by Fred. Harding, the administrator of said Jesse Nobles, in exoneration of the intestate's estate from all further liability, and the execution by the relator of the following paper writing:

"In consideration of $450 to me this day paid by Fred. Harding, in behalf and for the benefit of the estate of Jesse Nobles and those interested in and entitled thereto, I have released and do hereby release the said Jesse Nobles deceased, and the said Fred. Harding, administrator of Jesse Nobles, from all further demand and liability upon all the bonds made by said Nobles as surety for Theophilus Bland, as guardian for Malsey Nelson, a lunatic, and I covenant never to sue any representative of said Nobles upon any of such bonds or by reason of his surety as aforesaid. Nevertheless, I do reserve all my rights against the said Bland, and against any and all other sureties to any and all bonds given or made at any time by said Bland as guardian as aforesaid, which rights are not impaired hereby, and I hereby agree to execute any and all other instruments which may be necessary or proper to relieve the estate of said Nobles and his representative from any and all liability to the co-sureties of said Nobles, in case or by reason of any recovery which may hereafter be made against them, which instrument shall not impair the liability of said co-sureties of said Nobles. Witness my hand and seal, this 23rd day of March, 1879.

(Signed) L. E. DUDLEY, *Seal.*
Guardian of Malsey Nelson, a lunatic."

No question is raised as to the authority of the guardian of the relator on his behalf to adjust and settle the matters in dispute by compromise with one or more of the obligees, and on such terms as he may deem advantageous to the trust estate, nor any suggestion made that the arrangement entered into with the administrator of Nobles was not judicious and favorable to the lunatic. Such power seems to be incidental to the control and management committed to the guardian, and to the conduct and defence of suits in which the estate may become involved. We do not pro-

pose however to consider the extent and limitations of the authority conferred, since no objection is taken to its exercise in the present case, and confine ourselves to an examination of its legal results upon the obligation of the other sureties.

The release of the estate of Nobles absolute in form is followed by a covenant not to sue his representative, and further to execute any instrument needful for the protection of his estate from "all liability to the co-sureties in case or by reason of any recovery which may be hereafter made against them," the clear purpose and effect of which are not only to exonerate the intestate's estate from the claim of the lunatic and from that of the other sureties who may be compelled to pay in excess of their ratable shares, but to reserve the right to enforce against them the payment of their ratable parts of the common indebtedness. As this full immunity can only be secured to the estate of Nobles by relieving it alike from the creditor's demand and from being called on for contribution by the other sureties, it follows that they must also be exonerated from the payment of more than their *aliquot* parts of the whole. The reservation of the right to sue which rendered the defence unavailable at law under a divided jurisdiction and compelled a resort to another court, becomes inoperative in a proceeding in which all rights and equities are fully and finally adjusted, inasmuch as such reservation is incompatible with the covenants except as to a ratable apportionment among the several bonds. If a surety could be required to pay more he would at once have an equity to contribution from the others, the released surety included, and this would entitle him to redress upon the covenant. To avoid this circuity and to ensure entire exemption to the administrator of Nobles, the recovery from the co-sureties is restricted to their respective ratable parts of the common debt which admits of no demand from any upon him. The

release to the estate of Nobles is an equitable release to the co-sureties on the bonds of all in excess of such *aliquot* parts. This follows from the nature of the relations which subsist among sureties to a common obligation and aside from any implied contract between them. *Allen* v. *Wood*, 3 Ired. Eq., 386; *Wharton* v. *Woodburn*, 4 Dev. & Bat., 507.

The cases referred to in the argument for the relator are cases where the creditor reserves his remedy in express terms against all others, and leaves them in possession of all their rights as to himself and the co-obligors or co-sureties, and they differ from ours in the fact the covenant here extends protection against all liability to contribution to the over-paying surety. But if they are in conflict with the adjudications of this court we must adhere to the doctrine as declared with his accustomed clearness and force by the late Chief Justice in *Russell* v. *Adderton*, 64 N. C., 417, and recognized in *Evans* v. *Raper*, 74 N. C, 639, and *Craven* v. *Freeman*, 82 N. C., 361.

The liability resting upon the several bonds will be in the ratio of its penalty to the sum of all the penalties. *Bell* v. *Jasper*, 2 Ired. Eq., 597; *Jones* v. *Hays*, 3 Ired. Eq., 502; *Jones* v. *Blanton*, 6 Ired. Eq., 115.

Nobles was a surety with a single and different associate on each of the larger bonds, and the sum paid by him with interest to the point of time to which the referee's computations are made will be divided between those bonds in the ratio of nine to five, and the co-surety in each will pay a sum equal to that paid for the estate to Nobles in the apportionment between them. In like manner the sureties on the smaller bonds will pay their respective shares ascertained upon the same principle. The administrator of Nobles will be exempt, because his administrator has already paid his share. The relator can only claim payment of the sum falling upon the several bonds from one or both of the sureties thereon, and any loss from insolvency or other cause

will not be transferred to the sureties to other bonds, since the consequence in such case would be to subject the estate of Nobles to the demand of the over-paying surety in violation of the release; and for these several portions of the common subsisting indebtedness, the judgment will be entered for the principal of the bond to be discharged by payment of the sums due from the sureties thereon.

It will be referred to the clerk to make the computations, and when his report is confirmed final judgment will be entered accordingly.

PER CURIAM. Judgment modified.

CEDAR FALLS COMPANY v. WALLACE BROTHERS.

Issue—Bill of Exchange—Notice of Non-Payment.

1. It is not every matter averred on one side and denied on the other, that in a legal sense is an issue, but only such as are necessary to dispose of the controversy.
2. Generally, if the drawer of a bill has no reasonable ground to expect it to be honored, the holder is not bound to strict presentment and notice; but if the drawer has funds in the hands of the drawee, he has a right to expect his bill to be honored by applying thereto the funds belonging to the drawer or otherwise; and the drawer is entitled to presentment of his bill in reasonable time and strict notice if dishonored, although the drawer knew or had reason to believe when he drew the bill that the drawee was insolvent.

(*Albright* v. *Mitchell*, 70 N. C., 445, cited and approved.)

CIVIL ACTION, commenced in Randolph and removed to and tried at Spring Term, 1880, of GUILFORD Superior Court, before *Seymour, J.*

Verdict and judgment for defendants, appeal by plaintiff company.

Messrs. John N. Staples and *W. W. Fuller*, for plaintiff.
Messrs Scott & Caldwell, for defendants.

DILLARD, J. The case made by the complaint was, that defendants, merchants of Statesville, N. C., drew a bill of exchange on the 20th of November, 1872, at three days sight in favor of the plaintiff, (a manufacturing company of Randolph county, N. C.,) on E. Lepage & Co., of Norfolk, Virginia, for four hundred and four dollars and sixty cents; that the drawees having failed to pay the money on demand after a previous acceptance, a protest was duly made and notice given to both plaintiff and defendants; and thereupon the plaintiff took up the bill and brought this action claiming to recover against the defendants as drawers.

The defence set up was, that all the time from the date of the bill in November to the protest for non payment in December, the defendants had in the hands of the acceptors in Norfolk eight hundred dollars, of which sum three hundred dollars was paid on two bills drawn subsequently to the one in suit; and that the holding of the bill for so long a time before presenting the same for acceptance and payment was a negligence which discharged them.

At the trial of the cause, the formation of issues being delayed by consent of parties until further developments, the evidence was adduced on both sides, and thereupon the court framed and submitted to the jury the issue, "Did the plaintiff present the bill in reasonable time," and declined to submit those offered by the plaintiff, which are as follows:

1. Did the plaintiff forward the draft at the first opportunity and exercise all the diligence in its power to present the draft for acceptance?

2. Was the plaintiff delayed in the presentment of the draft by circumstances beyond its control?

3. Did defendants have a right to expect the payment of the draft?

4. Were Lepage & Co. insolvent at the time the draft was drawn?

5. Were Lepage & Co. insolvent at the time the draft was drawn, and was their insolvency known to the defendants?

6. Did defendants have reasonable grounds to believe that the draft would not be paid?

The refusal of the judge to adopt and submit the six issues proposed by the plaintiff instead of the single one submitted by the court, constitutes the matter of the first exception for our consideration. An issue of fact arises in cases where the only pleadings are a complaint and answer upon a material allegation in the complaint controverted by the answer. C. C. P., § 221, (1). So it is not every matter averred on one side and denied on the other, that in a legal sense is an issue, but only such as are necessary to dispose of the controversy. And to such necessary matters, the issues submitted ought to be confined as far as possible, the more comprehensive the better, in order to avoid embarrassment and confusion to the jury from a multiplicity of issues. *Albright* v. *Mitchell*, 70 N. C., 445.

Here, the defence was, and so was the uncontroverted proof, that the plaintiff held the bill and failed to present it for acceptance, or to put it in the way of being so presented through the National bank at Greensboro by its correspondents, from the 20th of November to the 20th of December; and upon the allegation that the presentment when made was not in reasonable time, the defendants claim to be discharged. This, the material fact to be ascertained, and the only one, was, whether the presentment was or was not in reasonable time. Such being the case, manifestly the issue submitted by the judge was comprehensive enough to em-

brace all the separate facts in the proposed issues of the plaintiff that were material. The facts proposed to be ascertained by the verdict of the jury on the first and second of the rejected issues, namely, *the forwarding of the bill by the first opportunity and the delay of presentment from circumstances beyond the control of plaintiff*, were material facts and proper for the consideration of the jury. And most obviously they were within the scope of the issue submitted by the judge, and to this extent, therefore, the plaintiff had no right to complain.

As to the other facts, namely, *the right of defendants to expect payment of the bill*, the actual *insolvency* of the drawees at the date of the bill, and the *knowledge* thereof by the defendants at the time, and the *reasonable ground of belief* by defendants that the bill would not be paid, proposed to be fixed by the jury in response to the third, fourth, fifth, and sixth issues of the plaintiff, were all immaterial under the undisputed facts of this case. It was proved and not questioned on the trial, that the drawers had in the hands of the drawees eight hundred dollars of funds at the date of the bill, and that three hundred dollars of that sum was drawn out on bills in favor of others, dated as late as the 6th of December. It thus appearing that there were funds in drawees' hands sufficient to pay the bill, the defendants had the *right to expect* their bill in favor of plaintiff to be paid. The insolvency of the drawees in such case, even if known to the drawers and producing *belief* in them that the bill would not be paid, would not excuse the plaintiff for not presenting it in reasonable time.

The drawers having funds in the hands of E. Lepage & Co., had the right to expect their bill to be honored by them, by applying thereto the funds belonging to the drawers or otherwise by the funds of the drawees or the means of their friends, and they were entitled to presentment of their bill in reasonable time and strict notice if dishonored, on the

part of the plaintiff, although the defendants at the time they drew the bill may have believed the drawees were insolvent and been so notified by them and requested not to draw on them. 2 Daniel Neg. Instr., § 1073, *et seq.*; *Predeaux* v. *Collier*, 2 Starkie's Rep., 57; *Staples* v. *O'Kinis*, 1 Esp., 332; *Nicholson* v. *Douthel*, 2 H. Black., 609; *Easdale* v. *Sowersby*, 11 East., 117; *Brown* v. *Ferguson*, 4 Leigh, (Va.,) 37. Such being the right of the defendants, resulting from the fact of having funds in the hands of the drawees, the plaintiff would not have been excused from the duty of presentment in reasonable time, even if the facts proposed to be inquired of in the issues 3, 4, 5 and 6) were admitted, and therefore they are immaterial and no error was committed in the court below in rejecting them.

The only other exceptions presented by the appellant for our consideration are in respect to an alleged expression of opinion on the evidence by the judge, and to the charge refused and as given. In order to an intelligible understanding of the points of error assigned, it is material to embody herein the instructions asked, which are:

1. If the jury believe from the evidence that plaintiff forwarded the draft at the first opportunity and used due diligence to have it presented, the plaintiff is not guilty of negligence.

2. What is reasonable time depends upon the circumstances of each particular case, and there is no definite rule as to reasonable time, but that it varies according to the circumstances of each particular case.

3. That circumstances beyond the control of the holder is a reasonable cause for delay in the presentment of a draft for acceptance.

4. If the jury believe that when the draft was drawn the defendants had no reasonable ground to expect the draft would be honored, then it makes no difference whether the draft was presented in reasonable time or not.

The first three instructions were given, but the court refused the fourth in the terms in which it was couched. It is undoubtedly true in general that if the drawer of a bill has no reasonable ground to expect it to be honored, as by having funds in the hands of the drawee or some arrangement for its acceptance and payment, made or to be made, the holder is not bound to strict presentment and notice. But the instruction asked and refused, taken with reference to the facts of the case on trial, could not have been given. In the case on trial, the fact of the existence of adequate funds in the drawee's hands was a fact proved and not denied. And in view of that fact, in place of giving the instruction in the terms thereof, the judge was right in refusing, and should have instructed the jury as he did—that the drawing of the bill by defendants under the circumstances, as a matter of law, was a reasonable ground to expect the payment of the bill. There was no error then in the refusal to charge as requested, and none we think in the charge as given.

His Honor having given the first, second and third special instructions asked by the plaintiff and refused the fourth as above explained, went on and in his general charge instructed the jury that if Lepage & Co. had funds in their hands belonging to the defendants sufficient to pay the bill, the defendants had the right to expect the payment thereof, and in such case the duty rested on plaintiff to make presentment within reasonable time; and after laying down the general rule of diligence in the presentment of such paper, he explained to the jury that within the meaning of the expression "reasonable time," the plaintiff company might except itself from the operation of the general rule by showing that it was prevented from presenting the bill sooner than it did, by the freshet relied on or other inevitable accident; and whether there was such freshet or not and its sufficiency to prevent an earlier presentment of the

bill, was fairly submitted to the jury as it seems to us. There is, therefore, no error in the charge given.

As to the error assigned in what is claimed to be an expression of opinion on the evidence by the court: In our opinion the expression used amounted to no intimation of opinion by the court, or if capable of such a construction, the subject matter thereof was so put to the jury in the general charge as to do no harm to the plaintiff. As excusing the long holding of the bill without presentment for acceptance, the plaintiff offered evidence tending to show that there was no post office nearer to their place of business than two or three miles, and that between the two points there was a creek which, by reason of heavy rains, prevented the plaintiff from presenting the bill for acceptance earlier than it did; and in opposition thereto the defendants offered evidence tending to show that the mail carried the bill from Statesville to plaintiff on the 20th of November, and that the answer of plaintiff acknowledging its receipt, mailed on the 25th of November, reached them at Statesville on the 27th of November. In this state of the evidence as to the prevention of presentment of the bill by high water, His Honor, after charging the jury that such prevention if found true was a good excuse, called attention to the fact of the transmission of the said letters between the plaintiff company and the defendants through the mail, and said to the jury that it did not appear that the same means of communication which carried plaintiff's acknowledgment of the receipt of the bill to defendants on the 25th of November, might not also have carried the bill for presentment for acceptance. The judge by this remark did not express any opinion. The point was developed by defendant's repelling evidence and was so designed to be. When the judge said it did not appear that the same means of communication might not have carried the bill to its destination, he merely stated what was true. In truth it did not

appear, and the defendants relying on the absence of any account of that circumstance, it was not improper in the charge to call the jury's attention to the point in the language the judge employed. However this may be, His Honor afterwards in his general charge left the question of prevention by high water to the jury as a question of fact, and in that connection advised the consideration of all the evidence on both sides, including the evidence as to the passage of letters between plaintiff and defendants after the bill came to plaintiff's hands, and as thus left, the jury had the whole matter before them, and it is not seen that the remark of the judge did or by possibility could have prejudiced the plaintiff.

There is no error, and the judgment of the court below must be affirmed.

No error. Affirmed.

WHITEHEAD & NOBLES v. LATHAM & SKINNER.

Judgment and Execution Liens—Priorities—Constitutional Law —Vested Rights.

1. A, B and C had all taken judgments against D. A's judgment was never docketed; B's was docketed in June, 1869; C's was docketed in January, 1878. Executions issued on all these judgments bearing teste fall term, 1879; *Held*,
   (1) That A, having never docketed his judgment had no lien on the land of the judgment debtor or its proceeds under execution sale which would entitle him to compete for such proceeds with more vigilant creditors who had docketed their judgments.
   (2) That B's judgment had ceased to be a lien by the lapse of time (ten years) from the day when it was docketed.
   (3) That C's judgment should first be paid out of the proceeds of the execution sale.

2. To change the mode of acquiring a lien under an existing judgment upon the property of the debtor, (*e. g.* to substitute the lien of a docketed judgment for the lien of a *fi. fa.*) neither impairs the obligation of the contract nor violates any vested rights.

APPLICATION of the Sheriff for instructions as to application of funds, heard at Spring Term, 1880, of PITT Superior Court, before *Avery, J.*

This is an application by the sheriff of Pitt county to the judge of the superior court of that county for advice as to the disposition of a sum of three hundred and twenty-six dollars raised by him as sheriff of said county from the sale of the land of Robert Highsmith under executions issued to him, and which were in his hands and by virtue of which the land was sold. These executions were as follows:

1. A *fi. fa.* from the superior court of Pitt county bearing teste at the fall term, 1879, of said court and issued upon a judgment in favor of Brown, Cherry & Perkins to the use of Whitehead and Nobles for one hundred and seventy-five dollars with interest from the first day of November, 1867, and costs thirteen dollars and thirty-five cents, rendered against said Highsmith at the May term, 1868, of said court. This judgment was never docketed and no execution has ever issued upon the same, except the one in the hands of the sheriff when the land was sold.

2. Two *fi. fas.* from the superior court of the same county issued upon two justices judgments docketed in said county on the 29th day of June, 1869, in favor of Alfred Forbes to the use of William Whitehead, one for fifty-eight dollars and forty-eight cents subject to a credit of thirty-five dollars and forty-four cents, and for costs seven dollars and twenty-eight cents; and the other for seventeen dollars and sixty-eight cents and six dollars costs. On the 19th day of December, 1879, executions were issued upon these two judgments.

3. On the 18th day of January, 1878, L. C. Latham and

Henry Skinner recovered judgment against the said Highsmith for sixty-one dollars with interest from the 13th of November, 1878, and costs thirteen dollars and ten cents, and on the same day was docketed in the superior court clerk's office of Pitt county.

Executions on all these judgments bearing teste of fall term, 1879, were in the hands of the sheriff at the time of the sale and by virtue thereof the land was sold on the 15th day of April, 1880, for the sum of three hundred and seventy-five dollars.

The sheriff says he is ignorant as to how this money should be applied and has asked the advice of the court.

Whitehead and Nobles, as the assignees of Brown, Cherry & Perkins and of Forbes, and Latham & Skinner made themselves parties to the proceeding and contest the application of the fund, the former insisting that the fund should be applied to their judgments and the latter contending that it should first be applied to the satisfaction of their judgment and the balance applied to the judgments of the other party.

His Honor in the court below held that the fund in the hands of the sheriff should be applied, first, to the two executions in favor of Alfred Forbes, then to the execution in favor of Latham & Skinner, and the balance to the execution in favor of Brown, Cherry & Perkins, from which ruling the plaintiffs appealed.

Mr. W. B. Rodman, for plaintiffs.
Mr. J. B. Yellowley, for defendants.

ASHE, J., after stating the case. We are of opinion there was error in the instructions given by His Honor for the application of the money. We cannot understand upon what principles the two judgments in favor of Forbes should be given a preference over that of Latham & Skinner, unless

it was upon the ground that his judgments had been first docketed. But when we come to examine his claim to a preference, we think it must yield precedence to the judgment of Latham & Skinner. Their judgment was rendered and docketed on the 18th day of January, 1878, and then created a lien on the land which was sold and that lien was continued and in full force up to the day of sale. Forbes' judgments were docketed on the 29th day of June, 1869, and no execution was issued thereon until the 19th day of December, 1879, more than ten years after the docketing the judgments, and not until the lien of the judgments had expired from the lapse of time. At the date of the sale, then, Forbes had no lien on the land, unless he acquired one by virtue of the levy of his executions which bore teste only from the fall term, 1879, a date subsequent to that of the lien of Latham & Skinner. The fact that Forbes' judgments had been docketed in June, 1869, can give him no advantage, for as has been said he had lost that lien by efflux of time and was then in no better condition than if he had never had a lien. The satisfaction of his executions should therefore be postponed to that of Latham & Skinner. The two Forbes judgments, however, were transferred to the superior court docket under the new system and became judgments of that court and the clerk of that court had the right under proper circumstances to issue executions thereon, and in that respect they had the advantage over the judgment in favor of Brown, Cherry & Perkins; for it does not appear that any execution on it had been issued and levied on the land of the defendant Highsmith, so as to have secured a lien before the change in the courts, nor was it ever docketed in the superior court of Pitt, or for aught that appears, ever transferred to that court after the adoption of the constitution of 1868. But the learned counsel for Whitehead and Nobles strenously contends that Brown, Cherry & Perkins by their judgment

rendered in the superior court of Pitt county, before the adoption of the new judicial system, acquired vested rights, to-wit, the right to issue execution on their judgment which should be a lien on the land of the defendant in the execution from its teste, and under which the lands of the defendant could be sold for the satisfaction of their judgment, and that no act of the legislature, whether in the form of an amended constitution or of an ordinary act of assembly, could destroy those vested rights or impair the obligation of the contract of which the record of the judgment was the conclusive proof.

To change the mode of acquiring a lien under a judgment upon the property of the debtor neither impairs the obligation of the contract nor violates any vested right. The legislature may at any time modify the remedy without impairing the obligation of the contract. Cooley Const. Lim., p. 35, and note and cases there cited. And the right to issue a *fi. fa.* on a judgment is not a vested right. The same author in this work referred to (page 448) says: "The right to a particular remedy is not a vested right. This is the general rule, and the exceptions are of those peculiar cases in which the remedy is part of the right itself. As a general rule every state has complete control over the remedies to suitors in its courts. It may abolish one class of courts and create another. It may give a new and additional remedy for a right or equity already in existence. And it may abolish old remedies and substitute new, or even without substituting any, if a reasonable remedy still remains." According to this authority the right to issue the *fi. fa.* in order to bind the land of the defendant is not a vested right, and the legislature had the right to change the remedy by substituting the lien of the judgment for that of the *fi. fa.* It in fact provided a better remedy by giving, if the conditions imposed were complied with, a continuous and permanent lien in place of one that is liable to be lost

by neglect or the want of proper diligence. This execution then of Brown, Cherry & Perkins should be postponed to those of Forbes. They are all dormant, and to say the least, very irregular. But as there is no objection made by any one to their sharing in the distribution of the money in the hands of the sheriff, we hold that the fund should be first applied to the satisfaction of the execution in favor of Latham & Skinner, then to those in favor of Alfred Forbes, and the balance to that of Brown, Cherry & Perkins.

There is error. Let this be certified to the superior court of Pitt county.

Error. Reversed.

ALFRED MAY, Guardian, v. W. A. DARDEN, Adm'r, and others.

Appeal—Costs.

Although the general rule is that no appeal lies from a judgment for costs only, yet there is an exception in favor of fiduciaries, to be inferred from Bat. Rev., ch. 45, § 54, which makes the decision in those cases "one affecting substantial rights."

(*Kidd* v. *Morrison*, Phil. Eq., 31; *State* v. *R. R. Co.*, 74 N. C., 287, cited and approved.)

CIVIL ACTION upon a guardian bond tried at Spring Term, 1880, of PITT Superior Court, before *Avery, J.*

Alfred Turnage, the former Guardian of Neta Turnage, and having funds in his hands belonging to the infant, died intestate on the 25th of June, 1879, and shortly thereafter the defendant, W. A. Darden, was appointed his administrator. Some time early in August following, the relator, Alfred May, was appointed guardian to said infant, and on the 21st of the same month brought the present action

against the defendant as administrator and the others, sureties on the guardian bond, to recover the ward's estate, claiming to be due on the returns of January 5th, 1879, the sum of nine hundred and seventy dollars and seventy-six cents and interest thereon since. The defendant answers admitting the indebtedness alleged, assenting to the recovery of judgment for that sum, and insisting that the action was prematurely and unnecessarily brought. There was an order of reference, and the referee in his report finds due to the ward on January 1st, 1880, nine hundred and ninety-nine dollars and eighty-one cents with compound interest thereon from that date. The defendant Darden excepted to so much of the report as charged his intestate's estate with the payment of the costs of suit, in which is included the allowance for the report. The court overruled the exception and gave judgment for the penalty of the bond to be discharged by the payment of the sum reported by the referee, and that the costs be paid out of the assets of the intestate, if any, in the hands of his administrator, from which judgment the defendant appealed.

Messrs. W. B. Rodman and *Reade, Busbee & Busbee*, for plaintiff.

Mr. George V. Strong, for defendant.

SMITH, C. J. The only point presented in the appeal is the adjudication of costs against the defendant for the reasons assigned: 1st. That the claim was not presented for payment before suit. 2nd. That payment was not unreasonably delayed. 3d. Nor did the defendant refuse to refer the matter in controversy as provided by the act of 1868'-69.

The act referred to declares that "no costs shall be recovered in any action against an executor, administrator or collector unless it appears that the payment was unreasonably delayed or neglected, or that the defendant refused to

refer the matter in controversy, pursuant to section fifty, in which cases the court may award such costs against the defendant personally or against the estate, as may be just." Bat. Rev., ch. 45, § 54. The purpose of the statute was obviously to urge these representatives to a prompt and early settlement of claims against the deceased, and to protect the estate, when proper diligence was used, from costs needlessly incurred by creditors in prosecuting their claims. The meaning is too plain to admit of doubt, and it plainly meets the present case.

Less than twenty days passed after the defendant's appointment before the action was brought. There was no controversy about the amount due as stated by the intestate himself in his last return to the probate court. The reference resulted in reducing the sum which the defendant admitted in his answer and offered to pay. The reference was as profitless as the suit was premature in allowing the administrator no time to adjust and pay the debt. Certainly payment was not in the language of the act "*unreasonably delayed*" and unless it was, the evils should not fall on the intestate's estate.

The plaintiff insists, first, that no appeal lies from a judgment for costs only, (*Kidd* v. *Morrison*, Phil. Eq., 31; *State* v. *R. & D. R. R.*, 74 N. C., 287,) and secondly, that the costs must be borne by the party against whom a recovery is made. We think neither proposition can be maintained. The cases cited are to the effect that where the essential subject matter is destroyed, lost or adjusted, an appeal will not be allowed from a jugment disposing only of the costs. This is not our case. Here the plaintiff recovers the damages demanded and the error assigned is in that part of it which (overruling the defendant's exception) imposes the costs upon the intestate's estate. This is certainly an order or determination involving a matter of law and "which affects a substantial right claimed in the action." C. C. P., § 299.

Nor are the citations from the various sections of the Code and Revisal regulating the taxation of costs generally, pertinent to the present case, for which a special provision is made.

We must therefore declare so much of the judgment as requires the costs to be paid from the intestate's estate in the hands of his administrator, the defendant Darden, erroneous, and it is in this respect reversed and the appellant will pay the costs of his appeal to this court.

Error. Judgment accordingly.

J. PHILLIPS, Adm'r, &c., v. A. G. LENTZ.

Removal of Cause—Appeal.

Where upon a motion to remove a cause, no facts are stated in the affidavit of the applicant as grounds for such removal, the ruling of the court below may be reviewed, but where the facts are set forth, their sufficiency rests in the discretion of the judge and his decision upon them is final.

(*State* v. *Duncan*, 6 Ired., 98; *Reynolds* v. *Boyd*, 1 Ired., 106; *State* v. *Lamon*, 3 Hawks, 175; *Cannon* v. *Beeman*, 3 Dev., 363; *State* v. *Seaborn*, 4 Dev., 305; *State* v. *Shepherd*, 8 Ired., 195; *State* v. *Twitty*, 2 Hawks, 248, cited, distinguished and approved.)

MOTION to remove a cause heard at Spring Term, 1880, of CABARRUS Superior Court, before *McKoy, J.*

This motion was made in a civil action pending in said court. After answer filed by defendant, he moved for the removal of the cause from the county of Cabarrus to some adjacent county, which was based upon the following affidavit: "The defendant being duly sworn, says that he cannot, as he verily believes, obtain a fair trial of this action in

this county; that any recovery which may be effected in this action will, as he is advised, pass by the will of the plaintiff's testator to two churches of the Methodist Episcopal persuasion in this county, one situated in Concord, and the other in the county, known as St. Matthews church; that the membership of said churches is large and of the persuasion known as Methodist Episcopal, is very large in this county, and ramifies into every part thereof, so that he verily believes no jury could well be impannelled in this county, which would not contain some element prejudicial in favor of said churches; that as he is informed and believes, the subject matter of this suit has been greatly canvassed amongst members of said denomination; that this membership of said denomination in this county is according to his information and belief larger than that of any other denomination; that this affidavit is not made for delay merely, but truly to procure a fair and impartial trial of this action." (Signed by the defendant, and sworn to before the clerk of the court.) The judge refused the motion and the defendant appealed.

Mr. W. J. Montgomery, for plaintiff.
Mr. W. H. Bailey, for defendant.

ASHE, J. The removal of causes, civil or criminal, from one county to another for trial, is authorized by the act of 1808—Rev. Stat., ch. 31, § 120, and Rev. Code, ch. 31, § 115. This section of the Revised Code was not brought forward in Battle's Revisal, and the legislature deemed it necessary to pass the act of 1875, ch. 19, which revived sections 115, 116, 117 and 118 of the Revised Code, except that portion of section 115 with reference to slaves. This section (115) omitting the clause referring to slaves, reads: "In all causes in the superior courts, civil or criminal, in which it shall be suggested on oath, on behalf of the state, of the traverser

of the indictment, or of the plaintiff or defendant, that there are probable grounds to believe that justice cannot be obtained in the county in which the causes shall be pending, the judge is hereby authorized to order a copy of the record of the cause to be removed to some adjacent county for trial; provided however, that no cause shall be removed, unless the facts are set forth whereon the party founds his belief that justice cannot be obtained in the county, so that the judge may decide upon such facts, whether the belief is well grounded."

The construction given to this section by this court, is, that the sufficiency of the affidavit for the removal lies in the discretion of the superior courts, and their discretion is one which this court cannot review.

The first act on this subject was the act of 1806, under the provisions of which a cause might be removed if it was suggested on oath that there were probable grounds that justice could not be obtained in the first county. The construction given to this act was, that a party was entitled to the removal of his cause whenever he made affidavit that there were probable grounds for such removal; the effect of which was to make him the judge in his own case and leave nothing to the discretion of the court—a mischief, to remedy which the act of 1808 was passed, which required the facts to be set forth, so that the judge might decide upon such facts, whether the belief was well grounded. In the case of *State* v. *Duncan*, 6 Ired., 98, Chief Justice RUFFIN said, the act of 1808 (Rev. Stat., ch. 31, § 120) requires the affidavit to set forth the facts whereon the deponent founds the belief that justice cannot be obtained, and expressly states the reason therefor to be "that the judge may decide upon such facts, whether the belief is well grounded." And it is held in that case that the application of a party to remove his cause, is a question addressed to the discretion of the judge of the superior court; and his

decision, as in other cases of discretion, is final and cannot be reviewed in this tribunal. *Reynolds* v. *Boyd*, 1 Ired., 106; *State* v. *Lamon*, 3 Hawks, 175; *Cannon* v. *Beeman*, 3 Dev., 363.

We are aware that there are some cases decided by our court which seem to be in conflict with these authorities, as for instance, the cases of *State* v. *Seaborn*, 4 Dev. 305; *Shepherd's case*, 8 Ired., 195, and *Twitty's*, 2 Hawks, 248, where this court has reviewed the decisions of the courts below upon the sufficiency of affidavits for removal. But in looking into those cases, it will be seen that the orders of removal were founded upon affidavits that did not come up to the requirements of the statute. As in *Twitty's case*, where the cause was removed on an affidavit on the part of the state, which stated the belief of the deponent without setting forth the facts on account of the existence of which the trial was prayed to be removed from the superior court of Burke to that of Lincoln, this court held the removal to be contrary to law, and added, "if such facts had been set forth, the judge of the superior court, and he alone, must have decided them."

The distinction seems to be—where there are no facts stated in the affidavit as grounds for the removal, the ruling of the court below may be reviewed; but where there are facts set forth, their sufficiency rests in the discretion of the judge and his decision upon them is final. There is no error. Let this be certified, &c.

No error. Affirmed.

W. L. TAYLOR v. C. C. HEGGIE.

Corporate Seal—Mortgagor and Mortgagee.

1. It seems that a corporation may adopt and make effectual as its seal the individual seals of its officers affixed to a deed of the corporation when it has no seal of its own.
2. A second mortgagee has no right to buy the estate of his mortgagor at a sale to satisfy a prior incumbrance, but he has a clear equity to be reimbursed for any expenditure, to relieve the estate of any incumbrances, and the property in his hands is charged therewith in preference to the trusts expressed in the mortgage deed.
3. Where a sale of mortgaged property is acquiesced in at the time by the mortgagor, he cannot afterwards recall such assent and contest the title of the vendee, either on the ground that the mortgage was invalid or that the particular purchaser had no right to buy.

(*Boyd* v. *Hawkins*, 2 Ired. Eq., 304, cited and approved.)

CIVIL ACTION to recover Land tried at Spring Term, 1879, of GRANVILLE Superior Court, before *Buxton, J.*

The plaintiff appealed from the judgment of the court below.

Messrs. Gilliam & Gatling, for plaintiff.

Messrs. Reade, Busbee & Busbee, and *G. V. Strong*, for defendant.

SMITH, C. J. The defendant becoming a redeemed shareholder in the People's Building and Loan Association, executed two deeds of mortgage conveying to it two tracts of land in Granville, one in July, 1873, for a tract known as for a tract known as the "Sassafras Fork land," in trust to the "Hunt land," the other in October of the same year, secure and provide for certain liabilities incurred and that might be incurred under the rules and operations of the association, with a power of sale in case of default. The defendant, being also indebted to the plaintiff for money loaned,

executed to him on January 22d, 1874, his bond in the sum of three hundred and five dollars and twenty-four cents, at eight per cent. interest, and to secure the payment thereof conveyed by a second mortgage deed the Sassafras Fork tract to the plaintiff with a like power of sale. On June 10th, 1875, the association rendered to the defendant a statement of his account, showing his indebtedness in the aggregate to be fourteen hundred and eighty-nine dollars and seventy-two cents. The defendant being in default, the association proceded on July 5th following, after due advertisement, to offer both tracts at public sale. The Hunt land was first sold, and the Sassafras Fork tract bid off by the defendant, and he not complying with the terms was again put up and bought by the plaintiff at the price of six hundred and five dollars. Of this sum the plaintiff paid over to the association five hundred and forty-two dollars, the balance due, and retained the residue to be applied to his own debt. The defendant made no complaint or objection at either sale, and had before said to the plaintiff that he wanted the property sold "as the only way of getting out of the concern." The association thereupon through its officers and (there being no corporate seal) with their individual seals annexed to each name, executed a deed for the said land to the plaintiff.

The present action is instituted to recover possession, the plaintiff claiming title both under the deed of the association and the mortgage to himself. The defendant denied the plaintiff's right of possession and asserted his own to the land, but in an amended answer permitted at spring term, 1879, after verdict, admits the plaintiff's title, reiterates his denial of the right of possession and insists on his right of redemption on payment of what is due on the plaintiff's secured note. A single issue, outside of the contention of the pleadings, was submitted to the jury, who respond that the land described in the first mortgage to the

association and in that made to the plaintiff is the same land mentioned in the complaint. No other facts seem to have been controverted. The court declared the defendant entitled to redeem, and adjudged that he be allowed to do so on payment of the debt secured in the mortgage to the plaintiff at any time before the last Monday in July, 1879, and that, in default, the clerk proceed to advertise and sell the land at the court house door in Oxford for cash, and apply the proceeds to the plaintiff's said debt and the costs of the action, and pay over the residue if any to the defendant. From this ruling the plaintiff appeals and presents its correctness for our revision.

Very much of the argumont before us, forcible and exhaustive, was expended in exposing the alleged usurious and oppressive character of the transactions between the association and the defendant, a redeemed shareholder, and to show the invalidity of the deed of the corporation for non-compliance with the requirements of the statute. Rev. Code, ch. 26, § 22. In our view the results of the discussion do not reach the decisive issue upon which the merits of the controversy depend, and we will only remark that the case cited (*Mill Dam Foundry* v. *Harvy*, 17 Pick., 417,) strongly supports the validity of the execution of the deed to the plaintiff and the sufficiency of the recognition of the seals used and adopted as those of the corporation itself, in the absence of any of its own.

It is a well established principle that a trustee who pays off an encumbrance or buys in an outstanding title superior to his own, cannot hold the relieved estate for his own benefit, but the act enures to the benefit of those interested in the trust estate for whom he is trustee. The doctrine is fully and elaborately discussed in its various relations in the notes to *Fox* v. *Macreth*, 2 White & Tudor's L. C. Eq., 72, and to some of the cases cited we propose to refer:

In *Bell* v. *Webb*, 2 Gill., 164, the trustee in a deed to sell

for the payment of debts purchased at a sheriff's sale through his agent some of the trust property, and it was decided that the *cestui que trust* was entitled to the benefit of the purchase and that the trustee had a first claim to be reimbursed for his expenditure therein.

In *Van Epps* v. *Van Epps*, 9 Paige, 238, a person who held a second mortgage in trust for third parties bought the premises for himself at a sale under the first mortgage for a sum insufficient to satisfy both mortgages, and the chancellor declared that "the defendant is wrong in supposing that he was authorized to become the purchaser of the farm under the master's sale upon the prior mortgage for his own exclusive benefit to the prejudice of the subsequent mortgage which he held in trust for others. The duty of the trustee, as the holder of the junior mortgage, was to make the mortgaged premises if possible produce upon the sale sufficient not only to pay off the prior encumbrance and the costs of foreclosure, but also to satisfy the subsequent encumbrance which he held in his fiduciary character, *and this duty came directly in conflict with his interest as a purchaser for his own benefit, to bid in the property at the lowest sum for which he could obtain it.* *McGinn* v. *Shaffer*, 7 Watts, 412.

The same principle is declared by this court in *Boyd* v. *Hawkins*, 2 Ired. Eq., 304, the facts of which were these: Land lying partly in Warren and partly in Granville county was conveyed upon certain trusts to one Pitts, who assigned and conveyed the estate to the defendant. There was no registration in Granville, and a creditor of the mortgagor obtained judgment against him and issued a *fi. fa.* to that county, under which the sheriff sold the land therein to one Robards, attorney of the creditor, and he immediately thereupon sold to the defendant Hawkins. GASTON, J., delivering the opinion uses this forcible language: "We hold it to be clear that the defendant cannot take to himself the benefit of the purchase from Robards. A trustee without

the unequivocal assent of the *cestui que trust* cannot act for his own benefit in a contract on the subject of the trust. It is established upon the soundest principles, that if he should so contract expressly for himself, he shall not be suffered to turn the speculation to his own advantage." While then the trustee is disabled from acquiring a paramount title in another to the trust estate for his personal advantage and in disregard of the equitable interests of those represented by him, he has a clear right to reimbursement of the moneys expended in making the purchase or removing the encumbrance; and the estate in his hands is charged therewith in preference to the trusts expressed in the deed.

The conduct of the defendant at the sale, his acquiescense therein and his bidding the property in himself forbids his treatment of the plaintiff's purchase as an officious and needless expenditure, and we think shuts out any inquiry in this action into the dealings between the association and himself, to lessen his liability and reduce the sum expended by the plaintiff. The latter acted in good faith and without any knowledge of the methods and operations of the association as affecting the defendant, and is entitled to full reimbursement out of the proceeds of any future sale under his own mortgage.

The judgment below is erroneous in excluding this claim and directing the money remaining in the commissioner's hands after satisfaction of the plaintiff's secured note, to be paid over to the defendant. The proceeds must be first applied to reimburse the plaintiff the sum paid over to the association with interest, and, subject thereto, be disposed of as required by the judgment in the superior court. The judgment must therefore be reversed, and this will be certified that further proceedings be had in conformity to the law as declared in this opinion, and it is so adjudged.

Error. Reversed.

HULL, LANIER & CO. v. M. E. CARTER and others.

Frivolous Pleadings.

1. An answer should never be held frivolous unless it be so clearly and palpably bad as to require no argument or illustration to show its character.
2. Defendants being sued as acceptors to several bills of exchange answered that they accepted the same for the accommodation of the drawer, without having any funds of his in their hands, and in reliance upon a promise of the plaintiffs, on condition of securing the debt (already due) by their acceptances, to sell other goods to the drawer on credit, which was refused, whereby, it was claimed, the defendants were discharged of all liability on such acceptances;

Held, under the foregoing rule, that the averments of such answer were not so disconnected from the subject-matter of the complaint or so deficient in substance or form as to be pronounced frivolous.

(The court strongly intimates that no appeal lies from a refusal to overrule and disregard a pleading as being frivolous.)

Erwin v. *Lowery*, 64 N. C., 321; *Womble* v. *Fraps*, 77 N. C., 198; *Swepson* v. *Harvey*, 66 N. C., 436, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of BUNCOMBE Superior Court, before *Schenck, J.*

There were three actions pending between the parties on appeal from judgments rendered by a justice of the peace. By consent of parties, they were consolidated and pleadings filed. The plaintiffs' counsel moved to strike out the answer as frivolous and irrelevant and for judgment. The court overruled the motion and the plaintiffs appealed.

Mr. Jas. H. Merrimon, for plaintiffs.
Messrs. Reade, Busbee & Busbee, for defendants.

DILLARD, J. An answer should contain a denial of the material facts or some of them in the plaintiffs case, without which his cause of action could not be maintained, or

set up new matter constituting a *defence* formerly a plea in bar or dilatory, or making a case for affirmative relief by counter-claim, C. C. P., §§ 100, 101, and sub-divisions under each. If the answer present new matter which is pertinent and *bona fide* relied on, as looking to and making up a complete defence, then the question is as to its legal sufficiency to constitute the supposed defence, and the regular mode to settle the question is by demurrer.

An answer should never be held frivolous and judgment given in disregard of it, unless, as stated in some of the New York cases, it be "so clearly and palpably bad as to require no argument or illustration to show its character," or in other words, such as to be capable of being pronounced frivolous or indicative of bad faith in the pleader on *bare inspection*. *Strong* v. *Sproul*, 53 N. Y., 497; *Young* v. *Kent*, 46 N. Y., 672. See also cases in North Carolina, *Erwin* v. *Lowery*, 64 N. C., 321; *Womble* v. *Fraps*, 77 N. C., 198; *Swepson* v. *Harvey*, 66 N. C., 436, and *Brogden* v. *Henry*, at this term.

In this case there were three appeals from a justice's court afterwards consolidated into and tried as one in the superior court, and each one was grounded on a draft drawn by W. E. Davidson in favor of the plaintiffs, and accepted by defendants. The answer admits the acceptances and that the consideration of the drafts as between the drawer and plaintiffs was a true past indebtedness for merchandise sold by plaintiffs to the drawer, and they aver that as to themselves they had no funds of the drawer in their hands and accepted the drafts for the drawer's accommodation and in reliance upon an alleged promise of the plaintiffs on condition of security for the debt already due by their acceptances, to sell other goods to the drawer on a credit as before, which they allege was refused and thereby they claim a discharge of all liability on their said acceptances.

The averments in the answer relied on as making a defence for defendants have certainly a connection with the

cause of action set forth in the complaint, and as to their sufficiency in substance or form, it is not proper for us to express or intimate an opinion, but all we mean to say is, that under the rule as above laid down on the subject of frivolousness, the matters set up are not so clearly and palpably bad as to be capable of being pronounced frivolous or indicative of bad faith in the pleader on bare inspection and therefore unworthy of argument and consideration.

Without deciding the question of the rightfulness of the appeal from the refusal of the court below to hold the answer frivolous, with, however a strong impression that it is not appealable, we hold there is no error in the judgment of the court upon the character of the answer and the judgment of the court must be affirmed, and this will be certified that a trial may be had according to law.

No error. Affirmed.

R. A. BROWN v. P. M. MORRIS.

Statute of Frauds—Contract—Agent and Principal—Pleading

1. A contract under which one is to make bricks on the land of another, the property in the bricks to remain in the owner of the soil until he has been paid for his clay and wood used and consumed in their manufacture, is not within the Statute of Frauds; Bat. Rev., ch. 50, § 10.
2. Where one buys from an agent the goods of his principal, under a misapprehension, not induced by the principal, that the goods belong to the agent, he cannot use as a payment or counter-claim, on a suit by the principal for the value of such goods, a credit given by him to such agent on an individual debt of the latter.
3. Where the complaint alleges a delivery to the defendant of 41,000 bricks under a verbal contract, and the proof shows a delivery to and

acceptance by him of 41,228 bricks, the contract has been sufficiently performed to sustain an action for the value of the same.

(*Golden* v. *Levy*, 1 Car. L. Rep., 527; *Tull* v. *Trustees*, 75 N. C., 424; *Johnson* v. *Dunn*, 6 Jones, 122; *Russell* v. *Stewart*, 64 N. C., 487; *Shelton* v. *Davis*, 69 N. C., 324; *Gorman* v. *Bellamy*, 82 N. C., 496, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of CABARRUS Superior Court, before *McKoy, J.*

Judgment for plaintiff, appeal by defendant.

Mr. W. H. Bailey, for plaintiff.

Messrs. W. J. Montgomery and *Wilson & Son*, for defendant.

SMITH, C. J. The plaintiff alleges a sale and delivery by himself to the defendant of 41,000 bricks of the value of three hundred and sixty-eight dollars and sixty-six cents, (as set out in a bill of particulars annexed) and brings his action to recover the amount due. The defendant denies the allegations and says that he purchased about 26,500 bricks from one Ultzman who was indebted to him, and had given credit therefor.

The court submitted two issues to the jury, which, with the findings are as follows: 1. Did the plaintiff under a verbal contract sell and deliver to the defendant any bricks? Response—"Yes." 2. What is the value of said bricks and interest on the same? Response. Three hundred and nine dollars and twenty-one cents, with interest from March 10th, 1877, up to date.

The defendant asked the court to submit an issue, as the only one arising upon the pleadings, in place of the others. Did the plaintiff sell and deliver to the defendant 41,200 brick of the value of three hundred and eight dollars and forty-six cents? which was refused.

The defendant also asked certain instructions to be given to the jury:

1. Plaintiff is not entitled to recover because, according to his contract as testified to by Ultzman, the property in the bricks was in Ultzman, and the plaintiff had no lien by virtue of his parol contract with Ultzman that the bricks were to be his until he was paid for his dirt and wood used in their manufacture. The court decided and charged the jury that unless the property of the bricks was in the plaintiff he could not recover; that the bricks being made on the plaintiff's land by Ultzman, they could enter into a valid parol contract that the property therein should be in the plaintiff.

2. That if the defendant bought of Ultzman without notice of the arrangement between him and the plaintiff, the plaintiff cannot recover.

The court declined and instead charged in substance that they must act upon the whole testimony, and not upon that of the defendant alone, and if the bricks were the property of the plaintiff and were under a verbal contract sold and delivered to the defendant, he would be responsible therefor.

3. That this being a special contract set out in the complaint there could be no recovery upon the common count for goods sold and delivered.

This was also refused and the jury were directed to enquire whether there was any and what contract entered into by the parties, and that, if there was, the plaintiff must show a compliance with its terms on his part, and the plaintiff could only recover on the express and not on the implied contract. These rulings we proceed to consider.

The allegations of the complaint being denied, it was required of the plaintiff to prove his property in the goods, their sale and delivery to the defendant, and their price or value. These propositions were embodied and passed on in the issues submitted, and none other were necessary or proper.

Nor was there any error in the refusal of instructions

requested; first, the land on and from which the bricks were manufactured belonged to the plaintiff and it was perfectly competent for him to agree with Ultzman that the property should remain unchanged and follow the material into the manufactured article. The statute of frauds has no application to a contract concerning personalty which the brick became, and which but leaves title where it was, in the owner of the soil. Secondly, although the defendant may have supposed the property was in Ultzman, his debtor, and that payment could be made by giving a credit on the indebtedness due from him, this erroneous belief cannot have the effect of defeating the claim of the true owner, for goods sold by one who was in fact his agent only in the transaction. Contracts are binding in the sense understood by both parties, not by one only; and according to a fair interpretation of their nature and terms. There was evidence of conversations between the defendant and the plaintiff in regard to the sale of the bricks and of the terms agreed on with Ultzman, but there was none of any representations on the part of the latter of his ownership of the bricks, nor of any enquiry by the defendant in reference thereto. The bricks were sold for the plaintiff and he ratifies the act. Had there been a positive and distinct understanding that the contract of sale was by Ultzman personally, no one else could enforce it, and the plaintiff would be compelled to seek his remedy for the taking and conversion in some other form. But the proposition that because the defendant thought, without being misled by any one, that the goods belonged to the agent, the principal and owner could not recover, is without support in reason or authority. If the agent possesses due authority to make a written contract, not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal is known or unknown, he, the agent, will be liable to be sued and be entitled to sue thereon,

and his principal will also be liable to be sued and entitled to sue thereon, in all cases unless from attendant circumstances it is clearly manifested that an exclusive credit is given to the agent and it is intended by both parties that no resort shall in any event be had by or against the principal upon it. Story Agen., § 160, a. "It is a well established rule of law that a sale by a factor creates a contract between the owner and the purchaser." *Golden* v. *Levy*, 1 Car. L. R., 527.

In *Tull* v. *Trustees*, 75 N. C., 424, a case very similar to this, the facts were these: The contract for the purchase of the bricks sued for was made with one Miller, one of the trustees of the church, whose building was then in process of construction, upon his representation that he had authority to make the purchase, and the bricks were delivered to the trustees. In fact Miller had no such authority from the trustees, and the trustees proposed to show further that they refused to buy the bricks and that Miller proposed to buy and give them to the church.

The court say: "If Miller was authorized to make the contract which he did make with the plaintiff to deliver the articles to the church, at the charge of the church, then the church is liable upon the special contract. If Miller was not authorized to make the contract, and therefore the articles were delivered, received and used without any special contract, then the defendants are liable on the implied contract. Here, the defendants labored under a similar misapprehension with Morris, and yet they were held liable for the goods, for the simple reason that they were delivered by the owner and used by the church. There is no material difference in this particular between the two cases.

Thirdly, the complaint describes the contract to be for the delivery of 41,000 bricks of the value of three hundred and eight dollars and forty-six cents, and refers to the bill of particulars annexed. This exhibit shows a succession of

deliveries and at different prices, aggregating the number and price set out in the complaint.

The instruction prayed assumes that this precise number of bricks must be proved to have been delivered and for the exact sum mentioned, in order to any recovery upon the complaint as framed.

If this particularity was necessary, the new system would be no improvement upon the old, and the very mischief it was intended to obviate would remain. But neither under the one nor the other can the position be maintained, and the fallacy lies in treating this as an action to recover upon a special unperformed contract, for the non-payment of a part of the articles delivered without the delivery, or any legal excuse for the non-delivery of the others, as decided in *Johnson* v. *Dunn*, 6 Jones, 122; *Russell* v. *Stewart*, 64 N. C., 487, and other cases of the same class.

Here, the proof was of the delivery of 41,228 an excess of 228 over the number mentioned in the complaint, so that taking the complaint in its strictest sense, there was a full compliance with the alleged contract on the plaintiff's part, and upon a well settled rule he could recover in general assumpsit.

When there has been a special contract, the whole of which has been executed on the part of the plaintiff, and the time of payment is passed, general assumpsit may be maintained and the measure of damages will be the rate of recompense fixed by the special contract. Am. notes to *Cutter* v. *Powell*, 2 Smith's Lead. Cases, and the numerous references there given.

The Code of Civil Procedure provides a more liberal system, and if the strict rules of pleading and practice, before in use, denied a remedy, it is now full and ample.

"No variance between allegation and proof, unless the adverse party has been misled is material; and if he has been misled an amendment may be made to remove the variance." § 128.

When the variance is not material the judge may direct the fact to be found according to the evidence and order an amendment. § 129; *Shelton* v. *Davis*, 69 N. C., 324.

It is a singular contention that under a contract to deliver a definite number or quantity of goods, and a delivery in excess, the vendor is not only debarred a recovery of the excess, but of such as pursued and fulfilled the contract.

But if under the contract described in the complaint and explained by reference to the accompanying exhibit, there had been delivered a smaller number of bricks, and they had been received and used by the defendant without objection, we see no reason why the plaintiff would not be entitled to compensation for such as were delivered; and we are not disposed to carry the doctrine that a partial delivery under an agreement to deliver a definite quantity or number of goods, leaves the purchaser the possession and use of such as are delivered without liability to the seller beyond the decided cases and as operating only when the failure to deliver is wilful and without legal excuse.

We had occasion at the last term in *Gorman* v. *Bellamy*, (82 N. C., 496,) to advert to the disposition of the courts to relax this rigorous principle of the common law, and to substitute the more reasonable rule, suggested by the supreme court of the United States in *Durnott* v. *Jones*, 23 Howard, 220, upon a presumed abandonment of the special contract, "that in such case the law implies a promise to pay such remuneration as the benefit conferred is reasonably worth." *Monroe* v. *Phelps*, 8 Ellis & Black, 739.

But our case is not within the rule applicable to special contracts wilfully left unperformed and clearly admits of compensation for such bricks as were delivered to the defendant, and so the case was properly left to the jury.

There is no error and the judgment is affirmed.

No Error. Affirmed.

PIERCE, HANES & BROWN v. J. W. ALSPAUGH, Adm'r.

Contract—Liability of Partners—Judge's Charge.

1. Where A rents and takes possession of a ware-house and afterwards associates himself in business with B and C, the two latter do not become jointly liable with A for the rent by occupying the building with him for partnership purposes.
2. If the judge undertakes to state the law he must do it correctly and any mistake is assignable for error; but it is not error to omit to charge in a particular way in the absence of a prayer for such charge.

(*Morehead* v. *Wriston*, 73 N. C., 398; *Parker* v. *Shuford*, 76 N. C., 219; *Bynum* v. *Bynum*, 11 Ired., 632; *Avery* v. *Stephenson*, 12 Ired. 34, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of FORSYTH Superior Court, before *Buxton, J.*

Verdict and judgment for plantiffs, Hanes & Brown; appeal by defendant.

Mr. J. C. Buxton, for plaintiffs.
Messrs. Watson & Glenn, for defendant.

SMITH, C. J. . The plaintiffs bring their action for goods sold and delivered to the defendant's intestate between the 19th and 30th days of September, 1878, to which the defendant sets up a counter-claim for rent due his intestate, based upon the following facts:

The intestate leased to the plaintiff, Pierce, a warehouse belonging to him for three years commencing on the 1st day of October, 1877, afterwards reduced to one year, at a rent of eight hundred dollars *per annum*, payable in quarterly instalments of two hundred dollars each. Pierce took possession of the premises and for a short space carried on business in his own name, when he formed a co-partnership association with the other plaintiffs which was to relate

back to the date of the commencement of the lease and to subsist as and from that day. During the year the firm needing larger accommodations induced the intestate to put up an additional building, for the rent of which they agreed to pay at the rate of ten or twelve per cent per annum on the cost thereof and in addition to the rent upon the original contract. The new structure was completed and the plaintiffs entered into possession of that also on the 1st day of April, 1878, occupying both buildings until the expiration of the term of the lease. It was in evidence that the plaintiffs, Hanes and Brown, had settled with the partner Pierce and paid him their full shares (one-third for each) of the rent of the whole property, and that Pierce had become and was entirely insolvent. There remains due the intestate of the original renting the sum of two hundred dollars, and of the renting of the new building the sum of twenty dollars, which the defendant contends should extinguish the plaintiffs' demand, and he have judgment for the residue. The only question raised is whether the plaintiffs, as a partnership, have become responsible for both rents to the intestate's estate. The defendant's counsel asked for the following instruction:

If any rent was due for the ware-house for the year ending September 30th, 1878, in law the plaintiffs, as partners, were all bound therefor, and this notwithstanding an agreement between Pierce and the incoming partners that they should pay him their respective parts of the rent, and their subsequent payment to him.

The court declined to give the instruction and charged the jury that if Pierce rented the warehouse for himself from Norwood (the intestate) for a year, the property was his for that time and he was liable for the rent; if afterwards he associated the other plaintiffs with him in business, they agreeing to pay him, each, one-third of the rent, and they had accordingly paid him their shares in full, then the

plaintiffs, Hanes and Brown, were not liable to the lessor for any part of the original rent. The court also added that if upon an adjustment of the accounts of the partnership, any moneys should be found due to Pierce, such sum could be reached and appropriated to the counter-claim, and an account might be taken to ascertain the fact. It being conceded that nothing could be obtained by a reference, this part of the charge becomes immaterial.

1. It is manifest that the defendant has no cause of complaint either of the refusal to give the instruction asked, or of that which was given. The original contract was with Pierce alone, he then doing business alone and the other plaintiffs not being associated with him, and they can be rendered liable, not by the use of the rented building, but by a direct assumption of the debt to the intestate or such recognition of a common obligation as implies a promise to pay. *Morehead* v. *Winston*, 73 N. C., 398; *Parker* v. *Shuford*, 76 N. C., 219.

2. The charge given is unexceptionable and the law properly declared by the court. The defendant may have been entitled to have the question submitted to and passed on by the jury, whether the firm had not assumed the payment of the rent, and this inferred from the subsequent arrangement in which all participated for the erection of the new house for the accommodation of the partnership business; and the fact mentioned in the case that the firm was to be responsible for the rent of this "*in addition to the said eight hundred dollars rent*, in connection with the common occupation and use of both by all the partners." The quotation from Collier on Partnership, section 526, strongly sustains the proposition that the facts warrant such a deduction.

But no instructions on the point were asked, and as no error is perceived in the charge as given in accordance with repeated adjudications, the exception is not open to the de-

fendant. When a judge refuses to charge as requested and undertakes to state the law, he must state it correctly, and if he does not, it may be assigned for error, but an omission to charge what if requested he ought to have charged is not an error of which a party can complain. *Bynum* v. *Bynum*, 11 Ired., 632; *Avery* v. *Stephenson*, 12 Ired., 34; *Jones* v. *Bunker*, at this term.

The judgment must therefore be affirmed and it is so ordered.

No error. Affirmed.

DOLLY G. PRICE by her next friend, &c., v. JOSEPH C. COX.

Attachment—Does Not Lie in Actions For "Breach of Promise"—Service by Publication.

1. The remedy by attachment is confined to actions upon contracts in which the amount to which the plaintiff is entitled can be specified in his affidavit and can be ascertained by some certain measure of damages, and hence does not lie in an action for breach of promise of marriage.
2. It seems that a defective service by publication may rightfully be remedied by an order for republication.

(*White* v. *Snow*, 71 N. C., 232, cited and approved.)

MOTION to vacate an order of attachment heard at Spring Term, 1880, of HENDERSON Superior Court, before *Schenck, J.*

The action in which this motion is made was instituted by the plaintiff to recover damages for an alleged breach of promise to marry. It appearing by affidavit that the defendant is a non-resident and has property in this state, and that a good cause of action exists against him, the clerk of

the court granted on order of attachment, and thereupon the defendant entered a special appearance and moved the judge to vacate the same upon the ground, first, that an attachment does not lie for a breach of promise to marry; secondly, that the affidavit is insufficient in not complying with the requirements of law in such cases; thirdly, that the warrant was returnable before the clerk at his office. His Honor overruled the first and second objections, and allowed the plaintiff to amend the warrant so as to make it returnable before the judge in term time. The defendant further excepted to the order for publication of the summons and the affidavit on which it was based, and the court held that the plaintiff might have leave to make re-publication, and that the attachment should be continued. From which ruling the defendant appealed.

Messrs. W. W. Jones and *Armistead Jones*, for plaintiff.
Messrs. Shipp & Bailey, for defendant.

SMITH, C. J. At the time of issuing the summons or at any time afterwards, the plaintiff may sue out an attachment against the property of a non-resident defendant "in an action arising on contract for the recovery of money only, or in an action for the wrongful conversion of personal property." C. C. P., § 197.

Is an action brought to recover damages for the breach of a promise to marry within the meaning of this section of the code? This is the enquiry presented for solution in the present appeal.

The words are sufficiently comprehensive to embrace every action upon a contract, since its object is the recovery of money, either in a specified sum or as compensatory damages for its violation. In a more restricted sense the action may be for the recovery of money as distinguished from damages uncertain in amount. In support of an in-

termediate interpretation which confines the ancillary remedy of attachment to actions on contracts in which a definite sum is agreed to be paid or can be determined by a rule of law governing the assessment of damages, it will be noticed that the attachment is allowed in one species of tort only, and that where the measure of compensation for the wrong is the value of the property converted. It is given for no other injury to person or to property.

The same language is found in other parts of the code, as first adopted, a reference to which will aid in arriving at a correct understanding of its meaning. The summons in an action arising on contract for the recovery of money only is required to contain a notice "that the plaintiff will take judgment for a sum specified therein, if the defendant shall fail to answer the complaint within the time specified." Section 74.

So it is provided that upon such default "*in any action arising on contract for the recovery of money only*," the clerk shall "enter judgment for the amount mentioned in the summons," if the complaint be verified by oath; and if not, and the action is on an instrument for the payment of money only, he shall assess the amount due, and in other cases ascertain what sum the plaintiff is entitled to recover from his examination under oath or other proof and shall enter judgment accordingly. Section 217 (1).

In other actions "for the recovery of money only or of specific real or personal property with damages for the withholding thereof," a jury may be called in to ascertain the damages, or if the examination of a long account be involved, a reference may be ordered. Section 217 (2).

As this precise form of expression is contained in sections cited and must be understood as intended to bear the same meaning in each, it is obvious that an attachment can issue only in such actions upon contract as will admit of the plaintiff's specifying definitely the sum due him, and of the clerk's

entering final judgment without the intervention of a jury. It has been decided that where unliquidated damages are claimed for the breach of a contract, this cannot be done without a writ of enquiry of the damages. *White* v. *Snow*, 71 N. C., 232.

The changes made in the code by the act of 1870, (Bat. Rev., ch 18,) and the late act of 1877, (acts 1876–'77, ch. 241,) reducing the summons to one form in all cases, cannot avail to modify the construction of its parts as a single statute when introduced, in their relations to each other.

The present action is for damages wholly indefinite until fixed by a verdict, and incapable of being determined and stated by the plaintiff in her summons, or of being ascertained according to the settled practice of the courts by the clerk alone. The executory agreement to marry is a peculiar contract, exceptional in many of its features, and the executed contract of marriage may be dissolved by a state, without impairing the obligation of *contracts* guaranteed in the constitution of the United States, and at the same time it cannot be rescinded by the parties. The cause of action arising on it, unlike other contracts, except when revised by statute abate, it is said, by the death of the party, and when entered into between an adult and a minor and consisting of dependent promises, may be enforced by one only of the parties to it. It is in its essential features an action for the redress of a personal injury like one for defamation or an assault and battery, and we see no reason for admitting the process of attachment in the one case that does not apply with equal force to the others, nor for putting a construction upon the statute that allows it in any of them.

The entire subject is elaborately and ably discussed in the opinion delivered by the supreme court of New York, from which our code is derived, *mutatis mutandis*, in *Barnes* v. *Buck*, 1 Lans., 268, where the very point came up for decision. The result of the examination and the conclu-

sion reached are announced in these words: "This remedy (by attachment) is confined to actions upon contract, in which the *amount to which the plaintiff is entitled can be specified.*"

The rule of construction thus announced not in very precise terms, may often be of difficult application and the tracing of the line of separation between the two classes of contract equally so; yet as some force must be given to the qualifying superadded words, "for the recovery of money only," mere surplusage otherwise and meaningless, we know no better rule than that laid down by the court. The line may be distinctly marked as future cases occur and are placed on one or the other side. There can be no hesitancy however in assigning the present action to its proper place, and in our opinion the attachment could not rightfully issue in its aid.

This renders unnecessary the consideration of the exception to the irregularity of the return and the exercise of the power of amendment to remove the objection to the attachment, and we see no error in the ruling in regard to a new publication in order to making the defendant a party.

The motion to discharge the attachment and vacate the order improvidently granted for its issue ought to have been allowed and there is error in refusing it. This will be certified to the court below.

Error. Reversed.

SAMUEL H. PERRY v. W. T. ADAMS and wife.

Amendment of Court Record—Appeal.

1. It is not only the right but the duty of the court to so correct and amend its records as to make them a true and perfect transcript of whatever occurred that belongs to the record, and the rule is not varied by the fact that the record when corrected will not then avail the purposes of the party moving the amendment.
2. The refusal to amend a court record is not the subject of review on appeal, unless based upon an adjudged want of power, and in such cases, as the discretion has not been exercised, the matter will be remanded in order that it may be.

(*Parsons* v. *McBride*, 4 Jones, 99; *Armfield* v. *Brown*, 73 N. C., 81; *Ashe* v. *Streator*, 8 Jones, 256; *State* v. *Swepson*, 81 N. C., 571; *State* v. *Davis*, 80 N. C., 384; *Phillips* v. *Higdon*, Busb., 380; *Seawell* v. *Bank*, 3 Dev., 279, *Finley* v. *Smith*, 4 Dev., 95; *Bagley* v. *Wood*, 12 Ired., 90; *Pendleton* v. *Pendleton*, 2 Jones, 135; *Gibbs* v. *Brooks*, 1 Jones, 448; *Williams* v. *Sharpe*, 70 N. C., 582; *Winslow* v. *Anderson*, 2 Dev. & Bat., 9, cited and approved.)

MOTION to amend record, heard at Spring Term, 1880, of GRANVILLE Superior Court, before *Seymour, J.*

The motion was denied and the plaintiff appealed.

Messrs. Merrimon & Fuller, J. B. Batchelor and *L. C. Edwards*, for plaintiff.

Mr. M. V. Lanier, for defendants.

SMITH, C. J. At February term, 1867, of the late county court, Simeon D. Coley, administrator of John R. Perry, filed his petition against Lucy A., then an infant and now the wife of the defendant W. T. Adams, and the sole heir at law of the intestate, for license to sell the lands descended to her for the payment of his debts. The petition was not sworn to, nor was service made upon the infant, or upon or accepted by her guardian.

The order for sale was granted, the sale made on April 29th, 1867, the land bought by the plaintiff, Samuel H. Perry, at the price of seven hundred dollars, and bond given therefor, the sale reported and confirmed at next term, and the petitioner ordered to collect the purchase money when due, and when collected to make title to the purchaser. The money was afterwards paid, a deed executed for the land, and the fund applied in a due course of administration.

The feme heir at law of the intestate was, at the commencement of this proceeding but five years of age and had a general guardian appointed in November previous thereto, and she married before attaining her majority. The guardian had knowledge of the proceeding but never became in any way a party.

The plaintiff's motion was to amend so as to set out in form the action of the court during the progress of the cause which was not particularly noted in the record, and the court found as a fact that the action of the court was held in accordance with the proposed amendment, but decided as a conclusion of law that the plaintiff was not entitled to his motion against the defendants for the reason that neither the infant nor her guardian were parties to the proceeding.

It is not only the right but the duty of the court, as its records import absolute verity, to so correct and amend them as to make them speak the truth, and be a transcript of whatever occurred that properly belongs to its record. *Parsons* v. *McBride*, 4 Jones, 99; *Armfield* v. *Brown*, 73 N. C., 81; *Ashe* v. *Streator*, 8 Jones, 256; *State* v. *Swepson*, 81 N. C., 571; *State* v. *Davis*, 80 N. C., 384; *Phillipse* v. *Higdon*, Busb., 380.

That the effect of an amendment may be to validate void process even, is not alone a sufficient reason for refusing to make it in a proper case. Thus a seal necessary to the validity of a writ when issued to another county, and the

sheriff has acted upon it, may on its return have the seal affixed and thus be rendered valid. *Seawell* v. *Bank*, 3 Dev., 279; *Finley* v. *Smith*, 4 Dev., 95.

This the court may do in perfecting process, and why not in correcting an erroneous recital in the record?

The reason assigned by the court for the refusal seems to be invalidity of the proceeding, as *ex parte* to affect the rights and interests of the heirs in the descended estate. But whether the proceeding be effective or not, it is obviously proper that what was in fact done and ordered should be entered upon the records. The court undertook to proceed in the cause and did make the several orders which are not fully set out, and we see no sufficient reason, founded upon the uselessness of the amendment, why in this, as in all other cases, the action of the court should not be truthfully entered. While, if amended, it may not affect the rights of the defendants, it is undoubtedly a proceeding begun in the court and conducted to a conclusion and although inoperative, is not less truly the action of the court than if its effect was to divest the estate out of the heir. We think, therefore, the court was under no legal obligation to refuse the motion upon the ground stated. But it is equally plain that the amendment, whether made or refused, is not the subject of appeal. The court whose records are to be affected is alone the judge of the facts and of the propriety of the amendment. It was otherwise by statute in the case of the records of the county court, which on appeal, could be reviewed and determined in the superior court. *Armfield* v. *Brown*, *supra*; *Bagley* v. *Wood*, 12 Ired., 90; *Pendleton* v. *Pendleton*, 2 Jones, 135.

In the last case, NASH, C. J., says: "Every court has the control of its own records and may alter or amend them or refuse to do so at its discretion. Whether the decision in this case was one of amendment, which is purely in the discretion of the judge, or one which is subject to review here,

we equally think the judgment is final and should be affirmed, for the reason that this is a court for the correction of errors in matters of law and not matters of fact."

We do not mean to say that no amendments when made are reviewable here, because when they affect vested rights, the court is not competent to make them, as in *Phillipse* v. *Higdon*, *supra*; *Gibbs* v. *Brooks*, 1 Jones, 448; *Williams* v. *Sharpe*, 70 N. C., 582. But the refusal to amend is not the subject of review unless predicated upon an adjudged want of power, and in such case as the discretion has not been exercised, the matter will be remanded in order that it may be. *Winslow* v. *Anderson*, 2 Dev. and Bat., 9.

We are at some loss to understand the ruling below, and whether the court means to abnegate its power to amend, and rest its decision upon the legal principle that the record in the case was unamendable because of the want of a party defendant. But as His Honor seems to have adjudged against the plaintiff's motion, as involving a question of right rather than the exercise of his own discretion in granting or refusing the amendment, we feel constrained to remand the matter to the reconsideration of the court, without any intimation that the amendment proposed if made will be of any practical advantage to the purchaser, but that the court may, if fully satisfied of the facts, make the record a true and faithful narrative of what was done.

The judgment is reversed and this will be certified.

Error. Reversed.

*W. B. HOLLIDAY, Adm'r, v. ANDREW McMILLAN and others.

Separate Estate of Married Woman—Counter-claim—Evidence.

1. Where personal property, the separate estate of a married woman, is sold under execution for a debt of the husband, the purchaser, when sued by the husband after the wife's death, as her administrator, for converting the property by means of such sale, cannot set up as a counter-claim under Bat. Rev., ch. 44, § 26, his claim to be reimbursed the amount of his bid at such execution sale.

2. In an action for such conversion the declarations of the deceased wife relative to the ownership of the property, as a part of and coupled with the *acts* of ownership exercised by her, are admissible in response to an imputation in the answer that she had surrendered such ownership to the husband.

(*Roberts* v. *Roberts*, 85 N. C., 29, cited and approved.)

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

Verdict and judgment for plaintiff, and appeal by defendants.

Mr. John D. Shaw, for plaintiff.

Messrs. P. D. Walker, G. V. Strong and *Mason & Devereux*, for defendants.

SMITH, C. J. This action begun by the intestate wife of the plaintiff in her life time, and since her death prosecuted by him as her administrator, is to subject the defendants to damages for seizing and selling under execution, certain specific articles for the personal debt of the husband.

When the case was here on a former appeal, (79 N. C., 315) it was decided that personal property acquired by a married woman since the adoption of the constitution, whose

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

marriage took place before, was and remained her separate estate, and could not, in an action for its recovery, under a plea of set-off or counter-claim, be appropriated to the payment of her husband's debt.

The answer denies the intestate's right to the goods, and asserts title in the husband, and further asserts a counter-claim for the purchase money paid for them. The statutory remedy upon an implied warranty of title to property sold under execution as belonging to the debtor, and whose debt has been thereby discharged or reduced, is given against such debtor and authorizes a recovery of an equal amount from him for the reimbursement of the purchaser such sum as he may have paid. It cannot be the basis of any demand against the intestate or against her estate. Bat. Rev., ch. 44, § 26.

2. A more serious question however arises out of the admission of declarations of the intestate in relation to her ownership of the buggy. Generally such evidence is not received to establish a right of property even in connection with the possession as was determined in *Roberts* v. *Roberts*, 82 N. C., 29. The present case stands on peculiar grounds. With separate estates held by married persons, and the husband's use of that belonging to the wife, the actual possession can seldom be ascertained except under the rule of law that it follows and attaches to the title. It would therefore seem almost unavoidable to admit such declarations made *ante litem*, to explain the quality and nature of the possession. They are received not as proof of ownership, but as an assertion and claim of ownership, and to repel the inference of holding for another, or of a recognition of property in any one else than the declarant. The declaration in this case responds to an imputation made in the answer of an assent to the husband's claim, implied by silence, and her failure to assert her own title. In this point of view the declaration is annexed to and part of an act of ownership

exercised by her over the article and rebuts any presumption of its surrender to her husband. We put the admissibility upon the ground of its association with this fact and the competency of proof of the fact which it explains and qualifies. There is no error, and the judgment must be affirmed.

No error. Affirmed.

JOHN O. ALEXANDER and wife v. C. H. and W. L. WOLFE Executors.

Pleading—Settlement of Estates—Parties.

Plaintiffs brought action as heirs-at-law of D. W. L. against the executors of J. W., her former guardian and administrator, to recover the amount due her from J. W. The estate of the infant consisted partly of personal property, and partly of the proceeds of land paid over to the guardian; *Held*,

(1) That a demurrer to the complaint assigning for cause a misjoinder of causes of action, necessitating the taking of two accounts, one of J. W's administration, and one of his guardianship, was properly overruled.

(2) That whatever sum was in the hands of the guardian was by act of law transferred to him as administrator upon his assuming the latter office and coming into possession of assets.

(3) That in order to a speedy and satisfactory settlement of the estate, there should be an administrator *de bonis non* in court to receive and apply the proceeds of the realty left in the hands of J. W. at his death.

(*Allison* v. *Robinson*, 78 N. C., 222, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of MECKLENBURG Superior Court, before *McKoy, J.*

The case was heard upon complaint and demurrer. The judge overruled the demurrer, and the defendant appealed.

Messrs. Jones & Johnston, for plaintiffs.
Mr W. W. Flemming, for defendants.

SMITH, C. J. The plaintiffs, heirs at law and next of kin of Dorcas W. Lee, deceased, bring their action against the defendants, executors of John Wolfe, her former guardian and administrator, to recover the amount due her by their testator. The estate of the infant is alleged to consist of some $2,000 in personal property and $940.45 proceeds of the sale of her land paid over to the guardian.

The defendants demur to the complaint and specify as the grounds of objection that it contains two distinct causes of action and requires the taking of two accounts, to-wit, of the testator's management of the infant's estate as her guardian, and of his administration since her death.

The demurrer was properly overruled, as both accounts, the one preceding the other, are necessary to arrive at the amount due from the testator. Whatever sum was in his hands as guardian, upon his appointment as administrator and coming into possession of assets applicable and sufficient to meet the liability, was thereby transferred and he became chargeable in the latter capacity. Both accounts are therefore necessary to be stated, and that of his administration will show what is due. But the trust fund is made up in part of the proceeds of sale of real estate and while this may be recovered by the heirs at law without the presence of an administrator *de bonis non*, in the opinion of the court delivered in the case of *Allison* v. *Robinson*, 78 N. C., 222, which is very similar to our own, such administrator for reasons there assigned ought to be made a co-plaintiff in order to the recovery of the full amount due to both in one action, and the defendants not be harassed with two suits and the taking the same accounts a second time. The overruling of the demurrer is sustained, and this will be certi-

fied in order to further proceedings according to this opinion.

No error. Affirmed.

CURTIS H. BROGDEN v. JAMES L. HENRY.

Frivolous Pleading—Principal and Surety.

1. A frivolous answer is one which is manifestly impertinent as alleging matters which, if true, do not affect the right to recover.
2. Such is not an answer which raises the question of the liability of a surety to a sealed instrument after three years from the time when the right of action thereon accrued.

(*Erwin* v. *Lowery*, 64 N. C., 321, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of BUNCOMBE Superior Court, before *Schenck, J.*

The action was brought upon a single bill of which the following is a copy:

RALEIGH, N. C., January 31st, 1876

$500—Ninety days after date, with interest from date, we, H. G. Candler principal, and J. L. Henry surety, promise to pay C. H. Brogden or order five hundred dollars, value received in borrowed money.

(Signed) H. G. CANDLER, (Seal.)
J. L. HENRY, (Seal.)

Candler made no defence, and judgment was taken against him for the want of an answer. The defendant, Henry, filed an answer and put his defence upon the statute of limitations, viz: that the cause of action stated in the

complaint did not accrue as to him within three years before the commencement of the action. The plaintiff's counsel moved to strike out the defendant's answer as irrelevant and frivolous, and for judgment. But the court held that the answer was not irrelevant or frivolous and refused to strike out and grant judgment, from which ruling the plaintiff appealed.

Mr. Jas. H. Merrimon, for plaintiff.
Messrs. Gilliam & Gatling, for defendant.

ASHE, J. We entirely concur in the ruling of His Honor. The answer of Henry was neither irrelevant nor frivolous. A frivolous answer in the Code is one which is manifestly impertinent as alleging matters which, if true or not, do not affect the plaintiff's right to recover. "When the answer is put in in good faith and is not manifestly impertinent, the defendant is entitled to have the facts either admitted by a demurrer or passed upon by a jury. *Erwin* v. *Lowery*, 64 N. C., 321. We have no reason to suppose the answer in the case was not filed in good faith, for it raises a very serious and important question, one that has been decided at this term in support of the answer of the defendant. See *Welfare* v. *Thompson*, at this term.

While we hold the ruling of the judge in refusing to strike out the answer of the defendant and grant judgment was not erroneous, we think it very questionable whether the plaintiff had the right of appeal.

Let this be certified, &c.

No error. Affirmed.

T. S. WELFARE v. W. L. THOMPSON and others.

Principal and Surety—Evidence—Statute of Limitations.

1. Under our system, which combines the principles of law and equity, it is competent to show by parol evidence that one who has become joint obligor with several others to a sealed instrument assumed only the liability of a surety, and that the obligee was aware of the extent of such liability at the time of accepting the instrument.
2. The statute of limitations bars in three years the liability of a surety to a sealed obligation.

(*Knight* v. *Braswell*, 70 N. C., 709, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of DAVIDSON Superior Court, before *Buxton, J.*

The action was brought upon a single bill which was as follows:

$450. LEXINGTON, N. C., April 25th, 1876.

One day after date we promise to pay to the order of T. S. Welfare the sum of four hundred and fifty dollars without defalcation, value received at eight per cent. per annum.

(Signed) W. L. THOMPSON, (Seal.)
J. H. THOMPSON, (Seal.)
C. M. THOMPSON, (Seal.)
C. F. LOWE, (Seal.)
F. M. THOMPSON, (Seal.)

The defendants, W. L. Thompson and J. H. Thompson, made no defence to the action. The other defendants, C. M. Thompson, C. F. Lowe and F. M. Thompson, filed a joint answer and set up for their defence that each was a surety on the note and that the plaintiff's cause of action against them was barred by the statute of limitations, not

having been brought within three years after the cause of action accrued.

The following issues were submitted to the jury:

I. Was C. M. Thompson a surety to the note?

II. If yes, did Welfare know it before he received the note and loaned the money?

III. Was F. M. Thompson a surety to the note?

IV. If yes, did Welfare know it before he received the note and loaned the money?

V. Was C. F. Lowe security to the note?

VI. If yes, did Welfare know it before he received the note and loaned the money?

All of these issues were found by the jury in favor of the defendants. Thereupon judgment was rendered against W. L. Thompson and J. H. Thompson, and in favor of C. M. Thompson, F. M. Thompson and C. F. Lowe, and that they recover their costs. There was a motion for a *venire de novo*. The motion was disallowed. The plaintiff then moved for judgment on the complaint and answer, which was refused and he appealed.

Mr. W. H. Bailey, for plaintiff.

Mr. J. M. McCorkle, for defendants.

ASHE, J. There were two exceptions taken in the progress of the trial, first, to the admission of parol evidence to prove that the defendants C. M. Thompson, C. F. Lowe and F. M. Thompson were sureties to the note, and secondly, to the refusal of His Honor to give the instructions prayed by plaintiff, to wit, that the statute of limitations was not a bar to any of the defendants, it being conceded that ten years had not expired after the execution of the note when the suit was brought. The authorities are very uncertain and conflicting upon the question whether or not it may be shown by parol that a joint promisor or obligor was in fact

a surety. Some of the authorities hold that in law it cannot be done but is a defence available in equity and the proof is admissible whenever equitable pleas are allowed in courts of law, and especially in our system where the distinctions between actions at law and suits in equity are abolished.

The current of authorities seems to incline to the conclusion that the testimony is admissible upon an equitable principle of protecting the rights of the surety. Some hold that to give this equitable protection to the surety, the holder or obligee must have had knowledge of the fact of suretyship when he received the note or it was delivered: others, that it will be sufficient if that fact is brought to the knowledge of the holder or obligee before any act complained of as endangering or injuring the rights of the assignee. Whatever importance may be attached to that distinction, we believe it is conceded that whenever it is proposed to prove that a co-promisor or co-obligor to a note or bond is surety only, the fact not appearing upon the face of the instrument, it is competent to show by parol that fact, and that the creditor knew at the time he received the note that he was surety. Brent on suretyship, §§ 17, 18, and cases referred to in notes 2, 3, 4 and 5. See also 2 Daniel on Negotiable Instruments, § 1338, and Parson's Notes and Bonds, 233.

The jury in our case, even if there be anything serious in the distinction, has relieved us from the necessity of deciding that question by finding that the defendants C. M. Thompson, F. M. Thompson and C. F. Lowe were sureties to the single bill declared upon, and that the obligee, the plaintiff, knew that they were sureties at the time he received the note and loaned the money for which it was given. There was no error in receiving the parol evidence.

And as to the other exception to the refusal of his Honor in giving the instructions prayed for, we are of the opinion that his ruling was not erroneous.

The third chapter of Title IV of the Code of Civil Procedure in prescribing the limitations to actions divides them into several classes, to wit, ten years, seven years, six years, three years, one year, six months, and ten years in actions for relief not otherwise provided for. The class of ten years embraces "An action upon a sealed instrument against the principals thereto." By using the word "principal" and omitting "sureties" the legislature evidently intended to make a distinction in the limitations to actions on sealed notes between principals and sureties; if not, why say "An action upon a sealed instrument against the principals"; if no such distinction had been intended they would have said simply "A action upon a sealed instrument" and that would have embraced both principals and sureties.

The class of three years includes "An action upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections." An obligation is a sealed instrument, and by the provisions of the last recited section the three years limitation applies to all actions upon sealed instruments, other than those mentioned in the preceding sections; and one of those not mentioned in the preceding sections is an action upon a sealed instrument against the sureties thereto.

Giving to the 3rd section of Title IV of the Code a fair and reasonable construction, we can come to no other conclusion than that three years was intended to be and is a bar to actions upon sealed notes against the sureties: and this is so declared by BYNUM, J., in *Knight* v. *Braswell*, 70 N. C., 709.

The judgment is affirmed.

No error. Affirmed.

JACOB WEBBER v. ROSA WEBBER

Fictio Juris—Divorce.

1. By fiction of law, all judicial proceedings during a term are treated as if they took place on the first day of the term.
2. Under this rule, where the plaintiff in a suit for divorce on the ground of adultery dies pending the trial, after it has been entered upon and before the retirement of the jury, if all issues are found by the jury in favor of the plaintiff, judgment of divorce will be entered as of the first day of the term while the plaintiff was still alive.

(*Clifton* v. *Wynne*, 81 N C., 160, *Farley* v. *Lea*, 4 Dev. & Bat., 169, cited and approved.)

CIVIL ACTION for Divorce tried at Spring Term, 1880, of EDGECOMBE Superior Court, before *Gudger, J.*

This is an action for a dissolution of the bonds of matrimony upon the allegation of the defendant's adultery. The issues were drawn and submitted to the jury who find them all in favor of the plaintiff.

The motion for judgment thereon was resisted by the defendant on the ground that the plaintiff had died pending the trial after it had been entered upon and before the retirement of the jury, whereby the cause had abated, and the death was shown by affidavit.

The court declined to proceed further in the cause, refused to give judgment, and the plaintiff appealed.

Messrs. Howard & Nash, for plaintiff.
Mr. W. B. Rodman, for defendant.

SMITH, C. J. It is clear that the action does not survive, and consequently abates, unless prevented by the rule of relation whereby all judicial proceedings during a term are treated as if they took place on the first day of the term. This rule has long been recognized and enforced in deter-

mining the rights of litigants, *inter se*, when causes are tried during the term as we said in *Clifton* v. *Wynne*, 81 N. C., 160, "to avoid unseemly controversies for priority or advantage among suitors whose cases were acted on at different periods of the session." This case comes within the provisions of the rule declared in that case, for otherwise the deferring of the trial to a later period of the term would defeat the action altogether. As between the parties, the trial occurred and the verdict was rendered under the fiction on the first day of the term. This result does not arise from any statute passed to prevent an abatement, which at common law follows the death of a party, but from a rule of practice long recognized and acted on, by which the verdict and judgment if rendered would have been conclusively deemed to be during the plaintiff's life.

While the statute of 17 Chas. II, ch. 8, which enacts that in all actions personal, real or mixed, the death of either of the parties between verdict and judgment shall not be alleged for error, so as such judgment be entered within two terms after such verdict, though not in direct terms embracing the present case, has been held applicable.

In *Hetherington* v. *Reynolds*, 1 Salk., 21, the court declared that while the death before the assizes is not remedied by the statute, yet "if the party dies after the assizes begin, though the trial be after his death, that is within the remedy of the statute; for the assizes is but one day in law; and this is a remedial law and shall be construed favorably."

So in *Jacobs* v. *Miniconi*, 7 D. & E. 31, on a rule to set aside a verdict for the plaintiff rendered after the defendant's death, the court declared "that all the sittings are considered in law as only one day; that of course all the verdicts given are referred to the first day; and that the construction adopted in SALKELD had always prevailed."

Again in *Taylor* v. *Harris*, 3 B. & P., 549, the defendant died on the night of May 5th, and at the second sittings

which began May 6th, the cause was tried and the verdict passed for the plaintiff.

In setting aside the judgment LORD ALVANLEY, C. J., says: "In respect to the case of *Jacobs* v. *Miniconi*, it is to be remembered that the cause there might have been tried at any period after it had once been entered in the judge's cause proper, and nothing but the multiplicity of business prevented it from being tried on the first day of the sittings—recognizing the correctness of that ruling.

We have been able to find but a single case bearing on the point in the reports of this country, *Springstead* v. *Joyner*, decided by the supreme court of New York in 1825, 4–423. The facts are as follows:

The cause was tried in the summer of 1823 and a verdict rendered for the plaintiff. The defendant made a case for the purpose of moving for a new trial, which was noticed for argument at the present term. The plaintiff having died, a stay was asked until an administrator could be appointed and the court adopted the argument of the plaintiff's counsel as correctly expounding the law.

"This" (the stay) urged the counsel, "would be of no use to the defendant, nor did the death of the plaintiff vary the situation of the parties. Should the judgment be for the plaintiff, it would relate to and be entered up as of the term next after the verdict was rendered (altered by a statute of the state to be done at the second term.) In the eye of the law the plaintiff's death worked no change whatever in the cause. Everything, even the attorneys, remained the same and all should be treated as if Springstead was still alive until the question of the new trial should be decided."

The doctrine has been repeatedly recognized and asserted in this court that all the proceedings had during a term are referable to its first day: and while it is declared in *Clifton* v. *Wynne*, that the day when the judgment is actually rendered may be inquired into in order to determine the con-

flicting claims of outside parties to the debtor's property and their liens thereon, this decision does not disturb the rule of practice which condenses all judicial action taken during a term into a single day and that the first day as among the parties to the action and in their relations towards other suitors in the court.

The authority of the case of *Farley* v. *Lea*, 4 D. & B., 169, is not recognized as precluding an enquiry by an assignee of the property of the debtor of the day on which judgment was actually rendered, in order to determine the prior right thereto, the principle being limited in its application to parties and other suitors whose actions were tried at the same term, as forcibly stated by GASTON, J., speaking for the court, thus: That a judgment in fact rendered on a late day of the term is as operative as though it were rendered on the first day thereof seems incontestable. Where a testator died in term time before judgment was signed, it was held that it might be signed after and execution taken out against his goods in the hands of his executor, tested the first day of the term, for they relate to and are considered as a judgment and execution of the first day of the term at which day the testator was alive," and in support are cited the opinions of LORD KENYON in *Bragner* v. *Langmead*, 7 D. & E., 20; HOLT, C. J., in *Owens* v. *Woodward*, 2 Lord Ray, 849, and CHANCELOR TALBOT in *Robinson* v. *Tonge*, 3 Pere Williams, 398.

It is urged that the fiction, not hurtful under a practice which confines judicial action mainly to the sessions of the court, is productive of manifest inconvenience, when, as in prosecuting appeals under our present system, further proceedings may be had after their close, and hence the fiction should no longer obtain. To whom, it is asked, must the undertaking in the appeal be given, to whom the notice required, and how can a deceased person be represented by an attorney? These and other difficulties which readily

present themselves to the practicing lawyer are not obviated and scarcely lessened by the abrogation of the rule. Suppose the death of a party occurs on the day after the termination of the session and the trial on the last day, the very same embarrassments are met in prosecuting the appeal within the interval allowed by law, and the same perplexing enquiry must be solved. If these defects in the administration of the law are incidental to the substitution of the new for the former mode of procedure and curable only by legislation, they are not sufficient reasons for unsettling a long established rule of judicial action. But an answer to some of the objections may be furnished by the rule of relation itself which deems the entire proceeding to have been conducted and concluded on a day when the party was in life and could be represented by attorney.

It is suggested that the action for a dissolution of the marriage tie, the end and object of which are consummated by death rendering a judgment needless, does not fall under the control of a fiction adopted for other and different purposes. While the suggestion is not without force, we can find no legal ground for its exemption from the operation of a principle applicable to all other actions. What may be the consequences of the judgment upon the property of either, we are not called upon to decide. It is our duty to ascertain and expound the law, as transmitted through numerous adjudications from the earliest times, and for the legislature to correct and modify as may be found necessary.

The judgment below is erroneous and is reversed and the plaintiff is entitled to judgment upon the verdict as of the term wherein it was rendered. This will be certified.

Error. Reversed.

JOHN C. HEYER v. NED BEATTY.

Estoppel—Notice.

1. Acts posterior to a sale, such as the payment of rent to the purchaser by one who claims that he owned certain land at the time it was sold to pay the debts of a third person, cannot be received in evidence to estop such claimant from asserting his title against the purchaser.
2. While it is a general rule that possession of land is notice to the world of all equities in favor of the occupant, this rule does not extend to the possession of a slave prior to 1863, who bought and paid for land and had the legal title conveyed to the white owner of his wife who made her home on such land.

(*Mason* v. *Williams*, 66 N. C., 564; *Webber* v. *Taylor*, 2 Jones' Eq., 9; *Maxwell* v. *Wallace*, Busb. Eq., 251; *Harrell* v. *Watson*, 63 N. C., 454; *Lea* v. *Brown*, 5 Jones' Eq., 379; *Barker* v. *Swain*, 4 Jones' Eq., 220; *Lattimore* v. *Dickson*, 63 N. C., 356; *Todd* v. *Trot*, 64 N. C., 280; *Haley* v. *Haley*, Phil. Eq., 180; *Robinson* v. *McIver*, 63 N. C., 645, cited and approved.)

CIVIL ACTION to recover land tried at Fall Term, 1879, of NEW HANOVER Superior Court, before *Eure, J.*

Judgment for plaintiff, appeal by defendant.

Messrs. D. J. Devane and *Geo. Davis*, for plaintiff.
Mr. A. T. London, for defendant.

DILLARD, J. This action is to recover a house and lot claimed by the plaintiff under a sale and conveyance by the administrators with the will annexed of W. C. Bettencourt, in July, 1863.

The defendant sets up as a defence that he bought and paid for the house and lot in 1845, and that being a slave, the deed was executed by Campbell, his vendor, by one Lord, his attorney in fact, to Bettencourt on a verbal trust for him, who accepted and held the title to his use until his death in 1862, and that by virtue thereof he had an equity

to have the title against the plaintiff, for the reason that defendant's possession from his purchase in 1845 and continuously to the time of the sale to the plaintiff was in law notice to plaintiff, whereby the legal estate passed to him by the deed of the administrators with the will annexed of Bettencourt, was and still is subject to the equity of defendant. To the answer of defendant setting up this equitable ownership the plaintiff replied, denying the purchase by defendant and the holding by Bettencourt in trust for him, and by way of repelling any equity of defendant as against him, the plaintiff alleged that he knew not who was in possession when he purchased, but that in fact a negro woman, the slave of Bettencourt then lived on the lot and the defendant with her (said defendant being the slave of one Holmes, and claiming said woman as his wife) and that his purchase was for fair value and without notice of any claim of right by or on behalf of defendant; and by way of estoppel on defendant, plaintiff alleged that defendant was present at the sale and did not forbid the same, nor otherwise make claim, but suffered him to buy and pay for the land in ignorance of his alleged equity and that after the sale but on the same day, the defendant rented from him and paid him rent from 1863 until the fall of 1869.

To ascertain how the disputed facts were, the court submitted to the jury several issues on the part of the plaintiff, to two of which respecting the alleged renting and payment of rent by defendant for the house and lot, defendant objected as immaterial, and the objection being overruled, the defendant, to counteract said two issues, asked the court to submit the issue—"Did defendant pay rent to plaintiff in ignorance of the effect of said payment on his rights in and to said land," which being refused defendant excepted, and this exception, together with others taken to the reception of evidence on the trial and to the refusal of special

instructions to the jury as to the land, constitutes the errors assigned, of which we will consider in their proper order.

1. The two issues objected to by defendant, as to his alleged attornment and payment of rent to plaintiff, were offered on the idea that those were acts which, taken in connection with the failure of defendant to forbid the sale or otherwise notify bidders of his claims, amounted to such conduct as in law to estop him from setting up any equity he might have against the plaintiff's title.

In our opinion the matters inquired of in those issues, although found to be as alleged by the plaintiff, did not of themselves establish nor could they be used as an aid to other facts at or anterior to the sale to establish an estoppel on the defendant. It is true that a party entering as tenant to another cannot, while that relation exists, dispute his landlord's title, but on the surrender of the possession he may set up any independent title or equity he may have. But here, as we gather from the case, that relation was put an end to by summary proceedings in ejectment, and so in this action the rule estopping a tenant to deny the title of his lessor does not apply, and the defendant was at liberty to set up his equity, unless by other facts and circumstances *in pais* as alleged, an equitable estoppel were created upon him. The rule as to estoppels of the kind insisted on in this case is, that if one by his conduct, whether fraudulent or negligent or merely omissive, gives another reasonable ground to believe he has no claim, and such other does so believe and acts on that belief, he is estopped afterwards to assert his title or claim. *Mason* v. *Williams*, 66 N. C., 564; Adams' Eq., 150.

Here the attornment and renting inquired of were acts posterior to the sale, and they could by no possibility be regarded as constituting to any extent conduct on the part of defendant drawing or influencing the plaintiff into the purchase of the house and lot. Facts constituting such es-

toppel must be at or before the sale, and therefore as it seems to us, the issues objected to by defendant as well as the counteracting one offered by himself were entirely immaterial to a determination of the case upon its true merits. Such acts on defendant's part were conduct tending to repel the idea of a trust in Bettencourt for him, and might have been evidence on the issue as to that fact, but in no sense could they have been an inducement to a prior purchase.

These issues then being immaterial need not have been submitted to the jury. They were wholly distinct from and had no connection with the other issues in the cause, and neither they nor the evidence adduced in their support, could by possibility have had any effect on the finding upon the other issues submitted, and therefore in our opinion, the submission of said issues to the jury and the rejection of the one offered by defendant to counteract the same were evidently not injurious to defendant and so do not make it proper for their immateriality to reverse the judgment of the court below.

2. The immateriality of the two issues looking to the establishment of an equitable estoppel on the defendant not being ground for the reversal of the judgment, the numerous exceptions to the competency of the evidence received in their support and to the leading character of the questions, go with the issues for the reason above stated and therefore they need no separate consideration.

3. The last exception and the one mainly discussed in the argument before us was as to the law refused to be charged and as charged by the court on the issue to the jury as to the notice by plaintiff of defendant's equity at the time of his purchase in 1863, at the sale under Bettencourt's will. The defendant prayed the instruction that if he was in possession of the lot in question at the time it was purchased by the plaintiff, then the plaintiff was charged with notice of all equities in favor of defendant. His Honor re-

fused so to charge, but instructed the jury that the possession of defendant (he being a slave) and his wife, who lived with him on the premises, being the slave of Bettencourt who held the legal title, was not notice.

The rule in equity undoubtedly is, that a party taking with notice of an equity takes subject to that equity; that is to say, he is assumed to take and hold only such interest in the property conveyed as his vendor might honestly dispose of, having due regard to the equities existing against him in favor of others. Adams Eq., 151; *Webber* v. *Taylor*, 2 Jones Eq., 9; *Maxwell* v. *Wallace*, Busb. Eq., 251. And the kind of notice spoken of in said rule may be an actual or constructive notice.

In this case there is no pretence of actual notice to the plaintiff of the right claimed by defendant, but it is plainly implied from the terms in which the instruction was asked, that the defendant claimed only to affect the legal title of the plaintiff with a trust from a notice by construction from the mere fact of his possession at the time of the sale. Possession is suggestive of title or right in the possessor and a prudent man should and would inquire into such apparent right before trading with another; and if he do not, it is but just to the rights of the party in possession to hold the purchaser as affected with notice of the equities in his favor.

This rule would make the possession of defendant at the sale notice of his equities against Bettencourt and the plaintiff would be held to take the title subject thereto if defendant were such a person in July, 1863, as the rule applied to, or the manner of his possession such as that the law would infer notice therefrom. The rule clearly would extend to and protect the rights and equities of a person capable in law to have such rights. But could possession by a slave in 1863 and up to emancipation at the close of

the war be constructive notice of equitable ownership in land when by law he could not from motives of the then public policy have such rights?

If it be said possession was constructive notice to plaintiff, of title in whom was it constructive notice? The wife of defendant, a slave of Bettencourt, in whom was the legal title, lived on the lot and so did defendant a slave of Holmes, and if their possession at the sale was suggestive of title at all, it was more so of title in Bettencourt than of any other person, in accordance with the custom then prevalent among slaves for the husband to go to his wife's house and not the wife to the husband's house.

By the law of 1863, when plaintiff purchased, the defendant was a slave unaffected by any act of congress or proclamation of President LINCOLN, and as such he could not hold land nor could a trust of land for him be enforced in the courts against the trustee. *Harrell* v. *Watson*, 63 N. C., 454; *Lea* v. *Brown*, 5 Jones Eq., 379, and *Barker* v. *Swain*, 4 Jones Eq., 220; and so the trustee might have kept or alienated the property at his pleasure.

Since the war the natural rights of the slaves have been recognized and in divers instances gifts, devises and agreements to hold in trust, void as against public policy in former days, have been validated and enforced as against the representatives of the original donors or testator, but in no instance that we can find, where the title claimed to be held in trust has passed into the hands of a stranger for value and without notice. See *Lattimore* v. *Dickson*, 63 N. C., 356; *Todd* v. *Trott*, 64 N. C., 280; *Haley* v. *Haley*, Phil. Eq., 180; *Robinson* v. *McIver*, 63 N. C., 645.

In our opinion, although it might possibly be competent to defendant to have the trust declared against Bettencourt and his heirs if no alienation had been made, yet he cannot affect the plaintiff with such trust, as he had no actual

notice and the possession of defendant operated no constructive notice of any equities in his favor.

There is no error and the judgment of the court below must be affirmed.

No error. Affirmed.

A. H. TABOR v. H. C. WARD and others.

Evidence—Retroactive Legislation—Constitutional Law.

1. The legislature intended by enacting chapter 183, of the laws of 1879, to apply to all suits on bonds and judgments executed or rendered prior to Aug. 1st, 1868, the common law rule of evidence which excluded suitors as witnesses, and the concluding clause of said act, by which the rules of evidence in force when said judgment was rendered or bond executed are made applicable in a suit thereon, was not intended to remove the incapacity of interest as to a bond given in 1866. That clause must be interpreted to have reference to the rules of evidence in force when the bond was executed other than that which was made the special subject of legislation in the act.

2. Retroactive laws involving no criminal element are not unconstitutional.

3. Laws changing the rules of evidence in civil cases, even as to past transactions, are not unconstitutional, where the party affected by the change is not left without remedy.

(*State* v. *Bond*, 4 Jones, 9; *State* v. *Bell*, Phil,, 76; *State* v. *Pool*, 5 Ired., 105; *Hinton* v. *Hinton*, Phil., 410; *Washington T. B. Co.* v. *Com'rs*, 81 N. C., 491, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of HENDERSON Superior Court, before *Schenck, J.*

This action was begun before a justice of the peace upon a single bill dated the 27th of July, 1866, and payable six months after date, with interest from date. The defendant pleaded payment and set-off, and judgment was rendered by the justice in favor of the plaintiff, from which the de-

fendant appealed to the superior court, and at said term a jury trial having been waived by the parties, the case was heard by the judge. The plaintiff offered himself as a witness in his own behalf, but the court excluded the testimony upon the ground that the plaintiff had been rendered incompetent as a witness in such a case by the act of 1879, ch. 183. The plaintiff excepted to the ruling, and judgment was given in favor of defendant, from which plaintiff appealed.

Messrs. J. J. Osborne and *W. W. Fuller*, for plaintiff.
The defendant was not represented in this court.

ASHE, J. The act of 1879, ch. 183, ratified on the 11th day of March, was passed as a proviso, by way of amendment to section 343 of the code. It provides that no person who was a party to a suit then existing, or which might thereafter be commenced on any judgment rendered, or on any bond under seal for the payment of money executed previous to the first day of August, 1868, should be a competent witness, "but the rules of evidence in force when said judgment was rendered or said bond under seal was executed shall be applicable to said suit."

The bond sued on in this case was executed on the 27th day of July, 1866, and before the first day of August, 1868, and falls within the restriction of the *proviso*, unless as is contended it comes within the provision of the last clause, a fair construction of which would give it the effect of an exception to the retrictive operation of the proviso.

The act of 1866, ch. 43, entitled "an act to improve the law of evidence," ratified on the 12th day of March, 1866, provided substantially among other things, that no person offered as a witness in any suit or proceeding should thereafter be excluded as a witness, and that a party to a suit should be competent and compellable to give evidence

in behalf of either or any of the parties to said suit or proceeding. Such was one of the rules of evidence in force when the note in suit was executed. To apply this rule of evidence literally to this note would lead to a palpable absurdity. It would defeat the very object of the legislature in passing the act of 1879. The act of 1866 makes a party to a suit a competent witness in his own behalf. The act of 1879 declares he shall not be a competent witness in his own behalf in a suit on a note under seal executed before the first day of August, 1868; it however contains a provision that to such notes, the rules of evidence in force when executed shall apply. And one of the rules of evidence in force was that he was competent as a witness in his own behalf; *ergo*, the provisions of the act are repugnant and it defeats itself. But the law does not warrant such a construction. The interpretation which makes a statute null and void cannot be admitted. It is an absurdity to suppose that after it is reduced to terms, it means nothing. It ought to be interpreted in such a manner as that it may have effect and not be found vain and illusive. Potter's Dwarris on Stat. Lim., 128.

The mischief in the law intended to be remedied by the act of 1879 was, that in actions upon judgments and sealed notes where payment was pleaded, the plaintiff, after the act of 1866 and section 343 of the code, might be a witness for himself or might use the defendant as a witness to rebut the presumption of payment arising from the lapse of time. The act of 1879 was passed to remedy that defect in the law. There can be no doubt about the intention of the legislature, and it is the duty of the court to so construe the act as to effectuate that intention. And in construing it, "every part should be viewed in connection with the whole, so as to make all its parts harmonize if practicable, and give a sensible, intelligent effect to each. It is not to be presumed

that the legislature intended any part of a statute to be without meaning." Potter's Dwarris, *supra*, 144.

In the application of this rule of interpretation to the act of 1879, it is clear from the first part of the first section of the act, what was the intention of the legislature; and to construe the last clause of the section according to the letter would make it repugnant to the first part and neutralize the whole act. To obviate such an absurdity, we think the last clause should be interpreted to have reference to the rules of evidence in force when the notes were executed, other than that which was made the especial subject of legislation in the act. This interpretation would give effect to each part of the act and relieve it from an inconsistency.

But it is insisted on the part of the plaintiff, that if this construction be given to the act of 1879, then it would be obnoxious to the objection of being retrospective, and that retrospective laws are not countenanced by the constitution of this state. *Ex post facto* laws are forbidden by section twenty-three, article one of the state constitution, but they refer exclusively to crimes. There is no provision in the constitution of this state nor in the constitution of the United States which prohibits the passage of retroactive laws, as distinguished from those that are *ex post facto*, unless they are such as impair the obligation of contract or disturb vested rights. Retroactive laws are not only not forbidden by the state constitution but they have been sustained by numerous decisions in our own state. See *State* v. *Bond*, 4 Jones, 9; *State* v. *Bell*, Phil., 76; *State* v. *Pool*, 5 Ired., 105, and *Hinton* v. *Hinton*, Phil., 410, where it was expressly held "that retroactive legislation is not unconstitutional, and that retroactive legislation is competent to affect remedies not rights."

It is well settled by a long current of judicial decisions, state and federal, that the legislature of a state may at any time modify the remedy, even take away a common law

remedy altogether, without substituting any in its place, if another efficient remedy remains, without impairing the obligation of the contract. And whatever belongs to the remedy may be altered, provided the alteration does not impair the obligation of the contract. Cooley Const. Lim., 350. Laws which change the rules of evidence relate to the remedy only. They are at all times subject to modification and control by the legislature and changes thus made may be made applicable to existing causes of action. *Howard* v. *Moot*, 64 N. Y. Rep., 262; Cooley, 353. They are incident to the remedy, and if the remedy may be abolished or modified, *a fortiori* may the rules of evidence be changed or abrogated.

Retrospective laws would certainly be in violation of the spirit of the constitution, if they destroyed or impaired vested rights. But there is no vested right involved in our case to be affected by the retrospective operation of the act of 1879. We have seen that rules of evidence are incidents to the remedy and one can have no vested right in a rule of evidence when he could have no such right in the remedy, and it is held in Bishop's Cr. Law, § 214, *Com.* v. *Com'rs*, 6 Pick., 501, and *Washington Toll Bridge Co.* v. *Com'rs*, 81 N. C., 491, that there is no such thing as a vested right in any particular remedy. There is no error and the judgment is affirmed.

No error. Affirmed.

J. D. WILKERSON v. R. S. BUCHANAN.

Evidence—Constitutional Law.

1. Since the enactment of ch. 183 of the laws of 1879, it is incompetent for the obligor to a bond executed in 1859 to prove by his own oath that the same was embraced in a compromise made by the parties litigant before trial.
2. The competency of a witness in a civil suit is to be determined by the law as it exists at the time he is called upon to testify, regardless of what may have been the rule at any previous time.

(The decision in *Tabor* v. *Ward* at this term is sustained by the citation of additional authority.)

CIVIL ACTION tried at Spring Term, 1880, of GRANVILLE Superior Court, before *Seymour, J.*

This is an action commenced before a justice of the peace on a bond executed by the defendant to D. S. Wilkerson and son, for the sum of one hundred and fifty-seven dollars, payable on demand with interest from date, and dated the 20th day of September, 1859. The case was carried by the appeal of the defendant to the superior court of Granville county from a judgment rendered against him in the justice's court, and was called for trial in that court at spring term, 1880.

A jury trial was waived by agreement of parties and all issues of fact as well as of law were submitted to be tried by His Honor. There was only one issue of fact submitted to the judge, to-wit, "was the bond sued on included in a compromise made between the said parties on the 28th day of September, 1869." On the trial of this issue the defendant offered himself as a witness to prove that the note sued on was embraced in the compromise and by that means had been paid and satisfied. This evidence was objected to by plaintiff's counsel and ruled out by the court, upon the

ground that this being an action against the defendant on a bond under seal for the payment of money, executed previous to the first day of August, 1868, the defendant by chapter 183 of the laws of 1879 is rendered an incompetent witness therein. The defendant excepted to this ruling.

The court found the issue for the plaintiff and gave judgment in his favor for the amount of the bond sued on with interest and costs, from which the defendant appealed.

Messrs. J. B. Batchelor and *L. C. Edwards*, for plaintiff.
Mr. M. V. Lanier, for defendant.

ASHE, J. This very question, whether a party to an action on a sealed note executed before the first of August, 1868, is a competent witness since the passage of the act of 1879, ch. 183, has been fully considered and decided at this term of the court, in *Tabor* v. *Ward;* and the decision there made may be taken as the opinion of the court in this case.

Since delivering the opinion in that case, on a further examination of the subject, we have met with an authority so very apposite, that we have thought it worth while to cite it here as confirmatory of the views of the court.

Mr. Wade in his treatise on Retroactive Laws, where treating of statutes affecting remedies and changing the rules of evidence, which are not unconstitutional, holds: "So a statute changing the rule of evidence as to the contents of sealed instruments, so as to let in testimony in rebuttal of the legal presumption of consideration as therein expressed, was applied to instruments signed and sealed prior to the statute."

"The competency of a witness in a civil suit is to be determined by the law as it exists at the time he is called upon to testify, regardless of what may have been the rule at any previous time." See section 215 and notes 4 and 5, and the authorities there cited to sustain the text.

There is no error. The judgment of the superior court is affirmed.

No error. Affirmed.

JOSEPH A. MABRY v. R. M. HENRY and others.

Practice—Res Adjudica.

1. The law does not tolerate successive actions or proceedings merely upon newly assigned reasons, when one and the same object is aimed at in all, but the decision first rendered will govern as *res adjudicata.*
2. Upon this principle, where a motion has been refused to set aside a judgment on the allegation that it was obtained against the course of the court, and that the defendant had a good and valid defence to the action in law, equity and morals, a subsequent motion will not be entertained to set such judgment aside distinctively put upon the ground of a fraudulent advantage taken in entering up the same and upon evidence more full and minute, but in substance the same as that produced upon the first hearing.

(*Jarman* v. *Saunders*, 64 N. C., 367; *Thompson* v. *Badham*, 70 N. C., 141; *Smith* v. *Hahn*, 80 N. C., 241; *Molyneux* v. *Huey*, 81 N. C., 106; *State* v. *Evans*, 74 N. C., 324, cited and approved.)

Motion to set aside a judgment, heard at Fall Term, 1879, of BUNCOMBE Superior Court, before *Graves, J.*

Both parties appeal from the ruling of the court below.

Mr. James H. Merrimon, for plaintiff.

Messrs. W. H. Malone and *Battle & Mordecai*, for defendants.

SMITH, C. J. The plaintiff after due service of process and for want of an answer recovered judgment against the defendants at fall term, 1874, of Buncombe superior court for $5,416.50, whereof $3,000 is principal money. On December 26th, 1876, notice of a motion to vacate the judg-

ment was served upon the plaintiff's attorney, upon the following grounds therein assigned:

1. On account of mistake, inadvertence, surprise or excusable neglect.

2. For that the judgment was obtained against the course of the court and is irregular and this defendant has a good and valid defence in law, in equity and in good morals to the said action. The motion was heard at fall term, 1877, upon the affidavits of the defendants, R. M. Henry and M. Erwin, of E. B. Davis former sheriff of Jackson county, J. E. Reed clerk of the said superior court, and a certified transcript of the judgment rendered in the former court of equity on which that now sought to be set aside is founded; and the court decided that the motion was not made in time under C. C. P., § 133, but was irregular under section 217, and ordered it to be vacated. Upon appeal by both parties from this ruling, it was held that the vacating order was unauthorized upon either ground and was reversed as erroneous. The opinion is reported in 78 N. C., 45 and 46.

A similar motion, after due notice, has been made, distinctively put upon the ground of a fraudulent advantage taken of the defendants in entering up the judgment and upon evidence more full and minute, but in substance the same as that produced upon the former trial, the particulars of which it is not necessary to repeat except that it is directed to an impeachment of the judgment itself as unjust and inequitable.

At fall term, 1879, the motion was again heard before the presiding judge who refused to vacate and held that the judgment should stand as a security for whatever sum, to be ascertained upon a reference for an account, should be found to be due to the plaintiff, and directed, upon defendant's giving a bond of indemnity against damages, an injunction to issue restraining the plaintiff from proceeding to enforce the collection of his judgment.

From this ruling both parties again appeal; the defendants from the refusal to vacate; and the plaintiff from the restriction of the annexed trust and the restraining order to give it effect.

The question to be determined is whether the matter is *res adjudicata*, or is open to the present renewed application.

The first application proceeds upon two specially assigned grounds, but any others could have been added sufficient to support the motion to set aside the judgment. Indeed these two are less congruous than would be the first associated with that now assigned. They all look to one common result, relief from an inequitable judgment, and are indeed but accumulated reasons why it should be granted. The notice itself in general terms impeaches the judgment as indefensible in law, in equity and good morals, a basis sufficiently comprehensive to admit the attack now made upon its fairness and integrity. The evidence then as now offered is largely directed to an impeachment of the judgment on its merits as well as for the manner in which it was entered up. If this further ground could have been taken in that proceeding, and we see no reason why it could not, then whether in fact it was or was not, the result is equally decisive and fatal. The law does not tolerate successive actions or proceedings, merely upon newly assigned reasons, when one and the same object is aimed at in all and it can as well be attained in a single action or proceeding; unless perhaps when a party is prevented by the fraud of another, an exception which finds no support in the facts of this case. The cases cited for the defendant, *Jarman* v. *Saunders*, 64 N. C., 367; *Thompson* v. *Badham*, 70 N. C., 141; *Smith* v. *Hahn*, 80 N. C., 241, and *Molyneux* v. *Huey*, 81 N. C., 106, establish the proposition that the remedy is by a motion in the cause and not by a new and original action, and hence redress would have been as well afforded in the former as in the present application.

Suppose for the purpose of illustration, the judgment is now set aside and cancelled, and in effect this is the ruling by which matters antecedent to and concluded by the judgment are re-opened for an inquiry as to the amount for which it should have been rendered, there will then be in this event two repugnant adjudications and each final between the same parties and upon the same point.

It is true the principle of *res adjudicata* does not extend to ordinary motions incidental to the progress of a cause, for what may one day be refused may the next be granted, but it does apply to decisions affecting a substantial right subject to review in an appellate court. The distinction is taken in the case of *Dwight* v. *St. John*, 25 N. Y. Rep., 203 decided in the court of appeals of New York, where, after a motion to have a judgment cancelled had been made and refused, a new action was instituted to have it declared a security only, upon an alleged agreement to that effect, for a debt due by promissory note. The court say: "Upon this point it is to be observed that some decisions, made before the existence of the code, especially that of *Simpson* v. *Hart*, in the Court of Errors, 14 Johns, 63, are chiefly based upon the ground that such summary proceedings as they passed upon were there heard without full proofs and were not reviewable. Whereas in the case before us the hearing was upon full proofs; and the code has entirely taken away the other ground by making the proceeding liable to review. By its section 349, the order referred to was appealable." "From this decision," says Mr. FREEMAN, "we may infer that in New York if not in other states the decision of a motion is as final and conclusive as the decision of a trial if the proceedings permit of a full hearing upon the merits and the order made is liable to review in some appellate court." Freeman on Judg'ts, § 325.

The motions now under consideration were not incidental to the attainment of ultimate relief and to facilitate the pro-

gress of the cause, but seek to reverse the final judgment by a direct and specific impeachment of its regularity and justice, and possess the general features and must be attended with the consequences of an original suit. And even when successive and contradictory rulings were made upon motions for a prisoner's discharge, PEARSON, C. J., whose words we have had occasion before to quote in *Wilson* v. *Limberger*, decided at this term, thus emphatically condemns the practice: "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 decisions to be prevented? It can only be done by enforcing the rule *res adjudicata*." *State* v. *Evans*, 74 N. C., 324.

It is with some reluctance we have come to the conclusion that the defendants are without relief in view of the facts found by His Honor and which so strongly appeal to the court in their behalf, but it is our duty to enforce the rules of law with impartial firmness and they leave the defendants without legal redress.

It must therefore be declared that there is error in that part of the ruling of the court below from which the plaintiff appeals and the same is reversed. Judgment will be so entered in this court.

Error. Reversed.

SMITH, C. J. For the reasons set forth in the opinion filed in the plaintiff's appeal in this case, it must be declared that there is no error in the refusal of the court to vacate and set aside the judgment, from which ruling the defendants appeal, and the judgment is in this respect affirmed.

No error. Affirmed.

K. R. JONES v. HARRISON PALMER.

Practice—Joining Causes of Action.

Plaintiff brought suit in the court of a justice of the peace claiming a debt of fifty dollars and also possession of a horse and wagon under a certain mortgage. On appeal from the justice's judgment to the superior court plaintiff offered to remit his claim for the personal property and declare only for the debt;

Held, that he had a right to take such a course in his discretion and that His Honor erred in denying him that privilege.

(*Mitchell* v. *Durham*, 2 Dev., 538; *Honeycut* v. *Angel*, 4 Dev. & Bat., 303; *Jones* v. *Cooke*, 3 Dev. 112, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of CRAVEN Superior Court, before *Gudger*, *J.*

This action was begun before a justice of the peace in the county of Craven. The plantiff complained that the defendant Palmer was indebted to him in the sum of fifty dollars, and that he held a mortgage on one bay horse and a wagon then in the possession of the defendant, executed by the defendant to one Eli H. T. Perry as collateral security for the payment of said debt; that said debt was due and unpaid and that defendant unlawfully holds from his possession the said horse and wagon, worth about fifty dollars. No defence was set up by the defendant, and after hearing the evidence of the plaintiff, judgment was rendered in favor of the plaintiff against the defendant for the sum of fifty dollars and for the said horse and wagon, to be applied to the payment of said debt. From this judgment the defendant appealed to the superior court. When the case was called in that court the defendant moved that the action be dismissed for the want of jurisdiction in the magistrate's court, and during the argument of this motion the plaintiff moved to amend so as to sue for the sum of fifty dollars

only, waiving all claim arising on the mortgage referred to in the magistrate's return. But the motion of the plaintiff was disallowed by the court upon the ground that the magistrate had no jurisdiction of the action as originally constituted in his court.

The defendant's motion was allowed and the action was dismissed, from which ruling the plaintiff appealed.

Mr. F. M. Simmons, for plaintiff.
Messrs. Green & Stevenson, for defendant.

ASHE, J. This is a suit brought for two causes of action, or in other words an action containing two distinct counts, the one to recover a debt of fifty dollars and the other to recover specific property. It does not follow that because the magistrate had no jurisdiction of one count, he therefore had none of the other. So far as relates to the second count or cause of action, if it is to be regarded as a proceeding to foreclose the mortgage, we concur with His Honor that the magistrate had no jurisdiction. If it was intended to be an action of claim and delivery, it was defective and could not be sustained in that view, for the act of 1876–'77, ch. 251, which gives to justices of the peace concurrent jurisdiction of civil actions not founded on contract, prescribes the requisites of an action of "claim and delivery" before justices of the peace, in all of which this second count is wanting, except that the property has been wrongfully detained. And another defect in the count is that the cause of action is founded on a mortgage given not to the plaintiff but to a stranger to the action, who had the legal title to the property and in whom was the right of action. But even if the magistrate had no jurisdiction of the second count he most clearly had of the first, and there is no reason why a want of jurisdiction or defect in the second count should deprive the justice of jurisdiction of the case. One

bad count in a declaration never vitiates those that are good, though in such a case if there be a general verdict on both counts, no judgment can be rendered. *Mitchell* v. *Durham*, 2 Dev., 538; *Honeycut* v. *Angel*, 4 Dev. & Bat., 306.

But where the declaration contains two counts, the one good and the other defective, and the attention of the jury is directed by the judge to that which is good only, a general verdict will be presumed to be found on that count and will be supported. *Jones* v. *Cooke*, 3 Dev., 112. This is the course we think would have been proper to have been pursued in this case, if the plaintiff had not moved to amend his complaint so as to sue for the sum of fifty dollars only, waiving all claims arising on the mortgage. The plaintiff had the right to enter a *nolle prosequi* to either or all of the counts or causes of action in his complaint. Sanders Rep., 207, note 2. His motion for leave to amend his complaint and waive the second count was virtually asking leave of the court to enter a *nolle prosequi* as to that count, a thing he had the right to do without the leave of the court.

His Honor committed an error in disallowing the motion of the plaintiff and dismissing the action. The plaintiff had the right to enter a *nolle prosequi* as to the second count and proceed on the first. Let this be certified to the superior court of Craven that further proceedings may be had agreeably to this opinion and the law.

Error. Reversed.

State on relation of SARAH BRIGGS v. DAVID SMITH, Adm'r.

Account and Settlement—Statute of Limitations.

While the general rule is that an action or proceeding to re-adjust a settlement made under the supervision of a competent court must be brought within three years from the time of such settlement, yet there is an exception where the settlement is made with a *feme covert*, against whom the statute of limitations does not run pending the coverture.

(The court takes occasion to express its disapprobation of the practice of carrying up cases by piece-meal.)

(*Wheeler* v. *Piper*, 3 Jones Eq., 249; *Whedbee* v. *Whedbee*, 5 Jones Eq., 393; *Spruill* v. *Sanderson*, 79 N. C., 466; *Lippard* v. *Troutman*, 72 N. C., 551, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of DAVIDSON Superior Court, before *Buxton, J.*

The facts appear in the opinion. The plaintiff appealed from the judgment of the court below.

Mr. W. H. Bailey, for plaintiff.
Mr. M. H. Pinnix, for defendant.

SMITH, C. J. In answer to the complaint, containing two counts, one charging a breach of the intestate's guardian bond and the other seeking to impeach and set aside an alleged settlement of his administration of the trust fund, after the majority and marriage of the relator, the defendant as his administrator relies on the said settlement and a receipt then given and the bar of the statute of limitations to both claims. The other controverted matters being reserved for the consideration of a jury, should one become necessary, the parties by consent submit to the court to find

the facts upon which rests the defence under the statute and to determine the law applicable thereto. The facts so found are as follows:

The defendant's intestate became guardian to the relator and executed the bond in suit on August 15th, 1863. The relator arrived at full age in November 1869, and was married on April 14th of the next year. She had the settlement with the intestate and gave him the acknowledgment referred to on May 5th, 1870. The intestate's final account of administration of his guardianship was returned to the probate judge and audited and filed on the day of the settlement with the ward. The guardian died in March 1875, and this action was begun on March 8th of the following year. Upon these facts the court being of opinion that the action was barred gave judgment for the defendant and the relator appealed.

The cause of action, being the non-payment to the relator of what was due on her arriving at full age, accrued after the adoption of the code of civil procedure and is governed by the limitations therein prescribed. Sec. 16.

If there had been no settlement, the action on the bond is within the six years allowed after the auditing of the final account, by section 33. But the settlement, admitted to have been made and relied on by the defendant, is an obstacle in the way of a recovery upon the bond so long as it remains and can be removed only by impeachment for fraud in fact or implied from the fiduciary relation subsisting between the guardian and his ward, as the plaintiff undertakes to do. The time within which this may be done is by several adjudications and C. C. P. restricted to the period of three years. *Wheeler* v. *Piper*, 3 Jones' Eq., 249; *Whedbee* v. *Whedbee*, 5 Jones' Eq., 392; *Spruill* v. *Sanderson*, 79 N. C., 466; C. C. P., § 34, (9). The settlement however took place after the relator's marriage, and the statute does not run against her because of her coverture. Section 42.

While it results from the legal right of a married woman to hold and retain her separate estate, as if she were a feme sole and no guardian or trustee is required for its management or protection, that she can receive what is due to her and give effectual acquittance for what is paid, yet her coverture reserves her right to attack the settlement and the validity of the written discharge for fraud or upon other sufficient legal grounds notwithstanding the lapse of time which bars one under no disability, not because she has not capacity to act in the premises but that her right of action for relief from fraud is not barred. In this respect her position is under the existing law peculiar and anomalous. The case of *Wheeler* v. *Piper* is in the argument of *Mr. Bailey* correctly distinguished from that before us, in that, the adult husband then became the owner of his wife's choses in action by reducing them into his possession and he was competent to receive and give a release binding upon both. Hence the delay of three years was a bar to the recovery of the slave and the right to impeach the deed of conveyance from the feme to her father which obstructed such recovery. But since the adoption of the constitution the wife's estate remains separate and does not by marriage vest in the husband. She may sue without him when the action relates to her separate property, C. C. P., § 56. And her coverture affords the same protection against the consequences of the lapse of time as before the recent changes, as declared in *Lippard* v. *Troutman*, 72 N. C., 551.

While then in the present aspect of the case we sustain the ruling of the court as to the count on the bond and the entry of the *nol. pros.* as to the surety confines the action to the liability of the guardian alone, we think the relator may proceed with her second alleged cause of action and that the ruling as to this is erroneous.

It is proper we should express our disapproval of the mode of proceeding adopted, whereby instead of a trial of

all the issues and a final disposition of the whole controversy, a part of the issues is separated from the others to be passed on, not decisive of the result, and the trial has again to be gone over with. All the issues should be settled and points of law reserved with consent, so that the decision may be final. The policy of the code is to secure an early and complete disposition of the cause. This suggestion has been more than once heretofore made, *Kirby* v. *Mills*, 78 N. C., 124. There must be a new trial and it is so ordered.

Error. *Venire de novo.*

W. M. WALTON v. RICHMOND PEARSON, Ex'r.

Certiorari--Laches.

1. Whenever a party is deprived of an appeal or induced into neglect to take and perfect it in due time by the conduct or declarations of the adverse party (whether intended by the latter to have that effect or not) the rule is to grant a *certiorari* as a substitute for the appeal.
2. Under this rule, where the plaintiff does not appeal because the defendant's counsel have, unintentionally, led him to believe that they would not appeal, a *certiorari* will lie for the plaintiff and he is not in default in failing to apply therefor until the term next after that to which the defendant has applied for the same writ, where the decision in the defendant's case is announced so late in the term as not to allow the plaintiff the time to take such a step in his behalf during that session of the court.

(*Collins* v. *Nall*, 3 Dev. 224; *Lunceford* v. *McPherson*, 3 Jones, 174; *Sharpe* v. *McElwee*, 8 Jones, 115, cited and approved.)

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

Messrs. J. M. McCorkle, G. V. Strong, and *Battle & Mordecai* for plaintiff.

Messrs. D. G. Fowle and *J. M. Clement,* for defendant.

DILLARD, J. The above entitled action was instituted on the administration bond of N. W. Woodfin deceased, as administrator of Charles McDowell deceased, against the present representatives of the said Woodfin, John Gray Bynum administrator *de bonis non* of Charles McDowell and R. M. Pearson, a surety to said bond, since deceased, and revived against Richmond Pearson his executor, and the breach assigned was the non-payment of a judgment recovered by the plaintiffs, assigned, pending this action, to James Wilson and S. McD. Tate, with an averment of assets come to hand sufficient to pay the same and a *devastavit* thereof by the said Woodfin.

The defence interposed by R. M. Pearson, the surety, was put on these grounds: 1st, that the action could not be maintained for the cause alleged by the plaintiff but only by the administrator *de bonis non* of Charles McDowell; 2nd, that the judgment, the non-payment of which is assigned as a breach, was a judgment *quando* and in law an estoppel as to the alleged *devastavit*; and 3rd, that the action was barred as to him by the statute of limitations.

On the trial before Judge Schenck, a jury trial being waived, His Honor found the facts and pronounced judgment in favor of defendants on the plea of the statute and against them on the other two defences, and the plaintiffs having taken an appeal but lost the same by reason of not perfecting it according to the code, at the last term of this court on their petition it was adjudged that their laches were excusable under the circumstances, and the case was ordered to be brought up to this court on a writ of *certiorari* as a substitute for appeal, and thus the case is constituted in this court for review as to error of law assigned in regard to the statute of limitations. See same case, 82 N. C., 464. At the present term of this court the record being brought up in answer to the writ of *certiorari* issued at the instance of the assignees of plaintiff, the defendant Rich-

mond Pearson, executor of R. M. Pearson deceased, pursuant to notice presents his petition for a *certiorari* to bring up the record so as to enable him to have review of his exceptions to the rulings of the court below adverse to him, at the same time that a review is had on the plaintiff's appeal of the decision for him on the plea of the statute of limitations.

The plaintiff's assignees, Wilson and Tate, have been relieved against a lost appeal because of the reasonable expectation they had, that under the agreement between the parties, a statement of a case of appeal might be served at any time, if not too late to admit of the case coming up to the next term of the supreme court and their case being thus brought up, they may have reviewed any alleged error as to the plea of the statute of limitations, and the present application on the part of defendant for a *certiorari* to constitute the case in court for a review of the points decided adversely to him, is commended to the favorable consideration of the court, from the fact that they intended to appeal if plaintiffs appealed, and specially for the additional reason that they were informed and relied on the information that there was no intention to appeal on the part of the plaintiffs.

Whenever a party is deprived of his appeal or induced into a neglect to take and perfect his appeal within the time prescribed by the statute by the conduct or declarations of the adverse party (unintentionally in this case) the rule is to grant the writ of *certiorari* as a substitute for the appeal. *Collins* v. *Nall*, 3 Dev., 224; *Lunceford* v. *McPherson*, 3 Jones, 174; *Sharpe* v. *McElwee*, 8 Jones, 115.

Here, the petitioner Richmond Pearson, executor of R. M. Pearson, showeth that he intended (the decision in the court below being in his favor) to appeal only in the event that an appeal was taken on the part of the plaintiffs, and that being informed by one of the counsel of plaintiffs, admitted to be continued as such by the assignors of plaintiffs,

that no appeal would be taken by them and relying on that statement he had omitted to take any steps towards perfecting his appeal until served with notice of the application for the writ on the part of the plaintiffs at the last term. And in excuse of the apparent laches in not applying for the writ at the last term of the court, it is urged by petition that having been informed by Wilson and Tate through one of their counsel that they had no intention to appeal, and in reliance on that information having paid out a large sum of money to the legatees of his testator, he might with propriety resist the grant of the writ for them and await the action of the court on their application before taking any proceedings for a *certiorari* on his own behalf. And it is alleged, as was the fact, that the decision of the court to award the writ to Wilson and Tate was so near to the end of the term that petitioner had not an opportunity to make his application after the opinion of the court was filed.

In our opinion all laches of petitioner in not appealing from the judgment of the court below is excused by the reasonable expectation he had that no appeal would be taken by Wilson and Tate, induced unintentionally by one of their counsel, and that the imputed default in not applying for the writ of *certiorari* at the last term of this court is also excused by the fact that petitioner might properly resist the application of his adversaries, and that after the decision of the court was announced he had not the opportunity to take any steps in his own behalf before the end of the term and the writ now applied for must therefore be issued so as to bring up the appeal for review of the questions made and ruled against the petitioner, and it is so ordered.

PER CURIAM. *Certiorari* granted.

REBECCA A. CHEATHAM v. JAMES A. CREWS and others.

Division of Land—Compensation for Deficiency.

1. A testator directed that his land (more than 1,000 acres) should be divided equally among his children, by three disinterested men, to be chosen by his executors to make such allotment. In the division a mistake occurred, whereby one of the children received about forty acres less than her proper share. The parties went into possession of their respective portions, several conveyances among the children were made of the lots falling to their share, and one of them had contracted in writing to convey to a stranger. Valuable improvements had also been placed on several of the lots, under the supposition that the division was fair and regular;

Held, that the party receiving less than her full share was not entitled, upon discovering the deficiency, to demand a re-allotment of the land, but must content herself with pecuniary compensation for her loss.

(*Kitchen* v. *Herring*, 7 Ired. Eq., 190, cited and distinguished.)

CIVIL ACTION tried at Spring Term, 1880, of Granville Superior Court, before *Seymour, J.*

James Crews died in the year 1875 seized and possessed of land containing more than one thousand acres in area, which in the second clause of his will he devises in these words: "2nd. I direct that all my land shall be divided into eight tracts of equal size and value by three disinterested men, selected by my executors hereinafter named, and distributed by ballot as follows: One share to my son James A. Crews; one share to my son Elijah T. Crews; one share to my son Edward N. Crews; one share to my daughter Rebecca A. Cheatham, widow of James Cheatham, deceased; one share to my daughter Martha M. Hunt, wife of Joseph P. Hunt; one share to my daughter Isabella J. Hicks, wife of Benjamin W. Hicks; one share to my daughter Susan C. Hunt, wife of George W. Hunt, and one share to my daughter Malissa F. Hester, wife of William S. Hester."

In another clause he distributes the proceeds of his per-

sonal estate into nine equal parts, giving one to the children of a deceased daughter and the others to his living children, the devisees aforesaid, and directing any irregularity in the value of the shares of the land to be made up and corrected in the apportionment of the personal estate.

The executors upon their qualification proceeded to appoint the three persons, as required by the testator, to make the partition and valuation of the land. The land was accordingly surveyed and divided and the shares assigned to each by lot, and report thereof returned to the clerk of the superior court of Granville and duly recorded in the book of settlements kept in his office. In the division, lot No. 2 drawn by the plaintiff and valued at eight hundred and thirty-eight dollars and fifty cents purports and was supposed to contain one hundred and twenty-nine acres, while in fact there was a deficiency of about forty acres, as determined by a subsequent and more accurate survey. The personal estate was also distributed, the plaintiff, as well as the others, receiving their shares upon the basis of the valuation of their respective tracts, assigned in the division of the land. After the filing of the report, the devisees entered into possession of their several shares and some transfers were made prior to the discovery of the deficiency in quantity of the lot belonging to the plaintiff.

The said George W. Hunt and wife Susan C., on October 30th, 1875, for the consideration of one thousand and seventy-six dollars, sold and conveyed their lot No. 1, containing one hundred and twenty-nine acres and valued at eight hundred and thirty-eight dollars and fifty cents, to the devisee Edward N. Crews and he for full value on November 4th following sold and conveyed the same to the said William S. Hester, husband of the devisee Malissa F. In like manner Joseph P. Hunt and wife Martha M., for full value, to wit, one thousand two hundred and eighty-four dollars and seventy-five cents, sold and conveyed her lot,

No. 6, containing one hundred and forty-two and three-fourths acres and valued at eight hundred and fifty-six dollars and fifty cents, to the said Edward N. Crews. The defendant James A. Crews has contracted with one Nathan Hammie, a stranger to the proceeding, to convey his lot, No. 5, containing one hundred and twenty-nine acres, valued at four hundred and fifty-one dollars and fifty cents, and having received four hundred and thirty-nine dollars, has executed a bond for making title on payment of the residue of the purchase money. Two of the defendants assert that they have made improvements on their lots and other changes have taken place among the owners, not needful to be specified. These transactions and dealings were in good faith and in full confidence that all acquiesced in the action of those who divided the land. The partition assigns six shares which contain each one hundred and twenty-nine acres; and of the two others, one has one hundred and forty-two and three-fourths and the other one hundred and thirty-one and a half acres, indicating an intent to carry out the instructions of the testator as nearly as the condition of the land would admit and without reference to the value of the parts.

The plaintiff discovering the error against herself instituted this suit in February, 1879, and demands its correction by a new survey and division, which shall make up her deficiency and give her an equal quantity of land with the others. The defendants submit to be charged with an assessment in money sufficient to make the plaintiff equal, but deny her right to disturb what has been done.

The court finds that a re-division for the correction of the mistake cannot now be made without great and obvious inconvenience and wrong and injury to others in interest, equally innocent, and adjudge the plaintiff not to be entitled to the specific relief demanded, but to a pecuniary compensation for the deficiency in her lot. Thereupon it was

ordered "that it be referred to the clerk to enquire and ascertain as near as may be" the number of acres in the whole tract and in lot No. 2, according to its marked boundaries, and further what sum would be an adequate remuneration to the plaintiff for her loss, calling in the aid of a surveyer if necessary, and to make report at the next term. From this judgment the plaintiff appeals.

Messrs. Merrimon, Fuller & Fuller, for plaintiff.

Messrs. M. V. Lanier, J. B. Batchelor and *L. C. Edwards*, for defendants.

SMITH, C. J., after stating the case. We think there is no error in the ruling of the court and in the measure of the relief accorded to the plaintiff. The interpretation put upon the will by her counsel that it requires a division into parts of equal area and an adjustment of values in the distribution of the personalty may be conceded to be correct, and it is manifest that the commissioners proceeded upon this understanding of the testator's directions. From the conformation, condition and situation of the land, a literal compliance with the directions may have been and we must assume in their opinion was impracticable without serious injury to the shares and not strictly in contemplation of the testator who imposes the duty and confides much to the discretion of the appointees. We must in fairness ascribe the slight deviation in their action to these considerations. This may be inferred also from the acquiescence of the devisees in what was done with full knowledge of the excess allowed two of the shares, their several occupations, and the acceptance of the sums paid in the apportionment by the executors. The court declares as a fact found upon the evidence, that a disruption of the division and an allotment *de novo* would be a wrong and injury to the defendants, and we are unable to see how any rectifica-

tion short of this will attain the object. We do not think the plaintiff has any equity to call upon the court to do this, and especially when she can have ample compensation for her loss in land from a pecuniary assessment upon the owners of the other shares.

No authority was cited to aid us in the investigation except the case of *Kitchen* v. *Herring*, 7 Ired. Eq., 190, which was for a specific performance of an agreement to convey land and has no bearing upon the question. Here, there is no contract at all and the parties derive title under a will to land which has been divided and alloted by persons appointed according to its requirements, and the suit is for the rectification of an unintentional error committed by them. The plaintiff's equity grows out of the relations of the parties as the beneficiaries of a common estate and will be enforced under a proper regard to the interests of all. Full and adequate compensation can be had in money without disturbing the assignment of shares and the interests therein which have since vested and this relief the judgment of the court awards.

There is no error. This will be certified to the court below.

No error. Affirmed.

W. J. HARRIS v. K. R. JONES.

Mortgage, What Words Constitute—Grant of thing Not In Esse—Registration.

1. Where the words of grant in an instrument are that the grantor "conveys a lien upon each and every of said crops" to be made upon certain land, such words will constitute a valid mortgage upon the crops,

although they be not planted at the time when such instrument is executed and registered.

2. Where a party living in one county executes a mortgage upon a crop to be planted on land bought by him in another county to which he contemplates removing, such mortgage may be properly registered in the latter county, the mortgagor having actually made such removal after the registration of the paper.

(*Simpson* v. *Morris*, 3 Jones, 411, cited and approved.)

CIVIL ACTION, tried at Spring Term, 1880, of WILSON Superior Court, before *Avery J.*

The case was submitted to the court upon the following facts agreed: On December 11th, 1877, one W. H. Bishop executed to Mollie Bardin a note under seal and a paper writing purporting to be a mortgage to secure the same, which are as follows:

$125. On demand Nov. 1st, 1878, I promise to pay Mollie R. Bardin or order one hundred and twenty-five dollars for value received for one bay horse. Dec. 11, 1877.

(Signed) W. H. Bishop [seal]

These presents between William H. Bishop of the county of Jones and state of North Carolina of the first part, and Mollie R. Bardin of the county of Wilson of the state of North Carolina of the other part, witnesseth that whereas the party of the first part is now engaged or about to engage in the cultivation of various crops upon a tract of land in Craven county, known as the farm which the said Bishop has recently purchased of E. R. Stanley, lying on Batchelor's creek and A. & N. C. R. R., and that the party of the first part is now indebted to the party of the second part one hundred and twenty-five dollars for one note; and that the party of the second part agrees to make advances in provisions and other supplies to the party of the first part from time to time during the year 1878, to be expended in the cultivation and housing the various crops to be made

on the said land or farm during the said year, to the extent of one dollar beyond which amount the advances to be made shall not go. In consideration of one dollar and to secure the said indebtedness of one hundred and twenty-five dollars and the advances hereafter made by the party of the second part, the party of the first part conveys to the party of the second part, their heirs, executors and administrators, the following property: One bay horse known by the name of Dobbin, and a lien upon each and every of the said crops to be cultivated and made upon the said land or farm during the said year, with free power to take possession of all the said crops at any time and place after their maturity, and should the party of the first part do any act to defeat this lien, the debt and advances secured herein shall be due and collected at once, as may be sufficient upon sale thereof to satisfy such advances and indebtedness and all expenses of making and executing these presents, and to take possession and sell so much of said property as may be sufficient to discharge the said indebtedness and what is due for advances after the first day of November, 1878, unless on or before that time the same should be sooner discharged by the surplus of said crop or otherwise. Witness my hand and seal this the 11th day of December, 1877.

(Signed) W. H. Bishop [seal.]

That the sole consideration of said note was the purchase of one horse used by the defendant in the cultivation of the crops herein referred to; that to secure the payment of the note the said W. H. Bishop, on the 11th day of December, 1877, executed to said Mollie R. Bardin the instrument, a copy of which is herewith filed as a part of this case, which was duly recorded in Craven county on the 28th of December, 1877; that no part of said note has been paid except the sum of forty-one dollars and seventy-five cents, realized from the sale of the horse conveyed in said mortgage lien; that on the first day of November, 1878, the said Mollie

Bardin endorsed for value the said note to plaintiff; that on the 12th of February, 1878, the said W. H. Bishop, being indebted to K. R. Jones in the sum of eighty dollars, executed to him (defendant) a chattel mortgage, which was duly recorded in Craven county on the 1st of April, 1878; that on the 24th of May, 1878, the said Bishop being indebted to said defendant in the sum of one hundred dollars, executed to him a chattel mortgage, which was also duly recorded; that at the date of the execution of the mortgage to Mollie Bardin and the mortgage to the defendant on the 12th of February, 1878, the crops therein conveyed were not planted, but were planted on the 24th of May following, the date of the execution of the second mortgage to defendant Jones; that during the fall of 1878, the said Bishop delivered to defendant five bales of cotton which were raised during the year 1878 upon the land described in the mortgage to said Mollie Bardin and K. R. Jones, and the proceeds of the sale of said cotton, to wit, one hundred and fifty seven dollars, were applied to the payment of the notes described in the mortgages to said Jones and failed by twenty-three dollars of satisfying the same; that at the time of the receipt of said cotton, the defendant had no notice of the lien of the plaintiff other than the notice given by the registration of plaintiff's mortgage. At the time of the execution of the mortgage from Bishop to Bardin, to wit, Dec. 11th, 1877, the said Bishop was living in Jones county and had at that time bought the farm upon which the crops referred to were raised and had moved some of his personal property (two loads of corn) to said farm, but on account of the refusal of the lessee of that year to surrender the premises, he did not move his family and the residue of his personal property until the first of January, 1878. Bishop lived on said farm during the year 1878 and cultivated the same upon which the cotton referred to was raised.

The plaintiff demanded payment of the balance due upon the note, to be made out of the proceeds of the sale of the cotton. His Honor upon the facts ordered the action to be dismissed, and the plaintiff appealed.

Messrs. Connor & Woodard, for plaintiff.
Mr. F. M. Simmons, for defendant.

ASHE, J. The record in this case presents three questions for the consideration of this court.

1. Are the words "conveys a lien upon each and every of said crops to be cultivated and made upon the said land or farm during the year" used in the deed, executed by the said Bishop to Mollie Bardin, sufficient to create a mortgage?

2. Can a mortgage be given upon an unplanted crop?

3. Was Craven the proper county for the registration of the mortgage?

Upon the first point we are of opinion the language used in the deed is sufficient to constitute a mortgage. "No particular form is necessary to constitute a mortgage," so the words of the deed clearly indicate the creation of a lien, specify the debt to secure which it is given, and upon the satisfaction of which the lien is to be discharged, and the property upon which it is to take effect. Jones on Mortgages, 60; In *McAffrey* v. *Wood*, 65 N. Y., 459, it is held "no special form of words is necessary to constitute a mortgage. The statement that the creditor is to have a lien, and that on default he may take possession and sell in the same manner as in cases of chattel mortgage, sufficiently discloses the intent."

In the case of *DeLeon* v. *Hegun*, 15 Cal., 483, it was decided by the supreme court of that state "that no particular words are necessary to create a mortgage. The words *we mortgage the property* when accompanied by a provision for the sale of it in case the money recited in the instrument

as being thus secured, be not paid, are clearly sufficient. And in *Langdon* v. *Bull*, 9 Wendell Rep., 80, where the action was founded upon an instrument which ran thus: "Now therefore for the payment of said notes, I hereby pledge and give a lien on the said engine to the said Langdon, and in case the notes are not paid, hereby consent that Langdon shall hold the same as security and see himself harmless, it being understood that I keep possession of the same until the time comes for the payment of the notes, and in case they are not paid, Langdon may take the same;" *It was held*, that this instrument contained all the essential attributes of a mortgage of personal property.

In our case, the instrument not only conveys a lien on the property to secure the defendant, but gives the power to the vendee, in the event of a failure to meet the payment at maturity, to take possession and sell. These provisions clearly constitute it a good chattel mortgage.

As to the second point, whether an unplanted crop is the subject of a mortgage: That question has been expressly decided in the affirmative at this term of the court in the case of *Cotten* v. *Willoughby*, *ante* 75, and it is unnecessary to add any authorities to those there cited.

As to the remaining question, whether Craven was the proper county for the registration of the mortgage we are of opinion the registration in that county is sufficient, upon the authority of *Simpson* v. *Morris*, 3 Jones, 411.

In our case the mortgage was executed on December the 11th, 1877, and registered in Craven county December the 28th, 1877, and at the time of the execution of the mortgage, Bishop was residing in Jones county, but had purchased the farm on which the crop was to be made and was in the act of removing to it, and had moved some of his personal property, and was only prevented from removing his family and the remainder of his personal effects, by the the refusal of the lessee of the premises to surrender the

possession before the first of January. But he did not move on the first of January, and lived upon the farm in Craven county, upon which the cotton in question was raised, during the year 1878.

In the case of *Simpson* v. *Morris, supra*, the plaintiff had purchased some slaves from David Simpson and took a bill of sale for the same. They both resided in Union county when the bill of sale was executed, and the slaves were sent soon after the purchase to the county of Mecklenburg, where the plaintiff owned a plantation on which the slaves were kept until the plaintiff removed to the same place, and his father David Simpson, near there. The bill of sale was proved and registered in the county of Mecklenburg, and on the trial of the cause, the defendant objected to its reception as evidence, because, as he insisted, it should have been registered in the county where it was executed and where both parties resided at the time of its execution. Chief Justice NASH who delivered the opinion of this court held the registration sufficient. "One object," he said, "of the registration act is to furnish those who deal with the owners of slaves a ready way of ascertaining their title to them. Another is to ascertain where slaves are to be given in under the revenue laws. The purchaser, the plaintiff, residing in Mecklenburg county, and the slaves being there, would naturally search the register's office of that county to ascertain his title." So in our case a creditor of Bishop proposing to take a lien on his crop for supplies to be furnished, or a mortgage to secure a debt in the year 1878, would hardly have looked to the registry of Jones county for incumbrances on his crop to be raised on his farm in Craven county, but would naturally have searched the register's office in the latter county where he resided and where the crop was to be made. The cases are analogous. Bills of sale of slaves were required to be registered in the county where the purchaser resided, when he took the actual posses-

sion of the slaves, Rev. Code, ch. 37, § 20, and chattel mortgages in the county where the mortgagor resided. Bat. Rev., ch. 35, § 12.

The registration of the mortgage we think was sufficient. If it is not within the letter, it comes within the spirit of the act. There is error and the judgment of the superior court is reversed.

Error. Reversed.

JOHN G. JONES v. C. W. BUNKER.

Province of Court and Jury—Boundary.

1. The construction of a written instrument or other contract whose terms are ascertained should be determined by the judge, and it is error to refer such construction to the jury.
2. Where a tract of land is described as "beginning at a point of a ridge near some large rocks, on the south east-side thereof, about two chains east of Stewart's creek, and runs up the ridge north," &c., and there is evidence tending to show large out-cropping rocks at each end of the ridge, the beginning will be fixed at the south-east end or side of the ridge, and the reference to the rocks will be considered as descriptive only, and as meant to aid in ascertaining the position of the point on the south-east side of the ridge, and not to give undue prominence to the rocks.

(*Burnett* v. *Thompson*, 13 Ired., 379; *Marshall* v. *Fisher*, 1 Jones, 111; *Clark* v. *Wagoner*, 70 N. C., 706; *Johnson* v. *Ray*, 72 N. C., 273, cited and approved.)

CIVIL ACTION to recover land, tried at Fall Term, 1879, of SURRY Superior Court, before *Gilmer, J.*

Verdict and judgment for defendant, appeal by plaintiff.

Messrs. George B. Everitt and *Reade, Busbee & Busbee*, for plaintiff.

Messrs. Watson & Glenn, for defendant.

SMITH, C. J. Several exceptions taken by the appellant appear on the record of which it is necessary to consider one only, which in our opinion is decisive of the case.

The plaintiff claims the land in dispute under a succession of deeds extending back to the year 1818, the last of which was executed to himself on November 5th, 1871, and a continuous possession of the respective owners down to the defendant's entry in 1874 or 1875. One of the deeds constituting his claim of title, made by the sheriff of Surry in the year 1847, pursuant to a sale under execution conferring authority on William Slade, describes the boundary line in these words: "Beginning at a point of a ridge near some large rocks, on the south-east side thereof, about two chains east of Stewart's creek, and runs up the ridge north," &c., and this description is followed in the deed from Slade to Solomon Graves, whose executors by virtue of his will convey to the plaintiff. The location of the ridge called for is conceded to be as laid down in the surveyor's plat, and there was evidence tending to show large out-cropping rocks at each end of the ridge, and the contention was whether the beginning was at the rocks on the south-east side of the ridge, or on the south-east side of the bed of rocks, cropping out at the north-east end of the ridge. It was admitted in the argument that if the line started at the south-east end or side of the ridge, as the plaintiff insisted, his right of recovery could not be resisted, and the controversy is thus narrowed down to the simple inquiry as to its position as described in the sheriff's deed.

At the trial before the jury, the defendant's counsel argued that the proper interpretation of those descriptive words required the beginning to be fixed at the south-east side

of the bed of rocks, and that the word "thereof" referred to its nearest antecedent, *the rocks*, and not *the ridge*, and asked of the court an instruction to this effect. The court declined so to charge, and told the jury it was a question for them to determine upon consideration of all the evidence bearing upon it. The plaintiff, although he did not ask any specific ruling favorable to his own contention as to the legal import of the language of the deed, assigns for error that the court did not construe it and tell the jury that the word "thereof" meant the ridge and designated the beginning at its south-east side.

It is too well settled to need the support of argument or authority that the construction of a written instrument or other contract whose terms are ascertained, is a matter of law to be determined by the judge and not left to the uncertainty of a jury verdict. It was then his duty to put an interpretation upon the words, and tell the jury whether they required the location of the beginning of the boundary line at the one or the other place, or at some other place different from either, and it was error to leave the question to the jury. The determination of this point is conclusive of the controversy, since in the one case the *locus* is within, and in the other without, the plaintiff's boundaries.

Our opinion upon this question is with the plaintiff and supports his construction of his deed.

1. It is manifest a point in the ridge is intended, near some large rocks, and more definitely pointed out as being on the south-east side of the ridge. The reference to the rocks near by is descriptive only, and is obviously to aid in ascertaining the position of the point on the south east side of the ridge, and not to give undue prominence to the rocks themselves.

2. This interpretation is supported by the further description that it is "about two chains east of Stewart's creek," and the line thence "runs up the ridge north," the ridge

being still the prominent object, and the line commencing at its south-eastern side, in order to fulfil the two conditions of running "*up the ridge*," and in a northern direction. These requirements do not admit of the beginning on the north-west end of the ridge, for then the line extended north would not run up the ridge but leave it altogether.

3. A different construction involves the substitution of an object mentioned only for the purpose of identification in place of the point which the reference only seeks to ascertain, and thus there would be two points, and obscurity resulting from the very words employed to produce certainty in the description.

It is the province of the judge to tell the jury what are the boundaries of the land conveyed according to the terms of the description; of the jury to ascertain where are the objects called for and by which the boundaries are controlled, and to fit the description to the thing described. *Burnett* v. *Thompson*, 13 Ired., 379; *Marshall* v. *Fisher*, 1 Jones, 111; *Clark* v. *Wagoner*, 70 N. C., 706.

The jury ought to have been directed to find the beginning of the line at a point on the south-east side of the ridge, near to a bed of rocks if such could be found, and then run it up the ridge a northern course, pursuing the other calls of the deed. For failing so to charge and leaving the matter to the jury, he committed an error of law which is presented for revision on the plaintiff's appeal. Had the error been corrected by the verdict and thus no injury done the appellant, no exception therefor could be entertained. *Johnson* v. *Ray*, 72 N. C., 273. But the error was not thus remedied and the plaintiff is entitled to a new trial. Judgment reversed and new trial awarded. This will be certified.

Error. *Venire de novo.*

H. V. CUNNINGHAM v. B. W. BELL.

Trust—Husband and Wife—Injunction.

A husband, as agent for his wife, purchased for her a tract of land but gave his own note for the price and took the title in his own name. The greater part of the purchase money was paid out of the wife's funds, and the husband afterwards conveyed the land to his sons in trust for the wife;

Held, That the wife was entitled to demand a conveyance to herself on the payment of the balance of the purchase money, and an injunction to restrain the vendor from selling the same under execution to satisfy an independent claim held by him against the husband.

(*Dula* v. *Young*, 70 N. C., 450; *Dockery* v. *French*, 69 N. C., 308; *Lyon* v. *Akin*, 78 N. C., 258, cited and approved.)

MOTION to vacate an injunction heard at Fall Term, 1879, of MACON Superior Court, before *Graves, J.*

The material facts are that in August, 1875, D. C. Cunningham, the husband of plaintiff, as agent for her, purchased of defendant a house and lot in the town of Franklin, Macon county, at the price of twelve hundred dollars, payable in six equal annual instalments, it being left to the husband to manage the trade and have the title secured to her, as her sole and separate estate. On making the purchase the husband gave his own notes for the money and took a deed conveying title to himself, and at the same time re-conveyed the house and lot to defendant to secure the notes for the purchase money as they should fall due.

It is alleged in the complaint that the plaintiff sold a tract of land belonging to her in order to raise the money to pay for the town property, and that the notes secured by the mortgage had been very nearly all paid by her, and His Honor finds as a fact in the case of appeal made out by him, that the payments, so far as made were made *as agreed on* either by the plaintiff in person or by means furnished by her, or derived from her separate estate.

The husband, D. C. Cunningham, in 1876, executed a deed purporting to convey the said house and lot to two of the sons of the marriage in trust for the plaintiff, and she now occupies the same and has so done ever since the purchase but recently the defendant has sued out an execution on a judgment he had against D. C. Cunningham in 1870, for a debt other than the one secured by the mortgage, and is now threatening to sell thereunder the equity of redemption in said land as belonging to D. C. Cunningham.

This action is brought by the plaintiff to redeem the land on the payment of whatever sum may be due on the mortgage, and praying to have the title thereof conveyed to her, and pending the suit to restrain the defendant from selling any supposed interest of D. C. Cunningham therein.

Upon the plaintiff's application, the judge granted an injunction as prayed for, with an order to show cause, and at the day appointed, on motion of defendant on answer filed, His Honor vacated the injunction, and from that order the appeal is taken.

Messrs. Reade, Busbee & Busbee and *T. F. Davidson*, for plaintiff.

Messrs. Merrimon, Fuller & Fuller, for defendant.

DILLARD J. It is unnecessary to recite or refer to any of the particular averments of the answer of defendant as bearing upon the question of the legal correctness of the order vacating the injunction, inasmuch as our opinion proceeds upon the facts above enumerated, taken from the judge's statement of the case and from the allegations of the complaint not controverted, or at least not denied from any knowledge to the contrary on the part of the defendant.

The plaintiff, if the land was purchased for her and to be paid for by her, and if the same had been paid for in whole or part by her means, had an equity on extinguishing the

purchase money to have a trust declared of the legal title to her use and to have a conveyance of the same to her in fee. Adams' Eq., 33, 34; *Dula* v. *Young*, 70 N. C., 450; *Lyon* v. *Akin*, 78 N. C., 258. Here, the judge finds as a fact that the payments on the purchase money secured by the mortgage, so far as made, were made by the plaintiff *as agreed on by means furnished by her or derived from her separate property.* And thereby an equity arose to the plaintiff *pro tanto* her payments, and will arise *in toto* on full payment, to have the trust declared and enforced in her favor against the defendant, the mortgagee of the legal estate; and this equity to redeem and have the title is such an interest as entitles her by the well established principles of equity to be heard in its assertion on her original right, accruing from her money paid, independently of any interest she may have as *cestui que trust* in the equity of redemption conveyed by D. C. Cunningham to the two sons in trust for plaintiff in 1876. 2 Spence's Eq., 660.

Our case then is the same as a bill in equity constituted in court by a person competent to redeem, and against the mortgagee holding the legal title; but defendant combats plaintiff's right and justifies the vacation of the injunction on the ground that if he is allowed to sell the supposed equity of redemption of D. C. Cunningham, the purchaser will acquire only such equity as he may have in subordination to the older and superior equity of the plaintiff, if such she have; and in such case he insists a court of equity would not have interfered, nor ought our present superior courts to restrain his execution, but leave the purchaser thereunder and the plaintiff to settle their conflicting equities by subsequent action.

The position of defendant is certainly correct, that the court ought not, as assuredly it would not, enjoin a sale under defendant's execution, if under it merely a case of conflict of legal titles was created, for the reason as held by

us in the case *Southerland* v. *Harper*, *ante*, 200. A court of law formerly by ejectment, and our present superior courts, by action to recover real property under the code, would be perfectly competent to pass upon such titles. But the claim of the plaintiff to redeem is a mere equity and this action is brought for its assertion, and now if defendant against whom the right is claimed is allowed to sell the supposed equity of redemption of D. C. Cunningham in the land, the purchaser under his sale can at most only claim an equity, and thus a new rival interest will be created by a party to the cause outside of the cause, complicating the matters in litigation and obstructing the jurisdiction of the court. We understand the rule to be that when a cause is duly constituted in a court of equity, that court will make a complete and final determination of all rights affecting the subject matter of the action, and to this end will require of the parties to set up all their rights, whether equitable or legal, so as to be bound by the decree, and will restrain any act of a party tending needlessly to increase the complications of the controversy. And hence in the present action it was proper to have compelled the defendant already before the court to set up his claim in the alleged equity of redemption of D. C. Cunningham under the lien of his judgment, and thus to have prevented an obstruction to the court.

The propriety of restraining a sale under the circumstances of this case is not only commended by considerations of conscience, but it is fully established and sanctioned by the authority of the case of *Dockery* v. *French*, 69 N. C., 308, which is similar to our case in all its features. There, one Morrisey executed a deed conveying land to French as trustee to secure a creditor his debt and to indemnify him against a suretyship for the trustor, and after the debts were paid as claimed by Morrisey, he sold and conveyed by deed to Dockery without having had a reconveyance of the legal

title from French, and subsequently to this the trustee having advertised to sell the land, Dockery brought his action to redeem, and for the conveyance of the legal estate; and pending the action the sale under the trust was enjoined, and this court held it proper on the ground that by it no harm would result to any one, and without it much mischief might ensue to the party claiming the right to redeem.

We think therefore the court should not have dissolved the injunction but continued it to the hearing, as it will be perfectly competent to the court at the end to adjudge between the equity claimed by the plaintiff and that claimed by the defendant by virtue of his judgment lien on the supposed equity of redemption of D. C. Cunningham; provided however, that the husband of the plaintiff and the two sons to whom he conveyed the equity of redemption in 1876, shall be brought in as parties so as to have a final determination of all rights.

There is error and this will be certified that the injunction may be continued and the cause in other respects conducted in conformity to this opinion.

Error. Reversed.

SALLY A. McCLENAHAN v. CORNELIA B. COTTEN, Ex'rx.

Counter Claim—Executors and Administrators.

1. A defendant sued on contract in a justice's court may plead as a defence an independent cross-demand arising *ex contractu*, the principal of which is beyond the jurisdiction of a justice of the peace.
2. The clause of the code which interdicts a second action upon the judgment of any court, other than that of a justice of the peace, without leave of the judge, was not intended to forbid the use of such judgment as a set-off or counter-claim.

3. A defendant sued as a personal representative cannot use as a set-off or counter-claim against a creditor of the estate, a claim against such creditor purchased subsequently to the death of the testator or intestate.

(*McDowell* v. *Tate*, 1 Dev., 249; *Kerchner* v. *McRae*, 80 N. C., 219, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of CHATHAM Superior Court, before *Seymour, J.*

In this action, decided against the plaintiff in a justice's court, an appeal was taken to the superior court, and on the hearing, the parties having waived a jury and consented to a trial of all issues of law and fact by the court, His Honor found the facts and the conclusions of law thereon as follows:

1. That the bond declared on is the bond of the defendant's testator and is for the sum of $173.20, bearing interest from the 11th of November 1862.

2. That the sum pleaded as a set-off or counter-claim by defendant is based on a judgment recovered by one A. H. Merritt against John S. McClenahan and the present plaintiff at May term 1870 for $201, with interest from the 11th of February 1860, and $23.95 costs.

3. That execution was issued on said judgment soon after its rendition and returned, nothing to be found to satisfy said execution over the homestead, and that no other execution was issued thereon.

4. That said Merritt assigned the said judgment on the docket of the court in 1878 to the defendant, on whose motion, after notice, the judgment was revived in her name and leave granted to have execution.

Upon these facts, the defendant having remitted all of her claim in excess of plaintiff's demand under the order of the court, His Honor adjudged the defendant to be entitled to have her counter-claim applied in extinction of plaintiff's

debt, and gave judgment for costs against the plaintiff, from which judgment plaintiff appealed.

Mr. J. H. Headen, for plaintiff.
Mr. John Manning, for defendant.

DILLARD, J. The questions presented on the appeal for our determination are, first, can a defendant sued in contract in a justice's court plead as a set-off an independent cross-demand arising *ex contractu*, the principal of which is beyond the jurisdiction of a justice of the peace, and secondly, whether a defendant sued as a personal representative may purchase a claim against a creditor of the estate subsequently to the death of the decedent, and avail of it as a set-off or counter-claim.

We concur in the opinion of His Honor on the first point, and do not on the second one.

Prior to the statute of set-off, a party sued for a debt could not at law defeat his adversary, by the fact that he had an unconnected legal demand, but had to proceed by a separate action, and the right to apply one debt to another, whether of a legal or equitable nature, could not be had except in a court of equity. To remedy this evil the statute was passed, and under it mutual debts between parties, and where either party was an executor or administrator and there were mutual debts between the testator or intestate and the other party, were allowed to be set one against the other, and the statute was of force in our courts of law under our former system, and the principle of it now exists under the code under the more comprehensive name of counter-claim. And by the old rules of pleading it was the right of the party having a set-off to avail of it, when less than the opposing claim, by plea of the general issue with notice of the particulars thereof or by plea of the same in bar when equal to or greater than the adverse demand.

Rev. Code, ch. 31, §77; *McDowell* v. *Tate*, 1 Dev. 249; 1 Chitty Plead. 569 and 570. The same right still exists under the code, with the same effect as formerly, but now much enlarged and to the further effect, that in addition to a mere bar, affirmative relief may be had for the excess, if the party will plead it as a counter claim, and this will be apparent by reference to the provisions of the code.

By C. C. P. §94, the only pleading on the part of a defendant has to be a demurrer or answer.

By section 100 an answer must contain, first, a general or specific denial of each material allegation of the complaint controverted by the defendant, &c., or, secondly, a statement of any new matter constituting a *defence* or *counter-claim*.

By section 101 the counter claim provided for is defined, and by subdivision 1 matters of recoupment and deduction as growing out of the contract or transaction set forth in the complaint, or connected with the subject of the action, are authorized; by subdivision 2 in actions on contracts, a counter-claim is made to embrace any other cause of action arising *ex contractu* existing at the commencement of the action; and by subdivision 3 a defendant may set up as many defences or counter-claims as he may have, whether formerly legal or equitable.

The question now arises, how may a party use and rely on his cross-demand? The answer is, he may plead it or not at his will, but if he elect to plead it, he may do so, and then, if it be equal to or greater than the opposing demand, he may plead it in bar, as formerly, or plead it as a *defence*, so called, under the code, the plea or defence having the operation merely to defeat the action, and not to admit of any judgment for an excess, or he may, if he will, instead of pleading it as a bar merely, set up his demand under the name and with the proper prayer of a counter-claim as

introduced by the code, and then the defendant will have judgment for the excess.

This construction is within the words of the code and is just in itself, for no reason can be given why A having a debt of two hundred dollars against B, who has a debt of one thousand dollars on him, should have judgment for his debt without the right in B to defeat the action by a plea of his larger debt as a set-off in bar. Such a distinction between set off set up as a bar and as a technical counter-claim is laid down as proper to be taken, by an intelligent writer, (Bliss on Code Pleading §368), and is recognized and admitted under the Code in New York. *Tillinghast & Shearnan* Prac. 158; *Burnall* v. *De Groot*, 5 Duer 379; *Prentiss* v. *Graves*, 33 Barb., 621.

In our opinion therefore the judgment, if not otherwise liable to objection, was properly pleadable as a *defence*, formerly a plea in bar, without any *remittitur* whatever, and that there was no error in the ruling on this point except in requiring the excess above plaintiff's demand to be remitted, which was an error against the defendant of which the plaintiff cannot complain.

The second error is assigned to be in the allowance by the court of the judgment purchased by the defendant in her executorial character as a set-off to the plaintiff's debt.

In support of this objection it is argued that by section 14 of the code, a second action upon a judgment of any court of the state, other than that of a justice of the peace, is forbidden without leave of the judge of the court, on cause shown, and therefore it is inadmissible to use the judgment here as a set-off, which in legal effect is but a new action. The answer to the objection is that the thing forbidden is an action *between the same parties* and we think is not to be extended to exclude the use of the judgment as a set-off. A second action is forbidden without leave on the ground that as *between the parties* every fact found and mat-

ter adjudged in a judgment is conclusively established, and there is no reason to sue on it again; but it cannot be that the legislature intended to restrict any use of the judgment otherwise (such as by way of set-off) of which it was capable as between the original parties, or between the judgment debtor and any assignee of the same; and such under a similar provision of the New York code is the construction, and we hold ought to be under our code. See section 14, C. C. P.; 2 Whitaker's Prac., 167; *Clark* v. *Story*, 29 Barb., 255; *Tufts* v. *Bramsted*, 4 Duer, 607; *Karlz* v. *Bradbury*, 21 Barb., 531.

It was further insisted that the judgment, if in every other view admissible as a set-off, was inadmissible by reason of the fact that defendant acquired it by purchase since the death of her testator, and as such it was her equitable property as an individual and not in her representative character.

The responsibility of executors in their individual characters upon causes of action arising wholly after their testator's death is settled, and in harmony with the authorities establishing that proposition, we think the purchase by defendant of the judgment on the plaintiff, although it was in terms assigned to her as executrix, made it in law the property of defendant as an individual. *Kerchner* v. *McRae*, 80 N. C., 219, and cases therein cited. And being the property of defendant as above described, it was not a chose in equity due in the same right to defendant as that in which the claim sued upon was due from her, and hence it could not have been allowed as a set-off in a court of equity, which in this respect follows the rule at law, or at least could not, unless some peculiar equity intervened, both as to the manner of its acquisition and the necessity for its application as a set-off. An executor or administrator owes the duty to settle up the estate by paying the debts and legacies, and distributing to the next of kin, and it is beyond the scope of the trust re-

posed in them to purchase up demands on the creditors of the estate for use as a set-off to their demands. Such a course if tolerated would involve the estate, or might, in unnecessary litigation, and would expose the representative to the temptation to claim, and with some show of right, to have a credit as a disbursement for the gross amount of all the claims he could buy up on the creditors of the estate.

We conclude that under our extended right of set-off and counter-claim under the code, a judgment purchased by defendant as executrix ought not to be received and maintained as a counter-claim, at least not unless its acquisition by the executrix was occasioned by way of payment by a doubtful debtor to the estate, or on some other peculiar equity, and here no such meritorious acquisition or peculiar equity is shown. We are of opinion therefore that upon the naked fact of a purchase by defendant of the judgment pleaded as a set-off, His Honor should have held the same not maintainable as a proper set-off or counter-claim in this action, and the judgment of the court below must therefore be reversed and judgment entered here for the plaintiff, and it is so ordered.

Error. Reversed.

S. J. HINSDALE v. D. SINCLAIR.

Proceedings Supplementary to Execution.

To authorize the grant of an order of examination under proceedings supplementary to execution there should be made to appear by affidavit or otherwise ;

(1) The want of known property liable to execution, which is proved by the sheriff's return of "unsatisfied" ;

(2) The *non-existence* of any equitable estate in land within the lien of the judgment;

(3) The *existence* of property, choses in action and things of value, unaffected by any lien and incapable of levy.

(*Brown* v. *Long*, 1 Ired. Eq., 190; *McKeithan* v. *Walker*, 66 N. C., 95; *Hutchison* v. *Symons*, 67 N. C., 156; *Weiller* v. *Lawrence*, 81 N. C., 65 cited and approved.)

PROCEEDING supplemental to execution heard at Spring Term, 1880, of ROBESON Superior Court, before *Eure, J.*

The plaintiff appealed from the judgment below.

Messrs. Jas. C. McRae, McNeill & McNeill and *Hinsdale & Devereux*, for plaintiff.

Messrs. W. F. French and *Rowland & McLean*, for defendant.

DILLARD, J. In this case an order of examination of defendant was procured from the clerk of Robeson county, on proceedings supplemental to execution on a judgment docketed in that county, and the order was grounded on an affidavit stating the issue of an *execution to the county of the debtor's residence and a return thereof "unsatisfied" by the sheriff*, and of the further fact, that the *debtor had property which ought to be subjected to the payment of the judgment.*

The defendant appeared on the day of the examination and moved to vacate the order upon objections to the affidavit, and there was an appeal to the judge; and from the judgment of the judge dismissing the proceedings the plaintiff appeals to this court, and so the question for our review and determination is, as to the sufficiency of the sheriff's return on the execution and the additional fact stated in the affidavit to warrant the proceeding.

By the law as it was under our system of courts prior to the constitution of 1868, a creditor with a legal demand had to establish his debt by a judgment in a law court, and one of his remedies for its enforcement was a *fi. fa.*, which

dealt with legal titles only in things corporeal, except legal rights of redemption, equities of redemption and other trust estates of the debtor authorized to be levied and sold under the act of 1812. And when the legal process was tried out and found ineffectual, then it was within the jurisdiction of the court of equity to aid the creditor by giving him relief, as to estates and rights of the debtor not capable of application by an execution, by a decree of the court operating in the nature of an execution. *Brown* v. *Long*, 1 Ired. Eq., 190. To initiate the equity jurisdiction, it was necessary as a general thing to have first issued a *fi. fa.* and had a return thereon of "unsatisfied" or *nulla bona* as indicating the insufficiency of the legal remedy, and then by bill filed to show forth that fact, and also to aver and point out the particulars of estates, interests and choses in action beyond the reach of an excution, for it could not otherwise appear but that the party's legal remedy was full and complete.

Under our present system, we have not courts of law and courts of equity as separate tribunals for the enforcement or administration of rights, but we have a union of the powers of each in our superior courts exercisable in but one form of action; and it has been repeatedly decided that while distinction in the forms has been abolished, the principles of law and equity still exist, and therefore it would naturally follow in our present organization that if the fruits of a judgment cannot be had by a *fi. fa.* with its limited reach, the superior courts could be invoked to help it out by its decrees in the nature of a *fi. fa.*, and such a jurisdiction by action we take it still exists, unless it has been taken away and made to be exclusively exercisable through proceedings supplementary to execution.

The code of civil procedure in section 264 in part at least, has undertaken to provide for the emergency both in the case of an execution *returned*, and of one *still in the hands* of

the sheriff, by declaring the creditor entitled in both cases to an order to examine the debtor concerning his property, giving the right, in the instance of a return of *unsatisfied*, in general terms, without prescribing how the application for the order is to be made, whether upon an affidavit or without; and if upon an affidavit, without saying what facts it shall contain, but prescribing in the case of an execution *unreturned*, proof to be made by affidavit or otherwise of property in the debtor, which he unjustly refuses to apply to the debt, as a prerequisite.

The statute being thus entirely silent in the case of an execution returned, and very indefinite in the case of an execution still in the hands of the sheriff, as to the state of facts on which an order of examination is to be granted, it was a matter for judicial construction to declare its meaning and to define on what facts and how established, such an order might be issued. Accordingly this court, with a purpose often avowed to construe the code as much in conformity as possible to our former system, early settled it, that supplementary proceedings was an extraordinary proceeding and not to be resorted to except upon *necessity*, and a state of facts showing that it will work out "something useful to the ends of justice, and that the aid of the court is not invoked for an idle purpose."

As exemplifying the instances in which that remedy is given, it was decided in *McKeithan* v. *Walker*, 66 N. C. 95, that the remedy lay only "in case the defendant had no known property liable to execution, or to what is in the nature of execution," by the latter clause of which expression is meant, with reference to the facts in that case, such equitable interests in land, as although affected with the lien of the judgment, were not liable to sale under execution under the act of 1812, but applicable by some proceeding for its sale in the nature of an execution, formerly by bill in equity and under our new system by action. And

it was further settled that when there was a lien on property, whether by the statutory effect of a docketed judgment, or by a levy of execution, it must be shown that a sale of such property has been had and the proceeds applied, and that the same is insufficient to satisfy the judgment before supplemental proceedings can be commenced.

It will be noted that by this decision the existence of *known property*, real or personal, which *could be sold by execution*, or *equitable interests in land not salable by execution*, but affected by the lien of the judgment, one or both, was a bar to supplemental proceedings, until a sale or the proof of the insufficiency of such property by affidavit; and hence it would seem necessarily to follow, that the affidavit required to initiate the proceeding should in terms negative the existence of both, or show such property to be of value sufficient to pay off the judgment. And as further settling, under what state of facts and how established a resort may be had to this remedy, this court in the case of *Hutchison* v. *Symons*, 67 N. C., 156, in commenting on the requisites of a proper affidavit in the case of an execution returned "*unsatisfied*," as was the execution in our case, held, that *such a return* showed the non-existence of property which could be sold by execution, and that to entitle the creditor to an order to examine his debtor, his affidavit should show the further fact, upon knowledge or information, that the debtor had property, choses in action, or things of value, which ought to be subjected to the payment of the judgment, which of course meant things not liable to seizure and sale under execution. The court in that case also fully assented to and approved the necessity of a sale of any property levied on by execution, or of equitable estates in land affected by the lien of the judgment not liable to execution under the act of 1812, as decided in *McKeithan* v. *Walker*, *supra*, unless on affidavit of insufficiency as aforesaid.

Putting these two cases together, we extract, that to

authorize the grant of an order of examination, these three facts must be made to appear by affidavit or otherwise, to-wit: the want of *known property* liable to execution which is proved by the sheriff's return of "*unsatisfied*," the *non-existence* of any equitable estates in land within the lien of the judgment, and the *existence* of property, choses in action and things of value unaffected by any lien and incapable of levy. The doctrine of these cases as to the requisites of a proper affidavit has not been recanted or modified, so far as we can find by any rulings of the court since that time, but reiterated in the recent case of *Weiller* v. *Lawrence*, 81 N. C. 65, and such an affidavit is now in use in the profession as material to indicate the necessity of the remedy in point of justice to the creditor, as an assurance to the court against the invocation of its aid to an idle end, and as a protection to the debtor against a discovery of his private affairs from the curiosity or other unworthy motive of the creditor.

To the requisites of an affidavit for an order of examination, as settled by the cases cited, we assent, as necessary in the case of an execution returned "*unsatisfied*," and equally so in the case of an execution *still in the hands of the sheriff*, notwithstanding the indefinite expression of the statute as to the affidavit required in that case, with the addition of a negative of any property liable to execution or its sufficiency to pay the debt, inasmuch as in that case there will be wanting the evidence imported by the return of "*unsatisfied*" by the sheriff.

This construction of the statute on the subject of supplemental proceedings is adopted by way of as near conformity as possible to the *ca. sa.* under our former system, of which it is in part a substitute, to have which it was a prerequisite to exhaust all liens by levy, and, besides, show by affidavit the non-existence of property which could be reached by a *fi. fa.*, and the existence of property which could not be reached by a *fi. fa.*

Applying the principles as settled by the decisions of this court, to the case under consideration, the affidavit on which the order of examination was made, was defective in not negativing as a further fact the existence of equitable estates in land bound by the lien of the docketed judgment.

There is no error and the judgment of the court below is affirmed.

No error. Affirmed.

SARAH F. McMICHAEL, Adm'x, and others v. MILTON HUNT, Ex'r of Jas. McNairy, and others.

Construction of Will.

The will of a testator made the following disposition of a portion of his estate: "I give and bequeath to my son James, in trust for the use and benefit of my son Boyd, the sum of $2,000, to be paid out by my son James, as trustee, to the support and maintenance of my son Boyd, from time to time as his necessities may require; the said $2,000 to be kept at interest, and the interest only to be used unless circumstances make it necessary to use and spend a portion of the principal.

There was no limitation over of the fund upon the death of Boyd, and no residuary clause to the will. The said Boyd was of feeble intellect and afterwards became a lunatic;

Held, that the bequest to the use of Boyd was an absolute interest and at his death went to his administrator.

(*Donnell* v. *Mateer*, 5 Ired. Eq., 7; *Whedbee* v. *Shannonhouse*, Phil. Eq., 283, cited and approved.)

CIVIL ACTION heard upon exception to a referee's report at Spring Term, 1880, of GUILFORD Superior Court, before *Seymour, J.*

The plaintiffs appealed from the ruling of the court below.

Messrs. Scott & Caldwell, for plaintiffs.
Mr. Jas. T. Morehead, for defendants.

SMITH, C. J. The only exception brought up by the plaintiffs' appeal for our consideration is to the ruling of the court in construing the fourth clause of the will of James McNairy. The testator died in October, 1840, and bequeathed therein as follows: I give and bequeath to my son James McNairy, in trust for the use and benefit of my son Boyd McNairy, the sum of two thousand dollars, to be paid out by my son James McNairy, as trustee to the support and maintenance of my son Boyd McNairy, from time to time as his necessities may require, the said two thousand dollars to be kept at interest and the interest only to be used, unless circumstances make it necessary to use and spend a portion of the principal.

There is no limitation over of the fund upon the death of the said Boyd, and no residuary clause contained in the will. Boyd was of feeble intellect and afterwards found to be a lunatic. and upon the death of the trustee, a guardian appointed to take charge of his estate. Boyd died on May 17th, 1878, intestate, leaving his wife, Elizabeth, surviving and without issue. The fund, constituting the legacy, was held and managed by James McNairy until his death in 1844, and subsequently passed into the hands of the defendant, W. W. Wiley, the guardian, who now has the principal unimpaired to be disposed of as the court may direct.

His Honor ruled that the bequest for the use of Boyd was absolute and at his death vests in his administrator, and adjudged that the money be paid to him, overruling the finding of the referee and sustaining the defendants' exception thereto. We concur in the opinion of the court that the restrictions imposed upon the trustee in the use and expenditure of the accruing interest were intended for the preservation of the fund for the life of Boyd, and ceased

at his death, when the legacy became unconditional and free.

The gift is of the entire sum of two thousand dollars to the trustee, for the use and benefit of my (his) son Boyd McNairy, and it is not qualified or restricted by the directions as to the investment and expenditure of the accruing interest in the support and maintenance of the beneficiary during his life. This was for the preservation of the fund and is not a withdrawal of the bounty intended for the legatee, and when the directions were executed, the legacy became absolute. This construction is necessary to avoid an intestacy, which a testator is not supposed to contemplate when disposing of his property, and still less when the intestacy would relate to a reversionary interest in a gift of personalty. This construction is in harmony with the current of judicial opinion in the interpretation of similar expressions.

In *Adamson* v. *Armitage*, 19 Ves. 416, the testator gave to the legatee the balance of his account in the hands of a certain person "with the interest thereon to be vested by my executors in the hands of trustees whom they shall choose and name, *the interest arising therefrom to be for her sole use and benefit;* and SIR WILLIAM GRANT held that the legatee was entitled to the absolute interest in the fund.

So where the testator bequeathed to his daughter "one hundred and twenty pounds per annum, (that is to say) the interest of four thousand pounds of my three per cent consolidated annuities," and added, "it is my wish and will that the interest as it becomes due to be added to the principal till she attain the age of twenty-one years, except twenty pounds per annum to find clothes," &c.; it was decided that the bequest of the interest passed the principal. *Stretch* v. *Watkins*, 1 Mad., 253.

Again it was held that a bequest of "the interest of the remainder (after all my just debts may be paid) I give and

bequeath to my mother, A. S. Wynne, for her life and at her decease to Catherine Clough," conveyed the principal. *Clough* v. *Wynne*, 2 Mad., 188.

The case decided in this court, *Donnell* v. *Mateer*, 5 Ired. Eq., 7, proceeds upon the same principle. The legacy in contention was in these words: "I leave three hundred dollars in the hands of my executors, to pay out to her (his daughter) as they see that she needs, if my estate will afford it;" RUFFIN, C. J., says: "The testator intended perhaps to entrust his executors with a vague sort of discretion, as to the time of payment, but not with the discretion of withholding the payment altogether. The daughter had an absolute right to demand the whole sum at some time, and therefore it is a vested and transmissible legacy, and belongs to the administrator."

Again, where the testator directed the emancipation of his slaves and their removal and settlement in Africa, and appropriated a portion of his estate to meet the expenses of such removal, and the residue of the appropriated fund not needed for that purpose was to be distributed among them when they reached the place of destination, and the slaves became free before the time designated for carrying this provision into effect, the court determined that the whole fund belonged to them, although they remained in the state. *Whedbee* v. *Shannonhouse*, Phil. Eq., 283.

The counsel for the appellant in support of the construction which made an intestacy, cited a passage from 2 Roper on Legacies, 333, following the cases we have quoted from that author, in which he says: "If however from the nature of the subject, or the context of the will, it appears that the produce or interest of the fund was only intended for the legatee, the gift of the interest will not pass the principal." The proposition, the correctness of which may be admitted, although no authority is referred to from which the precise meaning and extent may be ascertained, does not bear upon

the bequest adversely to the views we have expressed. Not only are there no words of limitation used to confine it to the life of the legatee, nor disposition of the reversion, but the early declaration in the clause clearly indicates the testator's purpose that Boyd should have the money absolutely, and this paramount interest must prevail.

We therefore affirm the ruling of the court below in sustaining the exception. This will be certified.

No error. Affirmed.

L. H. YEARGIN v. SUSAN SILER and others.

Officer—Summons—Service by Coroner—Deputy.

1. Where an official duty is judicial in its character, it is personal to the officer, and he cannot act by another, but where no discretion or judicial function is to be exercised, the officer may act in person or by another.

2. The service of a summons by the coroner in a case where the sheriff is interested, being the discharge of a purely ministerial duty, may be made by a deputy of the coroner's appointment.

(*Rowland* v. *Thompson*, 65 N. C., 110, cited and approved.)

MOTION to dismiss an action heard at June Term, 1880, of WAKE Superior Court, before *Gudger, J.*

Upon the facts set out in the opinion, the motion was allowed and the plaintiff appealed.

Mr. Walter Clark, for plaintiff.

Messrs. Gilliam & Gatling, for defendants.

DILLARD, J. By the act of 1872–'73, ch. 1, and other subsequent acts, the county of Wake has four regular terms of

the superior court in a year, of which two are return terms for all original and final process in civil causes, to-wit, February and August terms, and by the act of 1876-'77, ch. 85, §3, a summons issued more than ten days before its return term, if executed within the ten days, is directed to be placed on the summons docket and continued to the next term of the court at which it shall be treated as if said next term had been the return term thereof.

The plaintiff in this case sued out his summons from the clerk of Wake superior court on the 5th of August 1879, returnable to its proper return term in the same month, and more than ten days after its issue, directed to the coroner of Macon county, who executed the same by one Alman, specially deputed by him for that purpose, on a day less than ten days before the return day. The summons when returned was entered on the summons docket at the August term, and the defendants then entered an appearance by marking the names of their counsel, and again at January term next after, the same entry of appearance by defendants was still on the docket. At the February term, 1880, which was the next regular return term after the return term named in the summons, the plaintiff filed his complaint, and then the defendants entered a special appearance on a motion to dismiss for insufficient service, and from the judgment of the court below dismissing the action, this appeal is taken.

In this court it is urged as error in the judge below, that he held the service by the coroner by deputy to be insufficient, and also in entertaining the motion to dismiss after the entry of a general appearance to the action.

The only point necessary to be considered in the case is whether the coroner could execute the summons by a deputy against the sheriff who was a party to the action.

Blackstone, in his commentaries, says, "the office and power of a coroner are, like those of sheriff, either judicial or ministerial, but principally judicial;" and he further

says, that when just exception exists to the sheriff for suspicion of partiality, as being interested in a suit or of kindred to a party, writs to be executed should be directed to the coroner, who in such case acts as the sheriff's substitute and in a purely ministerial character. 1 Blackstone, 348 and 349. See also to the same effect Comyn's Dig., *Officer*.

The rule in matters judicial is *delegatus non potest delegare*, but in duties ministerial, the officer may act in person or by a deputy of his own choice and appointment. Broom's Maxims, 806 to 809 and authorities *supra*. Where the duty is judicial in its character, it is personal to the officer and he cannot act by another, but where no discretion or judicial function is to be exercised, the officer may act in person or by another. The nature of the duty rather than the title of the officer seems to settle the question whether there may be a deputy. *Abrams* v. *Erwin*, 9 Iowa, 87; *Whitford* v. *Lynch*, 10 Kansas, 180; *Rowland* v. *Thompson*, 65 N. C., 110.

Hence it is that although a sheriff in some of his duties is a judicial officer and as such may not act by deputy, yet in the main his duties are merely ministerial, and as to such it is implied, when not so provided by statute, that he may act by a substitute. And in accordance with this view the practice has been with us with reference to a sheriff. So likewise it is held in regard to the clerk of the court. He has powers judicial and also ministerial, and the rule is applied to him that he must act personally in the first class of duties but may by deputy in matters ministerial. *Rowland* v. *Thompson*, *supra*.

We think the coroner in like manner has powers and duties of the double character in him, and that whenever he acts in the place of the sheriff in the execution of a summons or other merely ministerial service, he may act by deputy just as the sheriff might, whose right so to act with the restriction above mentioned is conceded. The expressions of the law writers and decisions of the courts to the

effect that a coroner can not have a deputy apply, solely to judicial duties.

When the coroner acts in the place of a sheriff in the ministerial duty of serving a summons, there is no reason nor precedent against his employment of a deputy, and to hold the contrary in some of the contingencies which may happen, such as the death or removal of the sheriff from office, it would be quite impossible for him in person to perform all the duties, and the administration of justice would be retarded or denied. We think the existence of the power, when acting in place of the sheriff, to act by deputy in the service of process, though not expressed in terms, is implied in the following acts which refer to a coroner when acting in lieu of a sheriff: Bat. Rev., ch. 25, § 2; ch. 106, §§ 7 and 24; ch. 35, § 37; ch. 17, § 73, and in Rev. Code, ch. 31, §§ 121 and 122.

There is error in the judgment of the court below in dismissing the action, and this will be certified to the end that the cause may be proceeded with.

Error. Reversed.

STEPHEN WINBERRY v. FRANCIS D. KOONCE.

Consideration—Statute of Frauds—Assignment of Chose in Action—Measure of Damages.

1. An executory agreement by one who holds a judgment constituting a paramount lien on land, to assign the same to another incumbrancer whose lien is subject to such judgment, and also to an intervening mortgage, is sufficient consideration to support a promise of the proposed assignee to pay therefor one third of the amount of such judgment.

2. The statute of frauds does not require that a judgment constituting a lien on land should be assigned by a written instrument.

3. An intent to sell by one party and an intent to buy in the other, at a price agreed, with such conduct as means that one relinquishes all control of a *chose in action* and the other assumes to regard it as his own, with notice to the debtor of what has occurred, constitutes an assignment and a constructive delivery of such *chose* so as to divest the assignor of all his former ownership.

4. While it may be desirable that the assignment of a judgment should appear of record, an entry thereof upon the records of the court rendering it, is not necessary to complete such assignment.

5. In this case, the measure of the plaintiff's damage is the contract price, one-third of the amount of the judgment.

(*Miller* v. *Hoyle*, 6 Ired. Eq., 269; *Hyman* v. *Devereux*, 63 N. C., 624, cited and approved.)

CIVIL ACTION commenced before a justice of the peace, and tried on appeal at Fall Term, 1879, of ONSLOW Superior Court, before *Eure, J.*

Judgment for plaintiff, appeal by defendant.

Messrs. R. W. Nixon, A. G. Hubbard and *Battle & Mordecai*, for plaintiff.

Messrs. Green & Stevenson, for defendant.

DILLARD, J. The case was this: One Mills had a judgment docketed against W. M. Coston, which was a prior lien to any other on the lands of the debtor. Subsequently Coston executed a mortgage on his land to secure the creditors therein named, and that being duly registered became the second lien on the land, and after the registration of the mortgage the present plaintiff recovered two justice's judgments against Coston and had them docketed, whereby he acquired the third lien.

In this situation the two judgment creditors, Mills and Winberry, issued executions, under one of which, the entire estate in the land, and under the other, only the equity of

redemption could have been sold, and when the property was being cried by the sheriff, the plaintiff as he alleges sold his two judgments to Koonce at the price of one-third of their amount, and the money not being paid, this action was brought to recover the agreed price. The defendant by his answer denies any sale, executed or executory, of plaintiff's judgments to him at any price, and to settle the question of sale or no sale, the court submitted to the jury the issue: "Did plaintiff sell the judgments to defendant for one-third of their amount? and the jury in their verdict respond "yes."

There was no exception to the admission or rejection of evidence, nor to any instruction to the jury, but as we understand from the statement of the case of appeal, the case was treated in the court below as a verdict for the plaintiff subject to the opinion of the court upon certain points raised by the evidence, and so understanding it, we will proceed to consider the supposed errors of the judge in his conclusion thereon.

1. It was contended by defendant that the assignment of the judgments to him, conceding it to be made, was no consideration on which the promise sued on could be supported, and that plaintiff, on that account and for the additional reason, that nothing had been received by him on said judgments, could not recover. The right of plaintiff to recover in no manner depends on whether the defendant has or will ever collect the judgments. It is true that the plaintiff, by reason that his assignment does not pass the legal title to the judgments, occupies the relation of a sort of trustee to the defendant in the sense of being bound to allow the use of his name in actions at law for their collection and to take the proceeds, but that is ulterior to the consideration of the promise on which this action is brought. The promise sued on is the promise to pay one-third of the amount of the two judgments assigned, and the consideration

is the assignment of the judgments on Coston. Anything of value or advantage moving to the promisor from the promisee is in law sufficient to support a promise. It is obvious that the assignment made, if in manner sufficient to enable defendant to have execution and all other necessary remedies for the collection of the judgments, (about the manner of which we need not at present consider) was a valuable right, and in itself sufficient to support defendant's promise, but besides, it had the effect to put the plaintiff, the holder of the third lien on the land, out of the way as a competitor in the bidding, and thereby created to defendant the opportunity to buy at a less sum than he otherwise could have done. The assignment if made was under the rule a sufficient consideration, and so holding, the judgment of His Honor was not erroneous.

2. Defendant insisted that the judgments were a lien on land, and that the assignment, even if made, was void as amounting to a sale or transfer of interest in or concerning land, without a writing as required by the statute of frauds: The debt ascertained and adjudged by the judgments was the principal, and the lien they had on land was a security created by statute and only an incident, and the contract to assign the judgments was not within the statute of frauds. Contracts within the statute of frauds are contracts to sell or convey lands or some interest in or concerning them, in the party undertaking to alienate them, and they were required to be in writing signed by the party sought to be charged, upon the policy to prevent frauds and injuries. There is nothing of the character of vendor or vendee in this transaction of assigning the judgments, and there can be no necessity of a memorandum in writing to be signed by the plaintiff, for he has no interest in the land, but the judgment debtor only. It cannot be that a law enacted to protect against the frauds and injuries of witnesses in proving sales of land, or interests in land, can be construed to

extend to and include judgment liens created by the law itself as an incident to a judgment. Being an incident, it passes with a grant of the principal by mere operation of law. *Miller* v. *Hoyle.* 6 Ired. Eq., 269; *Hyman* v. *Devereux,* 63 N. C., 624.

3. The point was taken that judgment should be rendered for defendant, on the ground that what is called an assignment was incomplete and inoperative to pass any equitable right to defendant in the two judgments: It is unquestionable, that while the judgments were assignable, they must have been assigned in such manner as to be legally sufficient to pass the equitable interest therein, or otherwise it would be but executory and the action could not be maintained. No particular mode of assignment is prescribed or required. It may be done with or without writing, and in any form of words, provided the intent to assign be clear and some act be done between the parties amounting to an appropriation, or a constructive delivery. Adams' Eq., 54; 2 Schouler on Personal Property, 676. An intent to sell by one and an intent to buy in the other, at a price paid or agreed to be paid, with such conduct or acts as means that the one resigns all future control of the *chose,* and the other assumes to regard it as his own, is an appropriation *inter se,* and on notice to the party who is to pay it, approximates a delivery of a chattel, and is then called a constructive delivery, and thereupon the right of the assignee is perfected against any possible further control of the assignor. Adams' Eq., 55; Schouler on Personal Property, 678. Now here the jury find the sale of the judgments, and by the evidence sent up as a part of the judge's case, taking it most strongly against the appellant, the fact was that after the land was knocked down to the plaintiff, the defendant in execution of the agreement had the entry of the sale to plaintiff changed into his own name, and he then and there rehearsed the terms of the trade and procured an indulgence

from the plaintiff for the money which was to be paid him, until the next court. And herein there was plainly the assent of plaintiff to cease any further control of the judgments, and of defendant to hold himself to be owner, thus making in law an appropriation of the judgments to the defendant; and besides this, there was a recital before Coston, the judgment debtor, of the sale and its terms, and therein the equitable interest of defendant was perfected as much so as by delivery in the case of a tangible chattel. We hold therefore that the assignment was executed and the equitable title passed.

4. It was urged that the judgment docket stood in the name of the plaintiff and he still had control and therefore judgment should not be entered for the plaintiff: The answer is, it might be most desirable that the assignment should have been entered of record, but it was not necessary. It is enough if the assignment be made in such manner as to give defendant the right to go into court and have the aid of the court to enforce the judgments, upon any proof of ownership whether by record or other.

5. Upon the point as to the measure of damages, the assignment of the judgments being determined to be a sufficient consideration, it is evident that the plaintiff was entitled to recover the third of the judgments as held by the court below.

There is no error in His Honor's rulings upon the numerous points made by defendant against the rendition of the judgment on the verdict of the jury, and the verdict must be affirmed. Let this be certified.

No error. Affirmed.

W. TURNER, Admr., v. J. B. GAITHER.

Infant—Necessaries—Ratification.

1. A recovery cannot be had on a bond given by an infant to the administrator of his insolvent father for money of the estate loaned to enable such infant to acquire a professional education, on the ground that the consideration of such bond was "necessaries" for the minor.

2. An explicit acknowledgment by one after coming of age of a voidable indebtedness contracted in infancy is not a sufficient ratification to render the contract enforceable; there must be an express confirmation or new promise, voluntarily and deliberately made, with a knowledge that there is no existing legal liability.

(*Freeman* v. *Bridger*, 4 Jones, 1; *Hyman* v. *Cain*, 3 Jones, 111; *Jordan* v. *Coffield*, 70 N. C., 110; *Alexander* v. *Hutchison*, 2 Hawks, 535; *Dunlap* v. *Wales*, 2 Jones, 381, cited and approved.)

CIVIL ACTION tried at August Special Term, 1879, of IREDELL Superior Court, before *Gudger, J.*

The plaintiff declared upon certain notes under seal, and the defendant set up the plea of infancy and statute of limitations, in bar of recovery. The letter (dated in 1876) referred to in the opinion of this court and offered in evidence by the plaintiff to show that the defendant had ratified and confirmed the contracts made during his minority, is as follows:

Messrs. W. Turner & Son:

On a day not long since I received a letter from C. L. Turner saying he had papers in hand, in reply to which I will address father and son, and say I have no settlement to make with the son, but will deal exclusively with the father, or whoever settled the estate of A. B. F. Gaither, deceased. According to my memory, Mr. W. Turner has very small claims against me, as the principal of the note given him has been paid. The other papers are certificates merely showing that one J. B. Gaither received so much as

a part of his interest in A. B. F. Gaither's estate, to be accounted for on final settlement—witnessed and signed by Dr. Foote. Over three years ago I told Mr. W. Turner I was ready to settle whenever he showed me (the oldest heir) what went with the effects of said estate. I say so still, and claim a right to know. I do not say that Mr. Turner has acted dishonestly, but I want him to prove to me by showing accounts that he has acted honestly. I am not satisfied nor will I be until I see both sides of the books. If the estate was swept up by debts, show the facts and figures to me, then I will have no more to say. Some of Mr. Turner's younger children had a good deal to say about the estate and especially the heirs. It gored me and I began to suspect. The first thing that ever made me surprised was a remark made in my presence, namely, that Colonel Campbell's estate was wealthy, and when settled went as ours did. The James property at Olin was mentioned as belonging to estate, and worthless confederate money poked off on estate, and held and secured to administrator (that is the Olin property was). I have heard of good deal of dissatisfaction also from Ward's and other estates. Mr. McCubbins told me of meeting Mr. Turner and advised settling it up, but was shocked with surprise when told that W. Turner refused to show what went with the effects of the estate, and said as did my legal counsel that the heirs ought to have been represented when the final settlement was made, in fact the heirs should have been sued for settlement, and not cram off the thing in the manner in which it was done.

Please answer the following questions: Is not an administrator bound for the debts (that are due the estate) which he returns as good? If so, why was not William Gaither made to settle his debts as well as what mother bought at the sale, and was forced by threats and intimidations to sign a paper which she did not understand. Shame on you,

Mr. Turner. Close up every thing as near as you can, still there will be something unfinished. Ought not an administrator to know in two years how an estate will close? Did you not tell me two years after father's death that the children would get a thousand dollars and more apiece besides the land? Why was the estate not represented on the trial of the Grant suit? What went with all the gold you received? Was it returned as gold, was it sold as it should have been for one forty per cent that you charged me for the same gold I believe as late as the fall of '69? What went with proceeds of first sale, second sale, and sale of real estate? What rent did you collect from William Gaither, and did you make him refund the hundred dollars he took from his brother's desk? Please give a list of the debts you paid. I have heard of only a few small ones being paid. I must sooner or later see the records of A. B. F. Gaither's estate. Name the place and I will make my arrangements and meet you, W. Turner, with any one you may select to have a fair and square investigation, and do not say as before that it is none of my business what went with the estate. You had no right to a cent from any of us until you showed us where our estate had gone. The law says not, and let us abide by the law. Come square to the point, business is business, let us settle in a business-like manner. (Signed by the defendant.)

The other facts material to an understanding of the case are set out in the opinion of this court. Verdict and judgment for the plaintiff, appeal by the defendant.

Mr. J. M. Clement, for plaintiff.
Mr. J. M. McCorkle, for defendant.

SMITH, C. J. The action is brought on several notes under seal and accountable receipts, all of which, except the note bearing date October 30th, 1869, and a small sum not

disputed, were executed during the minority of the defendant to the plaintiff, administrator of A. B. F. Gaither, his father. The defences set up in opposition to the recovery are infancy and the bar of the statute of limitations. Upon an account ordered and reported during the progress of the cause between the plaintiff and his intestate's estate, it appeared that the assets had been administered and a large indebtedness still remained unsatisfied. The moneys for which the notes and receipts were given were used by the defendant in defraying his expenses in procuring a medical education in Philadelphia, and he had no other means than those furnished by the plaintiff for that purpose. The plaintiff insisted that the debt thus incurred was for necessaries, and relied on a letter addressed to him by the defendant in June, 1876, eight years after he arrived at full age, as evidence to repel the bar of the statute and as a ratification of the contract.

Several issues were submitted to the jury, and their responses in substance are that the defendant was under twenty-one years of age when the contracts were entered into; the moneys furnished were necessaries; the statute of limitations is not a bar, and the defendant has since attaining majority ratified and confirmed the contracts.

During the trial the defendant's counsel asked the court to charge the jury that "there is no evidence tending to show that the money furnished the defendant was for necessaries, the intestate's estate being insolvent, and that money advanced or loaned was not in itself within the meaning of the term *necessaries*, for which an infant can incur a binding obligation.

The further instruction was also asked that the failure of the plaintiff to make his final settlement of the intestate's estate until 1874, eight years after the grant of administration, let in the statutory bar to the accountable receipts and prevented a recovery on them. The court declined so to

charge and told the jury that the defendant's letter "amounted to a ratification of the notes and claims given by defendant to plaintiff and also repelled the statute of limitations."

There was judgment rendered on the verdict against the defendant and he appeals.

I. Were the moneys thus furnished and used in contemplation of law necessaries for the infant and is his contract to pay therefor valid against him? "Necessaries" are defined by Mr. Greenleaf to be "such things as are useful and suitable to the party's estate and condition in life and not merely such as are requisite for bare subsistence," and he cites as illustrations of the proposition that regimentals for an infant member of a volunteer military company, a livery for a minor captain's servant, a horse for an infant nearly of age, for exercise under a physician's advice, have been held to be included in necessaries, while money lent to supply them was not, unless actually used in their purchase. 2 Greenleaf Ev., § 365.

The doctrine with more strictness is thus laid down by PEARSON, J.: The general rule is that the contract of an infant is not binding on him. The exception is that an infant is bound to pay for goods sold and delivered to him, provided they are necessary for his support. This is put on the ground that unless an infant can get credit for necessaries he may starve, or, as it is expressed in some of the cases, an infant must live as well as a man; therefore, the law gives a *reasonable price* to those who furnish him with necessaries *ad victum et ad vestitum*, that is for victuals and clothes. LORD COKE says, (Co. Lit. 172 a) "it is agreed by all the books that an infant may bind himself to pay for his necessary meat, drink, apparel, physic and other necessaries." These last words embrace boarding, for shelter is as necessary as food and clothing. They have also been extended so as to embrace schooling and nursing (as well as physic)

while sick. In regard to the quality of the clothes and the kind of food, &c., a restriction is added that it must appear that the articles were suitable to the infant's degree and estate." It was accordingly held that timber for building a house of the value of $55 was not a necessary for which the defendant could be charged, although the house built was appropriate to his estate and station in society, and he had no other. *Freeman* v. *Bridger*, 4 Jones, 1.

The incapacity imposed upon an infant with the exception as thus explained, extends equally to expenses incurred in acquiring a professional education, and more certainly to money loaned for that purpose, which, however desirable for those whose means will admit, are not, in the sense of the law, necessaries for which the infant may enter into a valid obligation, and we are not at liberty to enlarge the operation of the exception. In this case the defendant had no estate whatever, and his expectation of deriving something from his father's estate, encouraged, as it would seem from the form of the receipts, by the plaintiff himself, has proved fruitless. *Hyman* v. *Cain*, 3 Jones, 111; *Jordan* v. *Coffield*, 70 N. C., 110.

II. Does the letter afford sufficient evidence of an intended ratification so as to bind the defendant to the fulfilment of the several contracts?

We are of opinion there is error in the ruling of the court upon this question also, and as to the effect of the evidence in sustaining the finding of the jury upon the second issue. "There is a distinction" says the learned author from whom we have before quoted, "between those acts and words which are necessary to ratify an *executory contract* and those which are sufficient to ratify an *executed contract*. In the latter case any act amounting to an explicit acknowledgment of liability will operate as a ratification; as in the case of a purchase of land or goods, if, after coming of age, he continues to hold the property and treat it as his own.

But in order to ratify an executory agreement, made during infancy, there must not only be an acknowledgment of liability, but an *express confirmation or new promise* voluntarily and deliberately made by the infant upon his coming of age, and with the knowledge that he is not legally liable. An explicit acknowledgment of indebtment, whether in terms or by a partial payment is not alone sufficient; for he may refuse to pay a debt which he admits to be due." 2 Greenleaf Evi. § 367.

To the same effect are the rulings in this state as a few references will show: "An examination of the authorities applicable to this question" (ratification), says TAYLOR, C. J., in *Alexander* v. *Hutchison*, 2 Hawks, 535, "leads irresistibly to the conclusion that the law is in favor of the defendant, and that the jury ought to have received an instruction that nothing short of an express promise to pay, made by the defendant after he had attained his age of discretion, would be sufficient to render him liable in this action." HENDERSON, J., in an opinion in the same case uses similar language: "This is unlike the promise which revives the remedy when barred by the statute of limitations, where the bare acknowledgment of an unsatisfied consideration is sufficient; for in this case there must be a new promise, an actual responsibility assumed after arriving at full age;" and he adds, "anything either by words or acts which amounts to an assumption or promise of the debt is sufficient."

When the same case came again before the court (1 Dev. 13) the Chief Justice, correcting the misapprehension of the judge who tried it in the court below, who instructed the jury if they believed the witness to find a verdict for the plaintiff, thus explains his former opinion: "It should, I think, have been left to the jury to determine whether they would infer from the defendant's behavior a clear and unequivocal assent to and ratification of the contract. Any

act or conduct on his part, denoting a full assent of the mind and leaving nothing to doubt and conjecture without the utterance of any words, would be sufficient to warrant such an inference." HENDERSON, J., taking the same view, remarks: "When it is said that an implied promise will take a case out of the statute of limitations but that it requires an express promise, after full age, to bind a person to the performance of a contract, made during his minority, all that is thereby meant is that in the first case the law will make the promise if there is an acknowledgment of a sufficient consideration; in the latter case the *party must make it himself.*"

So in *Dunlap* v. *Wales*, 2 Jones, 381, an infant who had purchased and given bonds for two slaves, after reaching full age wrote proposing to return the slaves and pay half the debt, and added "if they will not accept the above offer I will have to pay them, I suppose, but I shall do so at my convenience, as it will be nothing less than a free gift on my part, the negroes being entirely worthless;" and it was decided that the defendant had not thereby rendered himself liable.

We have reproduced so largely from the opinions of the eminent judges who formerly presided in this court because they contain a clear and forcible presentation of the law on the subject. The letter produced falls short of these requirements, and still less authorizes an instruction that it is itself a ratification. Without detaching single paragraphs which are supposed to involve an assumption of liability, its tone is querulous throughout, complaining of mismanagement and waste of the assets as reasons why the defendant was unwilling to pay the debts. Upon no fair and reasonable construction of the letter as a whole does it admit a liability or assume the payment of the debt to be so declared to the jury. At most it was but evidence to be submitted to the jury and to be considered and weighed

with any other offered that might bear upon the question. While it may not have been necessary to pass upon the alleged confirmation, yet as the error was committed in answer to a refused prayer for an instruction and is thus presented for review in the appeal, and the decision of the point may contribute to an early final settlement of the controversy, we have deemed it proper to dispose of that matter also.

There is error and there must be a *venire de novo*, and it is so adjudged.

Error. *Venire de novo.*

THOMAS J. OSBORNE v. R. S. CALVERT and others.

Arbitration—Award—Evidence.

Arbitrators chosen to decide all matters in controversy between several late partners in trade, made the following award:—"We, the referees chosen to make a settlement between John Osborne and R. S. Calvert, do make this settlement, to-wit:

That Calvert is due Osborne on first settlement	$325 00
On settlement with Tom Osborne & Calvert	268 75
Interest	10 75
(Signed by Arbitrators)	$604 50

Held, (1) That, with the aid of parol evidence to show upon what matters the arbitrators acted, such award is not impeachable, either for uncertainty or for failing to pass upon all matters submitted.

(2) That parol evidence is admissible to show upon what matters arbitrators acted.

(*Patton* v. *Baird*, 7 Ired. Eq., 255; *Blossom* v. *Van Amringe*, 63 N. C., 65; *King* v. *Neuse Mfg. Co.*, 79 N. C., 360; *Barretz* v. *Patterson*, Tay., 37; *Carter* v. *Sams*, 4 Dev. & Bat., 182; *Stevens* v. *Brown*, 82 N. C., 460; *Brown* v. *Brown*, 4 Jones, 123; *Walker* v. *Walker*, 1 Winst., 259, cited and approved.)

OSBORNE *v.* CALVERT.

CIVIL ACTION tried at Spring Term, 1880, of IREDELL Superior Court, before *Gilmer, J.*

Verdict and judgment for plaintiff, appeal by defendants.

Mr. J. M. Clement, for plaintiff.
Mr. J. M. McCorkle, for defendants.

SMITH, C. J. The action is on an award made as alleged in the complaint and denied in the answer, pursuant to an agreement of reference the terms of which are set out in the condition of a penal bond executed by all the parties to one John W. Weaver, as follows:

The condition of the above obligation is such that whereas a certain matter of controversy has arisen between the above bounden about and concerning the dealings and mutual accounts, kept by and between themselves for the last several years; and whereas they have mutually agreed to refer and submit to the arbitrament and award of John A. Stikeleather, J. W. W. Weaver and T. M. Gill, arbitrators indifferently named and chosen by and between them, and all things and considerations relating thereto; and it is agreed that the said arbitrators shall hear such statements of the parties and hear such evidence as they may deem proper, and make their award in writing and deliver it to the parties, provided it be made in writing and delivered to the parties at the time and place of making their award: Now therefore if the above bounden parties well and truly abide by, observe, keep and perform all and singular the agreements recited in this condition, then the above obligation to be void; otherwise to remain in full force and effect.

(Signed) J. E. Osborne, [seal,]
T. J. Osborne, [seal,]
J. C. Calvert, [seal,]
R. S. Calvert, [seal.]

Witness: J. W. Wilson.

The award rendered is in these words: We, the referees chosen to make a settlement between John Osborne and R. S. Calvert do make this statement, to-wit: That Calvert is due Osborne on first settlement,.....$325 00
On settlement with Tom Osborne and Calvert,..... 268 75
Interest,..... 10 75

$604 50

(Signed) J. W. W. Weaver,
J. A. Stikeleather,
T. M. Gill.

The instrument containing the terms and conditions of the reference is ineffectual as a bond, because all the contending parties are obligees and all are answerable for the default of each, so that the person to whom any sum may be awarded to be paid by another, is himself equally bound to pay it, and hence the paying and receiving hand being one and the same, the matter is adjusted without any payment at all. In other words, the instrument has no legal operation for the security of any of the parties to the controversy proposed to be settled by the arbitration, and the obligee has no beneficial interest in what may be awarded. But the plaintiff and defendant have treated the recitals in the condition as evidence of their agreement and its provisions, and upon the issue as to the existence of such agreement the jury find in the affirmative, and no exception being taken, the enquiry into its validity as well as its terms is concluded by the verdict.

The main contention is as to the certainty and sufficiency of the award in form to embrace and determine all the matters referred, and the admissibility of extrinsic proof that such were considered and passed upon by the arbitrators.

Two of the arbitrators were introduced by the plaintiff and were allowed after objection to testify, and proved the

following facts in connection with the making the award: The arbitrators met on the day when the agreement for submission was entered into, all the parties being present and on September the 28th, a few days thereafter, concluded their labors, made their award and delivered copies to each. They received and examined all claims presented, either individual or partnership, and heard the statements of the witnesses produced. The claims of the two original defendants were presented by R. S. Calvert, the present defendant, and among them one in favor of Calvert & Osborne. No claim was offered by James Calvert, the deceased. The arbitrators considered all the matters of account between the parties. The plaintiff enquired of the witness, Gill, how many (if more than one) decisions were made, and in answer after objection stated that he acted when his associates differed, that the transactions of the firm engaged in manufacturing whiskey, and consisting of R. S. Calvert and Thomas Osborne, the parties to the present action, and those of the firm engaged in making brandy, consisting of John Osborn and R. S. Calvert, were distinct and separate.

The defendant's counsel asked the court to charge the jury:

First. The award was upon its face uncertain and indefinite, and secondly, not co-extensive with the terms of submission, and for both reasons void.

The court declined to give the instruction in these precise words, and charged the jury in substance that the award must be co-extensive with the agreement to refer, and if they believed upon the testimony of the witness that all disputed matters were considered and decided by the arbitrators, full opportunity being afforded the parties to prepare for trial, and all the evidence was heard, and further that the Tom Osborne mentioned in the award is the present plaintiff, then the award was sufficient and otherwise not. They were directed to disallow the item of in-

terest because it did not appear to which of the sums awarded it belonged. The jury rendered their verdict for the plaintiff and from the judgment thereon the defendant appealed.

The only errors assigned are the refusal of the judge to direct the jury as requested and the admission of parol evidence to show what the arbitrators took into consideration and disposed of in their award.

1. The form of the award is obnoxious to neither imputation of uncertainty or of insufficiency. The testimony of the arbitrators discloses the fact that there were two partnership accounts settled, in both of which the defendant was a member, and that he was found to owe a balance in one settlement to his copartner, John Osborne, and in the other to his copartner, the plaintiff, and these sums are ascertained and awarded. The language used by the arbitrators is not very perspicuous, but in the favorable light in which awards are regarded, we think it is manifest the arbitrators intended, and such is the fair import of their award, to charge the defendant with the payment of $325 to John Osborne in the settlement of their partnership matters, and of $268.75 to the plaintiff in the settlement of theirs.

It is also sufficiently comprehensive to meet the requirements of the submission. It does not go into details but embodies the results of the investigations they were required to make. No defect is apparent upon its face, and no matters brought to the attention of the arbitrators over-looked or omitted. The field of enquiry was as large as the scope of the reference, and their duty appears to have been fully and faithfully performed. They are not required to report the particulars of their investigation, nor ought they needlessly to do so.

In *Patton* v. *Baird*, 7 Ired. Eq., 255, at the close of the opinion, PEARSON, J., makes this remark: "It may not be amiss to add, arbitrators are no more bound to go into par-

ticulars and assign reasons for their award than a jury are for their verdict. *The duty is best discharged by a simple announcement* of the result of their investigations." The same observation is reiterated in the subsequent cases of *Blossom* v. *Van Amringe,* 63 N. C., 65, and *King* v. *Neuse Mfg. Co.*, 79 N. C., 360.

There are abundant precedents to support the completeness and validity of this award. Where the dispute was about the value of stock and goods which each party had received from a certain farm, and their keep and feeding, and also as to the proportion each should pay in making up a certain sum, and, upon a submission, an award was made directing the defendant to pay a certain sum to the plaintiff and the costs divided between them, it was held sufficient. Watson Arb., 190.

An award upon a reference of a cause and all matters in difference that nothing was due is unobjectionable. *Ibid.* So where many different items of account or separate demands for money are presented, or where there are counterclaims, an award of a gross sum from one to the other will suffice. Morse Arb. and Award, 265.

Where the submission is general, an award of a specific sum will be presumed to be a full execution of the submission; and if several specific matters are referred, if the award shows an intent to decide all, it need not mention then in detail. *Ibid.* 348 and 350.

Awards are favorably considered and such construction will be adopted when admissible as will give them effect rather than defeat them. *Barretz* v. *Patterson*, Tay., 37; *Carter* v. *Sams*, 4 Dev. and Bat., 182; *Stevens* v. *Brown*, 82, N. C., 460.

II. The exception to the admission of evidence to show what matters were examined and determined by the arbitrators is equally untenable. "Parol evidence is not only admissible," says PEARSON, J., in *Brown* v. *Brown*, 4 Jones,

123, "but necessary to show what matters the arbitrators acted on," and the competency of such evidence is reasserted in *Walker* v. *Walker*, 1 Winst., 259.

We do not deem it necessary to protract the decision further. There is no error in the rulings of the court and the judgment must be affirmed; and it is so ordered.

No error. Affirmed.

J. D. T. WELLONS and others v. W. N. JORDAN.

Practice—Description of Land—Will—Condition.

1. Objections will not be heard for the first time in this court which, if made in apt time in the court below, might have been answered and removed.

2. The court will not hold a description of land in controversy too indefinite to admit parol proof to identify it when such description calls for natural boundaries and the lines of adjoining proprietors, especially, when the defendant admits in his answer that he withholds the possession of the land claimed by the plaintiffs.

3. A testator devised certain lands to his grandson, he to take care of his father and mother during their lives, and to hold the aforesaid property his life-time, and if he should take care of his parents, &c, and have issue, said property to be theirs in fee at his death; but if he should die without issue, then it was to "descend" to the testator's daughters in fee;

Held, (1) That a due support of the parents of the devisee was not a condition precedent to the vesting of the remainder in fee in his issue;

(2) That even if such were a proper construction of the will, only the heirs of the testator could take advantage of the breach of the condition.

(*Meekins* v. *Tatem*, 79 N. C., 546; *Bank* v. *Graham*, 82 N. C., 489; *State* v. *Secrest*, 80 N. C., 450; *Taylor* v. *Lanier*, 3 Murp., 98; *McNeely* v. *McNeely*, 82 N. C., 183; *Phelps* v. *Chesson*, 12 Ired., 194, cited and approved.)

WELLONS *v.* JORDAN.

CIVIL ACTION to recover land tried at Spring Term, 1879, of JOHNSTON Superior Court, before *McKoy, J.*

This action is for the recovery of land in possession of the defendant, who denies the plaintiff's right and asserts title in himself. The cause was referred to E. W. Pou, who made three successive reports, two of which were set aside and to the last at spring term, 1879, the defendant put in several exceptions. 1. For uncertainty in the finding in regard to the support furnished by the devisee, Harry, to his father and mother. 2. For the failure of the referee to find that such support was not afforded as required by the testator; and 3. For error in his conclusion of law that the plaintiffs were entitled to the land. The exceptions were overruled, the report confirmed, and from the judgment rendered conformably thereto the defendant appealed.

Mr. Duncan Rose, for plaintiffs.
Messrs. G. V. Strong and *A. M. Lewis*, for defendant.

SMITH, C. J. The solution of the controversy mainly depends upon the construction of the following clause in the will of Shadrack Ingram, who died in 1829:

"I lend unto my grandson Henry (Harry) Ingram, two tracts of land containing one hundred acres each, lying on the south-side of Hannah's creek, being on the road and on the head of Meadow branch, joining M. Vinson, M. Allen and Hardy Lee's land, and one hundred acres below the spring branch, joining William Allen's land on the south-side of the creek, on said creek between the Watery branch and Meadow branch, joining Wm. Lee, Hardy Lee, and the Allen lands, some under one hundred acres in it, and one negro boy, named Sam, two cows and two sows. Said Harry Ingram is to take care of his father and mother and to support their bodily needs, as far as in his power, their life time, and to hold the foresaid property his life-

time, and if he does take care of his parents and support them as above prescribed, and has issue, said property shall be theirs and their heirs forever. But if he die without issue, then it shall descend to my daughters and their heirs forever, after a bodily support for his father and mother their life time, if the said Harry Ingram should decease before they do."

The following facts are reported by the referee: The defendant is in possession of sixty-two acres of the devised land. At the death of the testator, his grandson Harry was seventeen years of age, and soon after Ambrose his father, and himself, built a house on the land, which was occupied by the family until 1833. In that year Ambrose and Harry contracted to sell the tract known as "Sockery place," to Nathan B. Allen, and the latter when he attained his majority in October of that year, executed a deed of conveyance therefor to Allen both understanding it to pass a life estate only. This was done at the instance of Ambrose who received in different articles most of the purchase money. Ambrose died soon after, and Harry, who while not lunatic, was of feeble mind, was not faithful in his attentions during his father's illness, but his father never suffered for the necessaries of life. About 1846 or 1847, his mother, Sally, also died. Harry lived with her till his marriage and then moved into a house on the same tract, some four hundred yards distant, and occasionally worked on her farm. She owned land, slaves and other property and had the means of comfortable subsistence. Harry did not take care of her and passed most of his time in childish amusements, but his life estate went mainly to the support and use of his parents.

Upon these facts the exceptions rest for support, and are now to be considered.

1. Upon the whole case, for want of proof of title the plaintiffs cannot maintain their action: This objection was

not made in the court below, nor the subject of investigation by the referee. The dispute as to title seems to have been limited to the proper interpretation of the will of Shadrack Ingram, and his ownership of the land conceded. According to the settled practice, points first made in this court, and which if taken at the trial, could have been perhaps fully answered and removed, will not be allowed, and cases on appeal are considered as prepared only to present such as were then taken and ruled. The cases relied on, *Meekins* v. *Tatem*, 79 N. C., 546, and *Bank* v. *Graham*, 82 N. C., 489, do not sustain the position for which they are cited. They simply declare that when upon the plaintiff's own showing, that is, upon the case he presents in his complaint, there is a want of jurisdiction, or cause of action apparent, the court will notice the objection and act upon it. But they do not establish the proposition nor warrant the inference that every omission to state a fact, material to the right of recovery, is to be considered as if the fact did not exist. Cases are made up to present exceptions and the decisions upon them and only such facts as are necessary to their being understood; and hence the propriety of the rule that excludes from consideration all such as were not taken in the court below. *State* v. *Secrest*, 80 N. C., 450.

2. The land is not sufficiently described in the will, nor in the complaint: The defendant recognizes the identity of the land claimed, and in his answer "admits that he withholds the possession of the said premises" and asserts title thereto in himself. How could he say this unless he knew from the complaint what lands were demanded of him and are claimed by himself? There seems to have been no controversy about the identity of the devised land as defined in the will, of which that in the defendant's occupancy forms part, and we cannot, from mere inspection of the will, undertake to determine that a description calling for various natural objects and lines of adjoining proprie-

tors, and located in the survey ordered, is too imperfect to admit of location by parol evidence.

3. The devise to the plaintiffs, the issue of Harry, upon the condition precedent that "he does take care of his parents and support them," fails for want of compliance with its requirements: We do not think the testator intended nor that the language employed expresses an intent that the limitation over to the issue of Harry was to be dependent upon his taking care of and supplying the bodily wants of his parents, since the further contingent remainder is given to the testator's daughters only in the event that Harry "dies without issue," and not also for want of the care and attention enjoined and expected. At most it would be a charge on the estate, a personal obligation on the devisee, as was held in *Taylor* v. *Lanier*, 3 Muph., 98. As was said in *McNeely* v. *McNeely*, 82 N. C., 183, where the devise was to a son "by him seeing to her," his mother, and it was contended that these words fettered and controlled the estate devised: "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 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?

In *Willard* v. *Henry*, 2 N. H., 120, cited by defendant's counsel, the land was conveyed by the father to his son by deed in February, 1803, on condition that unless the son maintained both his parents and a brother in a specified manner, and cultivated the farm with care and fidelity, the deed should become void as to the whole land during the life of the parents, and after their death, as to an undivided

half should continue void forever. In 1807 the father died and the widow repudiated the provision for her in the deed and took dower in the land. She died in 1818. In 1808 the son sold and conveyed the land to the ancestor of the plaintiff in the action. Neither the father nor mother was maintained as directed in the deed, nor was the farm cultivated in a husbandlike manner. The brother had been provided for. No entry for condition broken was made. The opinion of the court delivered by WOODBURY, J., declares: "The parents being dead, the plaintiffs may recover one-half for the condition in relation to half; whatever may have been its validity, and however it may have been broken, was not to operate after their decease. In respect to the other half, no re-entry or express claim to the premises is found; the plaintiff can therefore recover that also." The reasoning and the conclusions are not inappropriate to our case. Who is to take advantage of a condition broken? Who to assert the right to the support? The parents have neither done so, and both are dead, as well as their son upon whom and whose estate this obligation was imposed. The charge to them ceases. The mother had a satisfactory maintenance from her own estate, the father used the proceeds of the son's sale of his life estate. The life estate itself is extinct, and the plaintiffs come in and take, simply because they are the issue of the life tenant, and such is the language of the will. If however such effect were to be ascribed to the testator's words as contended for the defendant, we are not prepared to say there has been that dereliction of duty and disregard of the conditions as to defeat the limitation over to the plaintiffs.

But the defendants are in no privity with any of the parties interested under the will. They are simply wrong doers, raising issues between others who make none among themselves to quiet and confirm their own illegal occupation.

"When any man" says LORD COKE, "will take advantage of condition broken, if he may enter he must enter, and when he cannot enter, he must make claim, and the reason is for that a freehold of inheritance shall not cease without entry or claim, and also the feoffor or grantor may waive the condition at his pleasure." 2 Coke, 536.

The only person who could enter or make claim for nonperformance of the alleged condition precedent to the vesting of the estate in the plaintiffs are the heirs at law of the testator, and they assert no title thereto. *Phelps* v. *Chesson*, 12 Ired., 194.

There is no error, and the judgment is affirmed.

No error. Affirmed.

BANK OF STATESVILLE v. L. PINKERS & CO.

Leading Question—Evidence—Usage—Judge's Charge.

1. The allowance of a leading question is not assignable for error.
2. The usage of a particular bank, known and acted upon by its customers, may be proved to modify the general law-merchant, as applicable to such bank.
3. It is not error for the court to caution the jury that they must find their verdict upon what is actually adduced in evidence, and not upon conjectures arising from a (seeming) withholding of the testimony of better informed witnesses.
4. Where the appellant, sued as the drawer of a dishonored bill, contends that he did not intend, by an entry on such bill, to waive presentment for payment, and the jury pass upon such question of fact, without exceptions as to the evidence thereon, this court will not review their finding.
5. Where the drawer of a bill, sued thereon, admits in his answer that the same is the property of the plaintiff, he cannot thereafter be heard to contend that the bill, being unendorsed, had no vitality as a contract and, hence, admits of no beneficial interest in the holder.

(*Vaughan* v. *R. R. Co.*, 63 N. C., 11, cited and approved.)

BANK *v.* PINKERS

CIVIL ACTION tried at Spring Term, 1880, of IREDELL Superior Court, before *Gilmer, J.*

Judgment for plaintiff, appeal by defendants.

Messrs. D. M. Furches, J. M. Clement, G. N. Folk and *J. M. McCorkle*, for plaintiff.

Messrs. Reade, Busbee and Busbee, for defendants.

SMITH, C. J. The action is brought against the defendants, the drawers of a bill which is in these words:

"STATESVILLE, N. C., Nov. 17, 1875.

Sixty days after date pay to the order of ourselves seven hundred and seventy-six dollars, value received and charge the same to account of

To Leederman Bros., L. PINKERS & Co.

New York. $776."

On the face of the draft was written, "Acceptance waived. L. Pinkers & Co." The draft was made and delivered to the plaintiff for an antecedent indebtedness and upon no other consideration than the specified forbearance.

The defence, set up by the defendants, in opposition to the recovery, was the plaintiff's failure to present the draft at its maturity to the drawees for payment, and the discharge in consequence of such neglect. Two issues were prepared and submitted. the substance of the finding of the jury on which is that the draft was drawn and accepted with an understanding and agreement between the plaintiff and the defendants, that the draft should be held and not presented for payment, and that such presentation for payment was waived.

1. During the trial before the jury the plaintiff put to one of its witnesses the following question: "Was there a general custom with the bank to receive papers for discount without any purpose or practice on its part to present them for payment? and if so, did the defendants know of it at

the time they delivered the draft?" The question and the affirmative response thereto were, on objection from the defendants, admitted. The objection to the reception of proof of the usage of the bank, and the defendants' knowledge of that usage is not put as it should be, upon any specific ground, and we only know upon what it rests from the argument. Its admissibility is contested here as being a leading question, and the testimony itself as incompetent to control or vary a well settled rule of mercantile law in regard to negotiable paper.

The objection to the form of the question as leading, is disposed of in the recent case of .... recognizing the rule laid down by GREENLEAF that "when and under what circumstances a leading question may be put, is a matter resting in the sound discretion of the court and not a matter which can be assigned for error." 1 Greenl. Ev., § 435; *Moody* v. *Rowell*, 17 Peck., 498, where the subject is carefully considered.

The second ground is equally untenable. Proof of usage among banks in a particular locality has been allowed to modify the days of grace, as prescribed by the law-merchant, and to affect those dealing without, as was decided in *Renner* v. *Bank*, 9 Wheat., 581, which, with a series of cases in the appended note, may be found in Red. & Big. Lead. Cases on Bills of Exchange, 297.

So in *Vaughan* v. *R. R. Co.*, 63 N. C., 11, the defendant was allowed to prove "a custom of the company at the Henderson depot to weigh, mark and book bales of cotton immediately after they were received for transportation," upon a question of the reception of the plaintiff's goods for transportation and to qualify its liability therefor.

But the usage here is brought home to the defendants and enters into their contract with the plaintiff. Undoubtedly the drawer and endorser of a bill may by express agreement dispense with conditions essential under the general

law to charge him, and may in place of a contingent, assume a direct and absolute obligation as the defendants are alleged to have done in the present case.

2. The defendants' counsel adverting to the absence of one Howell, with whom the conversation heard and testified to by another of the officers of the bank, took place, and insisting upon a presumption that his examination would have been unfavorable to the plaintiff's case, was interrupted by the counsel of the latter, and thereupon admitted that the absent witness had been summoned and was too unwell to be in attendance at the trial. Adverting to this matter, the court instructed the jury "that they would be going outside the sphere of their duties, if they allow their verdict to be controlled by considerations based upon the non-introduction, as witnesses, of the defendants or of Howell, and that neither the jury nor the court knew what they would testify, if examined. The parties had gone to trial upon the evidence to which their attention had been called, and they must stand or fall by such evidence."

The charge contains a timely and appropriate caution to the jury, in view of what had occurred, and properly recalled their attention to the evidence upon which the verdict should be rendered. It is subject to no just complaint and meets our full concurrence.

The argument for the appellant in this court assigns several errors as apparent on the record, although not the subject of exceptions in the court below.

1. It is contended that the evidence adduced shows that a presentation of the draft for acceptance only was raised, and not its presentation at maturity for payment, and this appearing upon a fair construction of the case, the defendants are exonerated: The answer to this is furnished in the record itself. The answer avers that the defendants have never received notice of any demand on the drawees, or of their neglect or refusal "to pay said order" and that they

are thereby discharged. The case presented to this court puts a construction on the answer as admitting the waiver of presentation for acceptance alone, and not a waiver of presentation for payment when the draft became due, on which the defendants' liability depended. And so, an issue involving the point is submitted and passed on by the jury. Their verdict is conclusive and no exception can be heard for the first time in this court to the want or insufficiency of the evidence to support the finding. It would seem superfluous to repeat that we regard the evidence, when sent up, as confined to the exceptions and intended only to illustrate and explain them, and not as furnishing material for others to be taken in this court. The observance of this rule is essential to the just administration of the law between suitors, and we are not disposed to relax it.

It is again objected that the draft, being unendorsed has no vitality or force as a contract, and hence admits of no beneficial interest in the bank: The defence is not set up in the answer which in the second clause admits "the existence of the order" described in the complaint, and that they, the defendants, are informed and believe "the same is the property of the bank of Statesville, a corporation existing under the laws of the state of North Carolina." This answer was put in before the bank became a co-plaintiff and is a recognition of property in the bank and its right to the money due on the draft, if the claim to a discharge upon the ground stated is not maintainable. But the objection rests upon a misapprehension of fact. The defendants have not only drawn, but endorsed and delivered the bill, annexing to their endorsement a waiver of presentation for acceptance, and although the endorsement is in blank, the plaintiff's name could have been inserted at the trial as endorsee. As the exception then taken was removable, it cannot now be entertained.

It must therefore be declared there is no error in the ruling of the court and the judgment is affirmed.

No error. Affirmed.

H. O. SCOTT v. E. W. TIMBERLAKE, Adm'r.

Principal and Surety — Exoneration — Bankruptcy — Counter-claim—Exemptions.

1. The surety to an insolvent debtor cannot be compelled to pay a debt he owes his principal until he is relieved of the responsibility of suretyship, and may retain what he owes, as a counter-claim against such principal or his assignee with notice, in a suit by such principal or assignee on another note against the surety assigned the principal as a part of his exemptions in bankruptcy.

2. This right of surety is not changed by the fact that the principal has been adjudged a bankrupt and had such note assigned to him as part of his exemptions. The assignment does not impair the right of the surety when sued by the principal to avail himself of his equitable set-off or counter-claim; for the exemption is only of the excess beyond the claim of the surety for indemnity.

(*Williams* v. *Helme*, 1 Dev. Eq., 151; *Battle* v. *Hart*, 2 Dev. Eq., 31; *Nelson* v. *Williams*, 2 Dev. & Bat. Eq., 118; *Mast* v. *Raper*, 81 N. C., 330; *Walker* v. *Dicks*, 80 N. C., 263; *Carr* v. *Fearington*, 63 N. C., 560; *Steadman* v. *Taylor*, 77 N. C., 134, *Ferrer* v. *Barrett*, 4 Jones Eq., 455, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of FRANKLIN Superior Court, before *Seymour, J.*

The court adjudged upon the facts agreed on that the plaintiff recover, and the defendant appealed.

Messrs. J. B. Batchelor and *L. C. Edwards*, for plaintiff.

Messrs. Davis & Cooke and *E. W. Timberlake*, for defendant.

SMITH, C. J. The plaintiff holding the note described in his complaint, then over-due, on February 19th, 1876, was duly declared a bankrupt, and a few months thereafter obtained his discharge. At the date of the proceeding, and before, the plaintiff was indebted to Caroline Bullock by note to which the intestate was a surety, still remaining unpaid in the sum of one thousand dollars, and has become and is wholly insolvent.

The defence to the action is founded upon the continuing liability of the estate as surety for the plaintiff, and the right of the defendant to retain the indebtedness of his intestate as an indemnity against loss, an equity not displaced or impaired by the proceedings in the bankrupt court. This is the point presented in the appeal.

The surrender of the note in the schedule of the bankrupt's effects, and its designation by the assignee to be retained as exempted property of the bankrupt, may be left out of view in considering the effect of the discharge upon the relations of the parties, because the property in the note remained in the plaintiff, unchanged and unaffected by that proceeding. The act of Congress, in express terms, declares that "in no case shall the property hereby excepted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this title." Rev. Stat. U. S., § 5045.

The note, remaining with the plaintiff, is undoubtedly subject to any and all equitable defences or counter-claims that existed before the commencement of the proceeding in bankruptcy, and would be available equally in an action brought by him or his assignee. But as the discharge extinguishes the liability of the plaintiff as principal on the debt, and to the action of the surety who may pay it for reimbursement upon the promise implied by their relations, so neither can the plaintiff's recovery be resisted, according

to the argument for the plaintiff, by a defence which assumes that such liability still subsists.

There can be no question that the intestate paying the debt as surety would be barred, as would the creditor herself, of any action against the discharged bankrupt, to enforce either form of liability, for the sufficient reason that he is wholly exonerated from the debt. Sec. 5070. But this principle does not apply to the facts of the present case. The contingent liability of the surety to an insolvent principal is in the view of a court of equity a debt itself, and as such a set off against an indebtedness to the principal. The note, whether retained or assigned after maturity, continues subject to the defence, and the equity of the debtor is not severed or extinguished by the discharge. It is a well settled principle that the surety to an insolvent debtor cannot be compelled to pay a debt he owes his principal, until he is relieved of the responsibility of suretyship, and may retain what he owes as a fund for his own indemnity and protection. The rule is thus settled by HENDERSON, J., in *Williams* v. *Helme*, 1 Dev. Eq., 151: "The equity of the plaintiff arises from the insolvency of Helme. The right of the latter to assign the judgment was lost when he became unable to exonerate the plaintiff from the thraldrom in which he was placed on account of the suretyship, when Helme became unable to reciprocate the act which he required Williams to perform. I do not know a plainer equity."

In like manner RUFFIN, J., in *Battle* v. *Hart*, 2 Dev. Eq., 31, declares: "The bill alleges and the answer admits that at that time Barnes was also insolvent, and the plaintiff was surety for him. Upon the direct authority of *Williams* v. *Helme*, founded on the clearest principles, the plaintiff had then the right of getting any funds of Barnes he could, and retaining them for his indemnity, and he may thus retain against an assignee in equity for value and without notice

A surety in such a situation is a creditor, and the subsequent assignee only succeeds to his assignor's rights and subject to the equity of the surety which is prior.

The doctrine is asserted in numerous other cases. *Nelson* v. *Williams*, 2 Dev. & Bat. Eq, 118; *Mast* v. *Raper*, 81 N. C., 330; *Walker* v. *Dicks*, 80 N. C., 263. The latter case which is directly in point establishes the proposition that a surety before suffering loss may use his liabilities as such, as an equitable counter-claim or set-off against a debt he owes his insolvent principal, and this as well against the assignee of an over-due debt as against the assignor himself.

The transfer by operation of the assignment of the claim to the assignee in bankruptcy, does not obstruct or defeat this right of the debtor, and the former can only acquire such interest as the creditor then possessed, and his recovery is restricted to the excess of the sum due on the face of the note, if any, over the value of the equitable counter-claim. The discharge does not defeat an equity thus adhering to the note, and following its transfer, but operates upon the relations existing between the bankrupt and his creditor as to a further accountability for the debt *Carr* v. *Fearington*, 63 N. C., 560; *Steadman* v. *Taylor*, 77 N. C., 134.

The fact that the note is part of the plaintiff's exempted property, of which he cannot be deprived by any coercive legal process, does not impair the debtor's right, when sued, to avail himself of his recognized equitable set-off or counter claim, for the exemption is of the excess only, and this excess is, by law, placed beyond the reach of creditors.

The point was made by *Mr. Batchelor*, and pressed with much earnestness in his argument that under section 101 of the code, no independent suit could be brought to enforce such a counter-claim, and therefore it is inadmissible to defeat an action or diminish a recovery. We do not accede to the correctness of the proposition. There are many defences, such as payment, accord and satisfaction, and the

like, which may be used to defeat, but not to sustain an action. But can no action be brought to enforce the defendant's equity? The contrary was held in *Ferrer* v. *Barrett*, 4 Jones Eq., 455, where RUFFIN, J., uses this language in answer to a similar objection: "The demurrer rests on the position that Ransom could not maintain an action against Barrett on their original relation of principal and surety, until damnified by the payment of the debt, and by consequence, that he could not have an action against the parties on the bond given to him as a counter-security. The first part of the proposition is true in reference to an action at law; but it is not true with respect to relief in this court. It is the established doctrine in equity that a party, after the debt has become due, may upon the plea of *quia timet* file his bill against the principal and the creditor, to compel the former to make and the latter to accept payment."

The rule applies with greater force when the creditor and principal are the same person, and the adjustment can be effected by the application of one indebtedness to the extinguishment of another between the same parties. The defendant's equity in the present case is confined to his exoneration from the plaintiff's demand, and when he pays the residue of his surety-indebtedness, he will have no redress upon the plaintiff for reimbursement, since this liability comes under the operation of the discharge.

It must be declared that there is error, and a non-suit is ordered according to the case agreed.

Error. Reversed.

W. D. FARMER v. JERE BATTS and others.

Specific Performance—Evidence.

Where a contract to convey land describes the same as "one tract containing 193 acres, more or less, it being the interest in two shares, adjoining the lands of J. B., E. O. and others."

Held, That the description is not too indefinite to admit parol evidence to identify the land.

(*Murdock* v. *Anderson*, 4 Jones Eq., 77; *Allen* v. *Chambers*, 4 Ired. Eq., 125; *Capps* v. *Holt*, 5 Jones Eq., 153; *Grier* v. *Rhyne*, 69 N. C., 346; *Dickens* v. *Barnes*, 79 N. C., 490; *Edmundson* v. *Hooks*, 11 Ired., 373; *Robeson* v. *Lewis*, 64 N. C., 734; *Smith* v. *Low*, 2 Ired., 457; *Blanchard* v. *Blanchard*, 3 Ired., 105; *Morrisey* v. *Love*, 4 Ired., 38; *Ward* v. *Saunders*, 6 Ired., 382; *Carson* v. *Ray*, 7 Jones, 609, cited, distinguished and approved.)

CIVIL ACTION for specific performance of a contract tried at March Special Term, 1880, of WILSON Superior Court, before *Avery, J.*

The plaintiff submitted to a nonsuit and appealed. The facts are stated in the opinion of this court.

Mr. George V. Strong, for plaintiff.
Messrs. Connor & Woodard, for defendants.

SMITH, C. J. The plaintiff seeks to enforce against the defendants, as assignees with notice of his equity, the specific performance of an executory contract entered into by William Dixon in the words following:

"Received of W. D. Farmer fourteen hundred dollars in full payment of one tract of land containing one hundred and ninety-three acres, more or less, it being the interest in two shares, adjoining the lands of James Barnes, Eli Robbins and others. This 25th day of January 1864.

(Signed) WM. DIXON."

On the trial of the issues and with a view to locate and identify the land described, the plaintiff proposed to show that a tract of land, adjoining the lands of James Barnes, Eli Robbins and others was known as one in which William Dixon claimed two shares, and there was only one tract answering to this description and estimated to contain one hundred and ninety-three acres. The evidence, being objected to, was excluded on the ground that the words of description in the contract were too indefinite to authorize the introduction of testimony for the purpose of identification. In deference to this ruling the plaintiff submitted to a non-suit and appealed.

Many cases have been before the court where it has been necessary to decide upon the sufficiency of a description contained in a written instrument to admit of extrinsic evidence to locate the land, a brief reference to which may aid us in determining the validity of the present instrument. The following words of description have been held too indefinite to admit the specific enforcement of the contract or to allow the operation of a deed of conveyance:

"One house and lot in the town of Hillsboro." *Murdock* v. *Anderson*, 4 Jones Eq.. 77. "A certain tract of land lying on Flat river, including Taylor Lewis' spring house and lot, &c., and adjoining the lands of Lewis Daniel, Womack and others." *Allen* v. *Chambers*, 4 Ired. Eq., 125. "A tract of land lying on the north side of the Watery branch in the county of Johnston and state of North Carolina, containing one hundred and fifty acres." *Capps* v. *Holt*, 5 Jones Eq., 153. "A certain piece of land in the county and state aforesaid, adjoining the lands of S. J. Suggs and M. H. Rhyne and others, supposed to contain thirty or thirty-five acres." *Grier* v. *Rhyne*, 69 N. C., 346. "One tract of land lying and being in the county aforesaid, adjoining the lands of John J. Phelps and Norfleet Pender, containing twenty acres, more or less." *Dickens* v. *Barnes*, 79 N. C., 490. "The

defendant's lots at Nahunta depot." *Edmundson* v. *Hooks*, 11 Ired., 373. "Also seven hundred and fifty-two acres of land including the land I now live on and adjoining the same," held to be inoperative except as to that whereon he resided. *Robeson* v. *Lewis*, 64 N. C., 734.

The following have been deemed sufficient: "Three tracts of land, the House place, the Lynn place and the Leonard place, containing four hundred acres, more or less." *Smith* v. *Low*, 2 Ired., 457. "Levied on the land of North Blanchard joining the lands of J. H. Blackmore, Reuben Blanchard and others." *Blanchard* v. *Blanchard*, 3 Ired., 105. "Levied on land supposed to be upwards of one hundred acres where Richard Heath lives on." *Morrisey* v. *Love*, 4 Ired., 38. "Levied on the lands and tenements of Isham Doby adjoining the lands of Allen Newsom, Clairborn Newsom, and others." *Ward* v. *Saunders*, 6 Ired., 382. "My house and lot in the town of Jefferson in Ashe county North Carolina," the grantor having but one such in the place. *Carson* v. *Ray*, 7 Jones, 609.

Looking to adjudications in other states we find the following descriptions of the subject matter of the contract, with the aid of extrinsic evidence, to have been held sufficient: An agreement to "furnish water out of the mill dam sufficient to carry the fulling-mill and carding machine at all times except in drought in summer and the usual times of freezing in winter, and at all times to have such a share as is sufficient to carry one wheel when either of the wheels of the grist mill and saw mill are running," was supported in *Fish* v. *Hubbard*, 21 Wend., 651. Delivering the opinion COWEN, J., remarks: "If it were in proof that the donor or grantor owned one mill dam, one carding machine and one fulling-mill and no other property of that description at the date of his will or deed, ought we to hesitate in saying that he intended to pass such property? or should we say that possibly he intended some property of

his neighbor or neighbors answering a similar description." So a receipt of "fifty dollars in part payment of a house and lot of land situated in Amity street, Lynn, Mass; the full amount is seventeen hundred dollars;" the defendant being shown to own no other real estate on that street, except the lot, was declared to be binding and a specific performance enforced in *Hurley* v. *Brown*, 98 Mass., 545, and the court say: "The presumption is strong that a description which actually corresponds with an estate owned by the contracting party is intended to apply to that particular estate although couched in such general terms as to agree equally well with another estate which he does not own." In the subsequent case of *Mead* v. *Parker*, 115 Mass., 413, where the writing was in these words: "This is to certify that I, Jonas Parker, have sold to Franklin Parker a *house on Church street* for the sum of fifty-five hundred dollars," the court held that evidence was competent to show what house the defendant owned on Church street and decreed specific performance of the contract, remarking as follows: "The most specific and precise description of the property intended requires some proof to complete its identification. A more general description requires more. When all the circumstances of possession, ownership and situation of the parties, and of their relation to each other and the property, as they were when the negotiation took place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement." "Every valid contract," says Mr. Fry, in his work on specific performance, sec. 209, "must contain a description of the subject matter, but it is not necessary it should be so described as to admit of no doubt what it is, for the identity of the actual thing and the thing described may be shown by ex-

trinsic evidence." To the same effect Pomeroy on Contracts, § 90, note.

The rule relating to the admission of parol evidence is, that when not upon the face of the writing, but in its application, there are more persons than one, or more things than one, it may be shown which person or which thing was intended, by any evidence competent to establish the fact. Wigram on Wills, *Prop.* 7; Greenl. Ev., § 288.

Referring now to the description in the contract before us, let us see what are the particulars by which it is attempted to be defined and identified.

It is a single tract of land, with an area of one hundred and ninety-three acres, more or less, bounded by and comprised within the lines of James Barnes, Eli Robbins and others, unnamed, wherein the contracting party professss to own and undertakes to convey two shares. Now suppose a tract of land fitted to all these requirements and conditions can be found, and no other can be, would not the proof satisfy any reasonable mind that this was the land intended? and if so, is it not competent to ascertain and identify the subject matter of the contract and make it effectual?

It is often difficult to define in exact terms where land is the subject of an executory or executed agreement, and whenever practicable, the maxim, *magis valeat quam pereat* should be applied and prevail. Whether satisfactory evidence would have been given the jury, we are not to consider; the question is, does it not belong to them to decide whether the object can be identified by competent proof, and whether the description is upon its face so palpably defective as to be incurable by any evidence.

The recent case (*Dickens* v. *Barnes*, *supra*,) is much more vague in its language, as it contains only quantity, and refers to but two adjoining owners, whose lines are not said to enclose the tract. It is apparent in this deed that no land is enclosed, and the words used to define its location

are vague and insufficient to identify any tract upon which the conveyance can operate. The uncertainty upon the face of the instrument rendered it void, as in the description of the lot in Hillsboro, there being nothing to distinguish it from other lots.

We think the case of *Blanchard* v. *Blanchard, supra*, is an authority, very strongly in support of the proposition that the description of the subject matter of the contract is not as fatally defective as to be so declared by the court and withdrawn from the jury. The only unfavorable difference is in the designation of the land as that "of Noah Blanchard" while here the assertion of title in the vendor is not less unequivocally involved in the very act of disposing of it as his property.

But it is urged that the cases referred to by the plaintiff's counsel were all of levies under a statute which requires the officer to designate "the lands and tenements he has levied on, where situate, on what water course and whose land it adjoins," (Rev. Code, ch. 62, § 16) and exceptions were taken to such as were not thought to conform to the act. But the holding has been that any description that identifies the land is sufficient and in compliance with the law.

We think in the present case the judge erred in withdrawing the enquiry from the jury, and that under proper instructions as to what proof were necessary, he should have left the determination of the question to them. We feel disposed to uphold contracts, entered into, drawn often by persons unaided by a legal adviser and not careful and precise in the use of language, when there is a reasonbly sufficient description of its subject, and to give effect to what was intended but is not very clearly expressed.

Non-suit must be set aside and a new trial ordered. Let this be certified.

Error. *Venire de novo.*

R. McCASKILL and others v. J. W. LANCASHIRE.

Partnership Assets—Supplementary Proceedings—Equitable Interests.

1. The equitable interest of a partnership under a contract to convey land to the firm may be subjected to the partnership debts by proper proceeding against the surviving partner.
2. The equity of a debtor to have a conveyance of realty from a third person can be reached by the creditors only by civil action, and not by proceedings supplementary to execution.
3. The heirs of deceased partners are not necessary parties to an action to subject the real property of the firm to the claims of its creditors.

(*Simmons* v. *Spruill*, 3 Jones Eq., 9; *Hoppock* v. *Shober*, 69 N. C., 153; *McKeithan* v. *Walker*, 66 N. C., 95; *Hutchison* v. *Symons*, 67 N. C., 156; *Waugh* v. *Mitchell*, 1 Dev. & Bat. Eq., 510; *Rand* v. *Rand*, 78 N. C., 12, cited, commented on and approved.)

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

The defendant filed a demurrer to the complaint, which was sustained and the plaintiff appealed. The facts are embodied in the opinion of this court.

Messrs. Hinsdale & Devereux, for plaintiffs.
Mr. B. Fuller, for defendant.

DILLARD, J. The plaintiffs being creditors of the debtor partners trading under the name and style of J. W. Lancashire & Co., in November, 1870, after the death of W. H. Morehead and Melvin Lowery, two of the firm, recovered two judgments against J. W. Lancashire as surviving partner, one in a justice's court for two hundred dollars and the other in the superior court for a large sum, both of which were docketed in the county in which the lands described in the complaint are situate.

The object of the action is to have a certain alleged equitable interest or estate of J. W. Lancashire & Co. in the lands described in the complaint, which cannot be sold under an ordinary execution, defined and adjudged by the court, and to have the same applied to plaintiffs' judgment as being assets of the late firm, and in order to understand the points presented for our determination, it will be material to make a concise statement of the facts:

In 1866, J. W. Lancashire & Co., all the members of the firm being then alive, contracted to purchase the lands from the defendant, A. G. Thornton, at the price of $3,500, on the terms that they were to pay $1,000 cash down, and give their note for $2,500 to cover the balance, and the said Thornton was to convey the land at once.

The purchasers performed the contract on their part by making the cash payment and giving their note for the deferred instalment, and the said Thornton attempted to perform his part of the contract by executing what he and his grantees took to be a deed sufficient in form and substance to pass the estate, but the same was in fact inoperative to pass the legal title for want of a seal to it.

J. W. Lancashire immediately went into possession of the land, and used the same as partnership property, and having the instrument executed to them, they had every confidence that their title was good.

While matters stood thus, the land was levied on under an execution in favor of Hinsdale as the property of A. G. Thornton, and sold by the sheriff and title made to the purchaser, who bought with notice of the equities of J. W. Lancashire & Co., and just before the sale, the said Thornton went into bankruptcy and surrendered the note for $2,500, which is now in the hands of his assignee, D. G. McRae. Since the discharge of Thornton under the bankrupt act, he has acquired by deed the title of the purchasers at sheriff's sale under the Hinsdale execution.

The record states that the question of bankruptcy was stricken out and then follows the entry, "Demurrer sustained and appeal by plaintiffs."

Putting out of the case all the allegations connected with the going into bankruptcy of A. G. Thornton and his final discharge, we have upon the demurrer the following legal questions:

1. Are the facts sufficient in law to entitle the plaintiffs through the equity of J. W. Lancashire & Co. or the survivor of the members of the firm for a title as against A. G. Thornton, to require of the court to adjudge between that equity and the supposed conflicting equity of Thornton to retain the legal title until the outstanding $2,500 of the purchase money is paid, and another equity in him supposed to consist in his new legal title acquired from the purchaser at sheriff's sale under Hinsdale's execution.

2. If such equity may be asserted by plaintiffs, may it be done by independent action in the superior court, or must it be by proceeding supplementary to execution before the clerk in whose office their judgments are docketed.

3. If the remedy by action in the superior court be proper, then can plaintiffs proceed without making parties to the action the heirs of Morehead and Lowery, the two deceased members of the late firm of J. W. Lancashire & Co.

The instrument executed by Thornton to the members of the firm of Lancashire & Co. at the time of the purchase, though not effectual to pass the title, had at least the efficacy of a memorandum in writing sufficient under the statute of frauds to enable the intended grantees to compel a correction of the same or the re-execution of a proper conveyance to them, and on a suit brought for that purpose, the correction or the execution of a new deed would have been decreed notwithstanding the non-payment of the $2,500 bond, because, under the contract, the deed was to have been made before the payment of that sum, and un-

less there was some equitable ingredient to prevent, the decree would have been made. Adams' Eq., 169; *Simmons* v. *Spruill*, 3 Jones' Eq., 9. In our state the vendor's lien does not exist as in England, but in place of it, the title retained is the only security to the vendor, and if he part with the title, then the purchase money is on the personal responsibility of the vendee, and in the case of an inoperative conveyance, as in this case, as the title was not intended to be retained, the court would, as a general thing, decree the instrument to be made perfect as it was to have been. Adams' Eq., 128; *Simmons* v. *Spruill, supra.* But on application to a court of equity for correction or re-execution in a case like this, where a portion of the purchase money is unpaid, it is not a right compulsory on the court to grant it, but it is a matter within the sound discretion of the court to grant the relief prayed without or with a prepayment of, or liability for, the unpaid purchase money, as the events may or may not render it unjust to decree performance of the contract *in specie* as it was originally made; and whether in this case, there be or be not any events sufficient to justify the court to hold the equity of the plaintiffs as subject to the prior payment of the purchase money still outstanding, the court below has not said, and therefore we are not called upon to express an opinion.

Seeing then that the firm of Lancashire & Co. had an equity for the title against Thornton, and that J. W. Lancashire as surviving partner succeeded solely to that equity to be administered in payment of the joint creditors, it remains only to enquire on the first ground of demurrer whether the plaintiffs have the right to assert that equity in their own behalf.

The equity for title by way of correcting the instrument given for the land, existing at the first for the whole firm, became at last an equity by construction of a court of equity for John W. Lancashire, the surviving partner, in whom by

the ordinary doctrines of equity and the provisions of our statute, (Bat. Rev., ch. 42, § 2,) that right is declared to be vested in order to enable him to wind up the partnership and pay its debts. The plaintiffs having reduced their claim against the firm to judgment against Lancashire, the surviving partner, the docketing of the same operated a lien in their favor on the equity of the judgment debtor to have the title, and that equity under the construction of this court as to the meaning of the expression "real property" used in our statute, was such an interest as would be affected by the lien of a docketed judgment. *Hoppock, Glenn & Co.* v. *Shober*, 69 N. C., 153; *McKeithan* v. *Walker*, 66 N. C., 95. Such being the equity in the judgment debtor as against Thornton and such the lien of the plaintiff's judgment on that equity, the plaintiffs had a clear right in some form, upon the footing of their judgment lien or the well established and recognized principles of courts of equity, in the case of a dissolved partnership, through the equity of one partner against another, to have the joint estate applied to the joint debts for their indemnity and exoneration, to maintain an action for the enforcement of the lien of their judgment and the payment of their debt otherwise out of the joint estate. Adams Eq., 243, note 1; 1 Washburn Real Property, 423; Lindley on Partnerships, 576.

It therefore seems to us that the facts of an ascertained debt of the plaintiffs and a lien therefor on an equity of John W. Lancashire, surviving partner of Lancashire & Co., under the contract of sale of Thornton, for the tract of land mentioned in the complaint, are sufficient in substance and form, as stated in the complaint, to authorize the court to proceed to trial of the action on its merits, unless there be something to prevent in the other grounds of the demurrer which we will proceed to consider.

II. The second ground of demurrer in substance presents the question, whether the plaintiffs granting their right to

assert the equity of the partnership against A. G. Thornton, may do so by action in the court at term instead of by proceedings supplementary to execution in the cause in which their judgments were obtained: In *McKeithan* v. *Walker*, *supra*, it was held "that in order to sell an equitable estate in land not liable to sale under the act of 1812, the plaintiff in the execution must still resort to his action as formerly, to his bill in equity to ascertain the rights of the parties and enforce the lien of his judgment" and in such case of judgment operating a lien on the equitable right equivalent to the levy of an execution, and in all cases where an execution is levied on property, it was held that supplemental proceedings would not lie, unless after a sale of the property affected by such lien or levy, or the insufficiency of the same to satisfy the judgment be established by affidavit or otherwise. In *Hoppock, Glenn & Co.* v. *Shober*, *supra*, one Owen had the legal title to land which he had purchased for and with the money of one Crane, and upon the allegation, that the docketed judgment was a lien on the interest of Crane therein before the same was conveyed to Shober in trust to secure the United States, the plaintiff in the judgment proceeded by original action, and on appeal to this court, although no question seems to have been made as to the remedy adopted, this court took cognizance of the appeal without any question of the propriety of the action and herein cite *McKeithan* v. *Walker*. Also in the case of *Hutchison* v. *Symons*, 67 N. C., 156, the court *arguendo* cited the case of *McKeithan* v. *Walker*, and in speaking of the principle established by it, said, "if the debtor has property on which the creditor has acquired a lien, it must be shown either by a sale of the property or by affidavit that the property is insufficient to pay the debt, otherwise the application for supplemental proceedings has no sufficient ground to rest on." In other cases, some by original action where real property was concerned and some by proceedings sup-

plementary to execution in relation to personalty, the same case is cited, and in not one of them is the principle of the necessity of an action to enforce the lien of a judgment on equitable interest in land not liable to sale under execution, (established by *McKeithan* v. *Walker*,) reviewed.

The result of the cases, including the late case of *Rand* v. *Rand*, 78 N. C., 12, is that judgment creditors *must* resort to supplementary proceedings as provided for in the code, in all cases except the single one of a judgment operating a a lien on equitable estates in land which cannot be sold on execution, and *may* commence such proceedings even in that case upon affidavit of the insufficiency of the property affected by the lien to pay the judgment; but otherwise the proceeding to enforce the lien of a judgment on equitable interests in land not liable to execution under the act of 1812, *must be* by action in court, and the proceeds applied, if sufficient, before the judgment debtor can be subjected to supplementary proceedings. The line of distinction is distinctly drawn and now well known and generally conformed to in the profession. And as less circuity is made by the action in court than would be by a receiver on supplemental proceedings, who would have to bring an independent action and then report back to the clerk in the cause for final orders, we are inclined to stand by the decision in *McKeithan* v. *Walker* in the limited application it has to equitable interests in land. We must therefore hold that the second ground of demurrer should have been overruled.

III. The last ground of demurrer is that the heirs of the two deceased members of the firm, Morehead and Lowery, are not parties to the cause and that the cause cannot proceed without them: It is not every one who may have a remote interest in a cause who must be made a party, but it will suffice if those are before the court who are in a legal sense necessary to the determination or settlement of the questions involved. C. C. P., § 61. Here, the interest

of the partners was an equity to sue for title to the land, and existed at first in the whole firm; but now by the rules of law, in order to the payment of the debts and the settlement of the partnership business, that equity has survived to, and resides in the survivor, J. W. Lancashire. And by statute and the decisions of this court, that interest in the language of the law is vested in the survivor. Bat. Rev., ch. 42, §2; *Waugh* v. *Mitchell*, 1 Dev. & Bat. Eq., 510.

It appears from the complaint that the partnership has no means except the land averred to be worth not more than $1,000, and that there is besides the plaintiffs' debt, an outstanding debt to Thornton for the purchase money, either debt amounting to more than the land will sell for. Thus it is seen that the heirs of the deceased members of the firm could not have more than an imaginary prospect in a possible surplus after paying the debts. If the action were by Lancashire instead of by the plaintiffs claiming through him, the heirs of Morehead and Lowery could not hinder a decree to sell the land, apply its proceeds, and have the legal title conveyed to the purchaser upon a mere suggestion of a possible interest in them. And so the firm appearing to be insolvent without the possibility of a surplus from the land in the complaint mentioned, their absence from the case as parties ought not to delay the progress of the suit, as there is no legal title by descent in them to be affected by the decree.

We must therefore declare our opinion to be, that neither of the grounds of demurrer is sufficient in law to justify a refusal of defendant to answer to the action, and the judgment of the court below is reversed. This will be certified that further action may be had according to law.

Error. Reversed.

*State on relation of F. N. STRUDWICK, Solicitor, *v.* JOHN W. BRODNAX and others.

Evidence—Examination of Parties.

The examinations provided for by the code, sections 332-340, are only obtainable where the testimony sought is that of a person immediately interested in the action.

Semble, that the provisions of section 336 of the code were not intended to abrogate the common law rule which forbids one to impeach the veracity of his own witness, but only to allow evidence that the facts were otherwise than as testified by such witness.

(*Collier* v. *Jeffreys*, 2 Hay., 400; *Hice* v. *Cox*, 12 Ired., 315; *Spencer* v. *White*, 1 Ired., 236; *Shelton* v. *Hampton*, 6 Ired., 216; *Wilson* v. *Derr*, 69 N. C., 137; *Neil* v. *Childs*, 10 Ired., 195, cited and approved.)

MOTION by defendants in the cause for an order to take the deposition of a witness and for leave to rebut the evidence, heard at Fall Term, 1879, of ROCKINGHAM Superior Court, before *McKoy, J.*

The motion was denied and the defendants appealed.

Mr. Thomas Ruffin, for plaintiff.
Messrs. Mebane & Scott, for defendants.

SMITH, C. J. This action on the guardian bond against the defendants, the principal obligor, and the representatives of the deceased surety, seeks to enforce an account and settlement of the trust estate in the hands of the former, and is under a reference to the clerk of the superior court of Rockingham county, wherein the cause is depending. The defendant, John W. Brodnax, the removed guardian, files an affidavit setting out an arrangement entered into between himself and the widow of the testator, from whom the ward's property is derived, whereby the use and profits

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

of the land were to be appropriated to the discharge of the testator's debts in exoneration of its liability therefor, and that much of the trust fund with which he is charged has been applied to that object and expended in the support of the infant, who continued to reside with his mother, in consequence of which an adjustment of their mutual accounts and dealings is necessary before his administration of the ward's estate can be settled and his relations to it correctly ascertained. On this evidence his counsel moves the court for an order to take the examination of Mary L. Brodnax the mother, alleged to be temporarily resident of Danville, in Virginia, in order that, as he avers, he may establish his credits by her testimony and have "an opportunity of legally contradicting her testimony, if adverse to him, by her own verbal and written declarations and admissions" previously made.

An interpretation of those provisions of the code of civil procedure (that relate to and authorize such examinations, sections 332 to 340 inclusive) which permit a party to take and use the evidence and then directly impeach the source from which it comes, certainly introduces a novel feature in the law and practice, and subverts a long and well settled rule in the conduct of civil suits, that one who offers and examines a witness shall not be heard to impeach his character for veracity, or in the words of PEARSON, J., "to say that he attempted to impose on the jury by calling a witness whose general character is known to be bad." The rule does not prevail in criminal prosecutions, and the state may offer such impeaching evidence, as was held in *Collier* v. *Jeffreys*, 2 Hay., 400.

But the principle does not exclude in either class of cases, proof of facts different from those testified by the witness. A party is not precluded by the statement of one of his witnesses from showing by others the facts to be different, but he is not at liberty directly to assail his reputation for truth

and thus destroy his credit before the triers. The doctrine and the ground on which it rests are clearly defined and explained in *Hice* v. *Cox*, 12 Ired., 315, and in cases preceding it. *Spencer* v. *White*, 1 Ired., 236; *Shelton* v. *Hampton*, 6 Ired., 216, and *Wilson* v. *Derr*, 69 N. C., 137.

Is the rule abrogated or modified when the examination is had under section 336? The chapter in which these sections are found, abolishes separate and independent proceedings for the discovery of evidence under the usages obtaining in the former courts of equity, and substitutes a more direct and summary method of procedure, incident to the action itself, for taking and preserving the needed testimony. Parties and interested persons are made competent to testify on the trial, except in cases specified in section 343, which removes the disability, and in the amendatory act of March 11th, 1879, acts 1879, ch. 183. The examination taken preliminarily, as proposed by the defendant, can only be of parties to the action and of persons for whose immediate benefit the action is prosecuted or defended," (C. C. P., §§ 333, 339,) and differs somewhat from an ordinary deposition.

1. It is taken only before a judge or clerk of the court wherein the cause is depending and therefore at a place within their jurisdiction to act. § 334.

2. The witness is not compelled to attend in any other county than that of his residence or in which he may be summoned.

3. The evidence may be used on the trial by either party. § 335.

4. It is open to rebuttal, and the examining party may treat it as proceeding from an adverse witness. § 336.

Still it falls under the general rule that forbids the party who takes and introduces the examination, as evidence on his own behalf, from discrediting the witness himself except as that result may be incidental to proof of a different state

of facts. By calling his adversary, a party makes him so far his own witness that he cannot impeach or disparage his general credibility. 2 Whit. Prac., 279.

"Having called the plaintiff to testify," remarks STRONG, J., speaking for the court in *Packard* v. *Collins*, 23 Barb., 444, "he (the defendant) thereby represents him as deserving of credit, and is concluded from denying it by introducing evidence for the purpose of impeaching him, showing either that his general character for truth is bad or that he has made previous contradictory statements; but he may by any pertinent evidence prove a fact to be otherwise than as testified to by the plaintiff."

There is nothing in an examination taken under these special provisions, when exhibited to distinguish it in legal effect from other testimony produced, or exempt it from the operation of those rules which govern the introduction and determine the admissibility of all evidence.

Depositions taken in the ordinary way by a party and filed may be read by the other party. *Colbier* v. *Jeffreys*, 2 Hay., 400. Nor does the taking the deposition make him the witness of the party taking it. This is so held in *Neil* v. *Childs*, 10 Ired., 195, wherein PEARSON, J., thus declares the rule: "If the witness" (whose deposition had been taken by the plaintiff and used by the defendant at the trial) "had been called and examined, or if his deposition had been read by the plaintiff, the exception" (to the plaintiff's proving the hostile feelings of the witness towards himself and the witness' conflicting statements, offered to impeach him) "would have raised the question whether a party can impeach his own witness, in whose testimony he is disappointed, by showing that he had on other occasions stated differently," and adds, "the question does not arise in this case for a *party does not make one his witness by taking his deposition which he declines to read*, or by having a witness subpœnaed and then declining to examine him."

We should hesitate to ascribe to the rebuttal "by adverse testimony," authorized by section 336, which is defined by Worcester "a driving or beating back; a repelling or opposing by argument or evidence," an effect so sweeping as to break down a principle so long and thoroughly established and acted on in judicial practice, without some more clear and distinct manifestation of the legislative will than is furnished by the word employed to express it.

But the legal effect of the examination and its exposure to attack, if not acceptable to the defendant, are questions not now before us and it is not necessary to anticipate their solution. The court refused the motion (and indeed no order is required to obtain the preliminary examination under section 334, either in terms or upon the construction given to it by the courts of New York; Voorhies' Code, page 748, and cases cited; 2 Whit. Prac., 275,) for reasons in our opinion fully sustaining the denial, to-wit: that the witness had no such interest in the result of the action as is contemplated in section 339, and the testimony taken in the form of a deposition would accomplish every useful purpose as well as the proposed examination. We are unable to see how the existence of unsettled accounts between the witness and the defendant tends in any degree to show that the action is prosecuted for her immediate or even indirect benefit, and unless this does appear, the proposition is without the sanction of the statute.

The argument deduced from the usages of a court of equity and pressed upon our attention with the fruits of a laborious research into the subject, properly understood do not contravene, and if they do, must be controlled by the provisions in the code for a supervening remedy to take the place of the former system. The substitute is simple and complete, and provides adequately for all cases where the needed evidence is attainable without the delays and embarrassing incidents attaching to a bill of discovery in aid

of an action at law. The new system, discarding the cumbrous forms of the old, seeks to secure the same objects by a more plain, direct and equally efficacious proceeding.

So then upon the facts contained in the affidavit of the defendant, it is not a case entitling him to take the examination of the absent witness for the purposes specified, and in the mode prescribed in the code; and if he was so entitled, his right is not prejudiced by the refusal of the order. It must therefore be declared there is no error in the ruling of the court and the judgment is affirmed. This will be certified that the cause may proceed in the court below.

PER CURIAM. No error.

WILLIAM SMITH and another, Ex'rs, v. J. W. STEWART and others.

Agreement to Sell Land—Rescission—Rent—Improvements.

Upon the voluntary rescission of a contract for the sale of land, the vendee having been in possession, he is entitled to a return of the purchase money, and the vendor to a fair rental for the use and occupation of the land, less the value of the permanent improvements placed thereon by the vendee; such value being estimated, not by their cost to the vendee, but by the extent to which they have enhanced the worth of the land.

(*Wetherell* v. *Gorman*, 73 N. C., 380; *Hill* v. *Brower*, 76 N. C., 124, cited and approved.)

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

The case was heard upon exceptions to an account, and the defendants appealed from the ruling and judgment of the court below.

Mr. A. Burwell, for plaintiffs.

Messrs. Wilson & Son, for defendants, cited the following cases, referred to in the opinion of this court, *Pearsall* v. *Myers*, 64 N. C., 549; *Dunn* v. *Tillery*, 79 N. C., 497; *Hook* v. *Fentress*, Phil. Eq., 229; *Lowder* v. *Roding*, 8 Ired. Eq., 208.

SMITH, C. J. The plaintiffs' action is to recover the amount due from the defendants on their promissory note given for a tract of land sold by them as executors of J. A. Campbell, and as the property of their testator, and the defence set up is the want of title in the vendors.

When the cause was called for trial it was by consent of parties adjudged that the contract of sale be rescinded and the note canceled, and a reference was made to the clerk to ascertain and report the rents and profits of the land during the occupancy of the defendant, Stewart.

The clerk accordingly proceeded to take the account, both parties being present, and to hear the evidence adduced, and made his report ascertaining the balance due for the use and occupation, after allowing sundry credits, to be $588.68. To this report the defendants filed numerous exceptions, which, condensed in form, are as follows:

1. That the plaintiffs are not entitled to any compensation for the use of the land, and if they are so entitled, the measure of the compensation is the interest due on the purchase money.

2. That the annual rental allowed ($150) is excessive and not sustained by the weight of the testimony.

3. That no interest should be charged on the annual sums.

4. That the defendant has not been allowed divers credits, to-wit, for

a. Repairs on out-buildings.

b. Guano used in 1878 on the land.

c. Fences built on the land.

d. Ditching and draining bottom land.

e. Improvement of the land from industry and labor of defendants.

f. Value of manure left when the plaintiffs regained possession.

Upon hearing the exceptions, the court overruled the first and fourth, sustained third, and in part the second, reducing the value of the rental to $75 for the first year, $100 for the second, and left undisturbed the referee's allowance of $150 for each of the three remaining years. The result of all which is to reduce the indebtedness of the defendants to $348.68.

The defendants appeal presents but two questions:

1. Should the defendant be charged with the rental value of the lands, or with the annual interest on the purchase money?

2. Is he entitled to credits as specified in the 4th exception?

The legal consequences of the rescission of the contract of sale is to restore the parties, as far as practicable, to the position they would have occupied if no contract had been entered into. The vendee is entitled to the return of any of the purchase money he may have paid, the vendor to the value of the use and occupation of the premises, that is, to a fair rental annual value thereof, and this involves the allowance of any improvements bestowed increasing the value of the premises during the possession. Upon this basis the court seems to have acted in diminishing the charge for the two first years of the occupancy.

This rule, consonant with the principles of equity, has been recognized in the rulings of the court in cases in this respect similar to the present.

Thus, where land was sold by an executrix in a mistaken exercise of power supposed to be conferred and the sale was vacated, the reference was for "an account reimbursing

(Whitaker) the purchaser, the value of what he paid for the land and *charging him with rents and profits.*" *Wetherell* v. *Gorman*, 73 N. C., 380. When the account had been taken, upon a second appeal from rulings upon exceptions thereto, the court adhered to the terms of the order of reference, declaring that in ascertaining a fair rent "the enhanced value of the land by reason of any improvement made thereon," not the costs of the improvement, was the proper credit to be allowed. 74 N. C., 603.

Again in *Hill* v. *Brower*, 76 N. C., 124, the first sale being annulled and a resale ordered, BYNUM, J., referring to the claim for improvements, says: "If the land will sell for so much, he (the purchaser) is entitled to the repayment, with interest, of the purchase money paid and also to the value of his improvement put upon the land, with the qualification however that the improvements must be estimated according to the enhanced value conferred upon the land. *The defendant must account for the rents and profits.*"

The authorities cited for the appellant do not conflict with this rule, and are either to the effect that the relations subsisting between vendor and vendee (and those between mortgagee and mortgagor are similar) are such that the latter, being admitted into possession, is not responsible for rents, the equitable estate being in him, charged with the payment of a sum of money to the other party. In other words the vendor becomes entitled to the profit as an incident to his estate, and the vendee's right is, to be paid the purchase money. The cases have no application to a contract voluntarily annulled.

The argument also proceeds upon the ground of a conceded inability to make title, and the discharge of the purchaser in consequence, while no such fact has been determined, and the necessity of making the enquiry is removed by a voluntary cancellation of the agreement, the effect of

which is to put the parties *in statu quo* and restore his own to each.

It is further insisted for the defendant that he should not be required to pay anything to the plaintiffs, since he will still remain liable to the action of the true owner for damages. As we have said it does not appear that the title is in any other person who can hold the defendant still liable, and he cannot, upon a mere suggestion of the kind, be allowed, under a contract, to enter upon, use and appropriate the profits of the land, and then repudiate all obligation upon an allegation of a want of title in the plaintiffs, by whose authority and permission this was done. In this way he might escape liability altogether and retain the profits for himself.

It is suggested also that as an action at common law did not lie upon an implied contract to pay for the use and occupation of land, and the statute which gives it is repealed by the act of 1868–'69, ch. 156, § 23, in analogy, no allowance is due to the plaintiffs therefor. While the act of 1856 (Rev. Code, ch. 63,) is repealed in express terms, its essential provisions are re-enacted in section 5 of the repealing act, and the inference drawn from the supposed repeal is erroneous.

But the claim to the restitution of the profits received by the defendant rests upon the basis of a broader and more comprehensive equity, which the court having acquired jurisdiction will enforce, and not upon the technicality by which relief was denied in the former action of *assumpsit*. That equity is the right of each party to a contract annulled by consent to have restored to each that which has been received by the other by virtue of the rescinded contract, and properly belongs to the former, and upon this principle their respective claims are adjudged and settled.

The ruling in regard to the 4th exception must be sustained also. There is no evidence accompanying the report

from which we can see that the credits are well founded, or that they have been refused, or that they did not enter into the consideration of the court in reducing the rental value of the land for the first two years. There is therefore no ground upon which we can be asked to review the rulings of the court, and it is certainly needless to repeat that a party must show the assigned error or the judgment will be affirmed.

We do not wish to be understood as concurring in all the rulings against the plaintiff, and we pretermit an expression of opinion upon their correctness, because the plaintiff does not appeal and that matter is not before us.

There is no error and the judgment must be affirmed.

No error. Affirmed.

FREDERICK HUFFMAN v. WESLEY WALKER and others.

Boundaries—Evidence.

The location of boundaries mentioned in a deed may be established by parol proof and by reputation.

(*Standin* v. *Bains*, 1 Hay., 258, *Taylor* v. *Shuford*, 4 Hawks, 116; *Hartzoz* v. *Hubbard*, 2 Dev. & Bat., 241; *Hendrick* v. *Gobble*, 63 N. C., 48; *Hice* v. *Woodward*, 12 Ired., 293, cited and approved.)

CIVIL ACTION to recover land tried at Spring Term, 1879, of BURKE Superior Court, before *Graves, J.*

Both parties claimed under one Smith upon whose death his land was sold under a decree of the court of equity for Burke county on a petition by his heirs to sell for the purpose of partition.

The tract in question was bought at the clerk and mas-

ter's sale by the defendant and sold by him to the plaintiff. The defendant purchased another lot of same land from Avery and Gibbs who had bought it at said sale. The deed from the clerk and master for the first lot was prior in date to the other. There was no proof as to the possession of the land by any one. The controversy was as to the beginning corner of the land. The plaintiff alleged it was at a red oak on the bank of the river which was in Phillip Brittain's upper line where it crossed the river, and a conditional line agreed on between said Brittain and one William Jones.

The plaintiff testified in his own behalf that he had known the red oak on the bank of the river as the beginning of his land for fifteen years, that he was told by one Corswell and one Roper, (both dead) that the red oak claimed by him as the beginning was Phillip Brittain's upper line, and that the tree was marked on the east and west. One Smith testified on the part of plaintiff that his father bought of Phillip Brittain and Brittain held under one George Walker, that his father bought that part of the Brittain land lying on the north of the river, and one Jones bought that on the south side of the river and the river, was the conditional line between them; that he knew the red oak on the bank of the river as Phillip Brittain's upper line more than forty years, and knew Cane Brake creek; it came into the river below the red oak.

The defendant testified that he bought at the clerk and master's sale the land known as the Brittain land and sold the same to the plaintiff, Frederick Huffman. There were no exceptions taken to any of the evidence offered on the part of the plaintiff.

The defendant's counsel prayed His Honor to charge the jury "that in order to establish the beginning of the plaintiff's deed he should establish the fact that Phillip Brittain had a tract of land which crossed the river, by showing title by grant or deed or some other paper title to him, and could

not establish that fact by reputation, and that the plaintiff had failed to show by competent proof that Phillip Brittain had any tract that covered the land in controversy, and had failed to locate his deed." The court declined to give this instruction and the defendant excepted.

The court then charged the jury that "what are the boundaries of the land sued for, is for the court to say; but where the boundaries are situated, was a question of fact for the jury to determine." The court then read over the courses of the plaintiff's deed, stated the several boundaries in detail and told the jury the plaintiff must satisfy them by a preponderance of evidence as to where those several boundaries are situated; that when marked trees or natural objects were called for, they would control course and distance when identified by proof; that when such marked trees or natural objects could not be found, course and distance must govern. That plaintiff had submitted to them competent testimony in regard to the location of the boundaries of his deed, and it was for them to say whether he had proved his case or had failed; that upon questions of boundary the evidence of witnesses deceased was competent; that it was not always necessary to have a deed or grant or any paper title even to show title for land, for thirty years would ripen into title without writing of any kind." The defendant excepted.

The jury found the issues in favor of the plaintiff and that he is entitled to the land included in the boundary, beginning at the letter G as shown in plat running with the river to Cane Brake creek, then to letter J, then north to fallen pine on the ridge as shown by R K, then to the beginning. And there was judgment according to the verdict, from which the defendant appealed.

Mr. G. N. Folk, for plaintiff.
Mr. J. M. McCorkle, for defendant.

ASHE, J., after stating the case. There were no exceptions taken on the trial but those to the refusal of His Honor to give the instructions prayed, and the charge given to the jury.

The defendant on his examination as a witness admitted that he bought at the clerk and master's sale the land known as the Brittain land, and that was the land he sold to the plaintiff, and it is not denied that the land lay on the river, and that the beginning was where Phillip Brittain's upper line crosses the river, but the dispute is as to that point. The plaintiff contends it was at a certain red oak which stands on the bank of the river which was in that line, and in fact was a line tree in that line indicating where the line ran. The defendant insisted in his prayer for instructions, that that fact could not be proved by parol, but by some deed or other title in writing showing that Brittain owned a tract of land that crossed the river. We do not think that was at all necessary. The land in controversy was known as the Brittain land. It must have had some boundaries, and there is no principle of law better settled than that the location of boundaries may be proved by parol or reputation. Nothing is more common in practice, when a deed calls for the corner of an adjacent tract than to prove by parol, the declarations of deceased witnesses; for instance, where the corner stands, without showing in evidence any deed to the owner of the land. It is often matter of mere hearsay, but may be proved by other more direct means; and therefore it was perfectly competent for the plaintiff as he has done in this case, to prove by the declarations of deceased witnesses, that the red oak claimed by him as the beginning was Phillip Brittain's upper line. As to the objection that there is no competent proof that Phillip Brittain owned any land, the line of which crosses the river, there was proof offered without objection from which the jury were warranted in inferring that Brittain

once claimed the land and that his line crossed the river, for he and one Jones who claimed the land on the other side established the river as a *conditional* line between them. The proof seems to us to have conclusively established the red oak as the beginning corner of the land claimed by the plaintiff, and was perfectly competent for that purpose. See *Standin* v. *Bains*, 1 Hay., 258; *Taylor* v. *Shuford*, 4 Hawks, 116; *Hartzoz* v. *Hubbard*, 2 Dev. & Bat., 241; *Hendrick* v. *Gobble*, 63 N. C., 48.

We hold there was no error in refusing the instructions prayed, nor was there any in the charge given to the jury, unless it was in the concluding sentence which reads, "that it was not always necessary to have a deed or grant or any paper title even to show title for land, for thirty years would ripen into title without writing of any kind." This was evidently a "slip" and any one of common intelligence would understand it to mean "thirty years possession," but let that be as it may, we cannot say there was a fatal error in that, giving it the most unfavorable construction; for as we hold it was not necessary for the plaintiff to produce any deed or other paper title to Phillip Brittain, showing that he owned land covering that in controversy, and that one of the lines thereof crossed the river, although the charge may be against law, yet it was harmless, and it is apparent from the whole case that it could not have mislead the jury. *Hice* v. *Woodward*, 12 Ired., 293.

There is no error. The judgment of the superior court of Burke is affirmed.

No error. Affirmed.

FRANK THOMPSON *v.* HILL HUMPHREY, MARGARET HUMPHREY, and others.

Evidence—Transaction with Deceased Person—Guardian Bond, Rights of Surety.

A surety on the bond of a deceased guardian, having paid the amount of the recovery of a ward in a suit on such bond, brought action to be substituted to the claims of the guardian against one to whom he had loaned the money of the wards;

Held, (1) That the plaintiff was entitled to put in evidence the account taken in the suit by the ward on such guardian bond, and that the debtor to the guardian could not object to such evidence, it being immaterial to her to whom she paid the amount of her indebtedness.

(2) That the administrator of the deceased guardian was a competent witness to show the execution of the bond by the debtor to the guardian, the evidence being offered to affect the interest of a living person, and not "against a party then defending the action as executor, administrator, heir at law," &c.

(3) That while the plaintiff was not entitled at this stage of the case to have the debt assigned to him (it appearing that other wards of the deceased guardian had not been paid in full), he was entitled to maintain this action to have the debt paid into court to await a final adjustment of the rights of the several parties in interest.

(*Shields* v. *Whitaker*, 82 N. C., 516; *Ballard* v. *Ballard*, 75 N. C., 190; *McCanless* v. *Reynolds*, 74 N. C., 301; *Peebles* v. *Stanley*, 77 N. C., 243, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of ONSLOW Superior Court, before *Avery, J.*

Judgment for plaintiff, appeal by defendants.

Messrs. W. A. Allen & Son and *D. J. Devane*, for plaintiffs.
Mr. Henry R. Bryan, for defendants.

SMITH, C. J. John Humphrey in March, 1857, became guardian of the six infant children of one Stephen Humphrey deceased, and executed a guardian bond in the usual

form for securing their estate in the penal sum of $15,000 with the plaintiff and Henry Cox his sureties. Most of the wards on becoming of age were settled with by the guardian and their estate delivered over to them. A part of the trust fund consists of a bond executed by the defendant, Margaret, to the guardian in 1861, in the sum of $491.57 for money loaned her. John Humphrey died in 1868 leaving a will and the defendant Henry W. was appointed his administrator with the will annexed. One of the wards, William, died in June, 1862, intestate, and the said Henry W. became his administrator. In 1873, the said Henry W. rendered in the probate court his final account of the administration of the estate of the said John, and retained in his hands about $1,300 due from the guardian to the intestate William, and was allowed a credit therefor. The bond of the defendant Margaret was not included in the settlement and was left in the office of the probate judge.

Hill Humphrey brought an action on the guardian bond for the recovery of what was due him from the said John, against his administrator, Henry W. and the plaintiff and his co-surety Cox, in which there was a reference and report showing to be due $892.15, whereof $524.10 is principal money.

A *nol. pros.* was entered by the relator as to the administrator Henry W. The surety, Cox, pleaded his discharge in bankruptcy, and at spring term, 1878, judgment was entered up against the plaintiff alone for the amount due and for $128.70, the costs incurred, on which execution issued and the same has been paid by the plaintiff.

The object of the suit is to have the plaintiff subrogated to the rights of the testator, John, and of Hill, his ward, in regard to the bond of said Margaret, on which is due the sum of $912.22, and that he recover judgment against her therefor.

The defendants answered the complaint, and certain issues were submitted to the jury who in response say that,

1. The defendant Henry W. was duly appointed administrator with the will annexed of the deceased guardian, John Humphrey, at March term, 1868, of the proper court. 2. Margaret did execute her bond to the guardian of the infants for $494.57, as stated in the pleadings. 3. The bond did not constitute part of the assets retained out of the estate of the said John, for the intestate William by Henry W. the administrator of both; and 4. The guardian did not settle with all the wards except the defendant, Hill, during his lifetime.

Several exceptions appear in the record:

1. The plaintiff offered in evidence the account taken and reported in the suit of Hill Humphrey against Henry W. administrator of the said guardian, and his sureties, and it was objected that it was not admissible against the defendant, Margaret, because she was not a party to the proceeding. The evidence was received as against the other defendants. There was no error in the ruling of which the defendants can complain. The account was certainly competent against those who were parties to the suit and between whom it was taken. Nor would any prejudice come to the defendant, Margaret, upon an issue as to whom the bond belonged. If she owed the debt and had to pay it to some one, it was wholly immaterial to whom she paid it. The question of subrogation raises issues between others, but not with her. *Shields* v. *Whitaker*, 82 N. C., 516.

2. The next exception is to the admission of the testimony of the defendant, Henry, to show the execution of the bond, and this is also untenable. The witness is introduced to prove a transaction between his intestate and the defendant, Margaret, and although it is said by BYNUM, J., in *Ballard* v. *Ballard*, 75 N. C., 190, this is a transaction within the meaning of section 343 of the code, being an attestation of the deed from the living defendant to his intes-

tate, the evidence is not offered "against a party then defending the action as executor, administrator, heir at law, next of kin, assignee, devisee, legatee or survivor of such deceased person," but against a living defendant competent to testify herself about the same matter, and therefore the evidence is not within the reason of the rule which excludes. The scope and purpose of the act is thus stated by PEARSON, J., in *McCanless* v. *Reynolds*, 74 N. C., 301: "The proviso (in section 343) rests on the ground not merely that the dead man cannot have a fair showing, but upon the broader and more practical ground that the other party to the action has no chance, even by the oath of a relevant witness to reply to the oath of the party to the action, if he be allowed to testify. The principle is, unless both parties to a transaction can be heard on oath, a party to an action is not a competent witness in regard to the transaction." See also *Peebles* v. *Stanley*, 77 N. C., 243.

The answer besides is evasive, and dispenses with the necessity of proof of the allegation as to her, and no one else has any interest in the determination of the issue.

3. The plaintiff would be clearly entitled to the relief, if it appeared that all the wards had received their estates and none had a claim on this part of the trust fund. The jury find that the guardian did not during his life settle with all the other wards, and such as have not had their estate have a preferable right to the bond. It does not appear that any have asserted or intend to assert any claim to this part of the trust fund, and the plaintiff has an interest in its preservation not only for reimbursement but as some security for his subsisting liability upon the guardian bond. To leave the bond where it is, uncollected, may result in the loss of the debt, and the unsatisfied wards may not choose to enforce payment against their mother who owes it. It is to the common interest that this state of things does not continue, and in our opinion the plaintiff ought to have judg-

ment against the defendant for the debt and interest, and that whatever sum be realized be paid into the office of the clerk to await the further order of the court, and that meanwhile the unsatisfied wards be made parties, and have notice to come in and show cause if any they have why the same shall not be paid to the plaintiff. To the end that this may be done, the cause is remanded to the superior court of Onslow for such further proceedings as may lead to its final disposition, and it is adjudged that each party pay his own costs incurred in the appeal.

PER CURIAM. Remanded.

AMERICAN UNION TELEGRAPH COMPANY *v.* WILMINGTON, COLUMBIA AND AUGUSTA RAILROAD COMPANY.

Telegraph Lines—Appeal.

Under the act of March 19th, 1875, "to facilitate the construction of telegraph lines," taken in connection with the act of February 8th, 1872, for the same purpose, no appeal is allowable from an interlocutory ruling in the course of proceedings to establish such lines, but only from the final judgment therein.

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

Messrs. D. K. McRae and *D. L. Russell*, for plaintiff.
Messrs. Junius Davis and *Battle & Mordecai*, for defendant.

SMITH, C. J. The plaintiff, a corporation formed under the laws of New York, instituted in the superior court of New Hanover and is prosecuting a suit against the defendant corporation, under the act of March 19th, 1875, entitled "an act to facilitate the construction of telegragh lines," for

the condemnation of a right of way for the construction and operation of lines of telegraphic communication along the defendant's road. At the hearing of the application before Judge McKOY, at chambers on the 8th day of July last, he adjudged the plaintiff to be entitled to the right of way demanded, and appointed commissioners to ascertain and report the compensation to be paid to the defendant, as damages for the condemned property. The defendant thereupon applied for an appeal, and being refused now moves this court for a writ of *certiorari* to bring up the record of the cause, in order that the ruling of the judge may be reviewed. These are the undisputed facts set out in the affidavit, upon which the application is based, and the only point to be considered is whether the defendant is entitled to an appeal from the judgment rendered.

Upon a careful examination of the statute, and the portions of the act of February 8th, 1872, by reference incorporated with it, and regarding the policy indicated in both to favor the construction and early completion of such works of internal improvement, telegraphic being upon the same footing as railroad corporations, we are of opinion it was not intended in these enactments to arrest the proceeding authorized by them at any intermediate stage, and the appeal lies only from a final judgment. Then and not before may any error committed during the progress of the cause, and made the subject of exception at the time, be reviewed and corrected in the appellate court, and an appeal from an interlocutory order is premature and unauthorized.

It is the manifest intent of the act, as expressed in its title and apparent upon its face, to encourage and promote this and kindred enterprises for the public benefit, and to avoid the inconveniences and delays arising from opposition, as far as practicable and consistent with the rights of proprietors whose land or an easement in which is to be condemned and appropriated. In pursuance of this object

the first section confers upon the judge in vacation "the same power and jurisdiction as the superior court may exercise, and subject to the same right of appeal to the *superior* (an obvious mistake and intended for *supreme*) court, as from *final judgments* of the superior court," and it declares that the clerk shall "perform the same duties and be entitled to the same fees as in other similar cases in the superior court." He is also required to attend the court at the "court house of his county" and to "make all proper orders and entries, and issue all proper process, writs or notices as commanded by the superior court whether *in term time or in vacation.*"

The plain meaning of the section is to bestow upon the judge, during the intervals between the sessions of the court, the same powers that he can exercise at the term, and whatever is done becomes a record of the court. An appeal from any decision of his, made in the recess and at chambers, the court house being designated for such purpose, lies directly, as if made in term time, to the supreme court.

The equal jurisdiction vested in the judge when acting in vacation as when holding the regular term of the court, is wholly incompatible with a literal rendering of the section as allowing an appeal from his own decision to himself. Appeals in their proper sense are taken from an inferior and subordinate to a higher and superior jurisdiction. To avoid this absurdity and give effect to the general purpose of the enactment, it is necessary to substitute the word *supreme*, as designating the proper supervising tribunal, in place of *superior*, and this must be its true interpretation.

With this rendering, the appeal is only permitted from a final judgment of the judge in like manner as from a final judgment of the superior court, and in neither case from an interlocutory ruling as authorized in civil actions generally by C. C. P., § 299.

This construction derives support from the provisions of the eighth section, which gives "the right of appeal to the

supreme court" (the printed corrected by the enrolled act) when taken within "thirty days after the confirmation of the report of the commissioners," but meanwhile does not suspend the petitioner's right to take possession of an easement, privilege or use condemned, if the damages and costs adjudged be paid, or deposited as directed and adjudged by the superior court."

As the right to take possession is given only after final judgment of confirmation, and then is not interrupted by the appeal, we cannot reasonably understand the act as admitting the obstruction and delay resulting from an appeal at an earlier stage of the proceeding.

The constitutional provision (Art. iv., § 8,) that "the supreme court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference" is not impaired by postponing the exercise of the right to the final determination of the cause, when all the alleged errors may be reviewed, as in criminal prosecutions, and the section of the code which allows interlocutory appeals must yield to the special enactment governing the present case. The result of the denial of the appeal now asked is not to deprive the defendant of a trial of the matters of his defence in the appellate and supervising court, but to defer until at its conclusion the whole controversy can be heard and settled, and meanwhile the work proceeds without detriment to the public interests.

For these considerations the writ is refused.

PER CURIAM. Motion denied.

NOTE.—During the argument the plaintiff's counsel adverted to a gross error in sections 16 and 18 of chapter 138 in the published acts of the session of 1871-'72, ascertained by comparison with the enrolled act in the office of the secretary of state, whereby a large portion of section 18 is detached from its context and inserted in and made part of section 16. The error is repeated in the Revisal, ch. 99, the careful author of which, discovering the incongruity, attempts to bridge over the separa-

ting chasm by introducing a few necessary connecting words. As the laws are known and executed almost entirely upon the evidence of the printed copies, it is of the highest importance that entire accuracy be secured in the publication, and that a careful scrutiny and supervision be exercised while they are passing through the press. The occasion is a proper one for calling the attention of the general assembly to the subject.

JOSEPH SCOTT and others v. THOMAS ELKINS and others.

Reservations in Grants—Possession, Constructive and Adverse.

1. The rule announced in *Gudger* v. *Hensley*, 82 N. C., 481, as to the proof in reference to the reservations in grants, commented on and endorsed.
2. The possession by a lessee of a part of a tract of land gives the lessor a constructive possession of the entire tract, but this possession, outside the boundaries of the tenant's actual occupation, will not divest by lapse of time a title superior to that of the lessor.
3. The existence of visible and definite boundary marks is required to enlarge a possession beyond the limits of actual occupation, or a *possessio pedis*, and to confer a right. But an entry under a deed or other instrument purporting to pass land and defining its limits, is in law an entry into the whole tract, except as against a better title to a part not actually occupied; and not only are no visible boundaries necessary, but if they existed, they would be controlled by the conveyance under which the entry was made.

(*Gudger* v. *Hensley*, 82 N. C., 481; *McCormick* v. *Monroe*, 1 Jones, 13; *Melton* v. *Monday*, 64 N. C., 295; *Lenoir* v. *South*, 10 Ired., 237; *Graham* v. *Houston*, 4 Dev., 232; *Dobbins* v. *Stephens*, 1 Dev. & Bat., 6; *Lamb* v. *Swain*, 3 Jones, 370; *McMillan* v. *Turner*, 7 Jones, 435; *Williams* v. *Wallace*, 78 N. C., 354; *Davis* v. *McArthur*, *Ib.*, 357; *Thomas* v. *Kelly*, 13 Ired., 43, cited and approved.)

CIVIL ACTION to recover land, tried at Fall Term, 1879, of BUNCOMBE Superior Court, before *Graves*, *J.*

The defendants appealed from the judgment of the court below.

Messrs. Reade, Busbee & Busbee and *J. M. Gudger* for plaintiffs.

Mr. James H. Merrimon, for defendants.

SMITH, C. J. The plaintiffs derive title to the land in dispute under a grant from the state issued April 12th, 1798, to William Neel and Joseph Dobson, a deed from the last named grantee made December 8th, 1803, to John Templeton, and a conveyance dated November 2nd, 1807, from him to William Scott, the ancestor of the plaintiffs. The deeds purport to convey not a moiety, but a sole and absolute estate in fee in the land. William Scott died in 1842, intestate, and the plaintiffs are his heirs at law.

In 1834, William Scott leased a portion of the premises to John Wilson, who entered into and held possession until his death, for a period of eight years. The defendants claim under a grant issued November 29th, 1796, to John Gray Blount, a sale and conveyance of part of that described in the grant, by his executors under a power contained in his will, dated in December, 1835, to Robert and James Love, and two title bonds, each for fifty acres, parcel of the land, one dated June 26th, 1838, to Allison Elkins; the other September 18th, 1840, to Pleasant Bankenship. The plaintiffs exhibited also in evidence a deed executed October 15th, 1850, to said Allison Elkins, conveying ten acres of the tract occupied by the lessee, (Wilson,) and proved that the respective vendees each took possession of the lands described in the contract of sale to him, the former in the summer of 1858, and the latter in the year 1839, and that these are parts of the tract in dispute.

The absence of the plat, so often referred to, produces obscurity in the narrative of facts constituting the case on

appeal, and prevents us from fully understanding the nature and extent of the occupation under the title bonds, and its effect upon the continuity of the adverse possession of the plaintiffs' lessee. Our attention will therefore be confined to the errors assigned by the appellants, and specified in the record, and the rulings of the court therein.

1. We have had occasion heretofore to advert to the non-production of the list of entries within the boundaries of the grant to Blount, which in direct terms are excepted from its operation, and the inferences sought to be drawn from the absent paper, in *Gudger* v. *Hensley*, 82 N. C., 481, and to re-affirm the rulings in *McCormick* v. *Monroe*, 1 Jones, 13, and *Melton* v. *Monday*, 64 N. C., 295, and will merely add that the copy, made evidence by the statute, is certified to be a full and perfect transcript from the book of registration. It must then be assumed that the excepted entries were never attached though referred to in the grant, or that if they were, they have not been registered, and in either case there is no evidence of a suppression or withholding by the defendants, to which the doctrine of presumption *contra spoliatorem* can apply. But the error is not material, since whether the disputed land lies within the operative words of the grant, or among the exempted entries, the result will not be changed.

2. The defendants further except to the ruling of the court, as to the extent of the constructive possession of the lessee, and insist that by law it is limited to the lines of the demised land, and cannot enure to the benefit of the lessor for the entire tract described and conveyed in the deed to him.

While the proposition is correct as applied to the relations subsisting between the parties to the lease, and the lessee is only in possession of the part embraced in the contract, yet as against all others having a superior title to the invaded portion of the premises, or without title, the posses-

sion by the lessee is an assertion of the lessor's right to the entire land of which it forms a part, and extends his constructive possession, through the tenant, to its boundaries. This possession will not divest a superior title to a part outside the actual occupancy, for the reason that no action could be maintained by the true owner, and a constructive possession not exposing one to an action does not take away or impair an uninvaded legal right. It is by reason of acquiescence in a prolonged and continuous adverse holding, and the failure of the owner to assert his claim by entry or action, when the action will lie, that an imperfect ripens into and becomes in law a perfect title. The rule was correctly laid down in the instructions to the jury and is abundantly supported by authority. *Lenoir* v. *South*, 10 Ired., 237; *Graham* v. *Houston*, 4 Dev., 232; *Dobbins* v. *Stephens*, 1 Dev. & Bat., 6; *Lamb* v. *Swain*, 3 Jones, 370; *McMillan* v. *Turner*, 7 Jones, 435; *Williams* v. *Wallace*, 78 N. C., 354; *Davis* v. *McArthur*, *Ibid*, 357.

3. It is next contended that to give effect to the seven years adverse occupancy under color of title, it must be "under known and visible lines or boundaries," distinctly pointing out and defining the land.

We concur in the instructions given to the jury on this point also. The existence of visible and definite boundary marks is required to enlarge a possession beyond the limits of *actual occupancy* or a *possessio pedis*, and to confer a right. But an entry under a deed or other instrument purporting to pass land, and describing and defining its limits, is in law an entry into the whole tract, except as against a better title to a part not actually occupied; and not only are no visible boundaries necessary, but if they existed they would be controlled by the conveyance under which the entry was made. The principle governing in such case is thus stated by RUFFIN, J.: "Where one enters under a conveyance of some colorable title for a particular parcel of land, then the

rule is that possession of part is *prima facie* possession of the whole not occupied by another, which may be safely acted on, *as the documentary title defines the claim and possession.* But it is clearly otherwise where one enters without any such color of title, for then is there nothing by which his possession can be constructively extended an inch beyond his occupation." *Thomas* v. *Kelly*, 13 Ired., 43.

As therefore under the instructions of the court the jury find the issues for the plaintiffs, and among them, that the possession under the deed from Templeton to Scott, which undertakes and in form is sufficient to convey the absolute and sole estate in the land, has been *continuous* and *unbroken* for more than seven years through the tenant of the bargainee; the legal effect of the finding is to vest and perfect his legal title to the land, and it is not important whether the defendants acquired or did not acquire an estate under the Blount grant. If the title was in the defendants, or any of them, or outstanding in a stranger, not under disability, it is divested and the right of entry tolled. The exceptions are untenable and the verdict must not be disturbed.

Before concluding the opinion we will call attention to the careless manner in which the record comes before us and point out some of its imperfections. The issues were framed to meet the controverted allegations of fact presented in the original complaint and answer, and are not modified to meet the changed aspect of the case shown in the subsequent amendments. As an illustration of the incongruity, the issue is as to the title of *Joseph Scott*, in whose name alone the suit was brought, disregarding the numerous others afterwards by amendment associated as plaintiffs with him. We are therefore compelled to interpret the general finding set out in the record as applying to all disputed questions of fact arising upon the pleadings as amended. The absence of the plat to which frequent reference is made, as has been before observed, is calculated to lead to a mis-

apprehension of the facts of the case. Facts are stated and not relied on, such as the interfering possession under the title bonds which may have the effect of breaking the continuity of the possession by the lessee, and defeat his acquisition of the estate by occupancy for his lessor.

Our determination of the case therefore depends upon the decision of the points of law raised by the exceptions alone and in them we find no error.

No error. Affirmed.

JONATHAN WALKER v. WILLIAM E. GURLEY.

Mortgage Sale—Injunction—Excusable Neglect.

1. Where the complaint in an action for an injunction alleges that the defendant has sold a tract of plaintiff's land under a power of sale in a mortgage to secure a usurious debt, becoming purchaser at such sale for an inconsiderable portion of the debt, and has obtained judgment for the balance of such claim and sold all the plaintiff's other land to satisfy the execution thereon, and asks that such sale and judgment be set aside and that the execution of the writs of possession in the hands of the sheriff be stayed until the equities between the parties can be adjusted; the defendant is entitled upon the coming in of an answer fully denying the charges of the complaint, to have a temporary injunction, founded upon such allegations, dissolved.
2. A party to an action is not entitled to an injunction against execution on a judgment which might have been set aside by motion in due time under section 133 of the code.

(*Wilder* v. *Lee*, 64 N. C., 50; *Heilig* v. *Stokes*, 63 N. C., 612; *Capehart* v. *Mhoon*, Busb. Eq. 30, cited and approved.)

MOTION by defendant to vacate an injunction heard at Chambers on the 28th of January, 1880, (in an action pending in McDOWELL Superior Court) before *Avery, J.*

The plaintiff appealed from the ruling of the judge below.

No counsel in this court for plaintiff.
Messrs. W. H. Malone and *P. J. Sinclair*, for defendant.

DILLARD, J. In order to a proper understanding of the error assigned in the judgment of the court below vacating the injunction, from which the appeal is taken, it is necessary to state the material facts and the scope and object of the suit.

Plaintiff alleges that in 1866 he executed his note to defendant for one hundred and sixty seven dollars and sixty cents, including a sum for heavy usurious interest, and at the same time conveyed by the mortgage deed for its security a tract of land on Cane creek with a power of sale on twenty days advertisement after the first day of May, 1867, and that defendant, after the day of default, without proper notice, sold and purchased the land himself, which was worth the whole debt, at the sum of fifty dollars.

That immediately after the sale, defendant warranted and recovered judgment for the balance of the note, and docketed a transcript of the judgment in the superior court, and under an execution issued thereon caused to be sold and purchased himself, the only other tract of land which the plaintiff owned, called the Marshall place. That thereupon defendant instituted two actions to recover possession of said tracts of land, and at fall term, 1878, recovered judgment by default, and now has in the hands of the sheriff executions for the delivery of possession and for costs, under which he is about to be turned out. And as an excuse of his failure to defend said actions, plaintiff alleges that he employed counsel to represent him and expected him to put in his defence, but he failed to mark his name or put in any defence whatever.

The prayer for relief is that as the sale by defendant to himself under the mortgage did not alter the relations of the parties, and the land mortgaged is more than sufficient to pay the debt, the sale of that tract and also of the one sold by the sheriff may be set aside; that the judgment in the justice's court and the transcript thereof on the docket of the superior court, and the judgments of the superior court in the actions brought to recover possession, may also be set aside, and that after ascertaining the true debt to defendant, the tract of land conveyed in the mortgage may be resold by decree of the court, with prayer for injunction to stay the execution of the writs of possession in the hands of the sheriff until the ultimate trial of the action. Upon the application of the plaintiff on the foregoing facts, His Honor granted the injunction, subject to the motion of defendant to vacate it at any time on motion. At the next term of the court the defendant answered as to the material allegations of the plaintiff in substance as follows:

He denied the existence of any usury in the note secured by the mortgage. He denied that he sold the land as mortgagee to himself without proper notice, but on the contrary alleged that the deed was not a mortgage but a deed in trust, whereby the land was conveyed to William C. Gurley for the security of defendant's debt, and in proof thereof exhibited with his answer the original deed, and he alleged that the sale was made by the trustee and not by himself, not on the short notice prescribed in the deed, but a ninety days notice.

Defendant denied that plaintiff's counsel failed to attend to his interest in the matter of the two actions to recover the land, but on the contrary averred that his counsel with consent of defendant's counsel had and kept in his hands from one court to another the complaints in the two suits, and afterwards declined to file answers for the plaintiff.

On the filing of answer, defendant moved to vacate the

injunction and on consideration of the case as made by the complaint and answer, the court ordered the injunction to be vacated as to the writs of possession in the hands of the sheriff, but continued it as to the costs, it appearing to the court that the defendant prosecuted his suits to recover the land *in forma pauperis*, and from this judgment the appeal is taken.

It is to be observed that the judgment in the justice's court, after the sale of the land under the mortgage, established the balance due of the note as a debt against the plaintiff, and the same together with a transcript docketed still existing and not reversed or vacated on appeal or motion in the cause, is to be taken as concluding the plaintiff in this action from any defence for usury or other thing anterior to the date of the judgment, and therefore on the motion to vacate the injunction, it is to be taken that the execution, under which one of the tracts of land was sold, was for a true debt of the plaintiff. And as to the other tract alleged to have been sold by defendant as mortgagee and purchased by himself at his own sale, the fact turns out to be by the original deed exhibited by defendant's answer and not denied, that the same was conveyed, not to the defendant as mortgagee, but to William C. Gurley, and was sold by him, and the defendant as purchaser having recovered judgment for each of said tracts of land in a court of competent jurisdiction, the said judgments do establish the right of property or at least the right of possession of the defendant therein, and they standing unreversed by appeal or motion in the cause are also to be taken as conclusively establishing at least a present right of possession against the plaintiff.

It is necessary to hold the plaintiff as bound by all the matters adjudged in the said action before the justice of the peace, and the two brought in the superior court to recover possession of the land, and also to be barred of all defences which but for his laches or the fraud of the defendant he

might have made therein in order that there may be an end of litigation. *Wilder* v. *Lee*, 64 N. C., 50.

Here, there is no pretence of any fraud practiced by defendant on the plaintiff whereby he was prevented from making his defence. The failure to put in his plea of usury before the magistrate, or to set up any equitable defence he might have against the sale under the mortgage or the recovery of the land in the suits for that purpose, was the fault of the plaintiff, and in the case of the alleged surprise in the fact of his attorney making no defence, the remedy to plaintiff, if any he had, was under C. C. P., section 133, by a motion in the cause, and the omission to resort to that mode of relief debars him from making use of the same matter in an independent action. *Wilder* v. *Lee, supra.* The defendant then was entitled to be viewed in the light of having a right of possession adjudged and established at law, and as such, on the filing of his answer fully, completely, and directly denying the facts on which any equity in plaintiff's favor arose, it was his right to have the injunction dissolved as in the case of common injunctions. *Heilig* v. *Stokes*, 63 N. C., 612; *Capehart* v. *Mhoon*, Busb. Eq., 30.

The supposed equity of the plaintiff in the alleged fact of a sale by defendant as mortgagee to himself and without proper notice, is fully denied by the answer, and defendant sustains his denial by the production of the original deed under which one of the tracts was sold, which was a deed in trust to William C. Gurley to secure defendant, and not a mortgage. All the facts being denied on which any equity in the plaintiff could rest, the injunction was properly dissolved as to the writs of possession in the complaint mentioned.

There is no error, and this will be certified to the court below.

No error. Affirmed.

W. H. MOTZ v. J. & E. B. STOWE.

Executions — Application of Fund — Equitable Assignment — Bankruptcy — Notice.

1. Where several executions come into the hands of a sheriff before a sale of the debtor's property, it is the duty of the sheriff to apply the proceeds of sale to the senior execution.
2. And as soon as a sheriff receives money in payment of an execution, the law makes the application, and it is a satisfaction of the judgment; and such money in the sheriff's hands is held by him to the use of the judgment creditor or his assignee, who may make an equitable transfer of his interest—whether in the form of an order or assignment, or whether the same be recorded or not.
3. An assignee in bankruptcy takes the estate of the bankrupt subject to all the equities against it, and a purchaser at his sale takes in like manner, whether he had notice of the equities or not.
4. Assignment of equitable interests discussed by ASHE, J.

(*Allemong* v. *Allison*, 1 Hawks, 325; *Henry* v. *Rich*, 64 N. C., 379; *Murrell* v. *Roberts*, 11 Ired., 424; *Steadman* v. *Taylor*, 77 N. C., 134; *Clerk's Office* v. *Bank*, 66 N. C., 214, cited and approved)

APPLICATION of sheriff for directions as to the proper distribution of fund raised by executions against defendants in favor of the plaintiff and other creditors, heard at Chambers in LINCOLNTON, in July, 1879, before *Schenck, J.*

The matter was heard upon exceptions to a referee's report, and Shipp & Bailey, creditors, appealed from the ruling of the judge below.

Messrs John D. Shaw, Hoke & Hoke and *Hinsdale & Devereux* represented the interests of the different claimants.

ASHE, J. The sheriffs of Lincoln and Gaston counties having funds in their hands, collected by virtue of executions against J. and E. B. Stowe, in their respective counties,

not knowing how the same should be distributed among several judgment creditors, applied to Judge Schenck, of the 6th judicial district, for advice as to the application of said funds. Notice of the application was ordered by His Honor to be issued by the clerk of the superior court of Lincoln county to all the creditors interested in the distribution of the funds, and by consent of parties it was referred to Geo. F. Bason to find and report, to His Honor at chambers, the amount of money in the hands of each of said sheriffs, derived from the sale of land belonging to J. and E. B. Stowe or either of them, the amounts and dates of docketing all judgments unpaid in both counties, and all facts that may be necessary for a proper distribution of the funds. The referee made his report in due time, and exceptions were taken thereto by Messrs. Shipp & Bailey. His Honor overruled the exceptions and confirmed the report of the referee, and directed how the money should be applied.

As we discover no error in the principle on which His Honor directed the distribution of the funds in the hands of the sheriff of Gaston, and that collected by the sheriff of Lincoln in August, 1878, it will be needless to advert to that branch of the case, except so far as it may be necessary to do so in considering the applications of the sheriff of Lincoln.

The referee reported that there was in the hands of J. A. Robinson, sheriff of Lincoln county, the sum of twelve hundred and fifty dollars, collected as follows: six hundred and ninety-six dollars thereof by a sale in 1875, of the lands of Jasper Stowe under various executions, returnable to spring term, 1875, of Gaston superior court; fifty-five thereof by a sale of the lands of said Jasper Stowe, and five hundred thereof by a sale of the land of E. B. Stowe, in August, 1878, under executions returnable to fall term, 1878, of Gaston superior court, issued upon judgments in favor of Beebe & Foyle, J. R. Falls, Sarah Beatty, W. H. Michal,

Wiley Rudisill, and J. C. Burroughs, all of which were rendered at spring term, 1870, of Gaston superior court and docketed in the county of Lincoln. That in 1875, when the sheriff of Lincoln made the sale by which he made the six hundred and ninety-six dollars mentioned above, the oldest judgment of record in Lincoln was one in favor of *W. H. Motz, administrator,* v. *J. and E. B. Stowe,* for some two thousand dollars, which was also a transcript from Gaston. Before said sale in 1875, it had been regularly assigned for value to Dr. Wm. Sloan, and the assignment put upon the record by the plaintiff therein. During the year 1875, and before the sheriff had made any disposition of this fund of six hundred and ninety-six dollars, Sloan made an assignment in writing to Messrs. Shipp & Bailey, of which the following is a copy:

In consideration of legal services performed and to be performed by Shipp & Bailey, attorneys at law, for me, I hereby assign to them the money now in the hands of the sheriff of Lincoln county raised upon executions belonging to me against the property of J. and E. B. Stowe, about six hundred dollars. This the 8th of November, 1875.

(Signed) Wm. Sloan.

The assignment was made before Sloan went into bankruptcy, and before any suits were brought or judgments obtained against him, but was never recorded. Mr. Shipp immediately notified the sheriff and demanded the money.

In 1876, the sheriff of Gaston raised some twelve thousand dollars by a sale of the property of the Stowes, the distribution of which was referred to W. L. T. Prince. All the judgment creditors had notice of this proceeding. Shipp & Bailey had no actual notice served upon them, nor did they ask to be made parties, or make any claim for any part of this fund, nor did they give notice of their claim on the Lincoln fund. That the claim of Shipp & Bailey was neither presented nor passed upon by Mr. Prince in this

reference, and that Jasper Stowe was before Prince and examined as a witness.

The fund in Lincoln was not considered in this reference, but a report was made by Prince distributing the Gaston fund, and a decree of the court was made confirming Prince's report. Among the judgments paid off in full under this distribution, was the Motz judgment above mentioned, and Sloan's assignee in bankruptcy received the money paid thereon and entered satisfaction thereof upon the record.

The contest for the fund in Lincoln was between Shipp & Bailey and the creditors for the six hundred and ninety-six dollars; and Beebe & Foyle and the remaining creditors about the entire amount, Beebe & Foyle claiming the whole and the other creditors claiming to come in and share with them.

He reports that the sum of seventy-five dollars was to be allowed to the referee for making the report, to be divided ratably between the different funds—thirteen dollars charged on the Gaston fund and sixty-two on the fund in the hands of the sheriff of Lincoln—and as his conclusion of law, that Shipp & Bailey by the assignment of Sloan acquired no right to any part of the fund in the hands of the sheriff of Lincoln; Shipp & Bailey excepted to the report:

1. In that the referee has erred in the conclusion of law drawn by him from the facts, to the effect that these exceptants are not entitled to the six hundred and ninety-six dollars in the hands of the sheriff of Lincoln county, particularly specified in the report, or any part thereof.

2. In that he has erred in deciding that Beebe & Foyle are entitled to the whole of said fund, for if the exceptants are not entitled to the whole of the six hundred and ninety-six dollars, he should have found that it should be divided *pro rata* amongst the seven judgments obtained in Gaston

county and docketed in Lincoln, and particularly specified in said report.

It appears from the facts found by the referee, that at the time of the sale of the land of J. and E. B. Stowe in 1875, there were sundry executions in the hands of the sheriff of Lincoln county, and that of Motz assigned to Sloan had priority, by reason of its seniority over all the others; that the sum of six hundred and ninety-six dollars was then raised by the sale under those executions; and that before the bankruptcy of Sloan, or any suits brought or judgments obtained against him, he assigned to Shipp & Bailey the amount in the sheriff's hands applicable to his judgment, and notice thereof was given him and a demand made for the money. All the judgments upon which these executions issued were rendered in the superior court of Gaston county, and were regularly docketed in the county of Lincoln.

It is well established law that where several executions come to the hands of the sheriff before a sale of the debtor's property, it is the duty of the sheriff to apply the proceeds of the sale to the senior execution, and even when he has seized property under a *fieri facias*, and before he has completed execution another *fieri facias* comes to his hands with a prior lien, or having the preferable right of satisfaction, he should satisfy the last mentioned execution. *Allemong* v. *Allison*, 1 Hawks, 325; Herman on Executions, 271. It is not only the duty of the sheriff to apply the proceeds to the satisfaction of the oldest judgment lien, but in contemplation of law it is so applied unless the sheriff in violation of duty makes a misapplication of the fund to a junior lien. Just as soon as a sheriff receives money in payment of an execution, the law makes the application and it is a satisfaction of the judgment. *Henry* v. *Rich*, 64 N. C., 379; *Murrell* v. *Roberts*, 11 Ired., 424.

But when there are several executions in the hands of the

sheriff, he may if he see proper discharge a junior execution in preference to one having priority, by incurring a liability to an action for damages to the creditor in the senior execution; but if he fails to do so, then the law makes the application. In our case he has never made any application of the proceeds of the sale to any execution. So when the money came into his hands, in contemplation of law, it was applied to the Motz judgment, and was money in his hands had and received to the use of Sloan, the assignee of Motz. Herman on Executions, § 267.

It was the duty of the sheriff to have returned the six hundred and ninety-six dollars after deducting the costs, his fees, and commissions, with the execution into the office from which it issued for the use of Sloan, or to have paid it to Sloan, to his order or to his attorney. Herman on Executions, § 268. If then the six hundred and ninety-six dollars was held by the sheriff to the use of Sloan, and it was the duty of the sheriff to pay over the same to him or to his use, it was such an interest in the fund as might be equitably assigned, and it would make no difference whether the transfer was in the form of an order or assignment, nor whether it was recorded or not. "As a general rule anything written, said, or done, in pursuance of an agreement and for valuable consideration, or in consideration of some pre-existing debt, to place a money right or fund out of the original owner's control, and to appropriate in favor of another person, amounts to an equitable assignment. Hence no writing or particular form of words is necessary, provided only a consideration be proved and the intention of the parties made apparent by suitable evidence." 1 Schouler on Personal Property, 100. And to the same effect is Adams' Equity, 170–1, where it is said, in order to pursue as nearly as possible the analogy of law, it is required that the assignment of equitable interests should be perfected by notice to the trustee, so as to deprive the assignor of subse-

quent control, and to effect a constructive delivery to the assignee. The principle of constructive delivery by notice to the trustee is applied to a debt or other chose in action, and there is no special form necessary; "but any declaration, either by writing or word of mouth, that a transfer is intended, will be effectual, provided that it amount to an appropriation to the assignee; for inasmuch as the fund is not assignable at law, nor capable of manual possession, an appropriation is all that the case admits." Adams' Equity, 54–55. The law does not require such an assignment to be registered.

With the application of the money raised by sale of Stowe's property in the county of Gaston (as reported by W. L. T. Prince) Shipp & Bailey have no concern. They had no actual notice of that reference, and their rights cannot be affected by it. That was a question that lay between Sloan's assignee, the debtor, and the other creditors. If they or any of them submitted to an application of the fund which deprived them of their rights, without resorting to the proper remedy to redress the wrong, it was their own fault, and they must bear the loss. Shipp and Bailey having acquired a good equitable title to the six hundred and ninety-six dollars in the hands of the sheriff of Lincoln, cannot be defeated of their rights by any act of Sloan nor of his assignee. The assignee in bankruptcy takes the estate of the bankrupt subject to all equities against it. It is settled in this state that a purchaser at an assignee's sale takes subject to all equities whether he had notice of them or not. *Steadman* v. *Taylor*, 77 N. C., 134; *Clerk's Office* v. *Bank*, 66 N. C., 214.

We hold that His Honor committed an error in overruling the first exception taken by Shipp & Bailey, and our decision on that point disposes of the second exception.

We are of the opinion, and so decide, that Shipp & Bailey are entitled to the six hundred and ninety-six dol-

lars, subject to the costs of the action incurred in the superior court of Lincoln, the sheriff's fees and commissions due under the Motz execution, and to a ratable part of the sixty-two dollars charged upon the Lincoln fund for the allowance to the referee for making report. Let this be certified to the superior court of Lincoln county, that the judgment of that court may be modified in accordance with this opinion.

Error. Reversed.

J. M. HUTCHISON v. H. W. RUMFELT and another.

Appeal—Certiorari.

1. A *certiorari* will not be granted by this court, where an alleged oral agreement between counsel to await the decision of a certain other case, is denied.
2. In such case, an allegation that the petitioner was misled by a conversation between his counsel and the counsel of his adversary, does not bring the case within section 133 of the code.

(*Wade* v. *Newbern*, 72 N. C., 498; *Rouse* v. *Quinn*, 75 N. C., 354; *Adams* v. *Reeves*, 74 N. C., 106; *Walton* v. *Pearson*, 82 N. C., 464, cited and approved.)

PETITION by plaintiff for a *Certiorari*, heard at June Term, 1880, of THE SUPREME COURT.

Messrs. J. E. Brown and *G. V. Strong*, for petitioner.

Messrs Reade, Busbee & Busbee, Gilliam & Gatling, and *A. W. Haywood, contra.*

DILLARD, J. In this case, McLean, one of the defendants, by a motion in the cause sought to enjoin a sale of his

homestead under an execution, on the ground of its allotment under a previous execution, which not being excepted to nor appealed from was claimed to be *res adjudicata*, and upon other grounds; and on the 27th of February, 1879, His Honor, Judge Schenck, found the facts and ruling against the said McLean on all the other grounds, and held with him on the point of the estoppel of the previous allotment of the homestead and granted the injunction, from which judgment both sides made entry of appeal and of waiver of notice of appeal.

There being no necessity for a statement of a case of appeal, McLean, in whose favor the decision was, perfected the appeal on his part by giving an appeal bond within time so as to carry up the case for him, in the event that an appeal was taken on the part of the plaintiff; but on the part of the plaintiff no appeal bond was filed until the 31st of July next after, and at the last term of the court, on motion of McLean, the appeal was dismissed for the want of appeal bond within the time prescribed. See 82 N. C., 425.

The present petition is for a *certiorari* to relieve against the lost appeal on the ground of an alleged special agreement between counsel to await the decision of the supreme court in the case of *Gheen* v. *Summey*, (80 N. C., 187,) then before it, and on the further claim of being misled by a misunderstanding of a conversation had by plaintiff's counsel with McLean's counsel.

The alleged special agreement between the counsel to await the decision of the case referred to in the supreme court before an appeal should be taken, is denied, and in such case there being no writing nor entry of record showing its terms, the rule is established and must be adhered to, that this court will not go into the matter of passing upon the contradictory affidavits of counsel. *Wade* v. *City of Newbern*, 72 N. C., 498. *Rouse* v. *Quinn*, 75 N. C.,

354. *Adams* v. *Reeves*, 74 N. C., 106, and *Walton* v. *Pearson*, 82 N. C., 464.

The exception to the rule requiring an admission or a written memorandum on the record or elsewhere of a special agreement is where a waiver of code time is provable by the affidavits on the part of the party resisting the writ, as ruled in *Adams* v. *Reeves* and *Walton* v. *Pearson, supra*. Here, the waiver of the statutory requirements being expressly denied on the side of McLean, the plaintiff fails to bring his case within the exception, and must be refused the writ, unless relievable on the ground of being misled by an alleged conversation between the counsel of plaintiff and counsel of McLean, within the spirit of section 133 of the Code of Civil Procedure.

To hold that the plaintiff misunderstood and was misled by a conversation between his counsel and the counsel of his adversary, involves a decision that there was a conversation on the subject of dispensing with conformity to the statute, the terms thereof, and the reasonableness of plaintiff's being misled thereby, all of which, like the fact of the special agreement itself, rests upon the affidavits of the opposing counsel, and they being in conflict as to the subject matter of the conversation, as well as in respect to the terms thereof, we cannot undertake to hold that plaintiff was misled, or if misled, was excusably so, and on that footing to relieve against the dismissal of the appeal at the last term.

The writ of *certiorari* petitioned for is refused.

PER CURIAM. Petition refused.

J. R. LINDSAY v. SUSANNAH MOORE.

Appeal—Certiorari—In Forma Pauperis.

A *certiorari* will not be granted where the petitioner is unable to give bond for his appeal, unless it be shown that the judge below made an order allowing the appeal *in forma pauperis*.

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

Messrs. Battle & Mordecai, for plaintiff.
No counsel for defendant.

DILLARD, J. The case made by the plaintiff in his petition for a writ of *certiorari* in excuse of his not bringing up his appeal to the last January term, is, that after the trial of his case at Clay superior court in the fall of 1879, and the disagreement of counsel as to the statement of a case for this court, the judge made out a case of appeal at Haywood superior court, and forwarded it by mail to the clerk of the superior court of Clay, and that being unable to give the security for appeal as required by law, he presented his affidavit with certificate of counsel for leave to appeal as a pauper.

Petitioner is unable to state whether an order was made or not allowing him to appeal without the required security, but states that such an order was either made or intended to be made by the court, and suggests that the order was either lost out of the file of papers by his counsel, or was not made from oversight in the judge.

It is required of a party desiring to appeal, who is unable from poverty to give the required appeal bond, on affidavit of that fact, and a certificate of error in the decision of the court by some attorney practicing in the court, to procure an order of the court for leave to appeal without the usual

appeal bond. But here, the petitioner is unable to say whether any such order was ever made or not.

If the application to appeal *in forma pauperis* was refused from the want or insufficiency of the required affidavit and certificate of counsel, then his appeal was lost without remedy; or if it was allowed, an order should have been made. And in the exercise of due diligence, the petitioner in person or by counsel should have known it and been able on application to state the fact to be so.

The statute requires in the case of inability to give the required security for an appeal, that an appeal may be had without security on the order of the judge allowing it, and it is incumbent on a party claiming the benefit of this provision to show that an order of the court was made; but in this case the petitioner is unable to produce such an order or even to say one was ever made, nor can his counsel for him. The nearest approach to the requirement of the statute is that counsel say an affidavit accompanied with a certificate of counsel was presented to the judge, and that he granted the appeal. They do not say he made the order. Apart from the insufficiency of the ground above mentioned, it does not appear that petitioner, after the case of appeal was settled by the judge at Haywood court and mailed to the clerk of Clay county, ever inquired into its arrival in the clerk's office, nor concerned himself to know if it had been sent up, nor to know that it had or had not come to this court, of which he might easily have informed himself, as the appeals from his county were not called till the 9th week of the January term, and then again at the foot of the docket. In both points of view there was laches, and no sufficient excuse is shown, and the writ must be refused.

PER CURIAM. Petition refused.

J. M. ANDREWS and others v. ELI WHISNANT.

Certiorari—Appeal—Clerk's Fees.

A *certiorari* will not be granted where it appears that the petitioner lost his appeal by reason of his failure to comply with a demand for payment of clerk's fees for making out the transcript; nor, where he failed to attend to the same from the rendition of the judgment appealed from in August to the beginning of the next term of the supreme court in January, or during its sitting at said term.

(*Martin* v. *Chasteen*, 75 N. C., 96; *Office* v. *Lockman*, 1 Dev., 146, cited and approved.)

PETITION by defendant for *Certiorari*, and *Supersedeas* heard at June Term, 1880, of THE SUPREME COURT.

Mr. W. J. Montgomery, for plaintiff.
Messrs. Hoke & Hoke, for defendant.

DILLARD, J. A judgment for the recovery of a tract of land was obtained by plaintiff against the defendant at a special term of the superior court opened and held for the county of Rutherford in August, 1879, from which, the defendant says in his motion, he prayed an appeal which was granted, and that he filed bond according to law.

Defendant represents that he forwarded to the clerk of this court one dollar, the fee required in order to have his case docketed here, and that having done all things necessary to bring up the case, he confidently expected the appeal to be constituted in this court at the last term, but this not being done, the appellee procured a transcript and filed the same and he had the appeal on his motion dismissed, and now is threatening to turn him out of possession under an execution.

The prayer of the petitioner is for a writ of *certiorari* to

bring up the appeal in the nature of a substitute for appeal and for a *supersedeas* to the execution in the mean time.

Upon the petitioner's own showing he was inattentive to the prosecution of the appeal, and he furnishes no sufficient excuse for his laches.

From the rendition of the judgment in August to the beginning of the next term of this court in January, petitioner looked not after his appeal at all, and by way of excusing himself and putting the blame upon the clerk, he shows by the affidavit of the clerk that he made out the transcript and demanded his fees therefor, of which his counsel had notice, and that the appeal papers were not sent on for the reason that his fees were not paid.

The excuse given in our opinion makes the laches more inexcusable. The act of 1868–69, ch. 279, in what is put down as chapter I of chapter 279, introduces new sections 555 and 561 into Title 21 of the Code of Civil Procedure, and therein the clerk is expressly authorized to demand his fees in advance, and if not then paid, then it is provided that he may on motion have judgment for the same. And thereafter in other subdivisions of said chapter follow specifications or schedules of the fees to be taken by him and the other officers in said act mentioned. And then comes the act of 1870–71, ch. 139, whereby new schedules of fees are prescribed which are the same that are brought forward in Battle's Revisal, ch. 105, and in the 16th section of the act the whole of Title 21 of C. C. P. on the subject of fees, as well as all other acts prescribing the fees allowed to be charged, are repealed, but chapter I of chapter 279 of laws of 1868–69 is expressly left unrepealed and in full force.

The effect of this legislation is that the clerk had a right to demand his fees for making out the transcript at the time he performed the service, and herein it was but the embodiment in a statute of that right which he before had according to the decisions upon this subject. In *Martin* v. *Chas-*

teen, 75 N. C., 96, this court, in considering the question of the obligation of the clerk here to render services gratuitously to an appellant allowed to appeal as a pauper, held he was not bound to do so, and in speaking on that subject RODMAN, J., says, "an appellant who has given an undertaking is not entitled to the gratuitous services of the officers of the court, but must pay for them as he procures them if the officers demand it." And to the same effect was the law held to be in *Office* v. *Lockman*, 1 Dev., 146, in which case the court, admitting the practice to be for the clerk to wait for his fees until the end of the suit and the collection of the same under execution against the party cast, held that a party strictly speaking was answerable at all times for his costs.

It is entirely reasonable in itself for the clerk to have the right to demand payment of his fees for the service of making out a transcript for the defendant, for the appeal bond given was no security to the clerk, and if the clerk was obliged to perform the duty and wait until the end of the litigation for his fees, and take on himself the risk of the party's solvency, it would result in making the office of clerk so unremunerative that no fit person could be found to have it.

We think, then, that the demand of simultaneous payment of the fees by the clerk was proper in him, and the plaintiff being notified thereof, as we are to take it he was, from the fact that he does not negative such knowledge, it was great negligence in him not to pay the fees or otherwise so to arrange as to have the appeal papers to come forward.

The defendant not only was negligent in the respect above mentioned, but he gives no account of his failure to look after his appeal here during the January term of this court, extending through two months on the first call of the docket, and some two weeks more on the second call, during

which time the petitioner, with ordinary care for his interests, could have known that his case had not been sent up.

Under the circumstances, the laches of petitioner is inexcusable and his application for *certiorari* and *supersedeas* must be refused.

PER CURIAM. Motion refused.

W. W. GREEN and wife *v.* GREENSBORO FEMALE COLLEGE and others.

Surety and Principal—Payment of Interest—Statute of Limitations.

Payment of interest on a note by the principal, before it is barred by lapse of time, arrests the operation of the statute of limitations as to all the makers (sureties as well as principal), and the statute commences again to run only from the day when the last payment was made. Section 51 of the code construed.

(*Woodhouse* v. *Simmons*, 73 N. C., 30; *Davis* v. *Coleman*, 7 Ired., 724; *McKeithan* v. *Atkinson*, 1 Jones, 421; *Lowe* v. *Sowell*, 3 Jones, 67; *McIntyre* v. *Oliver*, 2 Hawks, 209; *Willis* v. *Hill*, 2 Dev. & Bat., 231; *Walton* v. *Robinson*, 5 Ired., 341, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of FRANKLIN Superior Court, before *Seymour, J.*

This action is brought upon a promissory note in the following terms:

GREENSBORO FEMALE COLLEGE, N. C.,

$2,000. *Greensboro, N. C., Nov. 7th*, 1872.

Two years after date the Greensboro Female College, as principal, and N. H. D. Wilson, J. A. Cunninggim, H. N. Snow, W. H. Hill, Cyrus P. Mendenhall, and Seymour Steel, as sureties, promise to pay to Sarah Susan Jones, or order,

the sum of two thousand dollars, for value received, with interest from the date, at eight per cent. per annum, payable annually, for money borrowed. Witness the signature of the President of the college, and our names, as above stated as sureties.

(Signed.) N. F. REID, President of Board of Trustees of G. F. College.
N. H. D. WILSON,
J. A. CUNNINGGIM,
H. N. SNOW,
W. H. HILL,
CYRUS P. MENDENHALL,
SEYMOUR STEEL.

The principal and the two sureties first named made no answer, and the other sureties for their defence rely upon the bar of the statute of limitations.

The material facts are set out in the case agreed, and it appears therefrom that the annual accruing interest was regularly paid by the principal debtor, up to and including the year ending Nov. 7th, 1877, and was duly credited on the note; that the sureties knew nothing of these successive payments nor gave assent thereto, and that the payee received the money through the Raleigh National Bank, and did not know from whom it came. The court gave judgment for the plaintiffs and the defendants appealed.

Messrs. Davis & Cooke, for plaintiffs.
Messrs. Gray & Stamps, for defendants.

SMITH, C. J., after stating the facts. The sureties are discharged by the delay in bringing the action within three years after the maturity of the note, (C. C. P., § 34, Par. 1) unless the payments made in the meantime prevent that result under section 51. The sole question then is, do these

payments repel the statutory bar as to the sureties as well as to the principal in the note?

The law is well settled by adjudications in England and in this state, that a partial payment by one of several makers of a promissory note given for a specific sum takes the case out of the statute as to all, and a like effect follows the payment of interest. Brown Act. at Law, Law Lib. 90.

The endorsement of such payments, before the expiration of the time limited for bringing the action and when the entry is against the interest of the creditor, is received as evidence of the fact that the money was paid. The rule is founded upon the community of interest among the debtors and the presumption that no one would make a false admission against his own interest. 2 Greenl. Evi., § 444; *Woodhouse* v. *Simmons*, 73 N. C., 30.

The same doctrine is declared by this court in *Davis* v. *Coleman*, 7 Ire., 424; *McKeithan* v. *Atkinson*, 1 Jones, 421; *Lowe* v. *Sowell*, 3 Jones, 67, and in other cases.

In *Lowe* v. *Sowell*, PEARSON, J., thus expresses the opinion of the court: "In an action on a joint and several bond, the idea that a plea of payment can be true as to one and not true as to another defendant, necessarily involves a contradiction; because payment by one obligor discharges the debt, and in the very nature of things must support the plea as to all the obligors. An action may be barred as to one defendant and not as to another; but a debt cannot be paid as to one defendant and unpaid as to another."

This was the legal effect of a partial payment in rebutting the presumption of full payment, arising under the statute from the lapse of time unexplained. But it was also decided in numerous cases that a promise by one member of a partnership firm after its dissolution to pay a partnership debt, revived the liability of the other member as well as his own; and in like manner the promise of one maker of a promissory note, made before the statutory bar was

reached, arrested the running of the statute as to all, and made the time of such promise a new starting point. *McIntyre* v. *Oliver*, 2 Hawks, 209; *Willis* v. *Hill*, 2 D. & B., 231; *Walton* v. *Robinson*, 3 Ired., 341; *Davis* v. *Coleman*, 7 Ired., 424.

In consequence of these rulings, the general assembly in 1852 passed an act that no acknowledgment or admission of a partner after the dissolution of the firm, or of a maker of a promissory note after the statutory bar obstructed a recovery, should repel the statute as to the other partners or the other makers. Rev. Code, ch. 65, § 22.

The purpose and meaning of the act are to withdraw the power of one member of a dissolved partnership, by his acknowledgment or promise to continue or revive the liability of the other, and of a maker of a note by the same means, to remove the protection which the statute had secured to the other makers. It does not undertake to interfere with the legal force and effect of a recognition of the debt by the payment of a part of it.

Such was the state of the law when the new limitations prescribed in the code superseded those previously existing in their application to causes of action thereafter accruing. By the new statute it is declared that "no acknowledgment or promise shall be received as evidence of a new or continuing contract whereby to take the case out of the operation of this title, unless the same be contained in some writing *signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.*" C. C. P., § 51.

We are aware of no case in which this clause has been construed by this court, and as it is silent as to the effect of a part payment upon the others, we may be aided in examining the adjudications in England upon a very similar enactment in ascertaining its true meaning.

In *Wyatt* v. *Hodson*, 21 E. C. L. Rep., 302, Chief Justice

TILDEN speaks as follows: "Then with respect to payment of principal or interest it provides that 'nothing herein contained shall alter, take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever,' not confining the effect to the individual paying. Why? Because the payment of principal or interest stands on a different footing from the making of promises which are often rash or ill interpreted, while money is not usually paid without deliber tion; and payment is an unequivocal act, so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment. * * * On the broad construction of the act, we think *payment* of money by one of several joint contractors not within the mischief or the remedy provided by the legislature against the effect of an oral promise."

More directly in point is the case of *Channel* v. *Ditchburn*, 5 M. & W. (Exch.) 494, in which PARK, B., says: "Since the decisions in *Atkins* v. *Tredgold*, and *Slater* v. *Lawson*, (cited in the argument) the court of King's Bench have twice decided that payment by one of two joint makers of a promissory note is sufficient to take the case out of the statute as against the other. The first of these cases was that of *Burleigh* v. *Stott*, where the defendant was sued as the joint and several maker of a promissory note, and there the court held that payment of interest by the other joint maker was enough to take the case out of the statute as against the defendant; and that it was to be considered as a promise by both so as to make both liable. Since this decision, the court of King's Bench have come to the same conclusion in the case of *Manderston* v. *Robertson*, 4 Man. & Ryl., 440."

Referring to a distinction in the argument drawn between payments made before and after the statute had run, he adds, that in *Manderston* v. *Robertson*, the payment was made after the six years had elapsed, and yet it was held to be sufficient.

The reservation contained in the section leaves to a partial

payment the force and effect unimpaired, which the act before possessed, in continuing the common liability in the light of the decisions to which we have adverted. The act of 1852 in terms confines to the person making an acknowledgment or admission, or doing an act which recognizes the obligation before the bar interposes against a recovery, the legal consequences flowing from either, but does not include such as may be made or done before, and hence does not apply to the facts of the present case.

Upon a full and careful review, we are of opinion and so declare that the payments of interest on the note, before it was barred by lapse of time, arrested the operation of the statute as to all the makers, sureties as well as principal, and it commenced again to run only from the day when the last payment was made.

This being the ruling of the court below, there is no error and the judgment must be affirmed.

No error. Affirmed.

FIRST NATIONAL BANK of Charlotte v. LINEBERGER, RHYNE & CO.

Surety and Principal—Endorser—Indulgence to Principal, when a Discharge to Surety—Usury.

1. Forbearance given by a creditor to the principal debtor, by an agreement which binds him in law and would bar his action against the debtor, discharges the surety, unless at the time of forbearance given, the creditor unqualifiedly reserves his rights and remedies against the surety.

2. The agreement for such indulgence, if not under seal, must be founded upon a sufficient consideration—such as is legally binding on the credi-

tor and one the debtor may enforce against him. But if the consideration be usurious, when such a contract is void, the agreement will not discharge the surety or endorser.

(*Evans* v. *Raper*, 74 N. C., 639, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of MECKLENBURG Superior Court, before *McKoy, J.*

The plaintiff declared upon a promissory note made by W. & R. Tiddy, for two hundred and sixty-five dollars, payable to the order of the defendants, Lineberger, Rhyne & Co., sixty days after date, and dated the 6th of March, 1874. And they allege that the said note was endorsed by the said Lineberger, Rhyne & Co., to them for money lent, and that no part thereof has been paid except the interest thereon up to January, 1876.

The defendants, by way of defence, say in their answer, after admitting the endorsement, that no notice was ever given to them of the failure of said makers to pay said note at maturity; that they have no knowledge or information sufficient to form a belief as to the fact that said note had not been paid by said makers, but they believe it had been paid; and for a further defence they say that after the said note became due, and without the knowledge or consent of defendants, plaintiff for a valuable consideration made an agreement with said W. & R. Tiddy, whereby they agreed to extend the time for the payment of said note by said makers for thirty days or more. Thereupon the following issues were submitted to a jury:

1. Did the plaintiff at or before the maturity of the note sued upon, receive from the makers thereof interest thereon in advance, and if so, when, at what rate, and for what time? Answer—They did; one and one-half per cent per month from maturity until January, 1876.

2. Did plaintiff, in consideration of the payment of interest in advance on the note sued on, agree with the makers

to forbear the collection of the said note for the time for which interest was so paid? Answer—They did.

3. Did the defendants have any knowledge of or assent to such agreement to forbear? Answer—They did not.

4. Did the plaintiff at the time of the agreement to forbear as to the maker, reserve its rights and remedies against the endorser? Answer—Yes.

5. Has the note or any part of it been paid? Answer—Yes; amount $71.55.

Upon this finding of the jury there was judgmnet for the plaintiff and the defendants appealed to this court.

Messrs. Bynum & Grier, for plaintiff.
Messrs. A. Burwell and *Jones & Johnston*, for defendants.

ASHE, J. There was no exception taken on the trial to the issues submitted to the jury nor to the ruling of the court upon the introduction of evidence, and the only question for our consideration is, was there a proper judgment rendered upon the finding of the jury.

The principle is well settled that time or forbearance given by the creditor to the principal debtor by a promise or contract which binds him in law and would bar his action against the debtor, the surety is discharged. Because it essentially varies the terms of the original obligation which ceases to be that for the due discharge of which he became surety, and would deprive the surety of the power of instantly saving himself by suit against the debtor, if he should be forced to pay the debt. Parson's on Notes and Bills, 259; Daniel on Negotiable Instruments, § 1312; Story on Notes, § 14.

But this general principle is subject to qualification. The surety will not be discharged by indulgence given to the principal when at the time of the agreement for forbearance there is an unqualified reservation of the creditor's rights

and remedies against the surety. The reason assigned for this doctrine is, because the reservation rebuts the implication that the endorser was meant to be discharged, and prevents the rights of the endorser against the maker being impaired. For the endorser after such an agreement may immediately pay the debt and bring his action against the maker, and his consent that the creditor shall reserve his remedy against the endorser is impliedly a consent that such endorser shall have recourse against him. *Evans* v. *Raper*, 74 N. C., 639; *Rees* v. *Bennington*, White and Tudor, Hare and Wallace Notes, 382; Daniel on Nego. Inst., § 1322; Story on Notes, § 416. These authorities fully sustain the judgment of His Honor in the court below, upon the finding of the jury upon the issues submitted.

But there is still another view of the case which is equally strong in support of the judgment of the superior court.

To make an extension of time to the debtor have the effect of exonerating the endorser or surety, it is not merely necessary that there should be an agreement which varies the original contract by postponing the time for its performance beyond that fixed originally by the terms of the obligation, but the agreement for indulgence, if not under seal, must be founded upon a sufficient consideration. It must be such as is legally binding upon the creditor, one that the debtor may enforce against him, either as a cause of action or as a defence, for if he could not, the surety or endorser will not be discharged. Parsons on Contracts, 240; Daniel on Nego. Instr., § 1315, and *Rees* v. *Bennington, supra*, 383. Hence it must be, that if the consideration for the forbearance be usurious, when such a contract is void by law, the agreement will not discharge the endorser. *Rees* v. *Bennington, supra*, 384, and cases there cited in note; Danl. Nego. Inst., § 1317; *Richmond* v. *Standcliff*, 14 Vermont Rep., 258; *Vilas* v. *Jones*, 1 Comstock, 286, 287.

In this last case BRONSON, J., who delivered the opinion

of the court, in reference to some contrariety in the decisions of some of the courts, with respect to the effect which the fact might have upon the rights of the surety, whether the usurious contract was executed or executory, said: "The contract for usury is equally void whether the money is actually paid or only promised to be paid. I think it is impossible to maintain that either the promise or the payment of usury is a good consideration at all."

According to the finding of the jury in our case upon the first issue, the agreement for the indulgence was void. The act of 1876–77, ch. 91, § 3, declares "that the taking, receiving, reserving, or charging a rate of interest greater than is allowed in the preceding section (six or eight per cent.) when knowingly done, shall be deemed a forfeiture of the entire interest, which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon; and in case a greater rate of interest has been paid, the person by whom it has been paid or his legal representative may recover back, by an action in the nature of an action for debt, twice the amount of the interest paid."

The purpose and effect of this statute were not only to make void all agreements for usurious interest, but to give a right of action to recover back double the amount after it has been paid. The contract then in our case to pay the one and a half per cent. per month for the indulgence was void. If agreed to be paid in the future the promise was void, and none of the sum so promised to be paid could be collected by action. And if paid down, double the amount paid could be recovered back. So the agreement taken either way had no legal binding force upon the makers, and therefore according to the authorities cited the endorser was not discharged. There is no error and the judgment of the superior court must be affirmed.

No error. Affirmed.

M. ELLIOTT and others v. A. HIGGINS, Adm'r.

Agent and Principal—Re-issue of Execution—Administrator—Bankruptcy.

1. When judgment was obtained, in 1861, in an action brought by one in his own name as agent and attorney for certain parties in Indiana and Missouri (to whom the fund belonged), and in 1863 the same was collected by the sheriff under execution and satisfaction of the judgment endorsed by him on the execution, a portion of the money paid to the nominal plaintiff and the remainder sequestered by the Confederate authorities: *It was held*, on a motion by the non-resident parties in interest to re-issue execution, that the judgment was satisfied and that the motion could not be granted.
2. Where an administrator, in settlement with the distributees of the estate, gives his individual note for the balance due, such note is not "a debt created while acting in any fiduciary capacity" within the operation of the U. S. Revised Statutes, § 5117, and the collection of a judgment upon it is barred by a discharge in bankruptcy thereafter obtained.

(*Blackwell* v. *Willard*, 65 N. C., 555; *Justice* v. *Hamilton*, 67 N. C., 111; *Com'rs* v. *Staley*, 82 N. C., 395, cited and approved.)

MOTION to issue Execution heard at Spring Term, 1880, of MCDOWELL Superior Court, before *Gilmer, J.*

The motion was made before the clerk who ordered execution to issue, and upon appeal to the judge of the superior court the judgment of the clerk was affirmed, and the defendant appealed to this court.

Mr. W. H. Malone, for plaintiff.
Mr. G. N. Folk, for defendant.

SMITH, C. J. The defendant, as executor of Nimrod Elliott, having funds in his hands upon a settlement of his administration account to which the other plaintiffs were entitled, on the 16th day of February, 1861, executed and

delivered to their agent, Elkanah Elliott, his due bill or note in the following words:

I, A. Higgins, am this day due the heirs of Wm. Ballew and McCainey Elliott three hundred and forty-eight dollars 32 cents on the estate of Nimrod Elliott dec'd, to be paid hereafter. Feb. 16th, 1861.

(Signed.) A. HIGGINS.

The plaintiffs owning the fund were residents of Indiana and Missouri, and the intestate Elkanah, retaining the note on their behalf, on April 30th, 1861, brought an action thereon in his own name, describing himself as attorney for them and reciting their names, and at spring term, 1861, recovered judgment against the defendant for the sum specified and due.

On February 3d, 1863, execution issued to the sheriff, returnable to fall term, on which he collected the money, and endorsed thereon: "Received satisfaction in full of this *fi. fa.* for four hundred and eighteen dollars and 70 cents. Retain my fee and commissions, $10.94: pay into office $407.32.

(Signed.) J. H. DUNCAN, sh'ff."

A portion of the money was afterwards received by the intestate, and the residue passed into the hands of a receiver appointed under the sequestration act of the Confederate Congress.

In 1872, the defendant, under regular proceedings in the proper district court of the United States, was declared a bankrupt, and the year following obtained his discharge.

The present motion is for leave to issue execution, to which objection is made upon the ground that,

1. The debt has been paid and the judgment satisfied by the sheriff's return, and

2. The defendant is discharged by the decree in bankruptcy.

The hostile relations growing out of the essayed revolutionary movement for the withdrawal of this and other

states associated in the effort, from the United States and their common government, analagous to, and by the act of Congress of July, 1861, put on the same footing, as those subsisting between independent belligerent states by the law of nations, put an end to further business intercourse between the citizens of the respective parts, and revoked all agencies created or authority previously conferred upon the one by the other, as is declared in *Blackwell* v. *Willard*, 65 N. C., 555, and *Justice* v. *Hamilton*, 67 N. C., 111. The rule is not without exception, and Mr. Justice BRADLEY, delivering the opinion of the supreme court of the United States in *Ins. Co.* v. *Davis*, 95 U. S., 425, in an elaborate discussion of the question, and after quoting a paragraph from Emerigon that "if a foreigner is forced to depart from one country, in consequence of a declaration of war with his own, he may leave a power of attorney with a friend to collect his debts, and even to sue for them," uses this language: "Perhaps it may be assumed that an agent *ante bellum*, who continues to act as such during the war, in the receipt of money or property in behalf of his principal, when it is the manifest interest of the latter that he should do so, as in the collection of rents and other debts, the assent of the principal will be presumed unless the contrary is shown; but that where it is against his interest, or would impose upon him some new obligation or burden, his assent will not be presumed, but must be proved, either by his subsequent ratification, or in some other manner."

But the present case is not within the operation of the principle thus announced with its qualifications. The note is sued on in the name of the agent, as *trustee for the others*, and there is no legal impediment in the way of its prosecution to final judgment and ultimate satisfaction. As the law then was, he alone was, at law, the owner of the judgment, with full right to control and dispose of it and its fruits.

Again, the payment was not voluntary but coerced out of the defendant by process which he could not resist, and it would be unjust when the plaintiff of record has enforced satisfaction, that the defendant should be compelled to pay the same debt a second time. The parties beneficially interested recognize the agency, and seek to take advantage of what was done by their agent by asking for an execution pursuant to the judgment. We are not disposed to entertain, favorably, an application based solely upon the recovery in the name of their trustee, and which proposes to repudiate his subsequent agency, in suing out final process and compelling payment of the debt. In our opinion they are, and ought to be, equally bound by all his acts in their behalf, done in good faith, and intended for their benefit.

II. It is contended that the discharge in bankruptcy is ineffectual against this, as a fiduciary obligation. The bankrupt act exempts from a discharge any "debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or *while acting in any fiduciary character.*" Rev. Stat. U. S., § 5117.

We have already decided, in *Commissioners of Wilkes* v. *Staley*, 82 N. C., 395, that a bond given by a defaulting public officer for the amount of his indebtedness, and reduced to judgment, was not a debt created by his defalcation but by his own voluntary contract, and was barred by the discharge. The opinion is supported by the cases therein referred to, and rests upon sound and satisfactory reasoning. The decision was controverted with much earnestness of manner in the argument for the plaintiffs, but no cases were cited in opposition, and our conviction of its correctness remains unshaken. We are more desirous of being right than consistent, and would not hesitate a moment to change our rulings whenever convinced of their erroneousness.

It will be difficult in principle to distinguish that case from the present. The individual obligation of the defend-

ant, existing only by force of his own voluntary contract, is substituted for one resting upon assets with which he is chargeable as trustee, and his own personal estate thus becomes liable to its payment. By virtue of the judgment, the right to the money due on it vests in a trustee. This does not seem to be, in the words of the statute, a debt created "while acting in a fiduciary character," although the consideration of the contract may be such pre-existent liability.

But it is unnecessary to enquire whether the note is a novation or a cumulative security merely, and within the scope of the decision in *Commissioners of Wilkes* v. *Staley*, to which we fully adhere, since our opinion upon the other matter of defence determines the controversy.

There is error and the judgment below is reversed and a new trial granted. Let this be certified.

Error. Reversed.

CHARLES COLE v. JOSEPH J. FOX.

Parol Evidence—Suretyship.

In an action upon a bond where the defendant pleaded that he was a surety thereto and had given notice to the plaintiff to bring suit against the principal under ch. 232, § 1, acts 1868–'9, *parol* evidence is admissible to prove the fact of suretyship.

CIVIL ACTION commenced before a justice of the peace and tried on appeal at Spring Term, 1880, of CHATHAM Superior court, before *Seymour, J.*

The plaintiff declared upon a single bill of which the following is a copy, viz.:

"One day after date we, or either of us, promise to pay Charles Cole the just sum of one hundred and thirty six dollars for value received of him, as witness our hands and seals. W. B. DORSETT, [Seal.]

March 2d, 1861. Jos. J. Fox, [Seal.]

It was in evidence that Jos. J. Fox was in fact only surety on said note, the money having been borrowed for Dorsett. The defendant, Fox, introduced a written notice in conformity to the provisions of the act of 1868–69, ch. 232, § 1, addressed to the plaintiff, requiring him to sue W. B. Dorsett upon the note, on which he was surety, dated March 5th, 1870, and served the same day according to the return thereon, by the sheriff of Chatham county. It was conceded that no suit had ever been brought on the note against W. B. Dorsett.

His Honor charged the jury that if they were satisfied that the defendant was a surety, and that the notice was served on the plaintiff according to the sheriff's return, the defendant was entitled to their verdict. The jury found the issues in favor of the defendant, and there was judgment according to the verdict. A motion was made for a new trial upon the ground that it was incompetent to show by parol evidence that the defendant was a surety. The motion was overruled and the plaintiff appealed.

Messrs. Battle & Mordecai, for plaintiff.
Mr. John Manning, for defendant.

ASHE, J. The record presents but one question for our consideration, and that is whether it was competent to prove by parol evidence that the defendant was surety on the note sued upon. There was no other exception taken on the trial, and we must assume that the admission of this testimony was objected to when offered, or His Honor would

have disposed of the rule for a new trial upon the ground that the objection was not made in apt time.

There has been a contrariety of opinion expressed on this subject by the courts of the different states. Some have held that parol evidence in such a case is incompetent because it contradicts or varies the terms of the instrument signed by the surety. Others hold that it does not tend to alter or vary either the terms or legal effect of the written instrument, but is simply proving a fact outside of such terms, collateral to the contract and no part of it, and that the evidence is perfectly competent in a court of law. While some others maintain that though the evidence is incompetent in a court of law, it is competent in a court of equity.

After a careful investigation of the subject we are convinced that the weight of authority sustains the principle that the evidence is competent in a court of law, and more especially in our courts, having no separate jurisdiction of law and equity, where all the rights of parties, both legal and equitable, must be adjudicated in any suit wherein they are litigated and drawn in question. So that in referring to authorities it is immaterial whether they are decisions of courts of law or equity.

Fowler v. *Alexander*, 1 Heiskell, (Tenn. Rep.,) 42, was a case very similar to this. There, the action was brought upon a sealed note executed by Frederick Dean and Abijah Fowler. It did not appear upon the face of the note but that both were principals. Fowler only was sued on the note. He pleaded specially, in substance, that he executed the note sued on as surety for Dean, his co-obligor, and that after the said note became due he gave notice in writing to the plaintiff requiring him to put the note in suit; and averred that he failed to do so within the time required by law, and to proceed with due diligence to collect the same, by consequence whereof he claimed to be discharged from

liability. There was a demurrer to this plea. In the court below the demurrer was sustained, but on appeal to the supreme court the judgment of the superior court was reversed, on the ground that the matter of the plea, if true, was a good defence to the action. It was insisted on the part of the appellant that the fact of the suretyship should appear on the face of the note in order to entitle the surety to be discharged under the provisions of the code, 1968, but the court held "the principle is now well settled that the fact of suretyship may be shown by parol proof in a court of law upon a question between the surety and the holder of a note."

In the case of *Creech* v. *Hedrich*, West Va. Rep., 140, it was held that one or more of a number of obligors has a right to show that he or they stand in the relation of surety on the bond, by parol testimony; and in *Burke* v. *Cruger*, 8 Texas Rep., 66, WHEELER, J., said, "it is immaterial what may be the form of the instrument, whether a simple contract in writing or a specialty, and though all appear upon the instrument as principals, in equity parol evidence is admissible to prove that one or more of the joint-makers or co-obligors signed the instrument in the character of surety;" and in support of his decision cited Burge on Suretyship, 212, 1 Am. Ed.; 3 Texas, 215, for the principle that "in equity parol evidence is admissible to show who is principal and who is surety."

JOHNSON, J., in giving the opinion of the court in the case of *Smith* v. *Tunno*, 1 McCord, 451, said: "I take the principle to be that the relationship which subsists between the joint-obligors is a matter wholly extrinsic of the written contract, and may therefore be proved by parol, without any violation of the rule which prohibits the introduction of parol evidence to contradict or vary a written agreement."

And again in *Scott* v. *Baily*, 2 Jones, (Missouri Rep.) 140, the court held: "There cannot be a necessity for this court

again to assert that parol proof is perfectly admissible to show that a co-obligor in a note or bond is a surety for the principal obligor therein." To the same effect is Brandt on Suretyship and Guaranty, §§ 17 and 18, where the doctrine is fully discussed and the authorities on both sides of the question cited. Also 1 Parsons on Bills, 294.

We are of the opinion the evidence was competent for the purpose for which it was offered. Whether the notice given by the defendant to the plaintiff under the act of 1868-'69, ch. 232, § 1, was sufficient, or whether the plaintiff, at the time of the service of the notice, had such knowledge of the fact of the suretyship of the defendant as in law or equity would discharge him from liability, on the failure of the plaintiff to comply with the requirements of the notice, are questions we have not considered because they are not raised by any exceptions on the trial. We have dealt with the only exception taken, viz: was parol evidence competent to prove that Fox, the defendant, was a surety, and we hold that it was, and that there is no error in the ruling of His Honor in discharging the rule for a new trial. The judgment of the court below is affirmed.

No error. Affirmed.

WILLIAM FOY v. L. J. HAUGHTON.

Pleading—Defence of Fraud—Sufficiency of Answer—Practice.

1. In an action upon a contract where the defendant in his answer alleges that the execution of the contract was superinduced by the false and fraudulent representations of the plaintiff, but does not allege that he

was thereby deceived; *Held*, upon demurrer to the answer, that the same was not sufficient to defeat a recovery by the plaintiff.

2. In such case, where the court below held the answer to be sufficient, the action will be remanded to give the defendant opportunity to move for such amendment as he may be advised.

(*Walsh* v. *Hall*, 66 N. C., 233, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of CRAVEN Superior Court, before *Gudger*, *J.*

The case was heard upon complaint, answer and demurrer to answer. The court overruled the demurrer and the plaintiff appealed.

Messrs. Clark & Clark and *Green & Stevenson*, for the plaintiff.

Messrs. W. B. Rodman and *A. G. Hubbard*, for defendant.

SMITH, C. J. The action is to recover the amount specified in the sealed note described in the complaint, to which the defendant, in his answer admitting the plaintiff's allegations, sets up the defence of fraud, and says that the execution of the note was superinduced by the false and fraudulent pretences and practices of the plaintiff, and was given to remove an obstacle, caused by his false claim of title, to the consummation of a then pending contract for the sale of the defendant's land, and to obtain his deed of quit-claim thereto.

The plaintiff demurs to the answer, and for cause of demurrer, among others, assigns the following:

1. For that it fails to show that defendant was deceived by the false and fraudulent representations alleged to have been made, and

2. For that the facts stated in the answer are not in themselves sufficient to invalidate the obligation and defeat the recovery.

It does not appear from the answer that the defendant, at the time when he gave the note and received the plaintiff's deed of quit-claim to the land, was not fully aware of the groundlessness and fraudulent character of the plaintiff's pretended right, or that, relying upon the plaintiff's fraudulent representations, he was thereby induced to enter into the arrangement, in order to effect the sale. If the defendant acted with full knowledge of the facts, and was not deceived by the plaintiff's conduct and representations, however reprehensible they may have been, the defendant cannot now ask to be relieved from the consequences of his own inteiligent and voluntary act, the benefit of which he has himself taken. The very essence of the claim for relief consists, not in the attempt, but in the successful practice of a fraud, of which the deceiving of the injured party is a necessary ngredient.

The constituents of a remedial fraud in the procurement of contracts consist in "a representation, express or implied, false within the knowledge of the party making it, *reasonably relied on by the other party*, and constituting a material inducement to the contract or act." Adams Eq., 176. In the note it is said: "And so, if a vendee becomes acquainted with the fraud before completing his bargain, and chooses to go on, a court of equity will not help him." *Pratt* v. *Philbrook*, 33 Maine, 17, and other cases there cited.

The doctrine is thus defined by DICK, J., in the opinion delivered in *Walsh* v. *Hall*, 66 N. C., 233: "If representations are made by one party to a trade which may be reasonably relied upon by the other party, and they constitute a material inducement to the contract, and such representations are false within the knowledge of the party making them, and they cause loss and damage to the party *relying on them, and he has acted with ordinary prudence in the matter*, he is entitled to relief in a court of justice."

The want of an averment that the defendant was *misled*

and deceived by the plaintiff's false misrepresentations as to his title, or, in other words, that without knowledge of their falsity, he confided in their truthfulness, and acting upon them, executed the note, is therefore a fatal defect in the answer, and renders it obnoxious to the demurrer.

It is unnecessary to pass upon the other assigned grounds of demurrer, as our opinion upon this disposes of the appeal.

Ordinarily the judgment of this court sustaining the demurrer would be final, but as the defect in this case arises from the omission of an averment, which in our view is material, but was not so considered by the judge in the court below, and which may admit of correction by amendment, we remand the cause to give the defendant an opportunity to move for leave to make the amendment in this and other particulars, as he may be advised; and if unamended, the action must be dismissed. It is accordingly so ordered.

Error. Reversed and remanded.

J. O. BOONE, Trustee, &c., v. R. W. HARDIE, Sheriff.

Pleading—Sham Plea—Deed of Trust—Fraud.

1. In an action against a sheriff for the conversion of certain goods conveyed in a deed of trust, where the defendant's answer averred that the creditors of the trustor alleged that the deed of trust was fraudulent and void, and that he had seized and sold the goods under execution from a belief that the allegation was true; *Held*, that the answer did not contain a "sham plea," but was sufficient to raise an issue as to the alleged fraud.

2 Where, in such action, the plaintiff showed in evidence the deed of trust which averred that one of the motives to its execution was a de-

sire to secure creditors, and proved that the trustor remained in possession of the goods conveyed and ordered new goods, which were sold and the proceeds applied by *him* on the debts secured, as agent of the trustee, until stopped by defendant's levy, and that he had no intention to hinder, delay or defraud creditors; and the only issue submitted to the jury was, "Did the plaintiff (trustor) in making the deed in trust intend thereby to hinder, delay or defraud his creditors?" to which the jury respoded "No"; *It was held*,

(1) that it was not error for the court to refuse to grant the plaintiff a judgment on the verdict.

(2) That it was error to grant the defendant a judgment *non obstante veredicto*.

(3) That the absence of the fraudulent intent in the trustor had no efficacy to repel the fraud in legal intendment, and the finding of the jury was wholly immaterial.

(4) That the deed of trust was not fraudulent and void on its face but was presumptively so, and the presumption was required to be rebutted, and the question of fraud should have been passed upon by the jury under proper directions from the court.

(*Hardy* v. *Simpson*, 13 Ired., 132; *London* v. *Parsley*, 7 Jones, 313; *Cheatham* v. *Hawkins*, 76 N. C., 335, and 80 N. C., 161, cited and approved.)

CIVIL ACTION to recover damages for the sale and conversion of property conveyed in a deed of trust, tried at Spring Term, 1880, of CUMBERLAND Superior Court, before *Eure, J.*

D. H. Bell executed a deed in trust on the 18th of February, 1879, to his co-plaintiff, J. O. Boone, conveying for the security of his creditors in two classes as therein expressed, a stock of goods, wares and merchandise described as consisting of liquors, dry goods, groceries, notions and general merchandise, with all his book-debts and notes and his household and kitchen furniture, with a reservation out of the same of the personal property exemption allowed by law, and therein was named a day of default at the end of twelve months, after which, if the debts secured were not paid off and discharged, the trustee was empowered to take possession and sell the property and make collection and pay the unpaid debts in their prescribed order.

The deed was put to registration on the first day of March next after its execution, and shortly thereafter, under execution in favor of two of the creditors of said Bell, (Hervey & Co., and Egerton & Co.,) the defendant, a sheriff, levied on and sold, after first setting apart the exemption allowed by law, enough of the goods conveyed in the trust to make the sum of two hundred and eleven dollars and forty-five cents, and this action is brought to recover for the sale and conversion thereof.

The defendant justified under said executions against Bell, with averment of an allegation by the creditors that the deed in trust was fraudulent and void, as being executed with intent to defeat their recoveries, and that he seized and sold the goods from a belief that the allegation of the creditors was true.

On the call of the cause for trial, the plaintiff moved to strike out the clause of the answer, wherein justification was pleaded, on the ground that it was a sham plea, in that it did not distinctly allege the deed to be fraudulent so as to raise an issue of fraud, and the motion being refused, the plaintiff excepted.

The court then submitted to the jury the issue—"Did the plaintiff Bell, in making the deed in trust, intend thereby to hinder, delay, or defraud his creditors?"

Thereupon the plaintiff showed in evidence the deed in trust, which on its face, besides the facts and the powers and duties of the trustee hereinbefore recited, avowed one of the motives to its execution to be a desire to convey all the property liable to seizure and sale by execution for the security of his creditors, except his exemption. And it was proved by the oath and examination of Bell and the trustee, that Bell remained in possession and ordered new goods, some of which were put into the storehouse and others sent back, and he sold and applied the proceeds on the debts constituting the first class, by arrangement with the trustee

and as his agent, until stopped by the levy of the defendant; and that in the making of the deed and in all things connected therewith, Bell had no intention to hinder, delay or defraud his creditors, but a purpose merely to sell the goods and pay the creditors.

At the conclusion of the testimony as above on the part of the plaintiff, the defendant demurred to the evidence and asked the court to charge the jury that the deed in trust upon its face was fraudulent and void as to creditors, but His Honor reserving the point of law raised by the defendant, at the request of plaintiff allowed the jury to find upon the issue submitted. The jury found the issue in the negative, and His Honor refused the motion of plaintiff for judgment on the verdict and entered judgment that the defendant go without day and for costs *non obstante veredicto*, being of opinion on the point reserved that if the deed of trust was not fraudulent and void on its face, there was a strong presumption of fraud and it was not rebutted by the evidence, and from these rulings of the court below the appeal is taken by the plaintiff.

Mr. W. A. Guthrie and *T. H. Sutton*, for plaintiff.
Mr. Duncan Rose, for defendant.

DILLARD, J., after stating the case. It was not error to refuse the motion of the plaintiff to strike out the clause of the answer wherein the defendant set up his justification on the ground that the same was sham. Without doubt an answer may be stricken out as sham under C. C. P., § 104, and and so it might have been under the common law pleadings; but then under either system it must be really a sham pleading, that is to say, it must set up matter as a defence which is a mere pretence and has not the color of fact. The design was to prevent vexatious defences by the plea of matter for delay, false in fact, and so known to be to the

pleader. And while in general such a pleading may be stricken out where the falsehood can be clearly shown, we think the power ought not to be exercised in any case where the matter objected to, as presented or in any other form, might constitute a defence. Stephen on Pleading, Rule 9, p. 441; Bliss on Code Pleading, § 422 and note.

Under this view of a sham pleading, the clause of the defendant's answer could not be considered to be of that kind. The defendant therein alleged the executions delivered to him and the claims of the creditors that the deed conveying the goods was executed with intent to hinder and defeat them, and as such was fraudulent and void; and the answer then goes on to aver, that, so believing the deed to be, he levied on and sold the goods. We think the reference to and adoption of the allegations of the creditors as to the *mala fides* of the deed, and the averred action of the defendant, on a belief in the truth of those allegations, was in substance an allegation of the invalidity of the deed by the defendant himself, and was such an averment as that an issue might be made thereon as to the alleged fraud. We hold therefore that the clause objected to was sufficient for the formation of issue as to the alleged fraud, and the matter having the color of fact, the judge was right in refusing to strike it out.

Upon the other point of error assigned by plaintiff, on the refusal of the court to grant judgment for him on the response of the jury to the issue submitted to them, and in the grant of judgment in favor of defendant, *non obstante veredicto*, we are of opinion that His Honor did not err in refusing plaintiff judgment but did; in the grant of judgment to defendant.

Fraud with respect to the deed in trust in question might be of three kinds: fraud *per se* on the facts appearing on the face of the deed, not explainable by evidence *dehors* and not requiring the verdict of a jury, but to be declared

by the court; fraud by presumption of the law rebuttable, to be found a fraud by the jury under the direction of the court, unless there were other facts shown forth in evidence or admitted sufficient in law to rebut the presumption, and then, if there was not fraud of either of these kinds, there might have been fraud in fact, as an open question to the jury under instruction from the court as to what in law would constitute fraud, to be found from the circumstances and the evidence of the motives and intent of the parties. *Hardy* v. *Simpson*, 13 Ired., 132; *London* v. *Parsley*, 7 Jones, 313; *Cheatham* v. *Hawkins*, 76 N. C., 335, and same case 80 N. C., 161.

In fraud of the first kind there is nothing to be found by a jury, but in the others there is the fact of fraud to be found according to the artificial weight of the legal presumption, or against it upon the evidence submitted in rebuttal, or to be found as an open question of fact.

The issue submitted to the jury in this case had reference only to the intent in the mind of Bell, attendant on or moving him to the execution of the deed; and upon the supposition that the fraud under investigation was a fraud by presumption, it was entirely immaterial, and the response thereto was of no weight to rebut the presumption.

In *Cheatham* v. *Hawkins*, 80 N. C., 161, the immateriality of the intent in such case was described in the following language by the Chief Justice: "Acts fraudulent in view of the law because of their necessary tendency to delay or obstruct the creditor in the pursuit of his legal remedy, do not cease to be such because the fraud as an independent fact was not then in the mind. If a person does and intends to do that which from its consequences the law pronounces fraudulent, he is held to intend the fraud inseparable from the act." It is evident that the absence of the fraudulent intent in Bell as found by the jury had no efficacy to repel the fraud in legal intendment, and therefore the finding

was wholly immaterial and the refusal of judgment thereon in favor of the plaintiff was not erroneous.

But it remains to consider whether the fraud in the case was one by intendment of the law, and if so, whether it should not have been so found by the jury according to the intrinsic artificial weight of the presumption to be laid down by the court, or upon evidence submitted to them as reasonably sufficient to rebut the fraud.

Under the authority of the case of *Cheatham* v. *Hawkins supra*, the facts of this case being very similar to that, we agree that the deed of Bell to his trustee was not fraudulent and void on its face, but was presumptively so and the presumption was required to be rebutted.

The fraud imputed to the deed whether by presumption or as an open question of fact was drawn into issue upon the pleadings between the parties, and should have been passed upon by the jury under proper directions from the court as before explained, or by the court with a waiver of jury by the parties, of which there is no suggestion in the record; and this being so, there was no fact found or admitted in the record to warrant a judgment for the defendant.

A judgment *non obstante veredicto* is of very restricted application, being proper only, according to the law writers, when a plea is put in confessing the cause of action, and issue is joined or found on an immaterial matter in avoidance, in which case the party against whom the issue is found may have judgment on the confession *non obstante veredicto*; but that doctrine can have no application for the defendant, if it could in any case, as the fraud by him alleged has never been confessed by the plaintiff.

In our opinion upon the demurrer to evidence by the defendant, His Honor giving the plaintiff the full benefit of any fact on the face of the deed or otherwise proved or reasonably to be inferred therefrom, should have told the jury, if such was his opinion, that there was no evidence

that would justify a finding a rebuttal of the presumption, and should have had the jury to find the fraud.

From the omission of the court to have the fraud in this case found by the jury, there was no foundation or warrant for the judgment for defendant, and the same must be reversed and a *venire de novo* awarded.

Error. *Venire de novo.*

L. R. SIMPSON and wife and others v. VIOLA V. WALLACE and another.

Proceeding for Partition—Multifariousness—Practice—Conflicting Claim of Title—Homestead Estate after Death of Owner—Minor Child.

1. A proceeding for partition which asks a division of several separate and distinct tracts of land not held by the same tenants-in-common, and blends in one, independent causes of action to which the same persons are not parties, is multifarious.

2. Partition will not be ordered of land which the defendant alleges that the plaintiffs have an estate for the life of another and an equal share with the defendant in a contingent remainder therein.

3. In such case, the court will not adjudicate in a proceeding for partition a conflicting claim of title set up by the defendant, so as to exclude him by the estoppel.

4. Where the owner of a homestead dies leaving children, some of age and one a minor, the homestead estate vests alone in the minor child until her or his majority.

(*Watson* v. *Watson*, 3 Jones Eq., 400; *Williams* v. *Hassell*, 74 N. C., 434; *Parks* v. *Siler*, 76 N. C., 191; *Justice* v. *Guion*, *Ib.*, 442; *McBryde* v. *Patterson*, 73 N. C., 478; *Purvis* v. *Wilson*, 5 Jones, 22; *Maxwell* v. *Maxwell*, 8 Ired. Eq., 25; *Hager* v. *Nixon*, 69 N. C., 108; *Wharton* v. *Leggett*, 80 N. C., 169; *Lumbert* v. *Kinnery*, 74 N. C., 348; *Bank* v. *Green*, 78 N. C., 247; *Gheen* v. *Summey*, 80 N. C., 187; *Allen* v. *Shields*, 72 N. C., 504; *Johnson* v. *Cross*, 66 N. C., 167, cited and approved.)

SIMPSON *v.* WALLACE.

SPECIAL PROCEEDING for partition of land commenced in the probate court of MECKLENBURG, and heard on appeal at Chambers, on the 28th of January, 1880, before *Schenck, J.*

The plaintiffs, petitioners, appealed from the ruling of the court below.

Mr. Platt D. Walker, for plaintiffs.
Messrs. Jones & Johnston, for defendants.

SMITH, C. J. The three tracts of land described in the application for an order of partition are alleged to be held by the plaintiffs and the defendant, Viola, as tenants in common, to one of which the other defendant, Mary, also sets up a claim.

The first-mentioned tract, or "Rock-house Place," was set apart to Wilson Wallace, their father, under proceedings in bankruptcy, as his homestead, and retains its exemption from liability for his debts, until the said Viola, his only minor child, attains the age of twenty-one years.

The second tract was devised by Nehemiah A. Harrison to his daughter Caroline, wife of the said Wilson, who died before her husband, since also himself deceased, and has descended to the plaintiffs, Martha J. and Nehemiah W. and the said Viola, her children and heirs at law.

The third tract was devised by the same testator, with several slaves, to his grandson, Dallas Maxwell, son of a deceased daughter, subject to the following limitation: "But if the said Dallas Maxwell should die without leaving heirs, then it is my will that the whole of the above mentioned land and negroes shall be equally divided between my two daughters, namely, Mary Farrow and Caroline Wallace."

Dallas, the devisee, who is still living, conveyed his land to the said Wilson, and the same was afterwards levied on and sold, under an execution against the latter, to his said children.

The defendant, Mary Farrow, made a party because of her asserted claim, which the court is asked to pass on, insists that under the will she and her sister, Caroline, are entitled in equal moieties to a contingent remainder in the land devised to Dallas, to take effect at his death without issue, and that the children of said Caroline succeed to her share thereof.

The proceeding is obnoxious to several objections:

I. It is multifarious, in that it asks a division of several separate and distinct tracts of land not held by the same tenants in common and then blends in one, independent causes of action to which the same persons are not proper parties. The defendant, Mary, has or asserts a contingent estate in one half of the remainder in the land devised to Dallas, and has no interest whatever in the others.

II. Upon the construction which sustains the continuing validity of the limitation in remainder, the plaintiffs and Viola have a vested estate in the land, for the life of said Dallas, and an equal share with said Mary in the contingent remainder. In case of such uncertain interests, partition will not be ordered. *Watson* v. *Watson*, 3 Jones Eq., 400; *Williams* v. *Hassell*, 74 N. C., 434; *Parks* v. *Siler*, 76 N. C., 191; *Justice* v. *Guion*, *Ibid.*, 442.

III. The court will entertain an application from a trustee for advice as to the discharge of the trusts with which he is clothed, and, as incident thereto, the construction and legal effect of the instrument by which they are created, when a case is presented in which the opinion can be made effective; but it will not adjudicate a conflicting claim of title set up by another, so as to exclude him by the estoppel, in a proceeding to which it is incidental only, and not necessary to the attainment of its main object. "I am not aware of any case," says Chancellor ....., "in which the heirs at law of a testator or devisee who claim a mere legal estate in the real property, *when there was no trust*, have

been allowed to come into a court of equity for the mere purpose of obtaining judicial construction of the provisions of the will." *Bowers* v. *Smith*, 10 Paige, 693.

So in *Bailey* v. *Biggs*, 56 N. Y., 407, FOLGER, J., thus comments on the case before the court: "The jurisdiction (in interpreting wills) is incidental to that over trusts. There is nothing of that sort here. The title and possession of the plaintiff is purely a legal one. The title of the defendants, if they have any, is of the same kind. There is no trust to be enforced nor a trustee to be directed." See also *Bailey* v. *Southwick*, 6 Lansing, 356.

Where a defendant, alleged to be a tenant in common, sets up a sole seizin, the issue thus raised may be tried, and if decided against the defence, the partition will be ordered. *McBryde* v. *Patterson*, 73 N. C., 478; *Purvis* v. *Wilson*, 5 Jones, 22.

But no such relief can be obtained on a bill, showing an adverse title or claim in others than the alleged tenants in common to the land to be divided, as in the present case, as is expressly held in *Maxwell* v. *Maxwell*, 8 Ired. Eq., 25, the estate devised being a legal estate, and the construction a legal question.

The tract devised to Caroline is held in common, and is a proper subject for partition in the probate court, which alone has original jurisdiction to make the order.

The only point then presented is as to the ownership of the homestead.

The children of Wilson, to whom it was assigned are, all, except Viola, of full age; and the question is, is she alone, or her adult brother and sister with her, entitled to the possession and use until she attains her majority?

The question is not free from difficulty, and the terms in which, by the law of other states, a part of the lands of an insolvent debtor are protected from the claims of creditors and secured to him and his family, are so various in them-

selves and so unlike our own, that we can derive little aid from their adjudications in determining the import of the constitutional provision in this state, and the acts passed to give it effect.

The homestead, a creature of the constitution in this state, where there is a widow and no children, passes to her, and by express words, "the rents and profits thereof shall enure to her benefit during widowhood, unless she be the owner of a homestead in her own right." Const., Art. X, § 5.

If there are children of full age, the exemption terminates at the debtor's death, and is prolonged only when there are minors, until the youngest arrives at twenty-one years. Art. X, § 3. *Hager* v. *Nixon*, 69 N. C., 108; *Wharton* v. *Liggett*, 80 N. C., 169.

The constitution thus secures no interest to any except infant children and then only during their several minorities. It would seem an unreasonable construction to exclude adults altogether when there are none others, and to allow them to participate in the enjoyment of property with their infant brothers and sisters, on whose account alone and because of their minority, the exemption is continued after their father's death.

The assignment of a homestead creates no new estate in the exempted land; it simply ascertains and sets apart a portion of what the debtor owns, of limited value, and relieves it from liability for his debts during a specified period, leaving in him the estate already possessed unimpaired. *Lambert* v. *Kinnery*, 74 N. C., 348; *Citizens' Bank* v. *Green*, 78 N. C., 247; *Gheen* v. *Summey*, 80 N. C., 187. And the exemption is protracted after death solely for the benefit of his infant children, if there be such. The homestead privileges do not constitute a descendible inheritance, though the debtor's original and retained estate, subject thereto, is liable to the creditors; and as it is created under the law,

the law must be looked to, to ascertain its qualities and the persons who are to have it.

It is, in our view, a beneficent provision in this aspect of the case, for the young and helpless, and the interest of each ceases when he reaches his majority. There is no community of property to which the laws of intestacy apply, nor is it subject to testamentary disposition. *Allen* v. *Shields*, 72 N. C., 504.

This interpretation seems to have been given in the case cited, by RODMAN, J., and also by those who passed the acts of legislation to give it effect; for they expressly provide that if the party entitled to a homestead die, without having it set apart, "his widow, if he have one, then his child and children, *under the age of twenty-one years*, if he leave such, may proceed to have such homestead and personal property exemption *laid off to her, him or them*, according to the provisions of sections 7 and 8 of this chapter." Battle's Revisal. ch. 55, § 10. While this section has been decided to be inoperative as to personal property in extending the exemption after death (not authorized by the constitution) in *Johnson* v *Cross*, 66 N. C., 167, it is but carrying out the mandate as to the exempted land.

In our opinion, therefore, the homestead vests alone in the defendant, Viola, and the plaintiffs have no interest therein.

It is therefore declared and adjudged that the plaintiffs, Martha J. and Nehemiah W., as tenants in common, in equal shares with the defendant, Viola, of the second tract of land described in the complaint, and known as the "Washington Maxwell Place," devised to their mother, Caroline, are entitled to have partition thereof, but not of the other lands mentioned, and thus far the ruling of the court below is affirmed, and wherein it conflicts it is reversed.

A judgment may be entered in conformity with this opinion and it will be certified for further proceedings in the court below.

PER CURIAM. Modified.

G. H. RENAN and others *v.* J. A. BANKS Adm'r, and others.

Practice—Creditor's Bill—Purchaser of Land from Devisee.

Where land was conveyed to R by the devisees under a will within less than two years from the grant of letters of administration, and afterwards a creditors' bill is filed for a settlement of the estate, wherein a sale of the land is asked; *Held*, that in such proceeding R cannot set up any equities alleged to exist by reason of the fact that it was an exchange of lands between the devisees and himself, and the land so acquired by them is primarily liable; in such case, the equities alleged to exist must be settled in another action.

(*Donoho* v. *Patterson*, 70 N. C., 649; *Hinton* v. *Whitehurst*, 71 N. C., 66 *Brandon* v. *Phelps*, 77 N. C., 44; *Winfield* v. *Burton*, 79 N. C., 388, cited and approved.)

SPECIAL PROCEEDING commenced in the probate court and tried on appeal at Spring Term, 1880, of CUMBERLAND Superior Court, before *Eure, J.*

The plaintiff for himself and all other creditors of the defendant's testatrix, demanded judgment for an account and settlement of the estate, and for the amount due as alleged in their complaint, and that the property of the same be applied to the satisfaction thereof. The facts are stated in the opinion. The defendant, Rose, appealed from the judgment of the court below.

Messrs. McRae & Broadfoot and *N. W. Ray*, for plaintiffs.
Messrs. Duncan Rose and *W. A. Guthrie*, for defendant.

SMITH, C. J. Margaret Banks died in June, 1877, leaving a will, which was shortly afterwards proved in the proper court, and, upon the renunciation of the executor named, the defendant, James A. Banks, was appointed administrator to execute the trust thereof. The testatrix left personal property, all of which, except some furniture bequeathed,

has been appropriated to the charges of administration and the payment of debts; and devises two lots owned by her in the town of Fayetteville, one known as the "Bake-shop lot," to the defendant, (the administrator,) charged with the payment of the debts of the testatrix; and the other on Green street to the defendant, Marion Banks and Margaret wife of A. L. Powell, all of which devisees are children of the testatrix. The unpaid debts upon inquiry are ascertained to be $820.95, and the administrator alleges that he has advanced of his own money in the course of his administration more than the value of the unsold articles of furniture. The "Bake-shop lot" on Bow street has been sold, since the action commenced, under an order in the cause, for the sum of $333; one-fourth whereof was paid in money and the residue secured by bond and retention of title, which reduced by expenses of sale is largely insufficient to pay the debts of the testatrix. No inquiry has been made to ascertain the condition of the administration, and the value of the furniture, by any of the parties interested, for the reason, we must presume, that it would be unprofitable and useless. The lot on Green street has been sold by the devisees to one Thornton and by the latter to the defendant, George M. Rose, and deeds executed within two years after the grant of the letters of administration. The latter alleges that the devisees exchanged the devised lot for a lot on Haymount Hill near the town, and received about six hundred dollars for the difference in value, which exchange the devisees, each in his respective answer, deny; and he asserts a primary liability for the indebtedness to rest upon the last mentioned lot, and equity to require its sale in exoneration of his own.

The probate judge after directing the Bow street lot to be sold and the residue of the indebtedness ascertained by appropriating the proceeds of the sale thereto, and allowing the defendant, G. M. Rose, to discharge his land from lia-

bility by paying or adequately securing the same to be paid within six months with the accrued costs and expenses, proceeds to declare and adjudge:

That upon his failure to do so within ten days after he shall be informed thereof, the "Commissioners shall sell said house and lot on Green street at the market house in said town, first giving thirty days' notice of time and place of sale upon the same terms as above provided for sale of the Bake shop and lot."

From this judgment the defendant, Rose, appealed to the superior court and upon the affirmation of the judge of the superior court, to this court.

We see no error in the ruling of which the appellant can complain. By force of the statute, lands desended or devised remains liable to the demands of the ancestor's creditors for the space of two years after the grant of letters testamentary or of administration, during which all conveyances made by the heir or devisee are "void as to creditors, executors, administrators and collectors of such decedent," while those made afterwards "to *bona fide* purchasers for value and without notice" are valid and effectual to transfer the estate vested in such heir or devisee. Bat. Rev., ch. 45, § 156.

The incapacity of the heir or devisee to divest himself of his estate by contract or deed made during this interval has been repeatedly declared in former adjudications upon the force and effect of the disabling statute. *Donoho* v. *Patterson*, 70 N. C., 649; *Hinton* v. *Whitehurst*, 71 N. C., 66; *Brandon* v. *Phelps*, 77 N. C., 44; *Winfield* v. *Burton*, 79 N. C., 388.

The lot on Green street then remains liable to the creditors of the testatrix, as well after as before the attempted alienation by the devisees, and this land alone as the property of the deceased debtor, under the conferred jurisdiction can be pursued, and by a sale appropriated to the payment of their claims. The equities arising out of the subse

dealings of the devisees with others are entirely foreign to the purposes of the action, and cannot be permitted to obstruct or embarrass its progress towards a speedy determination. Those equities must be asserted and settled in another suit between the parties, and are recognized in this only so far as to allow the alleged purchaser to pay the debts and relieve the land. It would be fruitful in inconveniences if new issues could be introduced and new controversies opened, in the settlement of which the administrator and creditors have no interest, to the hindrance of the latter and delay of the former in closing up his administration. The court therefore properly declined to entertain and pass upon the equity set up in the answer of Rose against his co-defendants, as not pertinent to the object of the suit, and proceeded to order the sale of the only land which could be rightfully sold for the payment of debts, if within the limited time they were not otherwise discharged.

There is no error and the judgment is affirmed. Let this be certified for further proceedings in the court below.

No error. Affirmed.

RAND & BARBEE *v.* A. M. HARRIS.

Practice—Offer of Judgment.

1. In an action before a justice of the peace, a tender by the defendant as follows: "The defendant in this action tenders the plaintiff $15.42 as a settlement of the matter," is not sufficient under the provisions of Battle's Revisal, ch. 63, § 20; rule 16.

2. In such case the tender must be a proposition (made before any defence is set up) to pay a specified sum *in discharge of the plaintiff's claim* and not a sum in excess of a counter-claim.

RAND *v.* HARRIS.

CIVIL ACTION tried at Spring Term, 1880, of FRANKLIN Superior Court, before *McKoy, J.*

Judgment for plaintiff, appeal by defendant.

Messrs. Edwards & Batchelor, for plaintiff.

Messrs. Davis & Cooke and *E. W. Timberlake*, for defendant.

SMITH, C. J. The plaintiff commenced his action before a justice of the peace for the recovery of $51.80 and interest due on a promissory note, executed by the defendant to him. After the service and before the return of the process, and previous to putting in an answer, the defendant made the following written tender to the plaintiff:

"*Rand & Barbee* v. *A. M. Harris.*

The defendant in this action tenders the plaintiff $15.42 as a settlement of the matter."

This offer not being accepted, the defendant answered, admitting his indebtedness to the plaintiff, and set up a counter-claim thereto for $49.36, founded upon an alleged sale of unsound for sound meat, and the controversy was confined to this. The counter-claim was disallowed on the trial before the justice, but on appeal sustained in the superior court and judgment there rendered in favor of the plaintiff for $2.60, the difference between the opposing demands, and the costs of the action.

The error assigned by the defendant is in so much of the judgment as charges him with the costs incurred since his offer was refused.

In civil actions before a justice of the peace, it is provided that "the defendant may on the return of the process and before answering make an offer in writing to allow judgment to be taken against him for an amount to be stated in such offer with costs. The plaintiff shall thereupon, and before any other proceeding is had in the action, determine whether he will accept or reject such offer. If he accept

the offer and give notice thereof in writing, the justice shall file the offer and the acceptance thereof and render judgment accordingly. If notice of acceptance be not given, and if the *plaintiff fail to obtain judgment for a greater amount, exclusive of costs, than has been specified in the offer, he shall not recover costs,* but shall pay to the defendant his costs accruing subsequent to the offer." Bat. Rev., ch. 63, § 20, Rule 16.

The tender in the present case falls short in many particulars of the requirements of the rule, the materiality of which, in view of the favorable consideration bestowed upon proceedings before a justice, it is needless to decide, since, in our construction of the act, the facts of this case are not within the sphere of its operation. The tender must be made before any defence is set up, and it must be a proposition to pay a specified sum *in discharge of the plaintiff's claim,* and not a sum in excess of a counter-claim. The defendant may not set up an opposing demand, and his proposal must be acted on before it is known that any such defence will be made. The offer is for the settlement of the plaintiff's asserted claim, and it must be accepted or rejected as a full satisfaction. If accepted, nothing else is considered, judgment entered, and the cause determined; if refused, the trial proceeds, and if the sum due the plaintiff is ascertained to be within the offer (not under the reduction of a set-off or counter-claim) the statute gives the defendant all subsequent accruing costs. Here, the plaintiff's demand is admitted for the entire amount and the recovery is reduced by the finding of the jury upon a contested counter-claim. It does not appear whether the opposing claims grow out of the same transaction, and if they do, they are separable and distinct and do not affect the result. We therefore support the ruling of the court and affirm the judgment.

No error. Affirmed.

NORTH CAROLINA and RICHMOND & DANVILLE RAILROAD COMPANY v. CAROLINA CENTRAL RAILWAY COMPANY and others.

Condemnation of Land—Eminent Domain—Land acquired by Railroad.

1. The Carolina Central railroad, under its charter (and being the successor of the rights and powers of the Wilmington, Charlotte and Rutherford railroad under its charter) and under the general railroad law, Acts 1871–2, ch. 138, has the power to institute proceedings for the condemnation of land necessary for the uses of the company.
2. Land, acquired by one railroad company under a legislative grant of the right of eminent domain and unnecessary for the exercise of its franchise or the discharge of its duties, is liable to be taken under the law of eminent domain for the use of another railroad company.

(*State* v. *R. & D. R. R. Co.*, 72 N. C., 634; *R. R. Co.* v. *Davis*, 2 Dev. & Bat., 451; *Washington Toll Bridge Co.* v. *Comm'rs*, 81 N. C., 491, cited and approved.)

MOTION for an Injunction heard at Chambers in Charlotte on the 8th of June, 1880, before *Schenck, J.*

The North Carolina railroad company, under its charter granted in 1849, and subsequent amendments, completed in 1853 its authorized line of railroad from Goldsboro to Charlotte, entering the city on the northeast at A street, and proceeding down the street to the place where its warehouse and depot buildings are located. On September 17th, 1871, the company leased its road and appurtenances for a series of years to the Richmond and Danville railroad company, its co-plaintiff, a corporation formed under the laws of Virginia, and authorized by its charter to accept the lease and the transfer under it, and to hold and operate the leased road, which contract has been adjudged valid in this court in the case of the *State* v. *The R. & D. R. R. Co.*, 72 N. C., 634.

In February, 1855, by two successive acts of the general

assembly, the Wilmington, Charlotte and Rutherford railroad company was incorporated for the purpose of constructing a road from Wilmington to Rutherfordton with authority, out of separate subscriptions of stock, to begin the work at the same time at its eastern terminus and at Charlotte, and to proceed westward from both points along its projected line. The road was accordingly built, its eastern division as far as Wadesboro, and its western division to Lincolnton, when the company becoming embarrassed and unable to complete the road, the road-bed and other property of the corporation with its franchises were sold to the defendant, the Carolina Central railway company, incorporated in February, 1873, and invested with full power to purchase and hold the same and complete the work, extending the line to the western boundary of the state. For the western division a small station house or depot had been built near and outside the limits of the city of Charlotte, deemed to be sufficient for its business before the connection between its parts.

The defendant has continued the construction of the road until the junction of the two divisions has been effected—the road crossing the plaintiff's road before it enters the city, and extended twenty-two miles further west to Shelby in the direction of the proposed western terminus.

On December 31st, 1874, the lessee company and the defendant, to provide for the great increase of the business of the latter, entered into an arrangement for the joint use of the track along A street to a point at which the other railroads entering the city converge, and where they have erected large, commodious and expensive buildings for storage and safe keeping of goods *in transitu* from one to the other.

This track has been used in common until the lessee company, under an authority reserved in the contract, gave notice that the agreement for its joint use must terminate

on the 1st day of July, 1880. The defendant has expended large sums in the erection of necessary buildings at the place from which it is thus excluded and prevented from participating in the transportation of the freight arriving at the place and bound for northern seaports, which has become large and valuable and is constantly increasing.

The defendant company now in the hands of receivers, and apprehensive of the injury to its business from this sudden deprivation of its former facilities, with leave of the court under whose control it has been placed, has instituted proceedings before the clerk under its charter for the condemnation of a right of way over so much of the street as is traversed by the plaintiff's track, as will enable the defendant, without interfering with the use of the present road, to construct a parallel line down the street, and thus afford renewed access, such as was before possessed, to its freight depot thereon. The plaintiffs appeared and resisted the application. On the hearing before the clerk, he granted the prayer of the petitioner and appointed commissioners to examine the premises and condemn the land and right of way, necessary for the petitioner's relief, and to estimate the damages to be paid therefor, for a track extending from the said depot up A street to 9th street, along and on the west side of the plaintiff's track, not nearer thereto than eight feet, or so much thereof as may be necessary for the additional track. From this order the plaintiffs appealed to the superior court. Before action on the defendant's application by the clerk, the defendant entered upon the land and began the work, preparatory to laying down the rails of the new track, with full assent of the corporate authorities of Charlotte, when a restraining order issued in this action, with notice to the defendant to show cause why an injunction should not issue, interrupted the further progress of the work. Upon the hearing of the rule and the numerous affidavits read in evidence, His Honor finds

among others, as facts, in which he is fully supported by the proofs:

"That the depot is at the most approximate point to the business and mercantile portion of the city, and if the depot should be removed, it will result in the serious inconvenience and injury to shippers and business men, and will greatly cripple the business and usefulness of the defendant road which is a competing road with the plaintiffs."

"That a track for defendant road can be constructed in and along A street on the west side of plaintiff's track, and not less than eight feet therefrom, and can be occupied and used by defendant road with its engine and cars, without injury to the plaintiff company or interference with its transportation and business, present or probable future:"

"That the only (other) railway track on A street is that of the defendant company which has two side tracks therein, one 750 feet, the other 7300 feet in length from the depot extending north, the latter of which it is proposed to extend through A street to the crossing; and that both have been in the exclusive adverse occupation of the defendant company since 1874:

"That there is no other way of reaching the depot through the corporate limits of the city than through A street, that can be obtained without great trouble and expense, if at all:

"That should the plaintiff company ever need a double track, as claimed, or desire to construct such, it can be done on its right of way on the east side of its present track as conveniently as on the west side."

The court therefore disallowed the motion for an injunction and from the judgment the plaintiffs appeal.

Messrs. Graham & Ruffin, Jones & Johnston, and *W. W. Fleming,* for plaintiff.

Messrs. Bynum & Grier and *Clement Dowd,* for defendant.

Smith, C. J., after stating the case. While we suggest, we do not propose to pursue the enquiry whether the facts disclosed present a case of irreparable damage, for which, according to the established practice, a restraining order may be sought to stop the further progress of the work, nor whether the pendency of the proceeding for condemnation of a right of way will not be a barrier to the prosecution of the present action, since we fully concur with the rulings of the court upon the merits of the controversy, so far as they can be properly considered at this preliminary stage of the case, and upon the insufficiency of the reasons assigned for demanding the injunction.

The main if not the only important questions discussed before us are two:

1. Has the defendant company a right to proceed for condemnation of land for its use or has its power for such purpose been exhausted?

2. Is the land acquired and used for the North Carolina railroad company, liable under the law of eminent domain to be taken for the use of the defendant company?

We will examine and pass upon these enquiries, a negative answer to either whereof would be fatal to the success of the condemnatory proceeding.

First.—The first enquiry must be resolved by reference to the charter of the defendant company and the general law applicable to railroad corporations. As the successor of the Wilmington, Charlotte and Rutherford railroad under the purchase made at the judicial sale mentioned in section 15 of the charter, it succeeded also to "all the estate and property" of that company and to "all its contracts, franchises, rights, privileges and immunities," and hence could prosecute the unfinished work, as originally contemplated in like manner and with the same means as its dissolved predecessor. The charter of the latter (sec. 26,) expressly confers the right to condemn lands or a right of way over them, for

the use of the road, not to exceed a width of prescribed limits, in the absence of any agreement, or when "from any other cause the same cannot be purchased from the owner," and directs the mode of proceeding for the exercise of the right. Acts (Private) 1854-'55, ch. 225.

With slight modifications the defendant company is clothed with the same authority in section 8, which provides, "that when any lands or right of way shall be demanded by said company or condemned for the purpose of constructing their railway, or *branches or feeders*, and for want of agreement as to the value thereof, or from any other cause the same cannot be or is not purchased from the owner, the same may be taken at a valuation to be made by three commissioners, or a majority of them, to be appointed by the clerk of the superior court of the county where some part of such land or right of way is situated." Act 1872-73, ch. 75.

In concurrence will be found the provisions contained in the enactment of 1871-'72, for the formation of railroad companies, section 25 of which authorizes the board of directors by a vote of two-thirds of their whole number, at any time "to alter or change the route or any part of the route of their road, if it shall appear to them that the line can be improved thereby," and confers the like powers of acquiring lands needed for the changed as for the original route, and when the change is "made in any city or village after the road shall have been constructed," the sanction thereto is required to be given "by a vote of two-thirds of the corporate authorities of said city or trustees of said village." Bat. Rev., ch. 99, entitled Railroad Companies, sec. 25.

While this section is primarily applicable to roads formed under the act, it is extended with other enumerated sections to "all existing railroad corporations within this state." Sec. 45.

These references sufficiently sustain the claim of the defendant to resort to the right of eminent domain, when necessary to acquire lands for such uses as are contemplated in the present case, and are alike demanded by the interest of the company and the convenience of the public.

Secondly.—Is the property of the North Carolina railroad company subject to condemnation for the use of another?

We see no reason why land obtained under a legislative grant of the right of eminent domain, should be exempt from its exercise when the public interest requires it for other public uses, any more than other lands held by individuals. The rights of property thus invaded are as sacred in the one case as in the other, and equally protected in the fundamental law; and both are and must be subordinate to the demand of the state for public and useful purposes. The exercise of the power of eminent domain over the property of public corporations may be however subject to limitations not strictly applicable to other property. It is reasonable, as contended in the argument for the plaintiffs, that land of one such corporation, necessary for the exercise of its franchise and to the discharge of its duties, should not be taken and appropriated by another corporation no more important or useful, unless upon a clear expression of the legislative intent to confer it, and then the act itself would be a declaration that the condemnation was required for the public good. If the present application were to have this effect and seriously injure the business of the plaintiff companies, we should hesitate to hold that the right of way demanded by the defendant could be condemned under the general words found in its charter. But it is entirely otherwise. No real interruption of the plaintiff's business, no interference with the exercise of the franchises conferred in the charter, and, in the opinion of the witnesses, little or no inconvenience to transportation, will result from the construction of another track by the side of that of the plain-

tiff's, and eight feet or more from it as proposed to be done by the commissioners. At least such additional track can be laid down, and if built will not seriously, if at all, disturb the operations of the plaintiff companies, or their putting down and using a second track when required for an enlarged transportation in the future.

The right to construct and operate lines of telegraph along any railroad or other public highway in the state, and to obtain the right of way therefor by a condemnatory proceeding, is expressly conferred upon any telegraph company, incorporated by this or by any other state, by chapter 203 of the acts 1874–'75. The erection of poles with telegraphic wires from one to the other, along the line of the road, cannot obstruct the transportation of freight or the carriage of passengers over it, and thus two objects of great public usefulness are accomplished without detriment to either. Why, when only a similar privilege is demanded by one railroad of another, involving the common use of the same land by separate and non-interfering tracks for a few hundred feet only, and when this is the only route by which its own depot and the common terminus of other roads can be reached, should it be denied to the defendant company? This view is in conformity with adjudged cases.

In *West River Br. Co.* v. *Dix*, 6 How., 507, the supreme court of the United States held that the bridge of an incorporated company, built and maintained under a charter from the state, could be taken and condemned as part of a public road under the laws of that state. In the opinion of the court this language is employed: "A franchise to erect a bridge, to construct a road, to keep a ferry, and to collect tolls upon them, granted by the authority of the state, we regard as occupying the same position, with respect to the paramount power and duty of the state to protect and promote the public good, as does the right of the citizen to the possession and enjoyment of his land under his patent or

contract with the state, and it can no more interpose any obstruction in the way of their just exertion."

The same proposition is reiterated in almost similar terms in *The R. & F. R. R. Co.* v. *The Lo. R R Co.*, 13 How., 71, and GRIER , who spoke for the court refers to one point made in the bill as follows: "The counsel very properly have not insisted, in their argument in this court, on this point, that the legislature had no power to authorize the construction of one railroad across another."

In *Springfield* v. *Con. River R.*, 4 Cushing, 63, a bill was brought to enjoin the defendant company from maintaining a railroad and running cars thereon, over a highway in Springfield; SHAW, C. J., expresses the opinion that a grant of power by legislative act to lay out a railroad, where the precise course and direction between the *termini* are not prescribed, but left to the discretion of the corporation, does not confer authority, *prima facie*, to lay the railroad on and along an existing highway longitudinally, or in other words, to take the road-bed of the highway as the track of the road, and accordingly ordered an enquiry, "whether it was by fair and reasonable intendment necessary to lay and construct the same upon and along Front street or either of the public ways in Cabotville or not." In reference however to the condemnation of the one for the use of another, he adds: "But the court are of opinion that it is competent for the legislature under the right of eminent domain, to grant such authority. * * * The grant of land for one public use must yield to that of another more urgent." In the conclusion of the opinion he says: "The grant of a right is, by reasonable construction, a grant of power to do all the acts reasonably necessary to its enjoyment. It is not an absolute or physical necessity, absolutely preventing its being laid elsewhere; but if to the minds of reasonable men conversant with the subject, another line could have been adopted between the *termini*, without taking the high-

way, reasonably sufficient to accommodate all the interests concerned, and to accomplish the objects for which the grant was made, then there was no such necessity as to warrant the presumption that the legislature intended to authorize the taking the highway."

It is plain the facts of the present application meet all the conditions and requirements of the rule laid down by the supreme court of Massachusetts, and we forbear further discussion of the subject, and refer only to a few additional authorities—*Ches. & Oh. Can. Co.* v. *Balt. & Oh. R. Co.*, 4 Gill & Johns, 1; *Beekman* v. *Sar. & Schen. R. Co.*, 3 Paige, 45; *Chas. River Br.* v. *Warren Bridge*, 7 Pick., 394; *R. & G. R. R. Co.* v. *Davis*, 2 D. & B., 451; *Wash. Toll Bridge* v. *Comm'rs*, 81 N. C., 491; 1 Red. R. R., 261, 312, 313.

We have an instance of the facility with which parallel tracks, near to each other, may be operated without inconvenience to either, in that portion of the plaintiff's road running from Raleigh west, along which passes for several miles that of the Raleigh and Augusta Air-Line railroad, until the latter crossing the other proceeds in another and different direction.

We see no ground for apprehending an injury to the plaintiff's road by allowing the defendant to construct that, the necessity for which is produced by the withdrawal of the leave to use one for both, in order to re-open the way to its depot, and to renew connection with other roads, and thus to admit of convenient transfer of through freights from one to another.

We therefore sustain the refusal of the injunction and affirm the judgment. Let this be certified.

No error. Affirmed.

IN A CASE BETWEEN SAME PARTIES:

SMITH, C. J. The opinion in the case between the same parties with positions reversed disposes of the similar ques-

tions involved in this appeal and the repetition of what is there said and held needless. We advert to a single point not made in the argument, to avoid any inference from our silence to notice it. It is as to the right of appeal from the order appointing commissioners to lay out the right of way and define the limits of the land required, and also to assess the damages for taking the same. The right of appeal is expressly given to persons over whose lands the railway or its branches may pass, after the commissioners have acted and their report has been confirmed, and who may be "dissatisfied with the valuation of the commissioners," by the 9th section of the charter of the plaintiff company. Acts 1872–73, ch. 75.

This provision for an appeal at this stage of the proceeding would seem to imply an absence of such right at an earlier period, which if allowed might be exercised to the embarrassment and delay of the enterprise, and be attended with other serious inconveniences. We have accordingly held at this term that an appeal does not lie from an order appointing commissioners under proceedings instituted by telegraph companies, in the case of *The U. Tel. Co.* v. *W. & W. R. R. Co.*, *ante*, 420.

Nor do we see how such an order "affects a substantial right claimed" within C. C. P., § 229, since the appeal which is allowed will bring for review the legality and regularity of the order of appointment if there be exceptions thereto, as well as of the confirmation. There is no error and this will be certified to the court below.

No error. Affirmed.

W. H. RYAN and others v. JAMES McGEHEE.

Deed—Words of Conveyance—Evidence—Affidavit.

1. A deed, conveying land "unto the said R, in trust for B and others as aforesaid and their heirs," (R being one of those named in the preceding recitals of the deed as entitled to the equitable estate), convey an estate in fee to R the trustee.

2. When, in an action of ejectment, M is made a party defendant upon the affidavit of an agent which alleges among other things that "M claims title to the land sued for under the same party under whom the plaintiff claims;" *Held*, that the affidavit is incompetent to establish the fact that M and the plaintiff claim title under the same party.

(*Murray* v. *Blackledge*, 71 N. C., 492; *Triplett* v. *Witherspoon*, 74 N. C., 475; *Hare* v. *Jernigan*, 76 N. C., 471, cited and approved.)

CIVIL ACTION to recover land, tried at Spring Term, 1880, of GUILFORD Superior Court, before *Seymour, J.*

Judgment for plaintiffs, appeal by defendant.

Messrs. J. N. Staples and *J. T. Morehead*, for plaintiffs.
Messrs. Scott & Caldwell, for defendant.

SMITH, C. J. The plaintiffs claim title to the land described in the complaint, through successive conveyances, commencing in 1835 and ending in a deed from the sheriff of Guilford, executed in January, 1870, to William Ryan, trustee for himself and others named, who with the heirs at law of the trustee, made parties since his death, as plaintiffs, prosecute the action.

At the return term, after the complaint was filed, application was made by B. F. Martin, and he was permitted to become a defendant upon the following affidavit: "W. A. Martin maketh oath that he is the agent of B. F. Martin, and that the defendant, McGehee, is the tenant of said B. F. Martin, who claims title to the land sued for in this action,

under the same party under whom the plaintiff claims, and that he is advised that said B. F. Martin is a necessary party to a complete determination of the question involved." (Signed by W. A. Martin, and sworn to before the clerk of the superior court, on the 10th of September, 1877.) Thereupon the admitted defendant answers and denies the allegations of the complaint.

The court directed the jury,

1. To find a general verdict for the plaintiffs or the defendant, and to pass upon the following special issues:

2. Does the defendant claim the land in controversy under the same party as the plaintiffs, to-wit: the Deep River Mining Company, of the City of Baltimore?

3. What are the plaintiffs' damages?

The jury rendered a verdict for the plaintiffs and estimated the damages at $150.

On the trial the defendant offered no evidence, and the plaintiffs, in the opinion of the court below failing to show title under the deeds, proposed to estop the defendant from disputing that of the corporation, the alleged common source of the claims of both, and for this object introduced the affidavit of W. A. Martin. The defendant opposed its reception, as incompetent for that purpose, and, if received, insists upon its insufficiency to establish the fact.

The affidavit was admitted and read, and is the only evidence submitted to the jury to support their finding upon the second and principal issue.

The defendant contends further that the sheriff's deed, purporting to convey the estate of the said corporation to the trustee, Ryan, for want of words of inheritance, vested in him an estate for his life only, which expired at his death, and therefore no recovery can now be had.

These are the only exceptions we deem it necessary to notice, and we proceed, reversing their order, to examine and dispose of them:

I. The sheriff's deed for the land undertakes to "bargain" sell and convey unto the said William H. Ryan in trust for L. P. Bayne and *others* as aforesaid *and their heirs*, in as full and ample manner as he, the sheriff, is empowered by virtue of his office and the writ of *venditioni exponas*."

The court ruled, and in our opinion correctly, that the deed was in form sufficient to pass the fee in the land.

The trustee is himself one of those named in the preceding recitals, as entitled to the equitable estate, and is consequently included in the super-added word, "*others*." It is obvious, from the entire scope of the deed, that its purpose was to convey the full estate of the corporation in the land, and any restricted interpretation involves the inconsistency of passing a limited legal estate to the trustee, and an equitable estate in fee to himself and those for whom he holds. The difficulty is removed by annexing the words "their heirs" to the persons named and referred to, as well the trustee as the *cestuis que trust*, and making the legal and equitable estates of equal duration, and this we think is a fair and reasonable construction of the instrument and carries out the common intent. But if it were otherwise, the objection would not be fatal to the action, since it can be sustained by the owners of the equitable estate, who are also parties, as is decided in *Murray* v. *Blackledge*, 71 N. C., 492.

II. The affidavit, while unobjectionable as the declaration of one whose testimony has been used to induce certain actions on the part of the court for the benefit of the defendant, and to which he has thereby given credit, for some purposes, is incompetent to establish the fact in support of which it is introduced. Lands can only be conveyed *inter vivos* (except for a term of years) and the legal title thereto acquired and transmitted, by deed duly proved and registered in conformity with the requirements of the statute, and the fact is shown by its production or a copy in

case of loss or destruction. *Triplett* v. *Witherspoon*, 74 N. C., 475; *Hare* v. *Jernigan*, 76, N. C., 471. The estoppel set up against the defendant presupposes the existence of a deed in proper form from the corporation to the defendant, or some one under whom he claims; and admissions written or oral, which in this respect are of equivalent import, cannot be substituted as evidence so as to dispense with the production of the deed itself after registration, or a copy, or an explanation of its absence. To allow this would be to render titles insecure, and in judicial proceedings, dependent upon the uncertain memory of witnesses.

Suppose for illustration the plaintiffs had offered in support of their title no other evidence than the defendant's declaration that they were the owners of the land, would this alone be sufficient to determine the issue as to title, and warrant a recovery? And does the admission in the answer, in its widest scope, prove any more? It is a mere acknowledgment that the parties to the suit derive their opposing claims from a common source, under conveyances from the same corporation, and, if incompetent or insufficient to show the execution of a deed to the plaintiffs, must be equally so, to prove the execution of any, mediate or direct, to the defendant, to operate as an estoppel upon him. Still less does it point to the *corporation as that common source*, in preference to the numerous preceding owners, whose deeds were exhibited, as constituting the plaintiffs' claim of title, broken at its attempted connexion with the corporation.

The evidence itself utterly fails to show at which one of the many links in the chain the divergent streams of title arise, and there is nothing to support the verdict fixing this starting point in the corporation, rather than in one of the preceding owners, and so the jury ought to have been instructed.

In another aspect of the case the use made of the affidavit

is self-contradictory. It is relied on in proof of an attempted conveyance to the defendant to conclude him from questioning the right of the corporation, and the absence of such deed, as evidence of the plaintiffs' superior title. For one purpose it is assumed that there is such a conveyance; for another, that there is none, and the proof is deduced from the same declaration.

Aside from this, it may be asked, how can the plaintiffs have judgment upon a verdict which simply finds, as a fact, that both parties undertake to derive title to the land from the same corporation owner, but does not find in whom is the superior and better title? We lay out of view the general verdict for the plaintiffs, because this rests wholly upon the finding on the second issue, and is only a deduction from it. Except by the aid of the estoppel, as the court decided, the plaintiffs cannot recover, and the error in regard to the estoppel pervades the other findings.

It must be declared there is error and the judgment below is reversed and a new trial awarded. Let this be certified.

Error. *Venire de novo.*

THOMAS A. McNEILL and others v. JAMES P. HODGES, Guardian.

Guardian and Ward—Statement of Account—Confederate Transactions—Commissions.

1. Where a guardian being indebted to D paid the amount to A for him, taking A's individual receipt, A being indebted to the estate, the guardian is entitled to credit for the amount paid.
2. A guardian is entitled to credit for an amount collected out of him under execution for costs in a suit instituted by him; and the fact that in another transaction between the guardian and one of the makers of

the note sued upon in said suit, where the guardian became his surety and took a mortgage to indemnify himself against loss, does not warrant the inference that he could also have protected himself against liability for such costs.

3. A guardian is not chargeable with moneys paid to the mother of his wards for their board after their arrival at full age, no objection being urged against the propriety or justness of the claim or of the price paid.

4. In stating a guardian account, it is not requisite to state a separate account between the guardian and the administrator of a deceased infant ward, where there is no allegation of any misconduct on the part of the guardian but simply an objection to the *manner* of stating his account; nor is it a ground of exception that the estate of the deceased ward is distributed and blended with the estates of the other wards in the general account.

5. Interest is properly chargeable against a guardian from the time moneys are received by him, there being no evidence that the same remained unemployed in his hands.

6. A guardian is chargeable upon notes received by him for the hire of slaves before the war, where the obligors were solvent and the guardian forbore to bring suit against them before and during the war.

7. Where a guardian received coin for the rent of land in 1859, '60 and '61 in amount equivalent to its rental value in U. S. currency, the legislative scale does not apply.

8. Where a guardian received and disbursed Confederate money at different times during the war, the funds received and paid out should be grouped as nearly as practicable, and the receipts equivalent to the disbursements scaled as of the time of making the latter, and the excess of the former, reduced by the scale independently applied, carried into the general account.

9. A guardian is not exusable for accepting Confederate money at its enormous depreciation, during the latter months of the war, in payment at its nominal value for debts contracted in its earlier stages, when the depreciation was slight; but a guardian is not chargeable with Confederate money received by him for rents and hires in 1863 and 1864 (due at the end of those years) which was kept distinct from his own funds.

10. A guardian is entitled to a credit for $100 paid to a referee in an action instituted by him before the war against an administrator for a settlement and dismissed at plaintiff's costs after the collection of a large amount, although no report or order of allowance by the court

can be found, the guardian testifying that the report was filed and that search has been made for it, and there being no suggestion of bad faith.

11. A guardian is entitled to credit for costs paid by him in a suit where the defendant was solvent, but the guardian being informed that the debt was doubtful accepted certain notes in settlement (which were afterwards paid) and paid the costs of the suit.

12. A guardian is entitled to commissions although he omitted to keep and render regular accounts, where no imputation is cast upon his integrity by reason of the neglect.

13. A guardian is not entitled to commissions upon any disbursement made after his ward arrives at full age.

(*Love* v. *Love*, 3 Ired. Eq., 104; *Filhour* v. *Gibson*, 4 Ired. Eq., 455; *Outlaw* v. *Farmer*, 71 N. C., 31; *Arnett* v. *Linney*, 1 Dev. Eq., 369; *Finch* v. *Raglund*, 2 Dev. Eq., 137; *Drake* v. *Drake*, 82 N. C., 443; *Washington* v. *Emery*, 4 Jones Eq., 32; *Whitford* v. *Foy*, 65 N. C., 265, cited and approved.)

SPECIAL PROCEEDING heard on appeal at Spring Term, 1880, of CUMBERLAND Superior Court, before *Eure, J.*

This was a proceeding instituted by the plaintiff wards against the defendant guardian in the probate court of Cumberland county for an account and settlement. The probate judge took testimony and stated an account, to which both parties filed exceptions. All the exceptions were overruled, and both parties appealed to the superior court, and from the ruling of the judge below, both parties appealed to this court.

Messrs. McNeill & McNeill and *McRae & Broadfoot* for plaintiffs.

Messrs. N. W. Ray and *W. E. Murchison*, for defendant.

SMITH, C. J. The exceptions to the account stated by the probate judge and presented for review in the defendant's appeal may be divided into two classes; those taken by the plaintiffs and sustained; those taken by the defendant and

overruled. They will be considered in their proper order as belonging to the one or the other class.

I. Exceptions of the plaintiffs which are allowed:

Exc. 1. For that the defendant (and when this word alone is used it is intended for the appellant, Hodges,) is credited with the sum of $20, paid, as voucher produced shows, to A. D. McLean against whom he then held claims which should have been applied as a set-off to discharge the demand: In explanation the defendant testifies that this sum was due for professional services to D. H. McLean and was paid to the former for him, and the form of the receipt given overlooked. This statement accepted as correct, and the case depends mainly upon the testimony of the defendant delivered upon a protracted and searching examination, and the ruling of the court must be reversed.

Exc. 2. For that the defendant is allowed a credit for the sum of $9.30, costs incurred in prosecuting an action against R. B. Smith and others, on their note and paid to the sheriff under execution: The circumstances under which the defendant was compelled to pay this money are not explained. The only information is furnished by the defendant who recollects that he recovered judgment and collected the debt and his impression is that he was unable to get more. It appears further that in 1869, the defendant became a surety to one of the makers of the note, for money borrowed to pay for land purchased, and the land was at the same time mortgaged for his indemnity against this contingent liability. The land was afterwards sold and the debt satisfied. The judge passing on the exception seems to have drawn from these facts the inference that the defendant could have protected the trust estate from the costs of his suit, and was negligent in failing to do so. But we do not think this conclusion is reasonably warranted. The expense incurred falls primarily upon the plaintiff in a suit, although successful, and are recovered in the final judgment

against the defendant. This payment was not voluntary, but forced out of the defendant by the process of the court, and in the absence of contradictory evidence, must be assumed to have been legally demanded of him. Upon the ordinary presumption of good faith in the conduct of a trustee, who has no personal interest to subserve, and is nnder no imputed influence antagonistic to duty, the money thus paid ought to be deemed rightfully expended and allowed. Nor does it follow because an indemnity was given in the mortgage for the defendant's protection as a surety to the note of the mortgagor, an entirely separate transaction, that the defendant could have provided against the costs and would not have done so if he could. We do not concur in the ruling which imposes this loss on the defendant.

Excs. 3, 4, 5. For that the defendant is allowed for sums paid, just before the bringing the action, to the mother for board, to-wit, $150.40, for Mary L.; $725.44, for Caroline E.; $735.44 for S. Campbell, her daughter: These charges rest upon the same ground and may be considered together. The first sum was disallowed and so much of the others as was for board furnished after the parties respectively arrived at full age. The facts connected with the matter are these: The wards continued to live with their mother after as before their majority, and the defendant had paid for their board up to the year 1866, at the rate of eight dollars per month for each, and no other arrangement or understanding was entered into. Mary L. became of age in June, 1859; knew that her guardian continued to pay her board and made no objection to his doing so. S. Campbell attained her full age in July, 1868, and Caroline E. hers in February, 1871, and was married in October, 1877. The defendant had notice of the intended present suit, and, just before at the request of J. L. Smith, and upon information that his mother wanted a settlement of her claims for board,

went with him to her house and found there also another son and the said Campbell. These claims had often before been asserted, but payment delayed because of the scarcity of money, and the defendant deemed it his duty to adjust and settle all demands upon the trust fund before delivering over and accounting for what remained to the late wards. The two sons and their mother retired to a room for private consultation, and defendant supposed that the said Campbell was with them, in reference to the board, while the defendant remained on the piazza. The son soon came out and suggested a charge of five dollars per month, asking if that was too much, to which the defendant replied that it was reasonable. It was accordingly settled upon that basis, the board of those married paid up to the date of their marriages, and that of S. Campbell to January, 1878. The indebtedness was discharged by the transfer of certain notes against the defendan's son and the said W. J. Smith, both of which he then believed and now believes were solvent, and by his giving his individual note for $273, the residue of the demand. These notes were accepted in payment, and it does not appear that any complaint is made of their sufficiency even now. No objection is urged against the propriety or justness of the claim for board or of the price charged, or that the sum paid was not due and owing to the mother. The only complaint is that the settlement by the defendant under the circumstances was unauthorized and officious, and ought to be stricken from his account. This seems to be a harsh and strained interpretation put upon the defendant's act. He secured thereby no advantage to himself, and, he says, he made the settlement when called on from a sense of duty and would as willingly have left it to his wards if he had supposed such to be their wish. He held the estate in his hands and the means wherefrom to pay the claim, some of it contracted during minority, and his purpose was to prepare and deliver over the trust estate,

free from charges, to those who were entitled to it. The settlement was under the supervision and with the approval of the two sons, and, as he supposed, of the daughter S. Campbell also. The parties whose uncontested indebtedness has thus been discharged in entire good faith, and they relieved from any personal obligation, ought not to be allowed unless under strict rules of law, to avail themselves of the discharge and to refuse a credit for moneys honestly expended for their use and benefit by their trustee, upon an imputation of officiousness in the act. The trustee ought at least to be subrogated to the rights of the creditor whose debt has been paid, and thus the wards left in full possession of every legitimate defence open to them of the claim now preferred by the mother herself. We do not in this impair the rule of law, that an officious interference and payment of a debt by a stranger leaves him without remedy against the debtor. This is not a case of the kind and that principle cannot be invoked in resistance to this charge. We think the judge misapplies the rule in rejecting a part of the sum paid and entailing the loss upon the defendant personally, and his ruling is reversed.

Exc. 6. For that a separate account is not stated between the defendant and the administrator of the infant, Alice Smith, and that her estate is distributed and blended with those of her surviving brothers and sisters: The intestate died in 1856, very young, and no administration was taken out until the year 1878. The charges against the estate were all paid by the guardian, and her share of the money fund divided and passed over to the credit of her several distributees. Two of the distributees received their parts of the fund and had their shares of the slaves allotted in 1857 or 1858. Another distributee had partition of the slaves and his part assigned therefrom in 1862. The rest of the slaves were kept together until their emancipation, and the hires mixed with the general fund and all included

in the accounts of the distributees as credits due to them respectively. It is not suggested that the administrator requires the intestate's estate for any purpose but to pay over to the distributees who have already received their parts. No advantage will accrue to them but delay and expense in severing the accounts, and for more than twenty years all seemed to have acquiesced in this appropriation of the estate. The fund was held in common; there was no legal representative with whom the guardian could come to an account; and the objection lies not to any official misconduct on his part, but to the manner in which the accounts are now taken. The parties are all before the court, and the judgment now to be rendered will conclude and settle the whole matter. Why should the administrator be permitted to withdraw a fund, which it instantly becomes his duty to pay over to those who have already recovered it? The legal title thereto is in the administrator, but the equitable owners are those to whom he must pay it when collected. We are not without the support of past adjudications upon the point. A similar question arose in *Love* v. *Love*, 3 Ired. Eq., 104, and RUFFIN, C. J., thus disposes of it: "The plaintiff did not administer for the purpose of satisfying debts. His intestate owes nothing; it is not pretended. The plaintiff is therefore but an administrator purely in trust for the next of kin of his intestate brother. * * * As the case stands, the next of kin (there being no creditors) were the *real owners of the property, and the legal title subsequently got by the administrator, but a shell. It may be used to protect but not to annoy the true owners.*" To the like effect are *Filhour* v. *Gibson*, 4 Ired. Eq., 455, and *Outlaw* v. *Farmer*, 71 N. C., 31. The cases cited in the brief for the exceptant are not in conflict with those referred to. The ruling of His Honor in support of the exception must be reversed.

II. Exceptions of the defendant overruled by the court.

Exc. 1. For that interest is charged against him from the

time when the moneys were received, and he is allowed interest only from the date of the respective disbursements: The defendant exhibits no evidence that the moneys received remained unemployed in his hands for any space, and it was his duty forthwith to apply them to the debts or to invest in interest-bearing securities. This it was his duty to show if he seeks exemption from the obligation to account for interest. "Executors must expect to be charged with interest," says the eminent judge delivering the opinion in *Arnett* v. *Linney*, 1 Dev. Eq., 369, "unless they positively and unequivocally swear that they have not used the money themselves, nor loaned it to others, but have kept it on hand for the necessary use of the estate. We are obliged to adopt this rule to prevent executors from taking undue advantages; since it is impossible to trace the money and prove the particular uses made of it by the executor. He can always exonerate himself by keeping fair accounts and purging himself on oath." *Finch* v. *Ragland*, 2 Dev. Eq., 137. Answering a similar exception to the charge of interest without proof that the funds had been used, Gaston, J., says: "It has been calculated upon the notes and debts from the time when they became due, and upon the sales from the expiration of the term of credit. There has been no interest account kept by the executor that less was in fact received. This exception is overruled." The rule applies with greater force to a guardian whose primary duty is to keep the fund at interest and well secured, and not, as in the case of a personal representative to collect and account for only. We sustain the court in overruling the exception.

Exc. 2. For that the defendant is not credited with the notes of R. B. Smith and others for $145 and $231.50 due for hire of slaves in 1858 and 1859 while he is charged with the aggregate hires for those years: It is in proof that two of the parties bound in the notes, Smith and Williams, each

owned lands, and the defendant, deeming the debt secure, forbore to bring suit before and during the war. He assigns as a reason for not proceeding afterwards, the stay laws passed by the general assembly and the homestead and exemption provisions of the constitution. The debt may have been saved by reducing it to judgment, and the inaction of the defendant in taking any steps to secure the debt is without excuse, and the consequent loss ought to follow his own culpable negligence. This ruling of the court is approved.

Exc. 3. For that the rents charged for 1861 and the two succeeding years are not reduced by applying the legislative scale: By the testator's will his widow had liberty to take a certain tract and allow the defendant to have use of that devised to her. This exchange she elected to make, and her land was rented out with the assent of the older members of the family on such terms and conditions as were deemed necessary to prevent deterioration and impoverishment. The value of the rented premises before the war was $200 per annum, and the defendant received payment in coin equivalent in value to that sum in the currency of the United States. There is no error in refusing the scale.

Exc. 4. For that the receipts and disbursements are scaled at their respective dates, entailing constant loss on the defendant by reason of the continuing and rapid depreciation in confederate money: This exception, except as to the rents, is well taken. To avoid the consequences pointed out, and to correct the inequality in the scaling process, the funds received and paid out should be grouped as nearly as practicable, and the receipts equivalent to the disbursements scaled as of the time of making the latter, and the excess of the former, reduced by the scale independently applied, carried into the general account. This will remedy the evil and leave the scaled value of the excess to bear interest under the general rule. The accounts are not before us, but from a statement in the brief of the plaintiff's counsel

of the aggregate receipts and disbursements for the years 1862 and 1863, the referee will be able to make the adjustments upon the principle laid down without serious difficulty, and the large excess of the former, for the year 1864, must be disposed of according to the adjudications heretofore made in regard to the personal responsibility resting upon fiduciaries for confederate money perishing in their hands.

Exc. 5. For that the defendant is not allowed a credit for the scaled value of confederate money unexpended in his hands, and which he says he could not invest and has kept separate and distinct from his own: The defendant is not excused for accepting confederate money at its enormous depreciation during the latter months of the war, in payment at its nominal value for debts contracted at its earlier stages when the depreciation was slight, any more than he is for accepting such in payment of ante-war debts. But so far as the sum he now holds is constituted of rents and hires for 1863 and 1864, due at the end of those years, kept distinct from his own funds, it ought not to be charged against him, because, as a matter of public history, such funds were incapable of any investment which would have prevented the loss, at that date. All that could be then expected of a trustee was the careful preservation of the funds for the benefit and at the hazard of those to whom it equitably belonged.

The rulings of this court render necessary a reference and reformation of the account, and as this can be done with more convenience in the court below, the cause will be remanded for further proceedings in accordance with this opinion, and it is so ordered.

Error. Modified and remanded.

IN SAME CASE UPON PLAINTIFFS' APPEAL:

SMITH, C. J. The plaintiffs' appeal brings up for consideration the several rulings of the court by which certain

exceptions taken by them to the account reported from the probate court are disallowed. To these attention will now be directed.

Exception 1. For that the sum of $100 paid to A. McLean and endorsed by his receipt (voucher 17) is improperly allowed: This payment was made for taking and reporting an account in a suit instituted in 1857 in the county court by the defendant and Mary Smith against J. C. Smith, administrator of W. T. Smith for a settlement of the intestate's estate in which more than $12,000 was claimed to be due. The answer admitted a liability for a large amount. The cause was continued till 1867 and then dismissed at the plaintiffs' costs. During its progress the defendant collected about $3,600. The docket shows an order of reference to A. McLean to take the account, but no report is found and no order of the court making an allowance to the referee or directing any payment therefor is entered in the cause. The defendant testifies that the account was taken and reported, but after diligent search cannot be found. The demand for the service rendered was made on him by the referee and paid, and he thinks this was in consequence of an order of the court, though not put in the record. There is no suggestion of bad faith in the transaction, nor of interest or influence to pay a demand which is not due and just, and after the long interval which has since elapsed, covering the confusion and disorders of the civil war and the displacement and loss of judicial records and proceedings, the payment should be assumed to be correct, and was properly allowed. C. C. P., § 480; *Drake* v. *Drake*, 82 N. C., 443. Nor is the charge excessive. *Washington* v. *Emery*, 4 Jones Eq., 32.

Exc. 2. For that $10.25 (voucher 76) was improperly paid to J. C. Callahan, clerk: The costs were incurred in prosecuting an action against Thomas S. Lutterloh to recover $494 due from him to the wards in 1869. Lutterloh is

shown to have been solvent, but the guardian was informed by parties interested in the fund that the debt was doubtful and advised by them to accept certain notes, unquestionably good, offered by Lutterloh in place of his own. The exchange was accordingly made, and the substituted notes have mostly been paid since, and the whole amount is charged against the defendant in the account. As the subject matter of the suit was thus adjusted the suit could not be maintained, and the costs falling on the guardian were rightfully paid by him.

Exc. 3. For that the defendant is not entitled to commissions; and if to any, the allowance is excessive: This exception is sustained by the judge as to so much of the commissions as are allowed on disbursements made after the wards became of full age, and in this ruling we concur. The management of the estate has been conducted over a long series of years and through a period requiring the exercise of great care and diligence, and in our opinion with unusual success. It would be neither equitable nor just to deprive him of all compensation for his services because of his omission to keep and render regular accounts of his administration, when no imputations are cast upon his integrity by reason of the neglect. Nearly all the information upon which the charges against him are founded was obtained from his own testimony delivered upon a long, minute and elaborately exhaustive examination, and with no apparent disposition to withold anything he knew favorable or unfavorable to himself. On information thus obtained the complaint was itself amended. "It is only in case of fraud or very culpable neglect," says RODMAN, J., in *Whitford* v. *Foy*, 65 N. C., 265, "that a trustee will be punished by being deprived of his commissions.

Exc. 4. The allowance of the charge for board paid for the plaintiff, Campbell, has already been disposed of in the other appeal.

Exc. 5. The claim of the defendant to have a credit for the scaled value of the surplus confederate money in his hands and lost, is also considered and passed on as far as the facts disclosed in the case will permit in the defendant's appeal, and needs no further comment here. The same order for remanding must also be made in this case to the end that the accounts may be reformed and corrected in accordance with the opinion of this court.

Error. Modified and remanded.

A. A. McKEITHAN v. MARY McGILL, Admx.

Executors and Administrators—Statute of Limitations—Burden of Proof.

1. An action against an administratrix (who qualified in 1863) upon a debt, due and owing by the intestate at his death to a creditor capable of bringing suit, is barred by the statute of limitations (Rev. Code, ch. 65, § 11) after the lapse of seven years.

2. Where an administrator pleads "no assets" and "fully administered" and relies upon the statute of limitations, the *onus* is on the plaintiff to show that the defendant had assets unadministered in his hands at the time the action was commenced.

(*Cooper* v. *Cherry*, 8 Jones, 323; *Reeves* v. *Bell*, 2 Jones, 254; *Alexander* v. *Alexander*, 1 Car. L. R., 273; *Godley* v. *Taylor*, 3 Dev. 178; *Jones* v. *Brodie*, 3 Mur. 594; *Bailey* v. *Shannonhouse*, 1 Dev. Eq., 416; *Rayner* v. *Watford*, 2 Dev., 338, cited, commented on and approved.)

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

This is a civil action commenced on the 17th day of December, 1878. before a justice of the peace in the county of Cumberland, to recover the amount of a note of which the following is a copy:

$140. One day after date we promise to pay to A. A. McKeithan, or order, one hundred and forty dollars value received.

(Signed) Clement Long, [Seal.]
Oct. 27th, 1860. Angus McGill, [Seal.]

The defendant pleaded general issue, statute of limitations, no assets, fully administered; that the plaintiff failed to present his claim within the time prescribed by law, and that there is another suit pending in the superior court of Cumberland for the same cause of action. There was judgment for plaintiff, from which the defendant appealed to the superior court.

The facts found in the superior court were that the defendant's intestate, Angus McGill, executed the note sued upon on the 27th day of October, 1860, and died on the 24th day of May, 1862. The defendant took out letters of administration in 1863, and duly advertised for creditors to present their claims before the 15th day of January, 1864, and the bond was presented for payment in 1864. In the superior court the defendant relied upon the acts of 1715 and 1789, to-wit, "Creditors of any deceased person shall make their claim within seven years after the death of such debtor, otherwise such creditors shall be forever barred." Rev. Code, ch. 65, § 11. The court held that the action was barred, and the plaintiff appealed.

Mr. N. W. Ray, for plaintiff.
Messrs. Guthrie & Corr, for defendant.

Ashe, J. It may now be considered as settled law that the act of 1789 is a bar to the action of a creditor when the defendant pleads that he has advertised, paid over the assets to the next of kin, and taken refunding bonds, according to law. *Cooper* v. *Cherry*, 8 Jones, 323; *Reeves* v. *Bell*, 2 Jones, 254. And so is the act of 1715, if there is a claim and a

person capable of suing, when seven years have elapsed since the death of the debtor if the debt was due in his lifetime, or since the cause of action accrued when the debt became due after his death. *Alexander* v. *Al xander*, 1. Car. L. R., 273; *Godley* v. *Taylor*, 3 Dev., 178; *Jones* v. *Brodie*, 3 Mur, 594; *Bailey* v. *Shannonhouse*, 1 Dev. Eq., 416.

If this were an open question we should concur with the opinion expressed by Chief Justice RUFFIN, in the case of *Rayner* v. *Watford*, 2 Dev. 338, that the act of 1715 made an absolute bar after the lapse of seven years from the death of the debtor, but we regard the construction of that act as settled in the case of *Godley* v. *Taylor*, *supra.*, in which case Chief Justice RUFFIN, though dissenting, says, "although my former opinion has been confirmed by reflection, but in future I shall consider myself under equal obligation to hold for law what I understand in conference with my elder brethren to be their opinion; that is, if the debt be due at the death of the debtor, claim must be made within seven years from the death, otherwise both the heir and the executor are discharged; and if the action arise after the death of the debtor, suit must be brought within seven years from the time the action accrued, or the heir and executor will in that case be discharged; and if the suit be brought against the executor within seven years from the death of the debtor, and the executor hath, at the time of the suit brought, not paid over the assets, he shall answer the demand; but if he hath paid them over, he shall have the plea of fully administered found for him." In other cases this court has held that after seven years, a defendant, relying upon the statute of 1715 as a bar, must aver in his plea that he has paid over the surplus of assets to the University. *Bailey* v. *Shannonhouse*, *supra.* But that must mean when he has assets; for if he has none, of course, such an averment is not necessary, for the law does not require any one to do a nugatory act.

In our case there was a debt due at the death of the debtor, and a creditor capable of bringing the action. The statute of limitations (Act of 1715) therefore began to run from the death of the debtor, and no action having been brought within seven years after the death, the action is barred, unless the defendant had assets unadministered in his hands when the action was commenced. But this is not made to appear by the pleadings or proofs. It was incumbent upon the plaintiff to show that the defendant had assets. It is true the defendant in the superior court relied on the acts of 1715 and 1789, but she had pleaded in the justice's court "no assets" and "fully administered," and those pleas do not appear to have been withdrawn. The *onus* was then on the plaintiff to show that the defendant had assets. "In an action against an executor on *plene administravit* pleaded, the plaintiff is bound to show affirmatively that the defendant had goods of the testator in his hands unadministered. 2 Stephens *Nisi Prius*, 1915; 2 Greenleaf on Evidence, § 346. The plaintiff having failed to show that fact or to take any steps towards its establishment, we cannot assume that the defendant had assets at the time of the commencement of the action, and must therefore hold that the act of 1715 is a complete bar, without any averment of payment to the University.

There is no error. The judgment of the superior court is affirmed.

No error. Affirmed.

*DAVID P. ADAMS v. WM. H. THOMAS and W. L. HILLIARD, his Guardian.

Lunatic—Property liable for Debt—Practice.

1. Subject to a reasonable maintenance of a lunatic and his minor children, the residue of his property is liable to pay his debts anterior to the lunacy.
2. On a judgment of this court against a lunatic, rendered prior to his lunacy, where no property can be seen which ought to be sold under execution from this court, the plaintiff will be granted leave to proceed on the judgment for its payment, by action in the superior court of the proper county.

(*Smith* v. *Pipkin*, 79 N. C., 569; *Blake* v. *Respass*, 77 N. C., 193, cited and approved.)

MOTION for leave to issue execution heard at June Term, 1880, of THE SUPREME COURT.

Messrs. Merrimon, Fuller & Fuller, for plaintiff.
Messrs. T. D. Johnston and *M. Erwin*, for defendant.

DILLARD, J. In this case a decree was heretofore entered in this court in an old equity cause in favor of the plaintiff for a large sum of money against the defendant, then of sane mind, but since and now a lunatic; and at the June term, 1879, of this court, on motion of the plaintiff for execution, after notice to W. L. Hilliard, the guardian of said Thomas, it was held that the plaintiff was entitled to be paid his debt and to have an execution therefor, but only out of any residue of his estate, real and personal, which might be left after the assignment of a sufficiency thereof to maintain the lunatic and his minor children; and the

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

grant of execution was suspended until the guardian could have such adequate amount set apart and report to this court an inventory thereof, as well as of the residue of the estate. See the case in 81 N. C., 296. At this term of the court the guardian of the lunatic having had a part of the estate assigned and set apart by proceedings in the probate court of Jackson county, for the maintenance of the lunatic and his minor children, of whom there are but two, now well advanced towards majority, files a certified copy of the allotment, including a schedule of all the estate of the lunatic, and all expenses and debts incurred in his support, and his other debts contracted before the lunacy, and thereupon the plaintiff renews his motion for execution, which makes it necessary to see whether there be anything which may be sold under the execution prayed for.

From the certified copy of the proceedings in the probate court the following material facts appear, to-wit:

1. That there is a decree of the circuit court of the United States in favor of William Johnston for a balance of eight thousand dollars, to pay which there is a lien on all the lands of the lunatic.

2. That besides this lien, there are docketed state judgments aggregating about $16,000, also operating as a lien on the real estate of the lunatic.

3. Besides these judgments, many other claims against the lunatic exist.

4. The real estate of the lunatic consists of many tracts, situate in divers counties, about 40,000 acres in all, worth from fifty cents to two dollars per acre, if sold on time, and not worth more than one-fifth at forced sales, the most valuable tract being involved at this time in litigation and requiring great outlay for costs and necessary attention.

5. That the whole real estate, as it now is, does not yield annually enough to pay the taxes assessed thereon.

6. The notes and evidences of debt are uncollectible from lapse of time or the insolvency of the debtors.

7. The sum of $2,000 is approved as a proper sum for the maintenance of the lunatic and his minor children and for costs and fees of suits in and about the lands of the lunatic annually for the first two years; $1,900 annually for the next two years; and $1,600 for one year thereafter, and then the sum of $5,000 for the support of the lunatic from and after the first of January, 1886, if he be then living, and he fixes on $2,450 as due and to be paid for expenses of the lunatic's maintenance incurred up to the present time.

8. A commissioner is appointed to make collections and sell lands on credit as prescribed, and to pay the sums designated as set apart for the lunatic, with the duty to make reports and be under the control of the court.

From the report made to this court, as we understand it, the entire real estate of the lunatic (there being no tangible personal property) is under the prior lien of a United States judgment for a considerable sum, and also under the lien of docketed judgments of the state courts for $16,000; and if so, we are unable to see that there is anything which can be sold under an execution for plaintiff's debt, or if there be, certain it is, that a sale under existing circumstances by the sheriff, the property now being involved in litigation, would defeat all maintenance to the lunatic as provided out of the same, and make a sacrifice of all the interests of the creditors having liens and claims on the estate.

Of the legality of the proceedings in the probate court and of the mode of setting apart a maintenance for the lunatic, and the property wherein it is done, and the amount set apart and the allowance for past and future litigation, we are not at liberty to speak, because no case involving exceptions therefor is before us by appeal; but all we can say is, that subject to a reasonable maintenance of the lunatic and his minor children, the residue of his property is liable to pay his debts anterior to the lunacy and ought to be applied.

The debt of the plaintiff is a debt established by judgment before the lunacy of the defendant, and as there is no property which we can see ought to be sold under an execution issued from this court, we can only refuse the motion for execution and grant leave to plaintiff to proceed on the judgment of this court for its payment by action in the superior court of the proper county, as he may be advised.

As we cannot act for the relief of the plaintiff under existing circumstances, the plaintiff, his debt being contracted before the lunacy, must seek provision to be made for the payment of his debt in the superior court, in which court alone there is power to deal with the subject, under chapter 57 of Battle's Revisal, as settled by *Smith* v. *Pipkin*, 79 N. C., 569, and *Blake* v. *Respass*, 77 N. C., 193.

The motion of plaintiff for execution is refused but with leave to plaintiff to proceed on the judgment of this court, or take such steps for its collection in the court below as he may be advised.

PER CURIAM. Motion refused.

J. H. WILSON, JR., and wife v. C. J. LINEBERGER and another.

Partnership—Sale of Interest of one Partner—Managing Partners—Allowance for Services—Wages of Employees.

1. Where, in the formation of a partnership among three persons, it was agreed that two of them should give their personal attention to the joint business and receive an allowance for their services of $1,000 each *per annum*, and afterwards the non-active partner sold his interest to another who permitted the business to continue without interruption or any new agreement; *It was held*, that upon the final settlement of the partnership affairs, the two active partners were entitled to the allowance of $1,000 each *per annum*, as upon the original agreement.

2. In such case where the two active partners (to whose discretionary management the entire business of the firm was entrusted) employed a person to attend to certain out-door matters and paid him for his services part of the time at the rate of $700 *per annum*, and part at the rate of $1,000 *per annum*; *Held*, that upon a final settlement, the active partners were entitled to credit for the amounts so paid, although the actual value of the services was only $700 per annum, there being no suggestion that the services were not required or that the employment and allowance were not in good faith.

(*Bank* v. *Fowle*, 4 Jones Eq., 8, cited and approved.)

CIVIL ACTION heard upon exceptions to a referee's report, at Spring Term, 1880, of GASTON Superior Court, before *McKoy, J.*

The defendants appealed from the judgment rendered.

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

SMITH, C. J. In March, 1871, a partnership for the manufacture of cotton goods at the Woodlawn mills was formed between the defendants and Lewis Lineberger, wherein the interest of C. J. Lineberger was two-fourths and of the other members one-fourth each. It was agreed among them that the defendants should give their personal attention and alone conduct the joint business and be allowed for their services, at the rate of $1,000 per annum to each.

In July, 1871, Lewis Lineberger, who under the arrangement took no part in the management of the affairs of the firm, sold his interest therein to the feme plaintiff, then unmarried, but the business thereafter as before, without interruption or any new agreement, was continued until July 1874, when it terminated by a sale of the interest of the defendant, Rhyne, and of the feme plaintiff in the partnership to the defendant, C. J. Lineberger. The managing partners finding it necessary employed one J. M. Lineberger, a son of C. J. Lineberger, to oversee and direct the outside

laborers in the service of the company, and paid him a salary at the rate of $700 per annum for the first five months, and for the remaining time of his service at the rate of compensation retained by themselves.

The plaintiffs admit payment for the share of the feme in the land and goods, possessed by the firm at the date of her assignment and sale, and in the action seek only an account of the dealings of the firm, while the feme was a member, in order that her share may be ascertained and paid.

The matters involved were referred, and the referee made his report to spring term, 1879, refused to allow the stipulated compensation for the special personal services of the defendants on the ground that the assignment of the share of the inactive partner to the feme plaintiff operated, *ipso facto*, as a dissolution of the existing co partnership; and thereafter was in law carried on a new joint business with no agreement as to terms, and in which neither member is entitled to charge for personal services. The referee also disallowed a credit for the sum paid J. M. Lineberger, in excess of $700 per annum, as beyond a fair and reasonable compensation to which he was entitled.

The only exceptions to the report are that the referee refused to allow these credits, and the appeal of the defendants is from the judgment of the court, overruling the exceptions and confirming the report. These it becomes our duty to review:

I. By the assignment of Lewis Lineberger and his withdrawal from the firm, it was dissolved at the election of the assignee or either of the remaining members, and each could have required the business to be settled and the proceeds and property distributed according to their respective shares. This was not done, but the business was prosecuted for nearly three years after the assignment, under no new arrangement, with the acquiescence and assent of the feme

plaintiff and now confirmed by her claim to have become a member in place of her assignor, and to share in the profits of the copartnership made up to the date of its actual dissolution.

This assent must be extended not only to a copartnership, but to *that then formed and operating* with its terms and conditions as previously understood and agreed upon. The assignee, silently but actually, enters the copartnership as an accepted substitute in place of the ret ring member, and succeeds not to his rights only, but to his responsibilities, in the future management of its affairs, and in the final adjustment thereof among the copartners. This is fairly implied from the continuance of the business, with her knowledge and approval, precisely in the manner and by the agency provided in the original constitution of the firm. If the feme plaintiff knew the terms upon which the defendants were devoting their time and energies to the management of the affairs of the copartnership, for the common advantage, while she herself gave them no personal care, as her assignor did not, and if she had no such knowledge and failed to seek information, when it was her duty to inform herself of the terms, and permitted everything to go on as before for a series of years, it would be inequitable to permit her now to reap the fruits of the labors of her copartners, to which she has in no way contributed, and refuse them any compensation for services thus rendered in a reasonable expectation of receiving payment. If she did not intend to recognise the defendants' right to remuneration, it was her duty to communicate to them her intention, and then their further prosecution of the partnership business would have stood upon a different footing, and their demand for compensation, as in the absence of a special provision in the partnership agreement, be perhaps deemed inadmissible upon the authority of the cases cited for the plaintiffs.

The rule governing in cases like the present is thus laid

down by SIR JOHN ROMILLY in *Austin* v. *Bays*, 24 Beavan, 606, called to our attention in the brief of the defendant's counsel: "There is no doubt that if two partners take in a third partner, without specifying the terms on which he becomes such partner, he has the same rights and is subject to the same liabilities as the original partners. *The terms and conditions of the partnership, which bind them, bind him, unless a new* contract be made between them." If this principle applies to a partnership increased by the addition of a new member, it applies more forcibly to the relations of one admitted in place of a retiring partner, and whereby the original constitution of the copartnership is maintained as to numbers.

So in *Meaher* v. *Wilcox*, 37 Ala., 201, WALKER, J., declares the opinion of the court in these words: "After the complainant succeeded to the interest of the persons originally composing the firm of Cox, Brainerd & Co., the defendants recognized and treated them as partners, and continued the business in conjunction with them, under the original agreement. This was quite sufficient to make the complainants partners, and the original articles remained operative as between them and the defendants."

"A person who comes into a firm through another who has acquiesced in a variation of the terms of the partnership articles," says Mr. LINDLEY, "is bound by that acquiescence and cannot revert to the original articles." Lind. Part., 678.

"It is not uncommonly said," remarks the same author, "that shares in partnerships are not transferable without the consent of all the partners, and this is quite correct, if all that is meant is, that the transferee cannot without the consent of transferor's copartners become a partner with them." *Ib.*, 563.

The same principle is recognized in *Bank* v. *Fowle*, 4 Jones Eq., 8, by BATTLE, J., delivering the opinion of the court, in

this language: "There can be no doubt that the general rule is that an assignment of the interest of one partner in a firm, either absolutely, or as security for a debt, is a dissolution of the copartnership, *if the assignee insist upon his right to have the business closed, and the share of each partner ascertained and paid to him after the payment of all the debts of the copartnership.*" Then, after citing the case of *Marquand* v. *N. Y. Man. Co.*, 17 John., 525, in which the consequences of an assignment of the share of a member as a security for his own debt are discussed, he adds: "But there is nothing either in the decision itself, or in the reasoning by which it is supported, which makes the assignment operate to dissolve the copartnership against the will of the assignee. He may, if he choose, permit the business to go on in its ordinary course; but if he do, his surety will be liable to its fluctuations, by which, if the business be prosperous, his security will be enlarged, but diminished or lost, if it be adverse"

We think it is clear therefore that the plaintiff's acquiescence in the continuance of the business implies an assent to the terms on which it was commenced, and that the defendants are entitled to the compensation promised in the special agreement. The overruling of the exception is erroneous, and the exception is sustained.

II. The appellant's second exception is that they are allowed only a credit at the rate of $700 per annum for the services of J. M. Lineberger during the period when he was paid out of the effects of the firm at the agreed rate of $1,000 per annum: The referee finds upon the evidence, (which is not before us) that the actual value of the services performed by the said J. M. Lineberger was $700 per annum. If the question was simply as to the value of the services, we should not hesitate to sustain the reduction made by the referee. But this is not the aspect in which it is presented. The defendants to whose discretionary management the entire business of the firm was entrusted, in the discharge of

their duties, deem it for the common advantage to employ an assistant for their out-door matters, and both agree upon a fixed compensation to be paid, and which is paid him out of the partnership effects. The person employed was the son of one, but, so far as appears, not related to the other managing partner. Three-fourths parts of the sum paid came out of their shares, one-fourth only from the plaintiff's share. There is no suggestion that these services were not required, or that they were not useful to the firm, or that the employment and allowance of compensation were not in good faith on the part of the defendants. Money derived from the common fund and thus honestly expended ought not to be disallowed, unless clearly excessive and indicating a disregard of, or culpable inattention to the common interest. Unless something of the kind appears or the excess be so great as to excite a reasonable distrust in the integrity of the transaction, the loss should not be shifted from the firm to the managing members, merely because of an underestimate put by others upon the value of the employee's services, and an error in judgment on their part. Nor does the fact of relationship, without other proof, furnish any just ground for imputation upon the measure of the allowance, and for a refusal to allow the charge.

As this seems to be the only reason assigned, and we do not concur in its sufficiency for the reduction made by the referee, we do not think the loss, and it must be borne by the firm or by the defendants, should fall upon the latter. We must therefore sustain this exception also and reverse the overruling judgment of the court upon it. The report must be reformed in these particulars and the plaintiffs will then be entitled to judgment. Unless this can be done by counsel without, there must be a reference to the clerk to make the correction and report the amount due. The cause will be retained for final judgment.

Error. Reversed.

MATTHEW MOORE v. D. I. WOODWARD.

Claim and Delivery—Chattel Mortgage—Defence of Usury.

In an action of claim and delivery for certain property conveyed by chattel mortgage, the defendant can set up the defence of usury under the act of 1876-7 (ch. 91) upon the allegation that the sole consideration of the bond secured by the mortgage was usurious interest, which had accrued upon certain other bonds executed by defendant to plaintiff.

(*Shober* v. *Hauser*, 4 Dev. & Bat., 91, cited and approved.)

CIVIL ACTION tried at January Special Term, 1880, of DUPLIN Superior Court, before *Gilmer, J.*

The defendant appealed from the ruling of the court below.

Messrs. W. A. Allen & Son, for plaintiff.
Mr. J. L. Stewart, for defendant.

DILLARD, J. This action is claim and delivery for personal property conveyed by a chattel mortgage to secure a bond for two hundred and fifty-four dollars, bearing date the 9th day of March, 1878, and containing a power of sale after the first day of November next after.

The defendant makes two defences to the action: In the first he alleges that in 1875, being truly indebted to plaintiff in $578, he executed to him two bonds, one for $450 and the other for $371.44, interest being estimated and included therein at the rate of thirty-six per centum per annum, and that after paying usurious interest at the same rate at divers times, he at length executed to plaintiff the note, for the security of which the property sued for was mortgaged, and he avers that the entire consideration of said note is interest on said bonds executed in 1875, at the usurious rate afore-

said, and that by reason thereof the note is void in law, and so likewise the mortgage executed for its security.

In the second defence, defendant alleges the payment of $250 by way of usurious interest on said two large notes within two years next before the commencement of this action, and upon the footing of that payment he demands judgment for $500, twice the sum so paid for interest, and that the same may be allowed him as a counterclaim.

On the trial the plaintiff having made a *prima facie* case, by introducing the mortgage conveying the articles described in the complaint, and the note for $254 thereby secured, the defendant proposed to show that the consideration of the note was entirely for usurious interest on the said antecedent indebtedness alleged in his answer, and tendered evidence to prove the fact, but His Honor excluded the offered proof, being of opinion, as stated in the case of appeal, that the same was inadmissible in the present action, and thereupon verdict and judgment were entered for the plaintiff, from which defendant appealed, presenting for our consideration only the alleged error of the rejection of his said evidence.

Any and every contract, whether sealed or not, may be held null and void on plea of the party sued thereon, for illegal consideration at common law, or as being expressly or impliedly forbidden by statute law. Chitty on Contracts, 570, and *Collins* v. *Blanton*, 1 Smith's Leading Cases, 155. And to make a contract void by statute, it is not indispensable that it be expressly forbidden, or in so many words declared to be void, but it will be held to be void if it contravene the directions of the statute, or be opposed to the general policy or intent thereof. Chitty, *supra* 599.

By our former statute, as contained in the Revised Code, ch. 114, the taint of usury made the contract void both as to principal and interest into whosoever hands it might come, and so likewise any appearance, shift or device where-

upon or whereby an illegal rate of interest was received or taken was declared to be void. By the act of 1876–'77, ch. 91, under which the transaction between the parties took place, six per cent. is fixed as the legal rate of interest, with the liberty by special contract to stipulate for so high a rate as eight per cent., and in case more than the rate allowed be taken, received, reserved or charged, the contract is not invalidated as to the principal, but the entire interest carried by the note or other evidence of debt, or otherwise agreed to be paid thereon, is forfeited; and in case such greater rate has been paid, a remedy is given to the party paying the same to recover by action of debt twice the amount of interest paid.

Both of the statutes were enacted in restraint of excessive interest from the same general policy, and especially on the idea of protecting the borrower against the oppression of the lender, the chief difference being, that a violation under the old statute invalidated the contract, working a forfeiture of the sum lent as well as of the interest, whereas the present law leaves the contract valid for the principal but makes the interest forfeitable.

The forfeiture of the entire unpaid interest and recovery back of twice the interest paid is in the nature of a penalty intended to induce an observance of the statute, and it is the duty of the courts so to expound and apply the law as to carry out the legislative intent.

In this case, supposing the matters alleged in the answer to be true, the bond put in evidence by plaintiff and the mortgage for its security, have for their consideration interest estimated on the two previous bonds of $450 and $371.44 at a rate beyond that allowed by the statute, and therein they both, though not expressly forbidden or declared void, are contrary to the policy and intent of the act of 1876–'77.

There can be no question that if the interest, claimed to be secured by the bond and mortgage put in evidence by

the plaintiff, was sought to be recovered by an action on the two previous bonds of defendant, the same would be held forfeited on plea of the defendant by the express provision of the statute, and the device of taking a distinct bond for the interest and a mortgage for its security ought not to take the case out of the operation of the act, whether the action be on the bond to recover the money or claim and delivery to get the property mortgaged, so as to sell it and in that way raise the money. If the act for forfeiture of the interest can be evaded by the contrivance of a distinct bond therefor, and a mortgage to secure the same, so that in a suit to get possession of the property conveyed for its payment the violation of the act cannot bar the recovery, then the act answers no purpose, and it had as well never been passed.

In *Shober* v. *Hauser*, 4 D. & B., 91, under our former tatute against usury, it was held that not only the original usurious contract was void, but also a deed in trust or any other assurance given for the security thereof was under the same condemnation, and void. So under our present statute, while the contract is valid as to the principal, a stipulation for usurious interest secured by a separate bond and a mortgage therefor ought, as between the parties at least, on plea of the illegality, to bar the direct collection of the same by an action therefor, and also its indirect collection through a recovery and sale of the chattels mortgaged for its payment, on the ground of such distinct securities being executed in contravention of the act and subversion of its policy and purpose.

We think the matter of usurious interest if true as alleged was a good bar to an action on the bond, and equally so to an action for claim and delivery of the chattels conveyed for its payment, which are but accessary to the bond as their principal, and that the doctrine that he who asks equity must do equity is not in the way. Here, the bond

introduced in evidence was no part of the principal money, but wholly for the interest above the legal rate, and the mortgage was for its separate security; and this being so, the plaintiff has no equity as to this, his case being that of a transaction entered into entirely on illegal consideration and contrary to the policy and intent of the act. If the bond and mortgage were for principal in part and usurious interest included or agreed to be paid in part, the obligation to do equity might prevent the total avoidance and bar of the action as between the parties, which point we do not decide, but they are both wholly for illegal interest if the allegations of the answer be true; and if so, then the sentence of the law is that they are void.

The conclusion is, that it was error to refuse the proof offered by defendant tending to show the invalidity of the chattel mortgage, under which plaintiff claimed to recover, and for this cause the judgment of the court below must be reversed and a new trial had. Upon the other defence of counter-claim the case of appeal presents no ruling by the court below, and therefore we forbear to consider of it at all at present.

Let this be certified that a new trial may be had.

Error. *Venire de novo.*

A. R. NESBITT & BRO. v. J. M. TURRENTINE and wife.

Action under Landlord and Tenant Act—Power of Superior Court to Appoint Receiver—Omission to Require Bond.

1. In an action under the landlord and tenant act carried by appeal to the superior court, it is within the power of the court to appoint a receiver to collect the rents, &c., upon an affidavit by the plaintiff (not

controverted) that the defendants entered into possession as tenants of plaintiff, held over after expiration of their term, are insolvent, and that plaintiff has no security for rents.

2. An order appointing a receiver is not void by reason of an omission of the court to require adequate security.

(*Foster* v. *Penry*, 77 N. C., 160; *Forsythe* v. *Bullock*, 74 N. C., 135; *Turner* v. *Lowe*, 66 N. C., 413; *Deep River*, &c., v. *Fox*, 4 Ired. Eq., 61; *Gause* v. *Perkins*, 3 Jones Eq., 177; *Rollins* v. *Henry*, 77 N. C., 467; *Kerchner* v. *Fairley*, 80 N. C., 24; *Twitty* v. *Logan*, *Ib.*, 69; *Parker* v. *Parker*, 82 N. C., 165, cited and approved.)

PROCEEDING under the landlord and tenant act heard on appeal at Fall Term, 1878, of MECKLENBURG Superior Court, before *Schenck, J.*

The defendants appealed from the judgment below.

Messrs. J. E. Brown and *C. Dowd*, for plaintiffs.

Messrs. Shipp & Bailey and *Merrimon & Fuller*, for defendants.

SMITH, C. J. The plaintiffs commenced their action on June 5th, 1876, before a justice of the peace, under the landlord and tenant act (Bat. Rev. ch. 64) to recover possession of a dwelling house and lot and the sum of thirty-seven dollars and fifty cents, then due for rent. The defendants dispute the plaintiffs' claim, assert title in themselves and deny the jurisdiction of the justice to hear and determine the cause. Upon the trial the justice found the controverted issues of fact in favor of the plaintiffs, and adjudged that the defendants be removed from and the plaintiffs put in possession of the premises described in the oath of the plaintiffs, "and that they also recover the rent demanded." The defendants appealed to the superior court. The cause was continued from time to time in the latter court, and during its pendency the plaintiff, A. R. Nesbitt, submitted the following affidavit at spring term, 1878:

A. R. Nesbitt, the plaintiff, makes oath that the defend-

ants entered into possession of the premises in controversy, as tenants of the plaintiffs, and this action was instituted after the expiration of the said defendants' term therein, to recover the possession; that the defendants in said action are all wholly insolvent and plaintiffs have no security for rents; that the rent, which defendants agreed to pay plaintiffs for the said premises, was one hundred and fifty dollars per year or twelve dollars and a half per month. (Signed and sworn to by A. R. Nesbitt, on June 1st, 1878, before the clerk of the superior court.)

Upon this affidavit and motion of plaintiff's counsel, a receiver was appointed to collect the rents and profits and to hold the same subject to the further order of the court; and from this interlocutory judgment an appeal is taken to this court.

If it appears on the trial that the title to the real estate is in controversy, the justice shall dismiss the action and render judgment against the plaintiff for the costs. Bat. Rev., ch. 63, § 17. And the same course must be pursued in the superior court in the exercise of its appellate jurisdiction. *Foster* v. *Penry*, 77 N. C., 160. "If he (the justice) finds that the defendant was a tenant," remarks RODMAN, J., delivering the opinion in this case, "he must proceed to try any other matters in issue, and give such judgment as may be proper. No claim of a freehold title in the defendant can be allowed to be made. It is impertinent; for if the defendant is not a tenant it is immaterial, as, on failure of proof that he is, the jurisdiction fails; and if he is a tenant, the plea of title cannot avail him as he is estopped to allege it." The rule admits of exception when there is an equitable defence, for which, under the old practice, relief would be afforded in a court of equity, and this relief is now obtainable in the same action, *Forsythe* v. *Bullock*, 74, N. C., 135, and if sought would oust the justice's jurisdiction. *Turner* v. *Lowe*, 66 N. C., 413, and *Davis* v. *Davis*, *ante*, 71.

Until the trial, however, it cannot be ascertained that any controversy fatal to the jurisdiction will arise, and if it does then so appear, it becomes the duty of the judge, as it was the duty of the justice, to dismiss the action. Meanwhile the cause must proceed, as in other cases, subject to the power of the court to make such interlocutory orders for the restraint of the parties or the security of the property in litigation, as are admissible where the jurisdiction is unquestionable.

The settlement of this controversy being protracted by continuances, and the rents in consequence largely accumulated, to all of which the plaintiffs would be entitled if successful in their action, it was a reasonable exercise of the power of the court to appoint a receiver to collect and hold them as directed in the order made. Bat. Rev., ch. 64, § 28.

The affidavit and the recitals in the warrant originally issued (which not being in the transcript but referred to in the proceedings, in the absence of exception, we must presume to be in proper form as prescribed in section 20) constituting the complaint in the cause, allege title in the plaintiffs and the wrongful withholding by the defendants, their tenants; and their alleged and admitted insolvency, make a case for such an appointment according to the practice of the court. *Deep River Gold Mining Co.* v. *Fox*, 4 Ired. Eq., 61; *Gause* v. *Perkins*, 3 Jones Eq., 177; *Rollins* v. *Henry*, 77 N. C., 467; *Kerchner* v. *Fairley*, 80 N. C., 24; *Twitty* v. *Logan*, *Ib.*, 69; *Parker* v. *Parker*, 82 N. C., 165. Nor is the error in the ruling assigned sustained by any evidence adduced, or by any finding of facts, and it is needless to reitterate that the appellant must show the error complained of or the judgment will be affirmed.

It is the practice of the court to require from all persons, to whose custody and care property is committed by its order, adequate security for its safety, but the order is not

void by reason of the omission, nor is this point presented in the appeal.

The proceedings had subsequent to the appeal constitute no part of the record to be reviewed and are needlessly set out in the transcript.

The judgment is affirmed and this will be certified.

No error. Affirmed.

J. W. DERR v. E. W. STUBBS.

Jurisdiction of Justice—Counter-Claim—Remission of Excess—Legislative Scale.

1. The constitutional provision restricting the jurisdiction of justices of the peace in actions upon contracts, contemplates his adjudication upon claims within the required limits, and therefore it is not allowable for a defendant to set up a counter-claim for so much as will extinguish the plaintiff's claim and permit the defendant to recover two hundred dollars; in such case, the remission must be absolute of all in excess of the justice's jurisdiction.
2. Where the defendant in an action before a justice sets up a counter-claim composed mainly of items subject to the legislative scale, and remits the excess over two hundred dollars; *Held*, that the claim, when so reduced, is a claim for two hundred dollars in lawful money, not in depreciated paper.

(*Dalton* v. *Webster*, 82 N. C., 279, cited and approved.)

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

This action was commenced before a justice of the peace to recover the sum of $187.39, due by note with interest from the 15th of July, 1860, subject to a credit of one hundred dollars of date February 9th, 1861. The defendant appealed from the judgment of the court below.

Messrs. Hoke & Hoke, for plaintiff.

Messrs. Jno. D. Shaw and *W. J. Montgomery*, for defendant.

SMITH, C. J. The defendant in answer to the plaintiff's demand, and as a set-off and counter-claim, relied upon an account for various articles furnished the plaintiff between September 22d, 1860, and January, 1863, in the aggregate sum of $1,097.72 upon which he had made the following endorsement:

"The defendant hereby claims to set-off the within account to the amount of the plaintiff's demand, and remits all excess, after deducting the said demand, over $200.

(Signed) E. W. Stubbs."

The account exhibited contained various articles delivered before the period, over which the scaling statute operates, of the value of $56.37 and the residue bear date in January, 1863, one large item whereof is reduced to one-fourth part.

The plaintiff contested his liability for this claim, and offered evidence in diminution upon issues submitted to the jury who find a balance of $253.20 due the defendant, March, 1863, on their mutual accounts, outside of the bond sued on.

At the trial the plaintiff insisted, and asked His Honor so to instruct the jury, that as the defendant had remitted all his demand over $200, that sum must be scaled and all in excess left out of view. His Honor replied that the jury would respond to the issues and he would reserve the question of the application of the scale until after the verdict. To this suggestion no objection was made After verdict the court applied the scale as of the date fixed by the jury, and deducting the sum thus ascertained from the plaintiff's debt, gave him judgment for the residue.

The act of 1868–'69, ch. 156, as amended by the act of 1876–'77, ch. 63, which authorizes a plaintiff to bring his

demand within the jurisdiction of a justice by remitting the excess, requires him to direct the justice to make an entry as follows: "The plaintiff in this action forgives and remits to the defendant so much of the principal of this claim as is in excess of $200, together with the interest on said excess." The statute in terms embraces a plaintiff only and applies to a proceeding pending in a justice's court, but it may be reasonably extended to a defendant asserting a counter-claim and assuming the relation of a plaintiff thereto, and upon a liberal interpretation be made available as a defence set up after appeal with leave of the judge in the superior court, but in order thereto it must be done substantially at least in the prescribed form. The remission must be absolute of all demand in excess of the justice's jurisdiction, and such as would be cognizable before him if prosecuted by the defendant as an original cause of action.

The entry before us made by the defendant, in language not very clear, seems to maintain a right to so much of his account as will extinguish the plaintiff's entire debt, and admit of a recovery of the $200 besides, surrendering only what is not needed for this purpose. The constitutional provision restricting the jurisdiction of justices in actions upon contracts contemplates his examination and adjudication of claims within the prescribed limits, while the defendant proposes that he shall pass upon the validity of an account exceeding those limits by the sum claimed by the plaintiff. This, we think, cannot be allowed. If the counter-claim be understood as reduced to the sum of $200, as the instruction asked by the plaintiff implies, he was not entitled to a still further reduction by applying the scale. The sum demanded, whether in Confederate money requiring a scale, or the lawful currency of the United States, determines the question of jurisdiction; and, in either case the remission is equally necessary of the sum in excess of that conferred upon a justice.

But the claim when so reduced is in both cases a claim for $200 in lawful money—not in depreciated paper. This is the ruling in the case of *Dalton* v. *Webster*, 82 N. C., 279, a misapprehension of which may have led to the asking of the instruction for the application of the scale to the reduced debt. We correct a slight inadvertence in the opinion in that case, which overlooking the change made by the act of 1876-'77, adds after the words "two hundred dollars," the words "together with the interest on said excess."

These remarks are intended to prevent any erroneous inferences from our silence in regard to the form of the entry in the present case. As a set-off, the right to which exists as before the changes in the mode of pleading and practice, the magnitude of the claim is not important, because the only office and legal effect of a set-off, as distinguished from a counter-claim, are to put an end to the action or reduce the amount of the plaintiff's judgment, as we have already decided at this term.

The irregularities in the record are serious, and with some reluctance we so far overlook them as to decide the principal point presented in the appeal, and that is, the course of His Honor in reserving the question in reference to the scale and applying it himself. This however, done without dissent by either party, does not now admit of exception.

The verdict ascertains the balance due and its date, and these facts render the scaling a mere matter of calculation involving no principle of law. It is true some of the articles charged are not liable to scale, and one of the others has been already scaled, but we are not able to see in what manner the credits and debits of the long running account were applied and adjusted by the jury, as no complaint is made in this particular and no instruction was asked for their guidance. We understand therefore the verdict to have properly disposed of the items and to find a balance

due referable to March, 1863, and thus to fix the time for the application of the scale. As the appellant must make his exceptions in apt time, and it does not appear from the record that he has done so, in reference to this subject of complaint, we declare there is no error and affirm the judgment.

No error. Affirmed.

S. V. PICKENS, adm'r v. W. D. MILLER and another.

Contribution—Sureties—Interest, when Administrators chargeable with—Arbitration—Demand.

1. Where successive bonds are given for the faithful discharge of a trust, all the bonds given during the continuance of the office are cumulative, and the sureties on each bond stand in the relation of co-sureties to the sureties on all the other bonds.
2. Administrators should not be charged with interest on moneys *bona fide* collected and kept for those entitled, unless there be plain proof of misconduct in such collection and custody; but, to exonerate himself from liability for interest, the administrator must exhibit regular accounts, showing a proper disposition of the trust fund.
3. Administrators are chargeable with interest on balances in their hands whenever those balances accumulate beyond the exigencies of administration, unless it appears that the fund has been kept sacred and intact for the *cestuis que trust*, as their property, ready to be delivered to them, so that profits could not have been made thereof.
4. Arbitrators differ from referees, in that, the former are not bound to find the facts separately from their conclusions of law, and are not required to report them.
5. No demand is necessary before bringing action on an administration bond.

(*Bell* v. *Jasper*, 2 Ired. Eq., 597; *Oates* v. *Bryan*, 3 Dev., 451; *Jones* v. *Hays*, 3 Ired. Eq., 502; *Jones* v. *Blanton*, 6 Ired. Eq., 115; *Moore* v.

Boudinot, 64 N. C., 190; *Hughes* v. *Boone*, 81 N. C., 204; *Hester* v. *Hester*, 3 Ired Eq., 9; *Finch* v. *Ragland*, 2 Dev. Eq., 137; *Arnett* v. *Linney*, 1 Dev. Eq., 369; *Peyton* v. *Smith*, 2 Dev. & Bat. Eq., 325; *Lusk* v. *Clayton*, 70 N. C., 184; *Blossom* v. *Van Amringe*, 63 N. C., 65, cited and approved.)

CIVIL ACTION upon an administration bond tried at June Special Term, 1880, of HENDERSON Superior Court, before *Schenck, J.*

The defendants appealed from the judgment rendered.

Mr. James H. Merrimon, for plaintiff.

Messrs. W. H. Malone, C. M. McLoud and *W. W. Fuller*, for defendants.

ASHE, J. This is a civil action brought by the plaintiff (relator) against the defendants as sureties upon the administration bond of John D. Hyman, as administrator of W. F. Taylor, deceased.

The complaint substantially alleges that W. F. Taylor died intestate in the county of Henderson; that on the 10th day of September, 1873, the said Hyman was duly qualified as his administrator, and together with the defendants executed and delivered to the probate judge of said county his bond in the penal sum of five thousand dollars conditioned for the faithful discharge of his duties as administrator; that as said administrator he collected a large sum of money belonging to the estate of the intestate, viz: seventeen hundred and sixty-five dollars, which he has not applied as the law directs, except the sum of six hundred and sixty dollars; that the said Hyman died on the --- day of ———, 1876, and afterwards, viz: on the 13th day of September, 1876, the plaintiff was duly appointed administrator *de bonis non* of the estate of the said W. F. Taylor; and that the sum of about eleven hundred dollars is due by the said defendants to the plaintiff as administrator aforesaid by reason

of their suretyship on said bond, no part of which has been paid.

The defendants in their answer deny that Hyman is dead, that he was appointed administrator of Taylor, and that they executed the bond. They deny that the plaintiff was appointed administrator *de bonis non*, or that any such sum of money as that alleged in the complaint, or any other sum, came to the hands of Hyman as administrator, and if it did, that it has been applied as the law directs, and they insist that no demand was made upon them for a settlement before the commencement of the action.

The action was continued until fall term, 1878, when the following order was made by *Avery*, the judge presiding, with the consent of the counsel of both parties, viz: "In this cause, by consent of parties, it is referred to C. M. Pace, and W. W. Jones, Esqrs., with power to choose an umpire, in case they cannot agree, to determine and settle all the matters of controversy between the parties arising in this cause, and their award, or that of a majority of them, to be a rule of court."

At spring term, 1880, of said court, the arbitrators returned their award, in substance as follows: That J. D. Hyman qualified as administrator of W. F. Taylor on the 25th day of February, 1869, and executed his bond in the sum of five thousand dollars for the faithful discharge of the duties of his office, with T. W. Taylor and G. W. McMinn as sureties, and on the 10th day of September, 1873, in compliance with an order of the probate court of said county, he renewed said bond in a like sum, with the defendants W. D. Miller and P. F. Patton as sureties; that said Hyman, as such administrator, received in the course of his administration, the sum of three thousand, four hundred and twenty-five dollars and fifty-seven cents, and disbursed the sum of two thousand and forty-four dollars and ninety-

one cents, leaving a balance in favor of his intestate's estate of one thousand three hundred and eighty dollars and sixty-six cents on the 5th of April, 1875; that Hyman, as administrator, never rendered any final account of his administration.

They further find that J. D. Hyman died on the — day of ——, 1876, and that the plaintiff, S. V. Pickens, qualified as administrator *de bonis non*, on his estate, on the 13th day of September, 1876; that they allowed J. D. Hyman as administrator two and a-half per cent. commissions upon all receipts and disbursements which are shown in an exhibit marked "A" accompanying the report; and as conclusions of law that the first and second bonds herein mentioned are cumulative, and that the defendants are responsible for the balance herein reported as a *devastavit* of said estate. Exhibit "A" referred to in the report, is an account stated by the arbitrators showing the receipts and disbursements of said Hyman as administrator, running from July the 1st, 1869, to April the 5th, 1875, with interest on both sides of the account, leaving on that day a balance unadministered of thirteen hundred and eighty dollars and sixty-six cents.

The defendants except to the report or award of the arbitrators:

First. Because the arbitrators held as matter of law that the two bonds given by Hyman in 1869 and 1873 were cumulative, contending that they were only liable for the breaches committed after they became sureties in 1873.

Secondly. Because the arbitrators have charged them with interest on each item of money received by their principal, from the time it was received, whereas they could only be held liable for such interest after demand made.

Thirdly. Because the said arbitrators have charged interest on the balance due April the 5th, 1875, without assigning any reason for so doing.

Fourthly. Because the arbitrators have failed to report the

evidence upon which they base their findings, so that the court might see whether the conclusions reached by them were warranted by the evidence upon which they acted.

Fifthly. Because they have failed to find whether any demand was made by the plaintiff upon the defendant before action brought, or to report any evidence as to such demand.

Sixthly. Because the award is otherwise defective, insufficient, vague, indefinite and erroneous.

At the special June term, 1880, of the said court, all of the exceptions to the award were overruled; the award was in all things confirmed and judgment rendered thereon in behalf of the plaintiff, and with an allowance of twenty-five dollars to each of the arbitrators, to be taxed in the bill of costs. From which judgment the defendants appealed to this court.

We will consider the several exceptions to the award *seriatim* in the order in which they were taken.

The first exception to the legal conclusion of the arbitrators, that the two bonds given by Hyman, as administrator, were cumulative, cannot be sustained. It is well settled that where successive bonds are given for the faithful discharge of a trust, all the bonds given during the continuance of the office are cumulative, and the sureties on each bond stand in the relation of co-sureties to the sureties on all the other bonds. The second bond is an additional and cumulative security for the faithful discharge of the duties of the administrator, and is retrospective as to pre-existing and continuous breaches. *Bell* v. *Jasper*, 2 Ired. Eq., 597; *Oates* v. *Bryan*, 3 Dev., 451; *Jones* v. *Hayes*, 3 Ired. Eq., 502; *Jones* v. *Blanton*, 6 Ired. Eq., 415; *Moore* v. *Boudinot*, 64 N. C., 190; *Hughes* v. *Boone*, 81 N. C., 204.

The second exception is untenable. An administrator should not be charged with interest on moneys *bona fide* collected and kept for those entitled, unless there be plain proof of misconduct in such collection and custody. *Hester* v.

Hester, 3 Ired. Eq. 9. But there is no pretence that the large balance which came to the hands of Hyman as administrator, was kept by him for the purpose of paying debts, or for distribution. He had been acting as administrator for more than seven years, when he died in 1876. The last item in the account of his administration stated by the arbitrators with which he is debited, is in the year 1872, four years before his death. He neither made annual returns, nor filed a final account. Nor does it appear that he kept any account of his administration, and in the case of *Finch* v. *Ragland*, 2 Dev. Eq., 137, the court held, "if an executor will not keep accounts to show when he did receive the money and how much, there are but two things the court can do—one is to charge him interest at the risk of making him pay it while the money lies by him; the other is to let him keep the interest actually received by him as his own, and use the testator's money for his own purposes; and that there may be no evidence of the amount of interest collected, or of the amount of principal used by him, encourage him not to keep accounts, or full and true ones. Which of these principles ought to govern, it is not necessary to say." And when an administrator has used a trust fund for his own advantage, of which there is a very strong presumption in this case, from the length of time it was held by him, he should be held to a strict interest account. *Arnett* v. *Linney*, 1 Dev. Eq. 369; *McNeill* v. *Hodges*, decided at this term, *ante*, 504.

As to the third exception: The defendants were properly charged with interest on the balance found due on the 5th of April, 1875, because that is the date of the last credit in the account, and "administrators are chargeable with interest on balances in their hands, whenever those balances accumulate beyond the exigencies of administration, unless it appears the fund has been kept *sacred and intact for the cestuis que trust*, as their property ready to be delivered to

them, so that profit could not have been made thereof. *Peyton* v. *Smith*, 2 Dev. & Bat. Eq., 325.

The fourth exception is founded upon a misconception of the nature of the reference. It was a submission to arbitration, and not a reference under the Code of Civil Procedure, and arbitrators are not bound to find the facts separately from their conclusions of law, and are not required to report them. *Lusk* v. *Clayton*, 70 N. C., 184, *Blossom* v. *Van-Amringe*, 63 N. C., 65.

There is nothing in the fifth exception. No demand is necessary to be made before bringing an action on an administration bond.

And as to the sixth and last exception, we are unable to see in what particular the award is obnoxious to either of the objections set forth therein.

We hold that His Honor committed no error in overruling the exceptions and giving judgment according to the award. The judgment of the court below is therefore affirmed.

No error. Affirmed.

H. T. FARMER v. S. V. PICKENS.

Landlord and Tenant—Vendor and Vendee—Estoppel.

1. Where the plaintiff in an action to recover land alleges a title in fee, it is competent for him to support such title, *as against the defendant in possession*, by proof of a renting by the latter from the plaintiff as the owner of the fee.

2. The rule between lessor and lessee extends equally to one who takes or holds possession under a contract of purchase, and he is not permitted to controvert the title of him under whom he entered or by whose consent he has continued a possession.

3. Possession previous to a lease or purchase does not let in the party in possession to dispute the title under which he entered.

4. A defendant in possession of land is estopped to allege a sheriff's sale of the same by consent of the party under whom the defendant entered, and a conveyance to the defendant by the purchaser at such sale, without a prior surrender of the land by the defendant to the person under whom he entered.

(*Clarke* v. *Diggs*, 6 Ire., 159; *Hartzog* v. *Hubbard*, 2 Dev. & Bat. 241; *Lunsford* v. *Alexander*, 4 Dev. & Bat., 40; *Smart* v. *Smith*, 2 Dev. 258; *Barnett* v. *Roberts*, 4 Dev. 81; *Love* v. *Edmonson*, 1 Ired. 152, cited and approved.)

CIVIL ACTION to recover land tried at June Special Term, 1880, of HENDERSON Superior Court, before *Schenck, J.*

Judgment for plaintiff, appeal by defendant.

No counsel for plaintiff.

Mr. J. H. Merrimon, for defendant.

DILLARD, J. The plaintiff sues to recover a house and lot, alleging a title in fee and present right of possession in himself, and an unlawful withholding of the possession by the defendant. The defendant by his answer denies the alleged ownership in fee of the plaintiff, and admitting the possession to be in himself, alleges the same to be lawful.

On the trial an issue in this form, "Is the plaintiff entitled to the possession of the land in controversy," was submitted to the jury without objection by defendant, and on a response thereto in the affirmative, judgment was rendered for the plaintiff, and on the appeal therefrom by the defendant, errors are assigned for our review which will be considered in their order.

1. The plaintiff to establish a right of possession in himself offered in evidence an obligation of defendant dated 19th of March, 1868, wherein is recited, "that defendant for one dollar per month rented the house and lot until the 1st day

of January, 1869," and to the admission of this evidence the defendant objected on the ground of irrelevancy.

A title in fee which is one of the facts stated in the complaint as a constituent of the cause of action could be by a state-grant and mesne conveyance, actual or presumed, good against the world, or it could be on the mere claim of the fee without any deeds whatsoever, by any proof estopping the defendant from questioning the title claimed by the plaintiff. *Clarke* v. *Diggs*, 6 Ired., 159. A fee established in either mode would be attended with a right of possession, as against the defendant, and it was competent to the plaintiff to have proved the fee in himself by a chain of title from the state, or he might have stood on the claim of a fee as alleged in the complaint by proof of an estoppel on the defendant to make a question as to his title, without any violation of the rule, that the *allegata* and *probata* must agree. The allegation of a *title in fee* imported *such a title* actual and probable by deeds or *such* against defendant by *estoppel*, and the obligation of the defendant for rent had the legal effect to create the relation of landlord and tenant for 1868, and the possession having ever since continued without surrender, it then estopped the defendant, and still does, to dispute the title whatever it be, that is claimed by the landlord. And this amounts to proof for the purposes of this action of the title in fee as alleged in the complaint. We therefore hold that the obligation of the defendant to pay rent was relevant to the issue and was properly admitted as evidence to the jury.

2. The second exception of defendant was to the refusal of the court to allow defendant to show by plaintiff and the record of a suit in equity that he was in possession before the lease, and that the same was made to him by plaintiff as a receiver of the court and that his title as receiver expired in 1868.

Upon the exclusion of this proof, the defendant put in

evidence a bond for title executed by plaintiff to him, dated on the same day as the lease, declaring at the time, that it was done to show that his possession was lawful; and it will be proper to consider the same in connection with the exception to the rejection of the evidence offered to put the lease out of the way as an estoppel.

The title-bond recites a purchase of the house and lot described as having been made by plaintiff at sheriff's sale, for which he had not received a deed, and provides for occupancy by defendant for the year 1868, at a rent of a dollar per month, with a stipulation after that year for occupancy by defendant free of rent until the title should be made him, when he was to secure the purchase money by a mortgage on the property.

Viewing the lease in connection with the title-bond, the effect of the title-bond is to reiterate the relation of landlord and tenant between plaintiff and defendant as acknowledged in the lease for the year 1868, and to establish the new relation of vendor and vendee after that year, and whether the defendant be regarded as a lessee or a purchaser, in either case, the evidence was properly rejected. It is settled that a person accepting a lease from another is estopped during the continuance of the lease, and afterwards, until he surrenders the possession to his landlord, to dispute his title, being a rule founded on a principle of honesty which does not allow possession to be retained in violation of that faith on which it was obtained or continued. *Hartzog* v. *Hubbard*, 2 D. & B., 241; *Lunsford* v. *Alexander*, 4 D. & B., 40; *Smart* v. *Smith*, 2 Dev., 258; *Barnett* v. *Roberts*, 4 Dev., 81.

The rule between lessor and lessee extends equally to one who takes or holds possession under a contract of purchase, and he is not permitted to controvert the title of him under whom he entered or by whose consent he has continued a possession. *Love* v. *Edmonson*, 1 Ired., 152.

It is urged however by the defendant that the rule of estoppel as to a tenant or purchaser, does not apply to him by reason of the fact that he had a possession before the lease to him, and for the further reason, that as plaintiff has himself shown that he had no title, defendant cannot be estopped from insisting on the same defect and thereby defeat the action.

The subject of the effect of a possession previous to the acceptance of a lease, or contract of purchase, on the right to dispute the title thus acknowledged has been much discussed and differently ruled, some maintaining that the doctrine of estoppel does not apply, because the party in possession does not derive his possession from the other, while others maintain that it does in that case as much and for the same reasons as if the possession had been so received. The ruling best supported by authority, English and American, is stated by Bigelow on Estoppel, 397 and 398, to be, that an anterior possession does not vary the application of the rule on the ground that although the party asserting the estoppel may not have lost the advantage of parting with the possession, yet by attornment to him or the new relation of vendor and vendee, he may have been led into some omission or conduct prejudicial to his title which otherwise would not have been. In this state the rule is held to be, that a possession previous to a lease or contract of purchase does not let in the party to dispute the title which he had recognized. In *Love* v. *Edmonson, supra,* the defendant had been in possession before the purchase of his and other tracts by Love from one Lockhart, and Edmonson conditionally purchased the same from Love, if a mortgage thereon was paid off, and if not, then his contract was to pay rent, just as was agreed in this case, and this court ruled that Edmonson, whether as lessee or purchaser, could not dispute the title of Love, and upon the question of the possession by Edmonson previously to his

contract of purchase enabling him to dispute Love's title, the court held upon the authority of the case of *Bullen* v. *Mills*, 29 Eng. C. L., 16, that that circumstance did not enable him to dispute the title which he had recognized Neither did a want of title in Love prevent the application of the estoppel, for he had only an equity of redemption, as the plaintiff here had an equity for a deed from the sheriff. We hold therefore that neither ground on which defendant seeks to except his case from the operation of the rule of estoppel is tenable, and that His Honor's refusal of the proposed proof was right.

3. The last exception of defendant was to the exclusion by the court of proof of an alleged sheriff's sale with plaintiff's consent to one Garren and a sale by him to defendant, subsequently to defendant's lease and contract of purchase.

The refusal of this evidence is justified on the same reasons and authority as was the evidence considered of under the last exception, and a farther discussion is therefore unnecessary. If the defendant could be allowed to set up a claim of title in Garren, and from him to himself, and then by an allegation of consent by plaintiff to the purchase by Garren, make a case for a declaration of trust by construction of a court of equity, the protection intended for the plaintiff and all landlords by the rule which forbids a dispute of their titles by a tenant, would be completely subverted. If there be an equity in favor of defendant in the fact alleged by him of a consent by plaintiff to the purchase by Garren, after surrendering the possession, he can set it up by an independent action.

The several exceptions of defendant having been passed upon and no error found in the rulings of the court below, the judgment appealed from must be affirmed, and it is so ordered.

No error. Affirmed.

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

Practice—Reference—Evidence—Costs.

1. A party who excepts to the failure of a referee to report evidence must show affirmatively that evidence was rejected or not reported, which might have varied the result.
2. One who successfully maintains an equitable defence against the recovery of land on the bare legal title, is entitled to judgment for his costs.
3. This rule is not varied by chapter 139 of the acts of 1870-71, which was merely intended to prescribe a schedule of fees, and not to determine which of the litigants should pay them.

(*Schehan* v. *Malone*, 71 N. C., 440; *Costin* v. *Baxter*, 7 Ired., 111; *Wooley* v. *Robinson*, 7 Jones, 30; *Pierce* v. *Sykes*, 1 Hawks, 87, cited and approved.)

CIVIL ACTION to recover land, tried upon exceptions to a referee's report, at Spring Term, 1880, of CHATHAM Superior Court, before *Seymour, J.*

See same case, 76 N. C., 127. Judgment for the plaintiff, appeal by defendants.

Mr. John Manning, for plaintiff.

Messrs. Batchelor & Edwards and *J. H. Headen*, for defendants.

SMITH, C. J. This cause was before the court at January term, 1877, and the equity set up in the answer sustained. The present appeal brings up for review certain overruled exceptions to the report of the referee and so much of the final judgment as taxes the defendants with the costs of the action. The exceptions to the report, three in number, will first be considered:

I Exc. For that the referee, disregarding the finding of the jury, fails to charge the plaintiff with rent for his occupation and use of the Johnson land during the first year;

This objection rests upon a misconception of the action of the referee. The verdict fixes the annual rent at $40, but the referee finds that the plantation was in bad condition and needed repairs when the plaintiff entered possession, and that his expenditures for repairs and fencing are an equivalent for that year's rent.

II Exc. For that the referee assesses the annual rent at a smaller sum than that found by the jury: This is not true in fact, as to the succeeding years of the plaintiff's occupancy, the jury and the referee concurring in putting the value of the annual rent at $40.

III Exc. The evidence taken before the referee does not accompany his report: This would be a valid objection and the referee would be required to report the evidence if there were, as there are not, any exceptions to which it is applicable, or perhaps any adverse rulings made in the progress of the inquiry, the proper subject matter of exception, suggested, which the evidence would tend to elucidate or explain. But none such are specified, and for aught that appears, if produced it would be wholly immaterial. The exception therefore was properly overruled. *Schehan* v. *Malone & Co.*, 71 N. C., 440.

IV Exc. The last exception is to the judgment for costs; the only question presented and discussed in the briefs and in the oral argument for the defendants.

The object of the action instituted was the recovery of possession of the land and the establishment of the plaintiff's legal title in fee thereto. The defence set up was a trust attaching to the legal estate and a right to redeem upon payment of the residue of the debt with which the land was charged. Most of the costs were incurred in determining this controversy and the sum to be paid in redeeming, and in this the defendants prevail and they are allowed to redeem upon payment of what is due. The plaintiff has not recovered the real property claimed in the

action, so as to entitle him to recover his costs under C. C. P., § 276, while the defendants have sustained their counter-claim and equity, which is but a reversed action between the same parties in which relief is at once afforded instead of the defendant's being forced to seek it in a new suit before another tribunal.

The recovery of costs by one suitor against another depends upon statutory regulations and is given to the successful party. *Costin* v. *Baxter*, 7 Ired., 111; *Wooley* v. *Robinson*, 7 Jones, 30.

In *Pierce* v. *Sykes*, 1 Hawks, 87, the widow and heirs at law of Rhodon Isles (some of whom were infants) had sued for and recovered the land in an action at law the complainant having an equitable defence thereto only, to assert and maintain which he sought and obtained relief by a bill in equity. In this latter suit, TAYLOR, C. J., delivering the opinion, remarks: "With respect to costs they ought to be paid by the defendants (the plaintiffs in the other action) since they prosecuted an unjust claim at law and have set up an inequitable defence in this court." This is the present case except that both suits are here condensed into one, and all rights, legal and equitable, finally adjusted in that.

We have not overlooked chapter 139 of the acts of 1870–'71, section 16, of which repeals, among others specifically mentioned, Title 12 of the Code, in which are found sections 276 and 277, "and all laws or parts of laws in conflict with, or giving any other fees than those mentioned in this act." Unless these qualifying and restrictive words are extended to the laws previously enumerated, and the force of the repeal confined to such portions of them as are inconsistent with the new and substituted statute, those sections regulating the payment of costs in actions would be absolutely repealed. But this statute merely prescribes a schedule of fees in place of those before allowed, and does not undertake to regulate by which of the parties to a de-

termined suit they are to be paid. A reasonable interpretation of the law therefore would seem to require an exemption from its operation of those sections of the code, which prescribe when and by whom costs are recoverable in actions, and which in no manner conflict with its purpose or its provisions. This view of the intended force of the repealing section is confirmed by a subsequent enactment (acts 1874–'75, ch. 119) which in terms repeals sub-division 4 of section 276 of the code and substitutes a modified provision in its place, thereby admitting to be in force the section a portion of which is thus amended, and, in our opinion, those others constituting a regulation for the payment of costs by parties litigant, of which the section itself is a necessary part.

It must therefore be declared that there is error in the ruling as to costs and that they should be adjudged against the plaintiff who fails in his action. The judgment is reversed and this will be certified.

Error. Reversed.

WILLIAM HOWELL v. LARKIN RAY.

Transcript—What it should Contain.

Every transcript or record, to be authoritative, must set forth before what person or persons the proceedings were had, or by whose authority the record was made, so that it may appear that such proceedings were not *coram non judice.*

(*State* v. *King*, 5 Ired., 203; *State* v. *Ward*, 8 Ired., 530; *Green* v. *Collins*, 6 Ired., 139, cited and approved.)

HOWELL *v.* RAY

CIVIL ACTION to recover Land tried at Spring Term, 1880, of WATAUGA Superior Court before *Gilmer J.*

The issues were found by the jury in favor of the plaintiff, judgment, appeal by the defendant.

Mr. G. N. Folk, for plaintiff.

No counsel for defendant.

ASHE, J. The statement of the case contains a voluminous mass of matter, in eighteen pages of legal cap embracing a great deal of evidence taken on the trial, both oral and written, which has no pertinence to the points raised by the record.

There was no exception to the charge of His Honor, and the only exceptions taken on the trial were, first, to the introduction of the transcript from the court of equity for the county of Ashe, of a petition to sell the land of Amos Howell including that in controversy, for the purpose of partition among his heirs, upon the ground that it did not show that the court was opened and held at Ashe, or that any judge presided therein at the time when the *ex parte* petition was alleged to have been filed; and secondly, because the sale did not describe the land; that it was only described as being on Elk river, as set forth in the report of the master and the other proceedings of the court of equity.

It is only necessary for us to consider the first exception, as the ruling of His Honor on that was erroneous and entitles the defendant to a *venire de novo*. The transcript from Ashe was an important link in the chain of the plaintiff's title, and it has been expressly decided in this state that every record must set forth before what person or persons the proceedings were had, or by whose authority the record was made. The doctrine was so declared by RUFFIN, C. J., in the case of the *State upon the relation of Hughes* v. *King*, 5 Ired., 203, and approved in *State* v. *Ward*, 8 Ired., 530.

In his opinion in *King's* case the Chief Justice said, "the objection when taken in the case of the *State* v. *Lewis*, 3 Hawks, 410, and *State* v. *Kimborough*, 2 Dev., 431, was overruled, not because it was deemed untenable in law, but because it was untrue in point of fact. There, the record showed that the court was held by a gentleman whom this court knew, *ex officio*, to be a judge of the superior courts of law, being the courts of the highest criminal jurisdiction in the state; therefore the court held that the record was sufficient in stating his presence, without setting forth his office. But it is plain it was thought necessary that it should be at least stated that the court was held by one who was a judge of the court, although it need not set out that he was such judge, as that was otherwise sufficiently known."

The question in the case of the *State on the relation of Hughes* v. *King*, was as to the validity of the appointment of a constable; and the certificate of the clerk of the county court merely stating that A. B. came into court and qualified, &c., without setting forth whether there were three or more justices on the bench on that day or any preceding day, it was held that it could not be received as a transcript of the record of the court, because it did not appear that there were justices enough to constitute a court, and therefore have authority to make or cause to be made a record of the court.

Before concluding this opinion we must again earnestly and urgently call the attention of our brethren on the superior court bench to the case of *Green* v. *Collins*, 6 Ired., 139, where the proper mode of making out the statement of cases on appeal is given.

A *venire de novo* is awarded. Let this be certified to the superior court of Watauga county that further proceedings may be had agreeably to this opinion and the law.

Error. *Venire de novo.*

SIMEON GRAYBEAL v. DRURY POWERS.

Pleading—Amendment—Practice.

Where the defendant in an action to recover possession of land answers admitting the possession but denying plaintiff's title, he cannot afterwards disclaim title and possession and put the plaintiff to proof of the adverse possession without an amendment of the pleadings.

(*Albertson* v. *Redding*, 2 Mur., 283; 1 Car. L. R., 274; *Squires* v. *Riggs*, 2 Hay., 150, cited and approved.)

CIVIL ACTION to recover Land tried at Spring Term, 1880, of ASHE Superior Court, before *Gilmer, J.*

The complaint alleges that the plaintiff is owner in fee simple and entitled to the possession of a certain tract of land described by metes and bounds, lying in the county of Ashe, and that the defendant entered upon it, cut down timber, and otherwise injured it and still wrongfully holds possession of the same.

The defendant in his answer denies the plaintiff's ownership and right to possession, admits that he entered and cut timber and holds the possession, but denies that his possession is wrongful.

The plaintiff claimed under a grant from the state dated the 14th of December, 1863, and the defendant under a grant dated the 13th of July, 1866.

A certain plat of the lands in dispute was introduced in evidence in which there was a red line running through the lands claimed by plaintiff from east to west; and a controversy having arisen on the trial as to the location of the defendant's grant, the defendant's counsel said, the controversy only extended to that portion of the land covered by the plaintiff's grant, which lay north of the red line, and offered to amend the answer if it meant otherwise, to which the plaintiff objected. His Honor consented to allow the

amendment upon terms which the defendant declined, and insisted he had the right to show that he had never had possession south of the red line, which the court refused to allow and the defendant excepted.

The defendant then disclaimed any title to any part of the land described and covered by plaintiff's grant, south of the red line, whereupon His Honor directed the jury to return a verdict for the plaintiff for all the land in his grant lying south of that line. A verdict was returned accordingly and judgment rendered in behalf of the plaintiff. There was then a motion for a new trial and the error assigned was the refusal of the court to admit the proof of no possession south of the red line without amendment of the answer, which was disallowed and the defendant appealed.

No counsel for plaintiff.
Mr. G. N. Folk, for defendant.

ASHE, J. The only question presented by the record is whether the ruling of His Honor in excluding the proof offered by the defendant upon the point of possession was erroneous. In an action to recover land the plaintiff must always prove the defendant in actual possession of some part of the land described in the complaint, unless the possession is admitted. The defendant here has admitted that he was in possession of the land, and the admission extended to every part of it. And having admitted in his pleading the possession of the whole tract sued for, it could not be allowed him in contradiction thereof, to prove that in fact he was not in possession of a certain part. The proofs must correspond with the allegations, not contradict them.

For the defendant to have availed himself of the defence which he has sought to set up in this case, he ought, in his answer, to have disclaimed title to all the land, described in the complaint, lying on the south side of the red line, and

denied that he had possession of any part thereof; and admitting the possession on the north side of the line, insisted that he had title thereto and that his possession was not wrongful.

The plaintiff might in that case have taken out his execution for the part disclaimed, but it would have raised a direct issue of title as to the land on the north side of the line, and the plaintiff would only have been entitled to recover if he could have shown a good title. *Albertson* v. *Redding*, 2 Mur., 283; 1 Car. L. R., 274 (28); *Squires* v. *Riggs*, 2 Hay., 150 (326).

The defendant having admitted in his answer the possession of the whole of the land covered by the plaintiff's grant, his disclaimer on the trial of that part lying on the south-side of the line was an admission of a wrongful possession and the plaintiff was entitled to a verdict. There is no error. The judgment of the court below is affimed.

No error. Affirmed.

J. N. KELLY and wife v. H. C. MCCALLUM and others.

Partition—Advancements—Pleading—Concession of Legal Proposition Inoperative.

1. A testator devised and bequeathed land and slaves to his wife, indicating in the will his intention that the property should be finally divided equally between the widow and children but leaving it discretionary with the widow to advance to the children at such times and in such kinds of property as her best judgment might dictate. To two of the children the widow advanced some slave property and more than their *aliquot* portions of the land, with the expectation of supplying the deficiency from the undivided slave property, which was amply sufficient for that purpose; *Held*, that an unexpected emancipation of the slaves

by the result of the war would not sustain a claim of the other children to have a re-division of the land, and an account from the two children first advanced of the slave property received by them.

2. A legal proposition cannot be established by admissions in the pleadings.

3. The failure to answer is an admission of the *facts* alleged by the plaintiff, but it does not involve a concession of a legal inference drawn therefrom, and still less the recognition of the correctness of the principle of law stated.

SPECIAL PROCEEDING for Partition commenced in the Probate Court, and tried at Spring Term, 1880, of BLADEN Superior Court, before *Eure, J.*

Hays T. Shipman died in 1844, owning a large estate in land and slaves which he devises to his wife (with some exceptions not necessary to notice) and adds the following clause to the gift: "desiring and trusting that she will so use it that it will be to the mutual benefit of herself and my dear children, Mary Eliza, Hays McNeill, Sarah Dorcas and Eliza Ann; also desiring that at the proper time she will make such advancements as prudence may dictate, (always bearing in mind that it is my wish that all my children shall receive, after her portion, equal shares) provided nevertheless, that should she choose to marry again, then and in that case, it is my desire and will that my estate be divided according to the laws of the state of North Carolina;" and in this event he adds certain articles to her equal share.

The son, Hays McNeill, died without issue. The testator's widow, Sarah J. Shipman, went into possession of the property and, upon the marriage of her daughter Mary E., to the defendant H. C. McCallum, advanced to her land of the value of $1,000 and negro slaves of the value of $5,883 and perhaps a small additional sum in other articles; and in like manner to her daughter Sarah D., on her intermar-

riage with the defendant John P. Smith, no land, but slaves of equal value as those advanced to her sister, Mary E.

The plaintiff Eliza A., resided with her mother until her marriage with the plaintiff John N. Kelly, and thereafter until her mother's death in November, 1868, and no specific advancements were made to her.

The slaves retained after the advancements mentioned were twenty-seven in number and of the value of $11,766, and the land of the value of $1,750.

The use of the property was shared in by the plaintiffs while residing with the mother and until the emancipation of the slaves at the close of the civil war.

The object of the suit is to have partition of the land and to charge the defendants with the value of their respective advancements in slaves, and the defendant Mary E. with the value of her land, and the facts stated were either conceded by the parties or found by the jury upon issues. The defendants, Smith and wife, put in no answer.

The court adjudged that the defendants were not chargeable with the value of the slaves advanced, that the defendants, McCallum and wife, having received their full share of the land, were precluded from claiming any part of that to be divided, and that the plaintiff, Eliza Ann, and the defendant, Sarah D., were entitled as tenants in common to equal moieties thereof and to a division between them.

The plaintiffs' appeal is from so much of the judgment as exempts the defendants from accountability for the value of the slaves received by them, and directs an equal partition of the land between the other two sisters.

Mr. R. H. Lyon, for plaintiffs, cited *Meadows* v. *Meadows*, 11 Ired., 148; *Walton* v. *Walton*, 7 Ired. Eq., 138; *Woodfin* v. *Sluder*, Phil., 200; *West* v. *Hall*, 64 N. C., 43.

Mr. T. H. Sutton, for defendants.

SMITH, C. J., after stating the case. We think the ruling of the court below correct and not liable to just complaint. No question is made as to the construction of the will in directing an equal distribution among the testator's children, and that in the manner provided in cases of intestacy, those who have received anything as an advancement being called upon to account for the value of it before sharing in the division of the residue, and we are not therefore called upon to put an interpretation upon its language, and to say how far it is advisory and how far mandatory in the expressions of the testator's expectations and wish.

There was reserved by the devisee and legatee, upon whom the trust of making an equal distribution is imposed by the testator, a large number of slaves, more than enough to make the plaintiffs equal to the others, and their right to be made equal out of those reserved, had the slaves remained property, upon such construction of the will is clear and undisputed. But the right of the *feme* plaintiff to this equal prior allotment passed away with the extinction of the property in slaves, and the other children of the testator suffer from the same cause the loss of theirs. Is it in consonance with his expressed will that the loss, common to all, and which could be averted by none, should be borne alone by those who had been advanced, and made up in part, at least, to the other out of his land?

The equality contemplated in the final disposition of the estate was to be secured by successive separations from the common property, according to the sound discretion of the wife, "as prudence may dictate," and with a due regard to the condition and wants of her children and the accounting for advancements afterwards. This discretion she exercised as to two of them, and when the other arrived at full age in August, 1864, still living with her mother, the very property from which her share was to be taken had become by the inexorable logic of events of no measurable value, and a

few months later ceased to exist. There was no unreasonable delay in allotting to the plaintiff her share in the slaves, and it was rendered impracticable by their emancipation.

The case, in some respects analogous, is not entirely similar to an intestacy, where the children, previously not provided for have no direct interest in the property of their parent until his death, and then a right only to exclude such as have been advanced from participating in the distribution until property of equal value has been set apart to them. This is simply the law of distribution of an estate not disposed of by will. But under the testator's will, it is claimed and conceded that a present interest vests in each of the children, and the estate given to the devisee and the legatee is clothed with a controlling trust, fulfilled only by a final equal division, although admitting of intermediate advancements, as in the judgment of the trustee may be suitable and proper.

The cases therefore cited in the brief of the appellant's counsel to show that the value of property advanced, in case of intestacy, is not diminished by death or loss, nor enlarged by increase of growth subsequently accruing, have no application to the facts of the present case, which are governed by the wishes and directions expressed in the will.

It is further insisted that the judgment is erroneous, in that, no answer was made to the complaint by the defendants, Smith and wife, and the allegations must be taken as true as to them. The failure to answer is an admission of the facts alleged by the plaintiffs, and such is the effect of a judgment by default to which they are entitled. But it does not involve a concession of legal inferences drawn therefrom, and still less the recognition of the correctness of the principle of law stated. The office of pleading, with the intervention of a jury or other tribunal to determine what is controverted, is to arrive at an understanding of facts, and the law is administered not as a party may have al-

leged but as it is declared by the court. Where by the assent of all, the facts are found by the jury, on issues involving the relations of each, the judgment must be rendered upon the verdict when it may differ from the allegations.

There is no error and the judgment is affirmed. Let this be certified for further proceedings in the case.

No error. Affirmed.

WILLIAM HARRIS v. E. N. BRYANT and others.

Sale for Assets—Purchasers—Demand—Practice—Parties.

1. Devised land was sold by order of the court to pay debts of the devisor, and bid off by the devisee, who, after the sale was confirmed, but before the purchase money had been paid, mortgaged the same to the plaintiff to secure a recited indebtedness of $1150. Afterwards, the devisee allowed A to pay the purchase money and take a deed from the administrator *cum. test. annex.* of the devisor; *Held.*
   (1) That the plaintiff was entitled to ownership and possession of such land subject to the claim of the administrator for the purchase money, and that a judgment in a suit between the devisee and one to whom the plaintiff had assigned the mortgage debt and security concluded all parties as to the extent and validity of such debt.
   (2) That the rights of the plaintiff could not be divested by a demand on him for the purchase money by the administrator *cum. test. annexo.* before conveying the legal estate to A.
2. Where land is directed by will to be sold and converted into money, the executor and not the heirs, represents the estate, and the latter are not necessary parties to a suit concerning the diposition of and charges on such estate.

(*Shields* v. *Whitaker*, 82 N. C., 516; *Ex Parte Yates*, 6 Jones Eq., 212; *Pettillo*, *Ex Parte*, 80 N. C., 50; *Etheridge* v. *Vernoy*, 71 N. C., 184 *Mebane* v. *Mebane*, 80 N. C., 34, cited and approved.)

HARRIS *v.* BRYANT.

CIVIL ACTION tried at Fall Term, 1879, of NASH Superior Court, before *Eure, J.*

The opinion states the facts. Judgment for plaintiff, appeal by defendants.

Mr. C. M. Cooke, for plaintiff.
Messrs. Bunn & Battle, for defendants.

SMITH, C. J. William B. Bryant died in the year 1861, leaving a will, in which he devised the land mentioned in the complaint to his son, the defendant, E. N. Bryant. In order to pay the debts of the testator, Burnett Gay, administrator, with the will annexed, under a license obtained from the probate court, and after advertisement, on October 8th, 1870, sold said land at public sale to the said devisee for the sum of $150 on a credit of six months. The sale was reported and confirmed and the administrator directed to collect the money and make title.

Before the purchase money was paid, on January 17th, 1871, the said E. N. Bryant and wife, conveyed the premises by deed of mortgage to the plaintiff to secure an indebtedness therein recited to be $1,150, and said deed was registered on February 9th following. On the 17th day of April thereafter, Owen Cobb, the testator of the defendant, W. O. Cobb, with consent of the purchaser, paid the purchase money to the administrator and took his deed of conveyance in fee.

In December, 1871, the plaintiff, for value, assigned the debt and the mortgage security to Susan Cobb, who brought her action against Bryant and wife, and at August term, 1873, of the superior court recovered judgment for $1,122.19 with interest from January 17th, 1871, and for the foreclosure and sale of the premises. The land was sold under this judgment on February 9th, 1874, and purchased by the plaintiff

for five dollars and duly conveyed to him. The judgment has since been re-assigned to the plaintiff.

The testator, Owen Cobb, alone answers and sets up title in himself, derived under the deed from the administrator, Burnett Gay.

While the record does not itself show the death of Owen Cobb, his will is made an exhibit and W. O. Cobb, the executor who qualified is substituted as a co-defendant in his place, and this assumes the truth of the antecedent facts omitted in the record. In the will, the testator authorizes and directs his executor to make sale of the disputed land, and, after payment of legacies, to divide the residue of the proceeds of sale among his wife and children.

During the trial before the jury (and no specific issues of fact seem to have been prepared and submitted to them, nor were they required to render a verdict) the plaintiff offered in evidence a transcript of the proceedings in the foreclosure suit, and the defendant, admitting the facts therein contained, proposed to show that the mortgage debt was for agricultural advances to be thereafter made, and that the plaintiff had been fully reimbursed for all that he had made, and in order thereto moved that an issue should be prepared, to which the defensive evidence would be pertinent. The court denied the motion and ruled that the judgment conclusively determined the existence and amount of the debt, which the defendant, Bryant, the only party interested in contesting it, would not be allowed to deny. This refusal of the court to submit the issue and admit the evidence constitutes the first error assigned.

I. We sustain the ruling of the court. The testator, Owen Cobb, acquired by the deed of the administrator Gay, executed under the circumstances set out, the legal estate in the land encumbered with the preceding mortgage to the plaintiff, and the right of his grantor whose place he occupied to be repaid the original purchase money before being re-

quired to make title to the plaintiff. He held the land only for his own re-imbursement and indemnity, and then in trust for the plaintiff. This claim of the testator was not controverted, and the judgment recognizing it, required the plaintiff to pay the same before demanding a conveyance; and upon his failure and the consequent necessity of selling the premises, its payment from the moneys received. Beyond this the testator had, and his heirs have, no interest whatever in the result, and the question as to the disposition of the excess lies exclusively with the parties to the mortgage, and between them the extent of the indebtedness is ascertained and settlement fixed by the judgment. *Shields* v. *Whitaker*, 82 N. C., 516.

II. The court also refused to submit an issue to the jury as to a demand alleged to have been made by the administrator, Gay, upon the plaintiff for the purchase money before he conveyed to the testator, Owen Cobb.

We concur with His Honor that this was immaterial and did not impair the plaintiff's equity to pursue the land in the hands of the grantee and charge it with the pre-existent mortgage liability. The right of Harris had been transferred to the plaintiff and could not be divested by his assent to a conveyance to another.

The remedy against a delinquent purchaser of land at a judicial sale, after the bid has by acceptance and confirmation become a contract, is pointed out by the late eminent Chief Justice in his opinion in the matter of *Yates*, 6 Jones Eq., 212; but it cannot summarily be sought as attempted in this case without the purchaser's consent or the sanction of the court in the substitution of another in his place. *Pettillo Ex parte*, 80 N. C., 50.

III. The third exception is to the want of parties for that the land descended to the testator's heirs at law.

It is true the legal estate vests in the heirs until the power of sale conferred upon the executor is exercised, and then

by virtue of the will passes to those to whom he may convey it. But the direction to sell and distribute the proceeds arising from the sale is a conversion of the land into personalty, and the executor represents all interested in the personal estate. The testator himself is only entitled to a return of the money advanced, and for which the legal title is but a security, and this limited beneficial interest vests in the personal representative. The heirs, as such, have no share in it, and they hold the legal estate, as a temporary deposit only, until it is transferred by the exercise of the power conferred in the will. In *Etheridge* v. *Vernoy*, 71 N. C., 184, the presence of a mere naked trustee was dispensed with, and the cause permitted to proceed to a final determination.

The executor possesses ample authority under the will to pass the title of the land without the aid or concurrence of the heirs, and may by the court be required to exercise the power and convey the estate to the plaintiff if he shall redeem, and to the purchaser if a sale shall become necessary. He occupies in respect to this land the position of the testator, and with a similar dominion and control over it, and hence may be compelled to do what the equities of others could have enforced against the deceased owner. The exception is therefore untenable.

Besides, this objection seems to have been made first at the trial, the executor having put in no answer for himself and unless clearly valid will not be favorably regarded, when its only effect is to delay, not to defeat the action. All the parties interested in the subject matter of the action are before the court, the executor legally representing all such as share in the personal estate, and will be bound by the judgment, and we see no necessity for making additional parties.

The appellant's objection to the form of the judgment points to no specific defect, and we suppose rests upon the

absence of any direction for a report of the sale to the court for its approval and confirmation as required in actions for foreclosure of mortgages as in the case of *Mebane* v. *Mebane*, 80 N. C., 34. This is however a suit to redeem, rather than to foreclose, and if there is force in the objection and the rule is equally applicable to both, it may be removed in the judgment hereafter to be rendered. This will be certified for further proceedings in the court below.

No error. Affirmed.

A. J. GAMBLE and another, Admrs. v. M. A. WATTERSON and others.

Sale for Assets—Exemptions—Practice.

Where, in a proceeding to sell descended land for assets, it appears by admissions in the pleadings that the debts contracted by the deceased before the adoption of the homestead exemption exceeded the value of the personalty, an unconditional sale should be ordered; and it is error to discriminate in such order of sale between debts incurred before and after the passage of the homestead laws. Such discrimination can only be exercised, if at all, when the proceeds of the land sold are brought into court for distribution.

(*Hinsdale* v. *Williams*, 75 N. C., 430; *Edwards* v. *Kearzey*, 96 U. S., 595, cited and approved.)

SPECIAL PROCEEDING commenced in the probate court and heard on appeal at Spring Term, 1880, of CLEAVELAND Superior Court, before *McKoy, J.*

The plaintiffs, administrators of R. N. Watterson, not having personal estate of their intestate to pay his debts, applied to the probate judge for license to sell a tract of land which descended to the defendants his heirs at law. The petition alleges the value of the personal estate to be about $160, and the debts to be some $400, of which half

were contracted before the adoption of the constitution of 1868, and that the land proposed to be sold consists of fifty acres worth two dollars and fifty cents per acre.

The adult defendant makes no defence and the other six infant defendants, by their guardian *ad litem*, answer admitting the facts charged and asserting their right of homestead in the land and its exemption from sale until the youngest of them arrives at full age. The license as asked was granted by the probate judge, and on defendants' appeal so modified in the superior court as to authorize and direct a sale of the land for the payment of those debts only which were contracted before the homestead exemption was givne by law, and from so much of the modified order as restricts the purposes of the sale, the plaintiffs appeal.

No counsel for plaintiffs.

Messrs. J. L. Webb and *Gilliam & Gatling*, for defendants.

SMITH, C. J. The necessity of the sale is apparent, and upon the estimates the proceeds thereof will be insufficient to pay the liabilities of the intestate which are paramount to the right of exemption. It was not therefore at all necessary to anticipate a question that may arise in the probate court upon the settlement of the administration and the distribution of the fund among the creditors, and which was not then before the court.

It is true, if the application had been for leave to sell the land, subject to the homestead encumbrance, for the payment of debts subordinate to that right, it would have been refused under the law as declared in *Hinsdale* v. *Williams*, 75 N. C., 430, and it is equally clear that according to the decision of the supreme court of the United States in *Edwards* v. *Kearzey*, 96 U. S., 595, overruling previous adjudications in this court, the land is not exempt from liability for debts contracted before the constitution conferring the right of

homestead went into operation. But when by a sale the homestead is destroyed and all benefit of the exemption lost to those for whom it was intended, it is quite a different thing to appropriate the proceeds to the satisfaction of one class of debts, and to exclude the other from all participation therein: and it may be (we do not now express an opinion upon the point) that the date of the contracting of the debt becomes immaterial, and the fund is to be applied under the general law regulating administrations of insolvent estates. There is no error in granting the license to sell, and the question as to the appropriation of the moneys in the hands of the plaintiffs belongs to the probate judge first to determine, subject to review in the superior as an appellate court. But the attempted restriction put upon the license, when the whole land must be sold, is unauthorized and erroneous, and we so declare in order that it may not obstruct the decision of the court upon the point, should it hereafter arise. In this view only can the appeal itself be entertained. This will be certified to the end that further proceedings be had in conformity with the law as declared in this opinion, for which purpose so much of the order as restricts the license is reversed.

Error. Reversed.

W. F. WASSON, Sheriff v. R. O. LINSTER and others.

Sheriff—False Return—Liability of Deputy—Execution of Process—Practice—Issues—Evidence—Deposition.

1. In an action by a sheriff upon the bond of a deputy (conditioned for the faithful performance of duty and to indemnify the sheriff for his acts and omissions) based upon a judgment rendered in another action

against the sheriff on account of the following false return endorsed upon process by the deputy, "came to hand 1st Sept., 1869, at 11 o'clock; defendant not to be found in my county," the falsity in the return upon which the judgment was rendered being the return of "not to be found;" *It was held*, that in submitting issues to the jury it was not error to exclude an issue offered by the plaintiff sheriff involving the fal-ity of the return generally, but that the proper issue was one in which was involved only the falsity of that part of the return upon which the judgment in the former action against the sheriff was based.

2. In such action, the deputy is not liable even if his return as to the time the process came into his hands was false.

3. In such action, evidence that the plaintiff had had opportunity to serve the process while in his hands and before he had placed it in the hands of the defendant is admissible either as original evidence or in rebuttal of the plaintiff's testimony; for if the return was false by no act of the defendant after the process came to him but by the prior neglect of the sheriff, there would be no ground of recovery.

4. An officer, notified of the necessity of prompt measures for the execution of process placed in his hands for the arrest of a party, owes the duty, quitting everything else, to make an effort to effect the arrest.

5. Where a sheriff sees the return endorsed upon process by a deputy before the same is delivered into the clerk's office, and with a knowledge of the facts allows the return to be made, it is in law and fact his return, and he cannot hold the bond of the deputy responsible although the return may be false.

6. It is too late to object on the trial of an action to the reading in evidence of a deposition which has been on file for six years without objection or notice of objection, during which time the action had often been continued by counsel and had been removed from one county to another.

(*Kerchner* v. *Reilly*, 72 N. C., 171; *Katzenstein* v. *R. & G, R. R. Co.*, 78 N. C., 286, cited and approved.)

CIVIL ACTION removed from Iredell and tried at Spring Term, 1880, of WILKES Superior Court, before *Buxton, J.*

The case is that on the 31st day of August, 1869, J. T. Long sued out a summons against R. M. Johnson returnable to spring term, 1870, of the superior court of Iredell,

and at the same time an order of arrest returnable to the clerk's office on the 3rd day thereafter, both of which were placed in the hands of the plaintiff (then the sheriff of the county) with directions to execute the same promptly, and he early the next morning, as he alleged, between seven and eight o'clock put the paper in the hands of the defendant (then a deputy sheriff) with similar instructions to be diligent in serving the same.

The defendant returned the process endorsed, "came to hand 1st of September, 1869, at eleven o'clock; *R. M. Johnson not found in my county.*" And thereupon said Long instituted a suit against the plaintiff to fall term, 1870, in which a recovery was effected for the penalty of $500 and costs $83, upon the allegation that said return was false, and the plaintiff after paying the same and demanding repayment of the defendant and his sureties, brought this action on the bond of indemnity executed at the time of his appointment as deputy.

Among other things, the defendant by way of defence alleged that the process had been placed in his principal's hands on the evening of the 31st of August with notice to execute the same at once, and that Johnson was on the streets and other public places and in the actual presence of the plaintiff, and that plaintiff kept the same in his hands without executing it, until Johnson getting information thereof made rapid flight so that he could not execute the process when it came to his hands at eleven o'clock on the next morning. At the trial in Wilkes, to which county the case was removed, the parties having disagreed as to the issues to be submitted, the judge framed the following:

1. Did R. O. Linster, Hugh Kelly and Hugh Reynolds execute to plaintiff the bond mentioned in the complaint for the purposes therein set forth?

2. Were the summons and order of arrest in the case of *Long* v. *Johnson* placed by the plaintiff in the hands of the

defendant, Linster, as his deputy for service on the said Johnson on the 1st of September, 1869?

3. If so, could the defendant, Linster, by due diligence have executed the same after receipt by him?

4. Is the return on said summons and order of arrest or either of them made by defendant, Linster, to-wit: "R. M. Johnson not to be found in my county," a false return?

5. If said return was false, did plaintiff have knowledge of its falsity, and consent to the return as made by his deputy?

6. Has the plaintiff been damaged by the said false return of his deputy made without his knowledge or consent; and if so, how much?

To these issues the plaintiff objected and proposed the three following as a substitute:

1. Did R. O. Linster, Hugh Kelly, and Hugh Reynolds make and execute the bond named in the plaintiff's complaint?

2. Is the return on the summons and order of arrest, or either of them, sued out by *Long* v. *Johnson*, made by R. O. Linster as deputy sheriff, and is it a false return?

3. Has the plaintiff been damaged, and to what amount?

The issues offered by the plaintiff as a substitute being rejected by the court, the plaintiff excepted, and this exception with others taken in the progress of the trial to the admission of evidence and to the instructions of the court given and refused (of which a more particular mention will be hereafter made) constitute the errors for our consideration on this, the plaintiff's, appeal.

Mr. D. M. Furches, for plaintiff.
Mr. J. M. Clement, for defendants.

DILLARD, J., after stating the case. Of the issues presented by plaintiff and rejected by the court, the first one is

the same in substance, and nearly so in language, as the first of the series presented by the judge, and its rejection of course can be no cause of complaint by the plaintiff.

The second issue of the plaintiff was properly refused, and the third one depending thereon ought to and did go with it. The bond sued on is a bond conditioned for the faithful and correct performance of duty by the defendant, Linster, as deputy sheriff, and to indemnify and save harmless the plaintiff against his acts and omissions as such. And beyond doubt, the plaintiff, if he suffered loss by an act or omission of the defendant in his office, and the defendant on demand failed or refused repayment, could assign the same as a breach of the conditions of the bond declared on, and recover therefor. But in fixing the amount, the assessment of damages would have to be grounded on the particular act which damnified him and be limited by the loss therefrom, and could not be helped out by any other act or omission for which the plaintiff had not incurred and suffered loss. The plaintiff in his complaint alleges that he was subjected in the suit of J. T. Long to the penalty of $500, for a false return made by the defendant as his deputy on the summons and order of arrest issued in the action of *Long* v. *Johnson*, and the counsel of plaintiff in his argument before us urges (and to the same purport in his brief) that his second and third issues looked to the establishment of falsity in either or both of the endorsements made by defendant on said process, and to the assessment of damages for either or both, and that by the refusal of his issues he was prejudiced.

A sufficient answer to the exception is, that a transcript of the record of the suit of Long against the plaintiff for the penalty for a false return is not made part of the case, so that we can see for ourselves whether the penalty was claimed for falsity in the memorandum of the time of day when the paper came into the defendant's hands, or in the

return, "R. M. Johnson not found in my county;" and therefore we have to be bound by the judge's statement, from which it appears that the ground on which the penalty of $500 was claimed and recovery effected against the plaintiff was falsity in the return, "*not found*," and not in the notation on the process of the time the process came to hand. Taking this to be so, if the said rejected issues had been received, it would have made it possible for plaintiff to recover damages for a false entry by defendant as to the hour of the day he received the writs, when plaintiff had never been damnified therefor; and we therefore hold the proposed issues of the plaintiff (2 and 3) were too broad, and the rejection of them by the court was not error.

The next exception of plaintiff is to the admission in evidence of the deposition of R. M. Johnson, which was objected to for want of sufficient notice of time and place, want of a sufficient commission, want of a sufficient certificate of qualification of deponent by oath or affirmation, and because of the opening of the deposition without notice, and the absence of any order of the clerk endorsed allowing the same to be read.

The judge in his statement of the case of appeal finds and sends up the fact that the deposition had accompanied the papers from Iredell to Wilkes, to which county the case was removed for trial, and had been on file for six years to the knowledge of both sides, and that the cause had been often continued by consent, and no objection made to the deposition or notice of objection given, until the same was offered to be read in the midst of the trial.

Under the circumstances of the case, without passing on the grounds of objection, *seriatim*, we concur with the judge that they were to be deemed waived, and there was no error in allowing the deposition to be read, on the authority of the cases of *Kerchner* v. *Reilly*, 72 N. C., 171, and *Katzenstein* v. *R. & G. R. R. Co.*, 78 N. C., 286.

In the course of the trial, the plaintiff, deeming it material to show that the falsity of return for which he had been subjected consisted in no particular in his own doings or omissions, while the papers were in his hands, introduced himself as a witness, and testified that the writs came to his hands on the morning of the 1st of September and not on the day before, to-wit, the 31st day of August as had been testified by Mr. Armfield (Long's attorney) and that he had not been with Johnson in the Masonic Lodge on the night of the 31st of August, nor seen him anywhere during the week. And to combat this proof and show an opportunity to plaintiff to execute the writs after they were delivered to him, as testified to by Mr. Armfield, the defendant offered to show and was allowed by the court against the objection of the plaintiff to show by R. M. Allison that plaintiff and Johnson were in the lodge at a meeting on the night of the 31st of August, and the reception of this evidence was excepted to as concerning a matter collateral.

The exculpation of plaintiff from fault, in reference to the facts constituting the return a false one, was material to him and directly involved in his right to recover; for certainly, if the return "*not found*" was false by no act of defendant after the writ came to him, but from a neglect of opportunity in the plaintiff himself to serve them on the occasion of the masonic meeting on the night of the 31st of August when the writs were in his hands, there would be no ground of recovery in the action against the deputy. And the evidence of plaintiff, to the effect that he had not been with Johnson at the lodge, or elsewhere seen him that week, was pertinent to put the untrue fact "*not found*" away from himself, and was essential to his success in the cause.

In this state of things, it seems to us, the testimony of Allison was admissible as original evidence, as tending to show an opportunity for service of the writs, the main ingredient in the falsity of the return in the plaintiff, and

besides was competent as rebutting plaintiff's evidence on that point, the same being a matter not collateral but directly involved and necessary to the main issue in the cause. No fact can be collateral to the issue, which is the only one, or one in a chain of facts, without which no recovery can be had; and it being indispensable to defendant to put the failure of due diligence away from himself, we hold there was no error in the admission of the evidence of Allison.

On the conclusion of the trial, the plaintiff asked the court to charge that if the writ and order of arrest were placed in the hands of the defendant on the morning of the 1st of September, between seven and eight o'clock, as testified to by himself, and defendant had made the return thereon, "came to hand September 1st, 1869, at eleven o'clock," it was a false return and defendant would be liable. His Honor refused so to charge, but in lieu thereof told the jury that that matter was not the grievance on which the action of Long against the sheriff for false return was grounded, but falsity as contained in the endorsement, "R. M. Johnson not found in my county." The court charged in substance that an officer notified of the necessity of prompt measures to prevent the escape of a party, owed the duty, quitting everything else, to make every effort to effect an arrest, and that if Linster, the defendant, did not so do, then he had no right to return "not found in my county," and the same would be false; and the sheriff having suffered from it the deputy and his sureties would be liable. But if the plaintiff saw the return of his deputy endorsed upon the process before the same was delivered into the clerk's office, and with a knowledge of the facts made no objection and allowed the same to be returned, it was in law and fact his return, and he could not hold the deputy's bond responsible, although the return was false.

There is no error in the refusal of the charge requested by the plaintiff, for the reason that falsity in the entry as

to the time when the writs came to hand, if any, had not damnified the plaintiff and was not a ground on which Long's recovery against the sheriff had been sought, according to the statement of the case by the judge, which in the absence of the record of that action we are to assume to be the fact; and this being so, it was proper not only to have refused an issue as to that matter but also the charge requested, for reasons alleged in passing on plaintiff's exceptions to the refusal of the issues tendered by him.

The charge on the subject of the diligence required of Linster after the process came to his hands, and what would make the return false as to him, and devolve responsibility therefor on him and his sureties, was unexceptionable; and so we are brought to the last clause of His Honor's charge in which he told the jury that if plaintiff saw the return as made out, and knowing all the facts made no objection and allowed it to be delivered to the clerk, it was in law and fact his return and he could not hold the deputy's bond responsible therefor.

The general rule certainly is, that one cannot claim to recover for an injury when he has contributed or consented to the act by another from which the injury comes. Broom's Maxims, 201. And in this case the evidence by plaintiff himself was that he saw the return as made out by the defendant and made no objection to the return, "R. M. Johnson not found in my county," in which consisted the falsity (according to the judge's statement of the case) on which the recovery was sought and effected by Long out of the plaintiff; and if the plaintiff, knowing the diligence that had been used to find Johnson, might have prevented the return in the form in which Linster had drawn it, as he certainly could, and he did not, he in law was assenting to the return as endorsed with its possible liabilities, and he cannot assign the entry thereof by defendant as a breach of his bond. If plaintiff omitted to serve the writs when he

might, as the evidence of Allison tended to show, and turned them over to his deputy when he could not, and afterwards on being subjected to the penalty for a false return were allowed to assign the return of his deputy, which he saw and could have prevented, as a breach of the deputy's bond, it would be to take advantage of his own wrong and shift the burden to innocent shoulders.

We declare our opinion to be that there is no error in the refusal of the charge requested by the plaintiff, nor in that given by the court, and the judgment of the court below must be affirmed.

No error. Affirmed.

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*STATE v. GEORGE W. SWEPSON.

Appeal — Certiorari — Amendment of Record — Discretionary Power.

1. A *certiorari*, as a remedial writ, will be granted on behalf of the state in a criminal action, under the supervisory power conferred upon this court by section eight, article four, of the constitution, where it appears in the petition that the superior court, on motion of the state to amend the record of a trial so as to make it speak the truth, refused to hear evidence in support of the motion upon the ground of a want of power.

2. Every court has power to amend its record to make it speak the truth, and for that purpose to hear evidence. But the propriety of the amendment and the particulars wherein it is to be made, are matters addressed to the discretion of the judge, the exercise of which is not reviewable by appeal or *certiorari*.

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

STATE *v.* SWEPSON.

(*State* v. *Lane*, 78 N. C., 547; *Bobbitt*, 70 N. C., 81; *Padgett*, 82 N. C., 514, *Brooks* v. *Morgan*, 5 Ired., 484; *Hartsfield* v. *Jones*, 4 Jones, 310; *Parker* v. *Gilreath*, 6 Ired., 221; *Webb* v. *Durham*, 7 Ired., 130; *Leatherwood* v. *Moody*, 3 Ired., 129; *State* v. *King*, 5 Ired., 203; *Davis*, 80 N. C., 384; *Craton*, 6 Ired., 164; *Reid*, 1 Dev. & Bat., 377; *Stephenson* v. *Stephenson*, 4 Jones, 472; *Bright* v. *Sugg*, 4 Dev., 492; *Winslow* v. *Anderson*, 3 Dev. & Bat., 9; *Anders* v. *Meredith*, 4 Dev. & Bat., 199; *Freeman* v. *Morris*, Busb., 287; *State* v. *Swepson*, 81 N. C., 571, and 82 N. C., 541, cited, commented on and approved.)

MOTION by the state for a *Certiorari* heard at January Term, 1880, of THE SUPREME COURT.

Attorney General and *Mason & Devereux*, for the State.

Messrs. Merrimon, Fuller & Fuller, D. G. Fowle and *R. C. Badger*, for the defendant.

DILLARD, J. A motion was made in this case at August term, 1879, of Wake superior court to amend the record of the minute docket of spring term, 1875, so as to show that the defendant, Swepson, was not present at the time of the trial, verdict and judgment, then and there had in the case, and the judge presiding refused to hear evidence as to the proposed amendment or to allow the same on the ground of a want of power, and from that judgment the solicitor for the state appealed to this court.

That appeal was held unauthorized and the same dismissed for reasons set forth in the opinion reported in the case, *State* v. *Swepson*, 82 N. C., 541, and thereupon the present application was made for a writ of *certiorari* to remove the said record and proceedings on the motion to amend in said cause into this court, for such action thereon as by law may be authorized. So the only question for our consideration in this petition is as to the right of the state to have the writ prayed for as a substitute for an appeal, or as a remedial writ by which to enable this court to supervise and

rule upon the decision of the superior court to entertain the motion to amend the record on the ground of a want of power.

The jurisdiction of this court is appellate, extending to a review of the errors of law apparent on the record of the judgments of the superior courts; and it is original as advisory in claims against the state, in petitions to rehear its own judgment, and in the supervision and control of inferior courts. And the mode, by which its appellate jurisdiction is called into exercise, is by appeal, which is regulated by statute, and is in place of the writ of error from the King's Bench at law and appeal in chancery under the English system; while in its original jurisdiction, the mode is, in claims against the state as prescribed in the statute, in petitions to rehear as prescribed by the rules of the court, and in the supervision and control of the proceedings of inferior courts by any remedial writs necessary to that end as prescribed in the constitution. Art. IV, § 8.

In this state in criminal actions, the defendant may in all cases appeal and have the judgment against him reviewed for errors of law apparent on the record, or assignable on the statement of the case of appeal, which is in lieu of a bill of exceptions; and so may the state appeal, but the right in the case of the state is without any bill of exceptions, and is restricted by the decisions of this court to errors of law on the face of judgments adverse to the state on demurrer to the indictment, or on motion to quash, or in arrest, or on a special verdict. *State* v. *Swepson*, 82 N. C., 541; *State* v. *Lane*, 78 N. C., 547; *State* v. *Bobbitt*, 70 N. C., 81; *State* v. *Padgett*, 82 N. C., 544. And in case of appeal lost without laches, the accused in all cases, and the state in the instances aforesaid, may have a writ of *certiorari* from this court as a substitute for an appeal.

From these established rights respectively of the state and the defendant, it results the judgment sought to be amend-

ed, being one in favor of defendant on a trial and verdict of a jury, that the case was not one of those in which our decisions allow a right of appeal to the state, either from the original judgment or that of refusal to entertain a motion of amendment of the record, and therefore no appeal lay for the state. But whether a *certiorari* may be issued in such cases to bring up the record for our review of the original judgment as on a writ of error it is not necessary to determine, as we are of opinion that upon the case presented on the petition under consideration, the writ must be ordered upon a distinct ground which will appear in the further discussion of the case.

The court of King's Bench in England always had a superintendency of the inferior courts, moving them to exercise their proper jurisdiction or withholding them from exceeding it, or reversing their judgments, and as a means by which to exert such supervision and control, various remedial writ were used, and among them the *certiorari* in all cases to remove the proceedings from an inferior court of record into that court; for otherwise it would have nothing to act upon, and the proceedings when certified up were the basis of action for a *procedendo*, prohibition, mandamus or reversal for error of law, treating the *certiorari* in the last case as in the nature of a writ of error. 3 Blackstone, 109 to 113, 41 to 43; and 4 *Ibid*, 391, 392; 2 Chitty's Prac., 353, 354; 1 Tidd's Prac., 397, 398, 400 and 715.

This superintending power of the King's Bench rested on the idea of the necessity of such an authority to an orderly exercise of jurisdiction by all the inferior courts within their prescribed limits, and to a uniformity in the administration of the law; and such its power was often referred to in our state, and a similar power was admitted to exist in our supreme court. With us it was held in divers cases that the superior court in the exercise of supervision and control

over other courts inferior to itself, had the right to employ the writs of *recordari* or *certiorari* according to the character of the court whence the proceedings were to be removed, the same being ordinarily used as substitutes for an appeal, but capable of being used, the first, in some cases as a writ of false judgment, and the latter, as in the nature of a writ of error, especially where the right of appeal was not expressly denied, but simply not provided for, among which cases may be cited the following: *Brooks* v. *Morgan*, 5 Ired., 484 and 485; *Hartsfield* v. *Jones*, 4 Jones, 310; *Parker* v. *Gilreath*, 6 Ired., 221; *Webb* v. *Durham*, 7 Ired., 130; *Leatherwood* v. *Moody*, 3 Ired., 129.

In the case of *Brooks* v. *Morgan* Chief Justice RUFFIN, speaking for the court, acknowledged the superior courts to have always exercised a supervision and control here, as did the King's Bench in England, and pronounced the existence of such a power as essential wherever law was the true and only standard of justice, besides being necessary to a uniform and regular administration of the law. And the court there held that in order to the correction of errors of law in the proceedings of the inferior courts, the writ of *certiorari* was the proper means to be used.

In the case of the *State* v. *Swepson*, 81 N. C., 571, removed from Wake to Franklin, the judge held that the case was not at issue before its removal and ordered it to be remanded to Wake county; and no right of appeal from that order existing for the state, the proceedings were brought into this court on *certiorari*, and we held the case to have been at issue and reversed the ruling in the superior court. And but for the existence of a power of supervision in that case, the order of removal being sufficient to put the case out of Wake court, and the court in Franklin having refused to proceed in it, there would have been a total failure of the prosecution without a trial anywhere.

Such a power of supervision and control perhaps exists

in the superior courts under our persent system in respect to the courts inferior to them, but certainly it exists in this court by express grant as contained in our constitution, (Art. IV, § 8) wherein it is provided that besides the appellate powers of the court, it shall have power to issue any remedial writs necessary to its supervision and control of the proceedings in the inferior courts.

Thus it would seem indisputable that the court has the power to supervise and control the proceedings in the superior courts, and to that end may use any writs necessary and proper, of which the writ of *certiorari* is the appropriate one as we have seen.

The grievance in this case is, that on a motion by the state to amend the record of the trial, verdict and judgment of the superior court of Wake at August term, 1875, in the case of the *State* v. *Swepson*, the judge refused to hear evidence in support of the proposed amendment, on the ground of a want of power, and thereupon the only question is, was the refusal to entertain the motion for the reason alleged such an error as to require correction in the exercise of the supervisory power conferred on this court, and is the writ of *certiorari* a fit and proper writ to be issued?

Of the power of the superior court of Wake, and indeed of any court, to amend its records and for that purpose to hear evidence, and thereupon to so amend the record as to make it speak the truth, there can be no doubt. *State* v *King*, 5 Ired., 203; *State* v. *Davis*, 80 N. C., 384; *State* v. *Craton*, 6 Ired., 164; *State* v. *Reid*, 1 Dev. & Bat., 377, and other cases. But it is equally well established that the propriety of an amendment and the particulars wherein it is to be amended are matters discretionary with the judge, and if in the exercise of his discretion, the amendment is refused then no appeal nor *certiorari* in the nature of a writ of error lies to review his judgment. *Stephenson* v. *Stephenson*, 4 Jones, 472; *Bright* v. *Sugg*, 4 Dev., 492; *Winslow* v. *Anderson*, 3 Dev.

& Bat., 9; *Anders* v. *Meredith*, 4 Dev. & Bat., 199; and *Freeman* v. *Morris*, Busb., 287.

If however the judge refuse to entertain a motion to amend and to hear the evidence on the ground of a want of power, then he fails to exercise his discretion, and therein a question of law is made, which is reviewable on appeal where that is allowed; and in state cases where no appeal is allowed, it is an error which may be brought up and reviewed in the exercise of the supervisory power of this court by a writ of *certiorari*, as was done in the case of *State* v. *Swepson*, 81 N. C., 571.

It is our opinion, taking the facts stated in the petition to be true, there was error in the refusal of the judge, on the ground of a want of power, to entertain the motion of the state to amend the record, and being satisfied of our jurisdiction to have the record certified into this court for supervision by us, it is ordered that the writ of *certiorari* prayed for be issued returnable to the next term of this court.

PER CURIAM. Motion allowed.

STATE v. WILLIAM H. HAM.

Appeal—Jurisdiction—Disposing of Mortgaged Property.

1. An appeal lies to this court from an inferior court mediately through the superior court. (Act 1879, ch. 141, construed.)
2. Justices of the Peace have exclusive original jurisdiction of the offence of disposing of mortgaged property.

INDICTMENT for a misdemeanor tried on appeal at Spring Term, 1880, of ALLEGHANY Superior Court, before *Buxton, J.*

Motion in arrest of judgment allowed, and the state appealed.

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

DILLARD, J. The defendant was indicted in the inferior court of Alleghany county in two bills, found at different terms, in one charging a sale by defendant of personal property, previously conveyed by him by a chattel mortgage for a lawful purpose to one Johnston, with intent to hinder, delay and defeat the rights of the said Johnston *without specifying* the particular articles so conveyed and sold; and in the other, charging the same offence with a variation of form in so far only as to describe and name the particular articles. At the trial of the cause, the defendant's motion that the solicitor be put to elect on which bill he would proceed, was overruled, and also his motion in arrest of judgment for want of an averment of the registration of the mortgage, and exception was taken to the denial of said motion and an appeal taken to the superior court. And in the superior court, besides the exception of defendant in the transcript from the inferior court, error was assigned in the further particulars that the inferior court had no original jurisdiction of the offence, that the sale of property was not averred to have been unlawfully made, and that no county was mentioned in the bill in which the offence was said to have been committed, and from the judgment of the superior court reversing the judgment of the inferior court and ordering an arrest of judgment to be entered, the solicitor for the state appeals to this court.

At the very threshold, the question arises, whether under the act of 1879, ch. 141, an appeal lies from an inferior court mediately through the superior court to this court.

The provision is "that appeals may be taken from this

(inferior) court to the superior court in term for error assigned in matters of law in the same manner and under the same restrictions provided now by law for appeals from the superior courts of the state to the supreme court of the state, and the final decision of each superior court shall be certified to the court below, that final judgment may be rendered;" and upon this phraseology a doubt is expressed whether the superior courts are a final appellate tribunal to all appeals from the inferior courts, or that a right of appeal exists from the judgments of the superior courts to this court.

By article four, section eight of the constitution, the supreme court has the "jurisdiction to review upon appeal *any decision* of the courts below, upon *any matter of law or legal inference*," and by section twelve of the same article, in distributing out jurisdiction among the courts established, or which may be established, power is given the legislature to parcel out only such jurisdiction as does not pertain to the supreme court, and then with a proper system of appeals. Considering these two clauses together, it would seem clearly to have been the intention of the framers of our constitution, that in all cases a way of appeal to the supreme court should exist for the review of the decisions of the courts below, directly or indirectly, for errors of law. To hold the legislature competent to deprive the supreme court of the power and jurisdiction to review upon the appeal of a defendant, or that of the solicitor of the state when allowable to him, by an act constituting the superior court a final court of appeals to cases in inferior courts, would be a concession of the right by a similar act to make the inferior or superior courts a final appellate tribunal to civil and criminal causes tried in a justice's court, and thus the supreme court would be shorn of two-thirds of its jurisdiction and the suitors correspondingly deprived of a review of those courts in matters of law by the court of the last resort.

The constitution, in article one section thirteen, after guaranteeing against conviction for crime, except by the verdict of a jury, makes an exception in the case of petty misdemeanors, and to that extent authorizes the legislature to provide other means of trial, but with appeal; and this right of appeal however provided for in a system of appeals, must be with the right in the party to appeal to the supreme court, and with power and jurisdiction in that court to review the decision of the court below in matters of law.

This right of appeal to the supreme court, we do not think, was intended to be taken away by the act of 1879, ch. 141, nor does any fair construction of it compel such a conclusion. The law, before the act of 1879 was passed, was that a party indicted and convicted in an inferior court might appeal to the superior court, and there be tried by a jury *de novo*, and if again convicted, might appeal to the supreme court. Acts 1876-'77, ch. 154, and Bat. Rev., ch. 33, § 111. The act of 1879, ch. 141, amends the act of 1876-'77 by providing that appeals may be taken from the inferior courts to the superior courts "for error assigned in matters of law in the same manner and under the same restrictions provided for appeals from the superior courts to the supreme court, and that the final decision in the superior court shall be certified to the court below that final judgment may be rendered."

The statute does not negative the right of appeal from the superior court to the supreme court which existed theretofore. It took away the right of trial by jury on the appeal and confined the trial in the superior court to errors of law in the court below as the legislature had authority to do under section thirteen, article one of the constitution, but left the pre-existing right of appeal to the supreme court. The act does not purport to take away the right of appeal to the supreme court under the previous law, and if it may have an operation consistently with that right, it is

the duty of the courts, to that extent, to give effect to it. Construe the final decision required to be certified down to the inferior court to be one from which the party does not desire to take appeal, and the statute will be entirely consistent with the jurisdiction and power of the supreme court and not inconsistent with the right of appeal to it, and such we declare our opinion to be is the proper construction of the act of 1879 on this point.

Having settled the right of appeal to this court, in such a case as the present, it is not necessary that we consider and pass upon all the errors assigned before the superior court on the transcript from the inferior court, as we concur with the court below in the judgment that the offence charged was not within the original jurisdiction of the inferior court.

The jurisdiction of the inferior courts extends by the act of 1876-'77, ch. 154, §§ 7 and 8, to proceedings in bastardy (since made cognizable in a justice's court) and all crimes and misdemeanors, excepting those whereof exclusive original jurisdiction is given to justices of the peace and except the crimes of murder, manslaughter, arson, rape, assault with intent to commit rape, burglary, horse-stealing, libel, perjury, forgery and highway robbery, and to appeals from justice's courts. In other words they come in between the jurisdiction of the justices of the peace and crimes excepted in the act, murder, &c., which belong to the superior courts, and therefore in order to settle the present inquiry we have only to ascertain the jurisdiction within which the offence charged against the defendant is included.

By the act of 1879, ch. 92, after giving justices of the peace exclusive original jurisdiction of all the offences referred to and described in the different sections, jurisdiction is given them in the seventh section of the act of all criminal matters where the punishment shall not exceed a fine of fifty dollars or imprisonment for thirty days, and by reference to

the acts of 1873–'74, ch. 31, it will be seen that the disposing of property conveyed in a mortgage under the circumstances there mentioned, for which the defendant is indicted, is a misdemeanor and is punishable by a fine not exceeding fifty dollars, or imprisonment for one month, which by statute is to be interpreted as thirty days.

It thus appears that the offence charged against the defendant was within the exclusive original cognizance of a justice of the peace and not within the jurisdiction of the inferior court, and so we must affirm the judgment of the court below, and direct a certificate to go down to the superior court, to the end that judgment on the conviction of the inferior court of Alleghany may be arrested.

PER CURIAM. No error.

STATE *v.* NICHOLAS THOMPSON.

Appeal—Practice.

1. A defendant who has been convicted in the inferior court is not entitled to a trial *de novo* before a jury upon an appeal to the superior court, but only to a review of the questions of law passed upon by the inferior court.

2. Upon such an appeal the appellant must present for the consideration of the appellate tribunal a "case" made and settled, embodying the points in controversy in the court below, in the same manner as on an appeal from the superior to the supreme court.

(*State* v. *Walker*, 82 N. C., 696; *State* v. *Murray*, 80 N. C., 364; *State* v. *Powell*, 74 N. C., 270, cited and approved.)

INDICTMENT for larceny, tried at Spring Term, 1880, of CHATHAM Superior Court, before *Seymour, J.*

The defendant was indicted and tried by a jury in the

inferior court of Chatham. The bill contained two counts, one for larceny the other for receiving. The jury found him guilty of larceny only. There was a motion by defendant to arrest the judgment, which was overruled and the defendant was sentenced to five years imprisonment in the penitentiary at hard labor, from which judgment he appealed to the superior court, where at said term the case was called for trial, and His Honor having announced that it did not appear there was any "case" made and settled upon appeal, the defendant's counsel moved for and insisted upon his right to a trial *de novo* in the superior court, but the motion was denied, and it was adjudged that there being no case as required by law, the cause be remanded to the inferior court to be proceeded in according to law, and the defendant appealed.

Attorney General, for the State.
Mr. J. H. Headen, for defendant.

ASHE, J. The record in this case presents two questions for the consideration of this court: 1. Whether a defendant who had been tried and convicted by a jury in the inferior court, upon his appeal to the superior court has a right to a trial by a jury *de novo* in that court; and, 2. Whether there was error in the ruling of His Honor in remanding the case to be proceeded in according to law.

The first question has been decided at this term in the case of *State* v. *Ham, ante*, 590, where it was held that on an appeal from the inferior to the superior court from a judgment rendered in the former court upon a verdict of guilty, the defendant has no right to a trial *de novo*, upon the facts of his case, in the latter court, but only to have his case reviewed upon any decision in the inferior court on any matter of law or legal inference that may have arisen on his trial in that court, in the same manner and under the same restrictions provided now by law for appeals from the supe-

rior to the supreme court of the state. There was no error in His Honor's holding that the defendant was not entitled to a trial *de novo* upon the merits of his case in the superior court, nor in ruling that it was necessary in every appeal from the inferior to the superior court there should accompany the transcript from the inferior court "a case" made and settled under the same rules and restrictions as are required in appeals from the superior to the supreme court. Act 1879, ch. 141. They must therefore be taken in accordance with the provisions of section 301 of the Code of Civil Procedure. And one of the essential requisites of an appeal to this court is, that a "concise statement of the case" shall be made and filed with the clerk to be transmitted to this court as part of the record, for the want of which the judgment will be affirmed unless there is error apparent in the record, in which case it would be the duty of the judge to arrest the judgment or award a *venire de novo*. *State* v. *Walker*, 82 N. C., 696; *State* v. *Murray*, 80 N. C., 364; *State* v. *Powell*, 74 N. C., 270. It is to be presumed there was no error in the record, as none is assigned by the defendant's counsel, and none found by the judge below.

There is no error. Let this be certified to the superior court of Chatham county, to the end that that court may certify its decision to the inferior court.

PER CURIAM. No error.

STATE v. ELIAS POLLARD and another.

Appeal—Criminal Pleading—Practice.

1. An appeal lies only after a final judgment in criminal trials, and not upon an interlocutory ruling.

2. A defendant indicted in an inferior court pleaded "former acquittal," and "not guilty." The court reserved the issue raised by the latter plea, and proceeded to try the question of "former acquittal," which was decided against the defendant, and he *immediately* appealed to the superior court, where the ruling below was affirmed, and the cause was remanded to be proceeded with on the plea of "not guilty;" *Held*, that, in strictness, the appeal should have been dismissed by the judge as premature, but that as the *procedendo* answered every practical purpose, the judgment of the superior court should be affirmed.

(*State* v. *Potter*, Phil., 338; *State* v. *Hinson*, 82 N. C., 549, cited and approved.)

INDICTMENT for killing live stock tried at Spring Term, 1880, of PITT Superior Court, before *Avery, J.*

The defendant appealed from the ruling of the judge below.

Attorney General, for the State.
Messrs. Latham & Skinner, for defendant.

SMITH, C. J. The defendant is charged with killing certain live stock, running at large in the range, in violation of the act of 1850, (Bat. Rev., ch. 32, § 94,) and upon his arraignment with others in the inferior court of Pitt, pleaded a former acquittal and not guilty. The issue upon the first plea was submitted to the jury and that upon second reserved by consent, and the jury rendered a special verdict. The court was of opinion, and so decided, that the facts found were insufficient to sustain the defence, and without further proceeding the defendant appealed to the superior court. His Honor affirmed the ruling of the inferior court and ordered his judgment to be certified to the end that the said court proceed with the cause and the defendant appealed to this court.

The inferior court, after its decision against the defendant upon the first plea, should have at once proceeded to impanel another jury to pass upon the other plea of not guilty.

In England this is allowed only in trials for felony, and in misdemeanors the one verdict is conclusive, and the court proceeds to final judgment unless perhaps in particular cases it may be relaxed. But in this country no distinction is made in this particular between felonies and misdemeanors, and in all offences the defendant failing in his plea of former conviction or acquittal, is entitled to a trial of his plea of "not guilty." 1 Whar. Cr. Law, § 572. We propose to refer to a few adjudications on this point:

In *Hirn* v. *Ohio*, 1 Ohio, 15, the defendant being charged with selling spirituous liquors by the small measure, pleaded a license, to which the state demurred, and the demurrer was sustained. The court of common pleas thereupon proceeded to judgment. The appellate court, reviewing this action says: "After sustaining the demurrer to the special plea, the judgment of the court should have been *respondeat ouster*. In a criminal case in this state a defendant cannot waive a jury trial in any other way than by a plea of guilty."

In *Commonwealth* v. *Goddard*, 13 Mass., 455, the indictment was for an assault and battery, and the defendant pleaded a former conviction, to which there was put in a demurrer, and PARKER, C. J., delivering the opinion, lays down the rule thus: "When the plea is found against the defendant in this country, he will be put to plead again to the indictment, and the trial will proceed as if no previous proceeding had passed."

In *Barge* v. *Commonwealth*, 3 Penn., and Watts (Penn.) 262, the defendant pleaded an acquittal and not guilty to an indictment for a misdemeanor, and GIBSON, C. J., uses this significant and forcible language: "The same justice, not to say humanity, which originally dictated a judgment of *respondeat ouster* in felony, dictates the same judgment in cases of misdemeanor where the defendant's special plea in

bar has been determined against him on matter of law, *and the case ought therefore* to have been put to the jury on the plea of "not guilty."

The same eminent judge in a similar case, referring to the English practice which ordinarily, as Mr. CHITTY says, denies to the defendant in petty offences the right to plead over, and which may in the discretion of the court be accorded in special cases, speaks thus: "Listening to the voice, not of humanity, but justice, we have carried this discretion a single step further by applying it to all cases without regard to the punishment, in which the plea contains no confession of facts which constitute guilt." *Foster* v. *Commonwealth*, 8 Watts & Serg., 77.

It is true, double pleading is allowed only in civil cases, under the statute of Ann, as was said by PEARSON, C. J., in *State* v. *Potter*, Phil., 338, and the jury could not be impaneled to try at one time more than the issue of a single plea, but the difficulty is obviated by allowing the second plea and jury trial of it, after the verdict on a preceding plea, and the reasonableness of this practice commends itself to our approval. Indeed it would seem that judgment could not be regularly pronounced except upon confession or a verdict establishing the defendant's guilt. This is inferrible from the provision that when the defendant will not answer directly to the indictment, the court shall order the plea of not guilty to be entered. Bat. Rev., ch. 33, § 74.

While the remark of the eminent Chief Justice is correct, that a plea of former conviction implies an admission of the criminal act and is inconsistent with an absolute denial, it is not true, as in our case, when the plea is a former acquittal, for it may be equally true that he was not and is not guilty of either charge.

The technical reason for not admitting, to be passed on at one and the same time by a jury, two incompatible pleas, cannot prevail against a well established practice, which

admits them to be acted on in succession, and it is not material that both are entered at once and the trial of one postponed until after the trial of the other.

In this view then the cause has not been finally determined in the court where the prosecution originated, and the issue upon the plea of not guilty remains still to be disposed of. It is needless to multiply authorities which settle the point that an appeal lies only after a final judgment in criminal trials and not upon an interlocutory ruling. *State* v. *Hinson*, 82 N. C., 540, and cases therein cited.

An appeal from the inferior to the superior court, by the express words of the act of 1879, ch. 141, is allowed "for error assigned in matter of law in the same manner and under the same restrictions provided now by law for appeals from the superior courts of the state to the supreme court of the state," and therefore the defendant's appeal to the superior court ought to have been dismissed, and the inferior court left to proceed with the cause. But as the order of *procedendo* accomplishes the same purpose as the dismissal of the appeal, we affirm the judgment, and this will be certified that the inferior court may be directed to proceed with the trial of the cause. See *State* v. *Ham*, 590, and *State* v. *Thompson*, 595, decided at this term.

PER CURIAM. No error.

STATE v. W. TAYLOR.

Assault and Battery—Jurisdiction.

The act of 1879, ch. 92, §§ 6, 11, does not render it necessary that a bill found by the grand jury of the superior court for an assault and battery should aver that a deadly weapon was used, that any serious

damage was done, that six months had elapsed before the finding of the bill, or that the offence was committed within one mile of the court during the session thereof. The defendant, under the plea of not guilty, may negative the existence of the jurisdictional facts.

(*State* v. *Moore* and *Hooper*, 82 N. C., 659 and 663; *State* v. *Watts*, 10 Ired., 369; *State* v. *Caudle*, 63 N. C., 30; *State* v. *Wise*, 66 N. C., 120, cited and approved.)

INDICTMENT for an Assault tried at Spring Term, 1880, of HERTFORD Superior Court, before *Graves, J.*

The bill was found at fall term, 1879, and on the trial the defendant was convicted and moved in arrest of judgment, for that, the indictment failed to allege that a deadly weapon was used, that any serious damage was done, that six months had elapsed from the commission of the offence to the finding of the bill, or that the offence was committed within one mile of the court during the session thereof, or any other fact which would give to the superior court jurisdiction. The judge refused the motion, pronounced judgment, and the defendant appealed. See Acts 1879, ch. 92, § 6, 11.

Attorney-General, for the State.
Messrs. Pruden & Shaw, for defendant.

SMITH, C. J. In *State* v. *Moore* and *State* v. *Hooper*, decided at the last term, it is held to be unnecessary in order to support the jurisdiction of the superior court in an indictment for an assault, an assault and battery, or an affray, to aver in the bill that the offence was committed more than six months previously and that meanwhile no justice of the peace had taken official cognizance of it; and that this matter of defence, like that arising under the statute of limitations, was available under the plea of not guilty. In one case the prosecution is defeated because it is begun too soon; in the other, that it has been deferred too long. This case is however attempted to be distinguished on the ground that

the assault is alleged to have been made in the same month in which the bill was found, and the want of jurisdiction is apparent upon its face. But this furnishes no sufficient reason for arresting the judgment. The averment of the time when the act was done, unless essential to its criminality, is not traversable, and hence not determined by a general verdict of guilty. This is a well established rule in criminal trials, and its scope is greatly enlarged by statute. Bat. Rev., ch. 33, § 66; *State* v. *Watts*, 10 Ired., 369; *State* v. *Caudle*, 63 N. C., 30; *State* v. *Wise*, 66 N. C., 120.

There is no error. This will be certified to the end that judgment be pronounced on the verdict.

PER CURIAM. No error.

STATE v. DAVID BERRY.

Assault—Jurisdiction.

Where the jury find by special verdict that the assault with which the defendant is charged was committed within the six months next before the finding of the bill of indictment, the jurisdiction of the superior court is ousted, and the case should be dismissed.

(*State* v. *Moore*, 82 N. C., 659; *State* v. *Hooper*, *Ib.*, 633, cited and approved.)

INDICTMENT for an Assault, tried at Spring Term, 1880, of PERQUIMANS Superior Court, before *Graves, J.*

The defendant was indicted for a simple assault. The jury returned a special verdict, and among other facts found by them, was the fact that the assault was committed on or about the first day of March, 1880, which was within six months before the finding of the bill at said term of the court. His Honor held that according to the finding of the

jury upon the facts of the case, that the defendant was guilty of an assault; but as it also appeared from the bill and the finding of the jury, that the indictment was found by the grand jury within six months after the commission of the offence, the superior court had no jurisdiction, and the case was for that cause dismissed. Appeal by the state.

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

ASHE, J. In this ruling we hold there was no error. The act of 1879, ch. 92, § 2, gives exclusive jurisdiction to justices of the peace of all affrays, assaults, and assaults and batteries, and fixes the maximum of the punishment for such offences at a fine of fifty dollars or imprisonment for thirty days. And it is provided in section eleven of the same act, that nothing in "this act shall be construed to prevent said courts (superior, inferior or criminal) from assuming jurisdiction of affrays, assaults, and assaults and batteries, if some justice of the peace shall not, within six months after the commission of the offence, have proceeded to take official cognizance of the same."

The construction of these several sections of the act of 1879 given by this court, is, that after six months from the commission of the offences of affrays, assaults, and assaults and batteries, the superior courts have concurrent jurisdiction with justices of the peace, unless they have taken official cognizance of the same within the six months; and 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 has taken official cognizance thereof. 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." *State* v. *Moore*,

82 N. C., 659; *State* v. *Hooper, Ib.*, 663; *State* v. *Taylor, ante*, 601.

Within the six months, the justices have exclusive jurisdiction of such cases. And as in this case where the fact is found by the jury in their special verdict, that the assault with which the defendant is charged was committed within six months before the finding of the bill of indictment, it was not only proper, but the duty of the court, to dismiss the case and discharge the defendant.

And in this connection it may not be amiss to suggest, that in cases like this, where the indictment is dismissed on similar grounds, if the justice should fail to take jurisdiction within the six months, that after that the jurisdiction of the superior court would attach, and the defendant might be again indicted in that court for the same offence.

There is no error. Let this be certified, etc.

PER CURIAM. No error.

STATE v. LOVE ANN JONES.

Assault with Intent to Commit Rape—Female May be Guilty of.

A female who aids and abets a male assailant in an attempt to commit a rape becomes thereby a principal in the offence.

(*State* v. *Perkins*, 82 N. C., 681, cited and approved.)

INDICTMENT for an assault with intent to commit rape, tried at April Term, 1880, of NEW HANOVER Criminal Court, before *Meares, J.*

Verdict of guilty, judgment, appeal by the defendant.

Attorney-General, for the State.

The defendant was not represented in this court.

STATE v. JONES.

DILLARD, J. The indictment contains two counts, one charging John Jackson with an assault with intent to commit a rape on one Sarah Jane Waldriss; and defendant, Love Ann Jones, with being present aiding, abetting and assisting; and the other charging in joint terms a simple assault and battery. At the trial of Love Ann Jones, (the male defendant not being taken), the jury found her guilty of the assault with intent to commit rape in manner and form as charged in the bill of indictment, and from the refusal of the court to arrest judgment this appeal is taken.

The question presented in this case for review is, whether a woman, being incapable in and of herself to commit rape, can be convicted and punished on a bill charging a man with an assault with intent to commit a rape, and charging herself with being present, aiding, abetting and assisting. At common law, rape was a felony, and the rule was, that all persons who were present aiding, abetting and assisting a man to commit the offence, whether men or women, were principal offenders and might be indicted as such, or if not present in a legal sense, they might be guilty as accessories before or after the fact. 1 Russell on Crimes, 557; 1 Hale, P. C., 628; 1 Hawkins P. C., ch. 16, § 10. And by these authorities, it is clear, that if the offence had been rape, instead of an assault with intent to commit rape, the pre ence of the female defendant aiding and assisting John Jackson in the deed would have made her guilty, and the grade of her guilt would have been that of a principal, or if not present but yet aiding, encouraging and assisting in the crime, her guilt would have been that of an accessory before the fact. But the offence charged in the bill of indictment in this case is a mere misdemeanor, as decided by this court in *State* v. *Perkins*, 82 N. C., 681, and being such, Love Ann Jones, if guilty at all, incurred the guilt of a principal, the rule being that whatever would make a person principal in the second degree or accessory before the fact in a felony,

makes him or her a principal in misdemeanors. 1 Wharton Cr. Law, § 2709. Applying this rule to the case at bar, John Jackson by the assault with the intent to commit the rape was a principal; and so, likewise, the female defendant (although incapable in and of herself to commit the offence) by advising, procuring or assisting in its perpetration, incurred guilt and of the grade of a principal, and is responsible as such, whether present or absent at the time of the fact committed.

Seeing that the female defendant may be guilty as a principal, ought she not to have been charged in the bill as a principal, and not as giving aid and assistance to the man in his assault with the unlawful intent? It may be, and we inclined to the opinion that it is so, that the assault with the criminal intent might have been charged against both of the parties accused, as principals, instead of charging Jackson with the assault and the woman with aid and assistance to him. But there does not appear to us to be any valid objection to the charge as made. The bill charges that Jackson made the assault and that Love Ann Jones aided and assisted him. That is but charging according to separate facts, and they as charged make in legal effect the case of guilt as a principal. *Regina* v. *Cresham*, 1 C. & M, 187.

There is no error and this will be certified to the criminal court of New Hanover.

PER CURIAM. No error.

STATE v. MILLARD F. DANCY.

Assault with Intent to Committ Rape—Female under Ten Years—Punishment.

Unlawfully to carnally know and abuse a female under the age of ten years constitutes the crime of rape; *Therefore*, one convicted of an assault with intent to commit such offence is liable to the punishment prescribed in Battle's Revisal, ch. 32, § 5.

(*State* v. *Johnston*, 76 N. C., 209; *State* v. *Storkey*, 63 N. C., 7, cited and approved.)

INDICTMENT for an assault with intent to carnally know a female under ten years of age, tried at Spring Term, 1880, of WILKES Superior Court, before *Buxton, J.*

The indictment charged that the defendant in and upon one Mary Ann Whittington (an infant under the age of ten years), feloniously made an assault, and her the said Mary did beat, wound and ill-treat, with intent her the said Mary feloniously and unlawfully to carnally know and abuse, &c. The defendant was convicted, and his counsel insisted "that the offence charged in the indictment was distinct from an assault with intent to commit a rape, and that the punishment was not prescribed by statute as such, but was to be punished as a (common) misdemeanor, the intent alleged being mere matter of aggravation and not changing the grade of the offence." But the court was of a different opinion and sentenced the defendant to imprisonment in the penitentiary for five years, from which judgment the defendant appealed.

Attorney-General, for the State.

The defendant was not represented in this court,

ASHE, J. If unlawfully to carnally know and abuse a

female under ten years of age is rape, then there is no error in the sentence of the court below, but if it is not, then it is erroneous.

The legislature has declared by the act of 1868, ch. 167, § 2, that "every person who is convicted in due course of law of ravishing and carnally knowing any female of the age of ten years or more, by force and against her will, or who is convicted in like manner of unlawfully and carnally knowing and abusing any female child under the age of ten years, shall suffer death." The act of the state of Michigan, in relation to the punishment of the crime of rape, is almost identical with the above section. In the case of *People* v. *McDonald*, 9 Mich., 150, which was like our case, an indictment for an assault with intent to carnally know an infant under the age of ten years, the court held, "both these offences are rape, as they come within the common law definition of that offence. The distinction between them relates solely to the character and amount of proof required to convict of the offence. Force and want of consent must be satisfactorily shown in the case of carnal knowledge of a female of the age of ten or more, but they are conclusively presumed in the case of such knowledge of a female child under that age, and no proof will be received to repel such presumption."

According to SIR WM. BLACKSTONE rape is the carnal knowledge of a woman forcibly and against her consent. 4 Bl., 210. LORD HALE, who wrote his Pleas of the Crown long after the 18th Elizabeth was passed, which made it a felony without benefit of clergy to carnally know and abuse any female under the age of ten years, defines rape to be "the carnal knowledge of any woman above the age of ten years against her will, and of a woman-child under the age of ten years with or against her will." 1 Hale's P. C., 210. And in this state, the construction given by this court to the second section of the above act of 1868, (Bat. Rev., ch. 32, § 2,) is

that it is "rape" to carnally know and abuse a female under ten years of age. Mr. Justice READE, in delivering the opinion in *Johnston's* case, 76 N. C., 209, held that the object of the statute of 18th Elizabeth, which is almost identical in its phraseology with the latter clause of the second section of our act of 1868, "was not to create a new offence distinct from rape, but it was to make such carnal knowledge and abuse, rape." And again, in *State* v. *Storkey*, 63 N. C., 7, this court held, "our statute makes it *rape* carnally to know a child under ten years of age, even though she consent."

Upon these authorities, then, we hold that unlawfully to carnally know and abuse a female under the age of ten years constitutes the crime of rape. And the third section of chapter 167 of the act of 1868, (Bat. Rev., ch. 32, § 5,) provides "that every person convicted by due course of law of an assault with intent to commit a rape upon the body of any female, shall be imprisoned in the state's prison, not less than five nor more than fifteen years." This section in the act of 1868, followed immediately after the second section of that act, and had direct reference to it, and was intended to include assaults upon females, whether of the age of ten years or more. It uses the words "any female," which embraces females of all ages.

The sentence therefore pronounced by His Honor upon the defendant was properly imposed, and there is no error. Let this be certified, etc.

PER CURIAM. No error.

STATE v. CATO BRYAN.

Bastardy—Costs—Discharge of Insolvents.

1. Neither the judge nor solicitor has the right to allow a defendant in bastardy proceedings to take the insolvent's oath and obtain his discharge without remaining in prison for twenty days.
2. It is a novel and untenable proposition that the allowance to the mother of a bastard should be paid by the county when the father takes the insolvent's oath.
3. Proceedings in bastardy being altogether of a civil character, when the defendant is discharged on taking the oath of insolvency, the law as to costs in civil actions prevails, whereby the county for whose benefit the proceedings are instituted is liable for the costs of the state, but not for the solicitor's fees nor for the costs of the defendant.

(*State* v. *Davis*, 82 N. C., 610; *State* v. *Pate*, Busb., 244; *State* v. *Higgins*, 72 N. C., 226; *State* v. *Hickerson*, *Ib.*, 421, cited and approved.)

PROCEEDING in Bastardy, heard at January Special Term, 1880, of WAKE Superior Court, before *Avery, J.*

This proceeding was commenced before a justice of the peace to subject the defendant to the maintenance of an illegitimate child, charged to have been begotten by him upon the body of one Jenny Green. The case was tried by a jury in a justice's court, and the defendant was found by the verdict of the jury to be the father of the child, and he was fined ten dollars and adjudged to pay the mother of the child fifty dollars and the costs of the proceeding, from which judgment he appealed to the superior court of Wake. And at said term he admitted the paternity of the child, and with the consent of the solicitor, was allowed to take the oath of insolvency and be discharged. The solicitor for the state then moved that the county of Wake be ordered to pay the mother the sum of fifty dollars allowed by the justice for the maintenance of the child, but the motion was overruled and the county was ordered by the court to

pay one-half of the costs of the clerk and sheriff and one-half of the solicitor's fee, from which ruling the state appealed.

Attorney-General, for the State.
No counsel in this court for defendant.

ASHE, J. There is error. In the first place the defendant should not have been allowed to take the oath of insolvency without remaining in prison for the space of twenty days. The solicitor had no right to consent to his discharge, and the judge no power to dispense with the imprisonment. See Bat. Rev., ch. 60, §§ 26–31; Acts 1875, ch. 11; *State* v. *Davis*, 82 N. C., 610.

The motion of the solicitor to charge the county with the fine of fifty dollars to be paid to the mother of the child for its maintenance, was a novel proposition. If the putative father was unable to give the bond for the indemnification of the county against the maintenance of the child and the mother was unable to support it, its condition was just the same as that of the other poor of the county, to be supported like them in the manner prescribed by law. Its being the illegitimate offspring of an insolvent father who had escaped the responsibility of its support through the tender regard of the law for the personal liberty of the citizen, gave it no privileges over the other unfortunate paupers of the county.

In overruling this motion there was no error; but there was error in the ruling of the court that the county of Wake should pay one-half of the costs of the clerk and sheriff and one-half of the solicitor's fees. The order seems to have been made under a misconception of the nature of the proceeding. Proceedings in bastardy are not criminal nor even *quasi criminal*, but are civil proceedings; and the law as to the costs therein is the same as in other civil actions or proceedings. *State* v. *Pate*, Busb, 244; *State* v. *Higgins*, 72 N.

C., 226; *State* v. *Hickerson*, *Ib.*, 421. This being a civil proceeding instituted in the name of the state for the benefit of the county of Wake and the defendant having been allowed to take the oath of insolvency and be discharged, the county of Wake is liable for the costs of the state in this behalf expended, but not for the solicitor's fees or any part thereof, nor for the costs of the defendant.

Let this be certified to the superior court of Wake county, that further proceedings may be had in conformity to this opinion.

Error. Reversed.

STATE *v.* ARNOLD PARISH.

Bastardy—Evidence.

On trial of a bastardy proceeding, evidence (by itself and unconnected with any fact tending to disprove the charge against the defendant) that the prosecutrix had sexual intercourse with persons other than the defendant about the time the child was begotten, is not sufficient to rebut the statutory presumption created by the oath of the woman, and is incompetent. And where, upon examination, the prosecutrix denies such intercourse, the matter being collateral, her answer is conclusive, and it is not error to reject the evidence when offered to impeach her credit. (Justices of the peace now have exclusive jurisdiction in such cases, under the act of 1879, ch. 92.)

(*State* v. *Bennett*, 75 N. C., 305; *State* v. *Britt*, 78 N. C., 439; *State* v. *Patterson*, 74 N. C., 157, cited and approved.)

PROCEEDING in Bastardy, tried at Spring Term, 1880, of JOHNSTON Superior Court, before *Eure*, *J.*

Upon the trial of the issue the mother of the child was introduced as a witness for the state and testified as to the pa-

ternity of the child and the time when it was begotten by the defendant. She was asked if she had not been before criminally intimate with several men whose names were mentioned, and especially with one Tom Carroll about and just before the time stated when the child was begotten. These questions were answered in the negative, and the defendant's counsel proposed to prove the sexual intercourse with these persons, and more particularly with Carroll, which had been denied. The testimony was rejected and the exception to this ruling is the only point presented in the appeal of defendant.

Attorney General, for the State.
Mr. T. M. Argo, for defendant.

SMITH, C. J. We sustain the correctness of the ruling of the court. Such testimony by itself and unconnected with evidence of the defendant's non-intercourse during the interval necessary to his being the father, or other fact tending to disprove the charge, was held to be insufficient to overcome the statutory presumption, and by itself incompetent when offered for that purpose, in the case of the *State* v. *Bennett*, 75 N. C., 305, and *State* v. *Britt*, 78 N. C., 439, and when offered to impeach the credit of the witness, the matter of the enquiry was held to be collateral and her answer conclusive. *State* v. *Patterson*, 74 N. C., 157.

The jurisdiction in bastardy proceedings is vested by a recent statute (acts 1879, ch. 92,) exclusively in a justice of the peace, except as to such as were pending at the time of its passage in the superior, criminal, or inferior courts as in the present case.

There is no error and this will be certified to the court below.

PER CURIAM. No error.

STATE v. DAVID F. BARNETT.

Bigamy—Territorial Jurisdiction.

It is the second marriage while the first wife is living that constitutes the crime of bigamy; and when such second marriage takes place in another state, the courts of this state cannot take jurisdiction of the offence.

INDICTMENT for Bigamy, tried at Spring Term, 1880, of HENDERSON Superior Court, before *Schenck, J.*

This was an indictment against the defendant for the crime of bigamy. The indictment was as follows: The jurors for the state upon their oaths present that David F. Barnett, late of the county of Henderson, on the 2nd day of June, 1879, in the county of Henderson and state of North Carolina, did marry one Margaret E. Dunberry, and her, the said David F. Barnett had for his wife, and that the said David F. Barnett, afterwards and while he was so married to the said Margaret E. Dunberry as aforesaid, to-wit, on the 2nd day of June, 1879, in the county of McNary and state of Tennessee, feloniously and unlawfully did marry and take to wife one Mary Campbell, and to her the said Mary Campbell was then and there married, the said Margaret E., his former wife being then alive, against the form of the statute in such cases made and provided, and against the peace and dignity of the state.

At spring term, 1880, of the said court, the defendant moved to quash the indictment, and based his motion upon the ground that the bill of indictment alleged the second marriage to have taken place in the state of Tennessee. His Honor sustained the motion and the state appealed.

Attorney-General, for the State.

No counsel for defendant.

ASHE, J. Bigamy was not an offence at common law, but has been made criminal by statute. Our statute, Battle's Revisal, ch. 32, § 15, declares "if any married person, doth take to him or herself another husband or wife, while his or her former husband or wife is still alive, the person so offending shall suffer as prescribed in section twenty-nine."

By this statute it is made a misdemeanor, and it is the second marriage while the first wife is living that constitutes the crime. When the second marriage takes place in another state, as is alleged in this indictment, the courts of this state cannot take jurisdiction of the offence. It is no violation of the criminal law of this state. "The common law considers crimes as altogether local and cognizable and punishable exclusively in the country where they are committed. No other nation therefore has any right to punish them." Story's Conflict of Laws, 516. In the case of *Folloit* v. *Ogelin*, 1 H. Black., 138, LORD LOUGHBROUGH held, "penal laws of foreign countries are strictly local and affect nothing more than they can reach and can be seized by virtue of their authority." Mr. Justice BULLER, in the same case on a writ of error, said: "It is a general principle that penal laws of one country cannot be taken notice of in another," and in a more recent case LORD BROUGHAM held "the *lex loci* must needs govern all criminal jurisdiction from the nature of the thing and the purpose of the jurisdiction." *Warrender* v. *Warrender*, 9 Bligh, 119, 120. And in this country in the case of the *Antelope*, 10 Wheaton's Rep., 66, 123, Chief Justice MARSHALL, in delivering the opinion of the court, said, "The courts of no state execute the penal laws of another." See Story's Conflict of Laws, § § 620 and 621. We might cite other authorities but it is unnecessary upon so plain a proposition.

There is no error. Let this be certified to the superior court of Henderson county, to the end that the defendant may be discharged.

PER CURIAM. No error.

STATE v. J. R. SELBY and others.

County Commissioners—Repairing Bridges.

It is not the duty of the commissioners of a county to take the *initial* steps for repairing the bridges thereof when they fall into decay; it is only when their co operation becomes necessary in a movement *started* by the township board of trustees or supervisors of public roads for such repairs, and is withheld without legal excuse, or they refuse to provide means to meet the contract, that they are criminally answerable for a breach of official duty.

INDICTMENT against the county commissioners for failing to repair a certain bridge, tried at Spring Term, 1880, of HYDE Superior Court, before *Graves, J.*

Upon the facts found by the jury, the court held the defendants not guilty, and *Grandy*, solicitor for the state, appealed.

Attorney-General, for the State.

No counsel for defendants in this court.

SMITH, C. J. The defendants who constitute the board of county commissioners of Hyde, are charged with a criminal dereliction of official duty in suffering a certain bridge to become and remain in a decayed and ruinous condition, and in not conferring with the township trustees and in concurrence with them contracting for the reparation there-

of. The special verdict rendered by the jury finds that the bridge, parcel of the highway, is over a creek twenty feet in width, has been hitherto kept up at the expense of the county and was for a considerable time out of repair and dangerous. Upon this finding His Honor was of opinion the defendants were not guilty, and in this we concur.

It is the duty of the township board of trustees, *with the concurrence of the county commissioners*, to contract for the building, keeping and repairing the necessary public bridges which the overseer with his assistants cannot conveniently construct and maintain, and to levy the charge on their county, (Bat. Rev., ch. 104, § 23, and the expense must be borne by the whole people of the county.) § 42.

But by the act of 1879, ch. 82, the control and supervision of the public roads in each township are committed to the justices residing therein, who are created and styled "The board of supervisors of public roads." If this board is the successor of the township trustees in the duty of looking after the county bridges as well, and exercises similar functions, the bill misconceives the party whose co-operation with the defendants is required for its performance. This may be the effect of the amendatory act. It is not necessary and we do not undertake to say how this is. But in either case the bill and the verdict alike fail to point out any neglected legal obligation devolved upon the defendants. The township trustees or the board of supervisors must enter into the contract for construction or repairing, "with the concurrence of the county commissioners," in the words of the act, by whose exercise of the taxing power the funds needed to meet the obligation are to be raised. But the latter incur no guilt by the inaction of others. It is only when their co-operation becomes necessary in a movement of the township board of trustees or supervisors for the reparation of a decayed bridge, and is withheld without legal excuse, or they refuse to provide means to meet the contract, that they com-

mit a breach of public duty and become criminally answerable. No such imputation is contained in the bill, and if it were no fact is found to sustain the charge. It is plain therefore that no judgment could be pronounced, and there is no error in the ruling of the court. The judgment must be affirmed.

PER CURIAM. No error.

STATE v. REUBEN HARDEE.

Evidence—Judge's Charge—Confessions, what Inducements will Exclude.

1. An omission to give a particular charge, not asked in the court below, cannot be noticed as an exception in this court.
2. It is not error to refuse to charge that confessions are to be received with caution. The judge may so charge or not, in the exercise of a wise discretion, to be guided by the circumstances of each particular case.
3. It is settled in this state that the confessions of a prisoner or the testimony of an accomplice, though without corroboration in material particulars, if believed by the jury, is sufficient to warrant conviction, and the propriety of giving a caution to the jury to prevent an improper confidence in its truth must be left to the discretion of the presiding judge.
4. The inducement which will exclude a confession must have some reference to the defendant's escape from the criminal charge to which that confession relates. The promise of some collateral advantage, entirely disconnected from the charge, will have no such effect.

(*State* v. *O'Neal*, 7 Ired., 251; *Moses*, 2 Dev., 452; *Patrick*, 3 Jones, 443; *Graham*, 68 N. C., 247; *Overton*, 75 N. C., 200; *Nash*, 8 Ired., 35; *Nat*, 6 Jones, 114; *Wiseman* v. *Cornish*, 8 Jones, 218; *State* v. *Hardin*, 2 Dev. & Bat., 407; *Williams*, 2 Jones, 257; *Noblett*, *Ib.*, 418; *Smith*, 8 Jones, 132; *Brantley*, 63 N. C., 518; *Storkey*, 63 N. C., 7; *Davis*, 80 N. C., 384, cited and approved.)

STATE *v.* HARDEE.

INDICTMENT for burning a gin-house, &c., tried at Spring Term, 1880, of PITT Superior Court, before *Avery, J.*

Verdict of guilty, judgment, appeal by the defendant.

Attorney-General, for the State.
Mr. W. B. Rodman, for defendant.

SMITH, C. J. The defendant is charged in two counts of the indictment, first, with maliciously and unlawfully setting fire to and burning the *gin-house* of J. J. Laughinghouse, with intent to injure and defraud him, and secondly, with the like burning of his granary, and was upon trial found guilty.

During the examination of the witnesses, whose testimony is set out in detail, one Laura Slade for the state testified to a conversation between the defendant and herself, in which she promised the defendant to marry him if he would tell about the burning of the gin-house, and defendant said that himself and one Gray Artis burned Mr. Laughinghouse's gin-house and barn, and that after the confession she refused to have him. The confession was sought and obtained in consequence of an offer of Bryan Grimes to pay her fifty dollars if she would get out of the defendant that he burned the buildings, as he had suspected was the fact. No objection was offered to the admission of the confession.

The state also proved that at the examination before the justice and before it began, the defendant, seeing Laura coming up and being told who it was, hung his head and said, "Lord, that girl is coming here against me." The witness stated that no inducement of hope or fear was held out to the defendant and that his confession was voluntary. This evidence was objected to and admitted, and defendant excepted. There was much other evidence offered, which the state insisted was corroborative of the truth of the confession, and the defendant's counsel in argument relied on

as discrediting the source from which proof of the confession came, but it is not necessary in our view of the case to be set out.

No instructions of the court were asked for the defendant and no objection taken to the charge, except that the court omitted to say to the jury, "that evidence of the character of that given by Laura Slade should be received with caution, and would not justify a conviction in the absence of testimony tending to corroborate it in some material particular."

After verdict a new trial was moved, first, for that the court did not give the instruction in reference to the credit due the testimony of Laura Slade, and secondly, that the verdict was clearly against the weight of the evidence.

It has been too often and uniformly held by this court to need repetition or reference, that an omission to charge, not asked in the court below, cannot be noticed as an exception in this court. The instruction, the omission to give which is assigned as error, was not requested, nor, except in the argument as to its credit addressed to the jury, called to the attention of the court. *State* v. *O'Neal*, 7 Ired., 251.

It is the duty of the court to state in a plain and correct manner the evidence in the case, and to declare and explain the law arising thereon, but he invades the province of the jury when he expresses an opinion as to the weight of the evidence. He must decide if there be evidence reasonably sufficient to warrant conviction, but the jury alone the effect to which it is entitled. C. C. P., § 237. *State* v. *Moses*, 2 Dev., 452.

While it may have been eminently proper for the court to comment in general terms upon the value of confessions and of the testimony of accomplices, as urged in the defendant's argument, we must suppose these considerations were by him pressed upon the attention of the jury, and the force of the argument left undisturbed upon their minds, to

whom their consideration properly belongs; and it cannot be assigned for error that they were not rehearsed by the court, and did not control the verdict. It is not error to refuse to charge that confessions are to be received with caution, and still less so when the court is not asked to give the instruction. *State* v. *Patrick*, 3 Jones, 443.

The jury alone must judge of the sufficiency of confessions as proving the fact confessed, and to them alone is committed that responsibility. *State* v. *Graham*, 68 N. C., 247; *State* v. *Overton*, 75 N. C., 200.

And so it is held that the failure of the court to tell the jury that evidence from near relations, or fellow servants, when testifying for one another, was by law regarded with suspicion was not error, nor would it have been so to charge, though it would not be improper in his comments to call attention to the fact. *State* v. *Nash*, 8 Ired., 35; *State* v. *Nat*, 6 Jones, 114; *Wiseman* v. *Cornish*, 8 Jones, 218.

It is settled in this state that the confession of a prisoner, or the testimony of an accomplice, though without corroboration in material particulars, if believed by the jury, is sufficient to warrant conviction; and the propriety of giving a caution to the jury to prevent an improper confidence in its truth, must be left to the discretion of the judge. *State* v. *Hardin*, 2 Dev. & Bat., 407.

Even the clear perjury of a witness committed on the trial does not authorize the court to direct the jury to discard the testimony, but it goes to his credit only. *State* v. *Williams*, 2 Jones, 257; *State* v. *Noblett*, *Ibid.*, 418; *State* v. *Smith*, 8 Jones, 132; *State* v. *Brantley*, 63 N. C., 518.

Nor will the court look into the evidence to ascertain if the verdict was rendered upon testimony which ought not to have convicted. *State* v. *Storkey*, 63 N. C., 7; *State* v. *Davis*, 80 N. C., 384.

We are not disposed, as in the argument of defendant's counsel we are urged to do, to disturb the law long settled

and to obliterate the line so often traced, which separates the respective functions of the judge and the jury, and still less to overstep the bounds which limit our own jurisdiction in appeals generally to a revision of the rulings of the court below upon questions of law. There is no objection to the charge of the court which we can uphold without passing the barriers of our own jurisdiction.

It must be left largely to the good sense and discretion of the judge who tries a cause to so comment upon the evidence and so regulate the proceedings as to aid the jury in exercising their undoubted and exclusive prerogative of determining the facts, and the sufficiency of the evidence offered to establish them. Such seems to have been the course pursued in the present case, and no just animadversion can be made upon the manner in which the trial was conducted and the case presented to the jury.

While no opposition was made to the admission of the confession of the defendant to the witness Laura Slade, and it is found that his exclamation on seeing her coming up to attend the preliminary examination before the justice was voluntary, as the question may often occur in practice, it is not improper to notice and dispose of it. We do so by quoting, and giving our assent to what is said by Mr. Taylor in his valuable treatise:

"Passing now," says the author, "to the nature of the inducement, it may be laid down as a general rule that in order to exclude a confession, the inducement, whether it assume the shape of a promise, a threat, or a mere advice, must have some reference to the prisoner's escape from the criminal charge against him. So a promise of some merely collateral benefit or boon, as for instance a promise to give the prisoner some spirits or to strike off his handcuffs or to let him see his wife, will not be deemed such an inducement as will authorize the rejection of a confession made in consequence." 1 Taylor Ev., § 803.

That a collateral inducement, having no relation to the offence, is an insufficient reason for rejecting a confession given in response, is concurred in by other elementary writers and sustained by adjudicated cases. 1 Arch. Cr. Pl., 127; 1 Whar. Cr. Law, § 686; 1 Greenl. Ev., § 229; *State* v. *Wentworth*, 37 N. H., 196; *Commonwealth* v. *Howe*, 2 Allen, (Mass.) 158.

We find no error and judgment must be rendered on the verdict, and it is so ordered. This will be certified.

PER CURIAM. No error.

STATE v. HARRISON HOLLAND and another.

Evidence—Testimony of Accomplice.

The unsupported testimony of an accomplice, if it produces entire belief of the prisoner's guilt, is sufficient to warrant a conviction.

(*State* v. *Haney*, 2 Dev. & Bat., 390; *State* v. *Hardin*, *Ib.*, 407, cited and approved.)

INDICTMENT for Larceny tried at Spring Term, 1880, of CHATHAM Superior Court, before *Seymour*, *J.*

The defendants, Harrison Holland and Jasper Fuller, were tried at said term, for larceny and receiving stolen goods. On the trial the state offered one Stephen Stone as a witness against the defendants. Stone was an accomplice and the bill of indictment had been sent against him and the others, but his name was erased from the bill. Stone testified to a state of facts which if true proved the defendants' guilt, but he was entirely uncorroborated.

The defendants' counsel asked the court to charge the jury that they ought not to find the defendants guilty upon

the uncorroborated testimony of an accomplice. His Honor declined to give the instructions asked for, but told the jury it was unsafe to convict upon the uncorroborated testimony of an accomplice, that such testimony always went to a jury under suspicion, but that if such testimony satisfied them beyond a reasonable doubt of the guilt of the defendants they should convict. The counsel for the defendants excepted. There was a verdict of guilty, and a motion for a *venire de novo*. The motion was refused and judgment rendered, from which the defendant Holland appealed to this court.

Attorney General, for the State.
Mr. John Manning, for defendant.

ASHE, J. We know that in England a defendant cannot be convicted upon the uncorroborated testimony of an accomplice. His testimony is allowed to go to the jury to be weighed by them for what it is worth, when supported by other evidence or by circumstances confirmatory of his testimony. But in this state a different doctrine obtains. Here, a defendant may be convicted upon the unsupported testimony of an accomplice.

In the case of *State* v. *Haney*, 2 Dev. & Bat., 390, this court held that "the unsupported testimony of an accomplice, if it produces entire belief of the prisoner's guilt, is sufficient to warrant a conviction; and the usual direction to the jury not to convict upon it, unless supported by other testimony, is only a precautionary measure to prevent improper confidence being reposed in it, and the propriety of giving this caution must be left to the discretion of the judge who tries the cause." The same doctrine is announced in the case of *State* v. *Hardin*, *Ibid.*, 407, where Chief Justice RUFFIN says: "It is however dangerous to act exclusively on such evidence, and therefore the court may properly caution the

jury, and point out the grounds for requiring evidence confirmatory of some substantial part of it. But the court can do nothing more, and if the jury yield faith to it, it is not only legal but obligatory on their consciences to found their verdict upon it."

There is no error. Let this be certified to the superior court of Chatham county, that further proceedings may be had in conformity to this opinion and the law.

PER CURIAM. No error.

STATE v. DANIEL KEATH.

Evidence—Practice—Judge's Charge—Drunkenness.

1. The weight of evidence is always a question for the jury.
2. A prisoner offered to prove a conversation between a witness and another person, and the same was rejected; *Held* that an exception thereto cannot be sustained in this court, where the evidence proposed and rejected is not set out in the record.
3. In a conflict of memory between a judge and counsel as to what a witness had testified, the jury were told that the court might be mistaken in the notes of the testimony and they could use them to refresh their memory, but it was from the mouth of the witness they were to get the testimony upon which to found their verdict; *Held*, no error.
4. Voluntary drunkenness is never an excuse for the commission of a crime.
5. This court will not pass upon an exception which is not shown by the record to have been taken on the trial.

(*State* v. *Worthington*, 64 N. C., 594; *State* v. *Jones*, 69 N. C., 16; *State* v. *Ballard*, 79 N. C., 627; *State* v. *Crockett*, 82 N. C., 599; *State* v. *Hinson*, *Ib.*, 597, cited and approved.)

INDICTMENT for Murder removed from Cleaveland and

tried at Spring Term, 1880, of RUTHERFORD Superior Court, before *McKoy, J.*

Verdict of guilty, judgment, appeal by the prisoner.

Attorney General, for the State.
Messrs. Merrimon & Fuller, for prisoner.

ASHE, J. On the 28th day of January, 1880, one Alice Ellis, a child, was found dead in an old field in the county of Cleaveland, in the vicinity of the residence of the prisoner. Her head was crushed as with a stone, and her body bore the marks of violent sexual connection. Suspicion fastened upon the prisoner. He was arrested, tried and convicted by a jury at spring term, 1880, of Rutherford superior court.

After the jury returned their verdict, there was a rule for a new trial. The rule was discharged and sentence pronounced against the prisoner, from which he appealed to this court.

There was no exception to the charge of His Honor, but the application of the rule was based upon exceptions which are as follows:

1. That the jury found against the weight of evidence.

2. Because the prisoner offered to prove by one J. Hicks, a witness for the defence, a conversation between the said Hicks and one Bridges on the 28th of January, 1880, at "Burnt Chimney," about eighteen miles from the place of the homicide, with regard to the person described in the testimony of Hicks given on the trial. The state objected and the conversation was ruled out. To which the prisoner excepted.

3. Because, in the notes of the evidence taken by the court, the testimony of Thornton Ellis was read over to the jury, which showed that the tracks were twisting, and the prisoner's counsel contended that the evidence of Thornton

Ellis was that the boots were twisting. The court told the jury "that in the notes of the testimony the court might have been mistaken, and would therefore ask the jury to take the notes only for the purpose of carrying them back to what the witness did say, as it was from the mouth of the witness they would get testimony upon which they were to found their verdict, using the notes of the court only for the purpose of refreshing their memories as to what the witness did say."

4. The prisoner's counsel asked the court to charge the jury, that if the crime with which the prisoner is charged was actually committed by him, while under the influence of whisky or by sudden provocation, as some of the evidence tends to show, and while other evidence tends to show that the prisoner and the deceased were perfectly friendly, and were but a short time before such occurrence on good terms, then it was manslaughter, and not murder. This instruction the court declined to give, as the evidence did not justify the charge, and the prisoner excepted. His Honor overruled all the exceptions and discharged the rule.

The only question presented for our consideration is, was there error in the ruling of His Honor upon the exceptions or in his ruling in refusing to give the instructions prayed for. We hold there was none. The weight of evidence is always a question for the jury. So well settled is this principle that we deem it unnecessary to cite any authority in support of the ruling of the judge below.

The second exception, to the rejection by the court of a conversation between the witness and one Bridges, cannot be sustained in this court, because the evidence proposed and rejected is not set out. "The omission to do so excludes the point. For unless the matter which the party offers to prove is set out, the error in rejecting it does not appear on the record," and the court is unable to see whether the evidence is relevant or not. *State* v. *Worthington*, 64 N. C., 594.

We are unable to see any error in his ruling on the third exception. In a conflict of memory between the court and the counsel for the prisoner as to what a witness had testified, the court might very properly have insisted upon its notes as the correct statement of the testimony of the witness; but in this case His Honor candidly told the jury that the court might be mistaken in the notes of the testimony, and they might use the notes for the purpose of refreshing their memory as to what he did say, but it was from the mouth of the witness they were to get the testimony upon which to found their verdict. It was fairly, we think, submitting the question of fact to the recollection of the jury.

After these exceptions had been overruled, the prisoner's counsel asked the judge to charge the jury that if prisoner committed the crime while under the influence of whisky or upon sudden provocation, it was but manslaughter. His Honor very properly refused to give this instruction, for there was no evidence in the case that justified such a charge. And even if there had been evidence that the prisoner was intoxicated, it is well settled that voluntary drunkenness is never an excuse for the commission of crime. 1 Wharton's Cr. L., § § 33, 41; Hawkins P. C., 356; Bishop Cr. L., § § 488, 489. And as to the point of provocation there is not the shadow of proof. We cannot conceive how it is possible a child whose person had been violated and who had then been murdered, evidently to suppress the evidence of the crime, could have given any provocation. The idea is preposterous.

The main stress of the argument of the prisoner's counsel, before this court, was upon the point that the evidence in the case was not sufficient to warrant the jury in finding a verdict of guilty, and that it was error in the judge below in not so instructing the jury. But that exception was not taken in the superior court, and it has been held in this court that a point which the bill of exceptions or the case

stated shows was not taken in the court below, and which does not appear upon the record, cannot be taken in the supreme court. *State* v. *Jones*, 69 N. C., 16; *State* v. *Ballard*, 79 N. C., 627; *State* v. *Crockett*, 82 N. C., 599; *State* v. *Hinson*, 82 N. C., 597. But as this is a question of human life we have carefully perused all the evidence in the case, and in our opinion it discloses such a series of circumstances which when grouped together point so convincingly to the prisoner as the perpetrator of the crime with which he is charged, that the jury were not only well warranted in finding the verdict of guilty, but that to have done otherwise would have been a flagrant violation of duty. The prisoner, by their verdict, has been justly doomed to the expiation of a crime characterized by the most brutal cruelty.

There is no error. Let this be certified to the superior court of Rutherford county, that the sentence of the law may be carried into execution.

PER CURIAM. No error.

STATE v. JACOB F. SLAGLE.

Expert—Evidence—Indictment for Murder by Poison.

1. The opinion of a medical expert upon a matter within the scope of his profession is admissible evidence and should be carefully weighed by the jury.

2. In an indictment for murder by poison, an averment that the prisoner knew of its noxious properties, is not essential. (*State* v. *Yarborough*, 77 N. C., 524, overruled.)

3. See syllabus in same case reported in 82 N. C., 653.

(*Flynt* v. *Bodenhamer*, 80 N. C., 205, approved, and *State* v. *Yarborough*, 77 N. C., 524, overruled.)

STATE *v.* SLAGLE.

INDICTMENT for administering Poison tried at Spring Term, 1880, of MACON Superior Court, before *Schenck, J.*

See same case reported in 82 N. C., 653. Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.

Messrs. Gilliam & Gatling, for defendant.

SMITH, C. J. This case was before us at the last term upon a demurrer which was overruled; and the defendant having been since tried and convicted of the offence imputed, in his present appeal assigns for error the admission of certain evidence offered by the state and also moves an arrest of judgment for the same defects in the bill alleged and decided at the former hearing.

During the trial a bottle containing the mixture which had been administered by the defendant was produced and shown to Dr. Lyle, an admitted medical expert, who stated he thought he could tell its ingredients from its smell, taste, and appearance, but he had made no chemical analysis, and he was allowed, after objection, to give an opinion as to what the mixture was composed of, and its effect upon a woman in pregnancy, when taken, and the danger to life. The exception was not insisted on in the argument of defendant's counsel, and it is in our opinion untenable. "The opinion of a well instructed and experienced medical man upon a matter within the scope of his profession and based on personal observation and knowledge," as was remarked in *Flynt* v. *Bodenhamer*, 80 N. C., 205, "is and ought to be carefully considered and weighed by the jury in rendering their verdict." No further comment on the point seems necessary.

The sufficiency of the indictment, equally involved in the demurrer and in the motion to arrest the judgment, has

already been decided, and if it be still an open question, our opinion remains unchanged.

The last two counts charge an offence at common law and pursue the form set out in Arch. Cr. Pl., 341, and in Chitty's Cr. Law, 798, which was prepared a year previous to the enactment of 43 George III, ch. 58, and is taken from the crown office as stated in the note to 2 Rus. on Crimes, 522 (533). In some of the states it has been held that in the absence of any statute the offence can only be perpetrated upon a woman so far advanced in gestation as to be quick with child, and this requirement is met in the present bill. But we are not disposed thus to restrict the criminal act, but to hold that it may be committed at any stage of pregnancy. It was determined by the supreme court of Pennsylvania in *Mills* v. *Commonwealth*, 13 Penn. State Rep., 631, and we quote the clear and forcible language in which the principle is announced in the opinion of COULTER, J.: "It is a flagrant crime at common law to attempt to procure the miscarriage or abortion of the woman because it interferes with and violates the mysteries of nature in the process by which the human race is propagated and continued. It is a crime against nature which obstructs the fountains of life and therefore it is punished. The next error assigned is that it ought to have been charged in the count that the woman had become quick. But although it has been so held in Massachusetts and in some other states, it is not, I apprehend, the law in Pennsylvania, and never ought to have been the law anywhere. It is not the murder of a living child which constitutes the offence, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct with embryo life and gestation has begun, the crime may be perpetrated."

This enunciation of the law, so careful and distinct in expression, dispenses with the necessity for further discussion.

The objection to the sufficiency of the first two counts which charge the administration of a poisonous substance, one of them specifying the mixture, with intent to kill the mother, for want of an averment that the defendant knew its noxious properties, if well founded, could not interfere with the judgment to be pronounced upon the conviction under the other counts, and is therefore not necessary to be considered. Such an averment is usually found in indictments charging the crime of murder or the attempt to commit it by the use of deadly drugs; and in *State* v. *Yarborough*, 77 N. C., 524, it is said by the court to be always safest to follow long approved precedents in this regard. But we are not prepared to concede that such an allegation is essential to the validity of the bill, when it charges the administration of poison, a word which *ex vi termini* imports its fatal properties when introduced into the system, with the intent to take human life. The knowledge would seem to be implied in the very use made of the poisonous drug with the imputed purpose. And so it is declared not to be a sufficient reason for allowing a writ of error after conviction upon an indictment for murder by poison, that it fails to aver that the prisoner knew the substance employed to be a poison, though such an averment is always safe. 2 Whar. Cr. Law, § 1066.

At the last term the defendant's appeal was inadvertently entertained instead of being dismissed, as it should have been, since no final judgment had then been rendered. But the dismissal of the appeal and the overruling of the demurrer have the same legal effect, in requiring the court below to proceed with the case, and we notice the course then pursued that it may not become a precedent in future practice and the error be at once corrected.

There is no error. This will be certified to the superior court of Macon.

PER CURIAM. No error.

STATE v. ANGELO REITZ.

Evidence—Alibi—Identification of Tracks—Hearsay—Declarations.

1. Whether an *alibi* is proved by a defendant on trial for a criminal offence is a question for the jury—to be weighed by them in connection with the whole testimony—and if shown to their full satisfaction, it is a good defence.
2. It is not necessary that a witness should be an expert to testify as to the identification of tracks; but where the witness gives reasons for believing the tracks described to be those of the accused, the whole of his testimony should go to the jury for them to say whether the grounds of his opinion are satisfactory.
3. Hearsay testimony of the existence of a mob is not admissible.
4. Declarations of a prisoner made to the officer after his arrest, but not in reply to any charge made against him, were offered by him and ruled out by the court; *Held* no error.

(*State* v. *Brandon*, 8 Jones, 463; *State* v. *Scott*, 1 Hawks, 24, cited and approved.)

INDICTMENT for burning a barn tried at Spring Term, 1880, of RUTHERFORD Superior Court, before *McKoy, J.*

The defendant was indicted for burning a barn. The evidence against him was circumstantial and he relied for his defence upon an *alibi.*

His Honor charged the jury in regard to an *alibi,* that if proved and established by testimony, it was the most complete and satisfactory defence that could be made; that when not complete, it could not avail the defendant. Whether an *alibi* is proved is a question for the jury. It is the duty of the jury to weigh the whole testimony, and if there is a reasonable doubt as to the guilt of the defendant, it is the duty of the jury to acquit. The state, before it can ask for a verdict of guilty, must offer to the jury such evidence as will fully satisfy the minds of the jury of the guilt of the defendant.

Exception was taken to the charge of His Honor, so far as it relates to the defence of an *alibi*, and some other exceptions were taken to the admission and rejection of testimony, as set out in the opinion of this court. There was a verdict of guilty and judgment from which the defendant appealed.

Attorney General, for the State.
Mr. J. C. L. Harris, for defendant.

ASHE, J. We suppose the exception to the charge was to that part which stated that when an *alibi* is not complete it cannot avail the defendant. We see no error in this, for the evidence offered against the defendant was circumstantial and must have raised a strong presumption of his guilt, or he would not have been driven to the defence of an *alibi*. If the proof was of such a character as to raise a violent presumption it would behoove the defendant to make proof of his *alibi* to the full satisfaction of the jury, and that is what we understand is meant by making *complete proof* of the fact, and so we think the jury must have understood it, as His Honor qualified the expression by proceeding to say—" whether an *alibi* is proved is a question for the jury. It is the duty of the jury to weigh the whole testimony, and if there is a reasonable doubt as to the guilt of the prisoner it is the duty of the jury to acquit." There is nothing in the charge that was calculated to mislead or prejudice the minds of the jury.

The first exception to the admissibility of evidence was to the admission of the testimony of a witness, who testified it was his best opinion that certain tracks found near the site of the burnt building were those of the prisoner. The reception of this evidence was objected to on the ground that the witness was not an expert. It is not necessary that a witness should be an expert to testify as to the identification of tracks. The correspondence between boots and foot-

prints is a matter requiring no peculiar knowledge to judge of, and as to which any person who has seen both may testify. *Commonwealth* v. *Pike*, 103 Mass., 446. His testimony in such a case can amount to nothing more than his opinion as to the correspondence.

Though the opinions of witnesses are in general not evidence, yet on certain subjects some classes of witnesses, as for instance experts, may express their opinions; and on certain other subjects any competent witness may express his opinion or belief. It is competent for a witness to express his opinion as to the hand-writing of a party or as to the identity of a person. 1 Greenleaf on Evidence, § 440. And if it be competent for him to give his opinion as to the identity of a person, we can see no reason why he may not give it as to the identity of his foot-prints. Such evidence of course would have more or less weight with a jury accordingly as the witness had had the means and opportunities of forming an acquaintance with the tracks of the defendant. In the case of the *State of Kansas* v. *Holwel*, 14 Kan., 105, where on a trial for larceny it became necessary to ascertain whether the wagon of the defendant had made certain tracks, the court admitted the testimony of a witness who testified that in his opinion they were the tracks of the defendant's wagon; but in that case the witness testified that he had examined the wagon, observed the peculiarities of the running gear and had measured the tracks.

In our case the witness who was permitted to testify, that in his opinion the tracks referred to were those of the defendant, as the ground for his belief, stated that the defendant had lived with him three or four weeks and worn an old pair of boots of his, and had twisted them so the witness could not wear them. The track was peculiar. "The left foot was the largest; the upper leather ran over the sole leather, and made a sort of mashing track."

The bare opinion of a witness as to the identity of the

tracks should have no weight with a jury; but when the witness gives his reasons for entertaining the opinion, the whole of the testimony should be allowed to go to the jury, for them to say whether the grounds of the opinion are reasonable and satisfactory.

The next exception is to the reception of hearsay testimony as to the existence of a mob. This is not one of the cases where hearsay testimony is admissible.

The last exception was to the ruling out the declarations of the defendant, made to the officer after his arrest, which were not in reply to any charge made upon him. The declarations were clearly inadmissible. *State* v. *Brandon*, 8 Jones, 473; *State* v. *Scott*, 1 Hawks, 24.

There is no error. Let this be certified to the superior court of Rutherford county, that further proceedings may be had according to this opinion and the law.

PER CURIAM. No error.

STATE v. WALTER R. REESE.

False Pretence—Description of Property Obtained.

1. Generally, the same degree of certainty is required in the description of the goods in an indictment for obtaining them by false pretences as in the description of the property alleged to be stolen, in larceny.
2. A general charge that the defendant obtained "goods and money" of the prosecutor, to the value of fifty dollars, is too vague and indefinite; the goods should be described by the names usually appropriated to them, and the money should be described at least by the amount, as so many dollars and cents.

INDICTMENT for False Pretence tried at Spring Term, 1880, of BERTIE Superior Court, before *Gudger, J.*

STATE *v.* REESE.

The defendant was indicted in the inferior court of Bertie county for obtaining goods and money by false pretences. The bill of indictment was as follows, viz: "The jurors for the state upon their oath present that on the first day of January, 1876, in the said county one Walter R. Reese, late of said county of Bertie, designedly and with intent to defraud Henderson Pritchard and John A. Pritchard did, by unlawfully, fraudulently, designedly and falsely pretending and alleging to said Henderson Pritchard and John A. Pritchard of said county that he, the said Walter R. Reese, was the owner of a large and valuable farm with team and stock thereon in the county of Northampton in the state aforesaid which was abundant security for any advances by goods and money that the said Walter R. Reese might get from them, and upon which said representations the said Henderson Pritchard and John A. Pritchard were induced to part with their money and goods, obtain goods and money from them the said Henderson Pritchard and John A. Pritchard to the value of fifty dollars, and which said allegations were then false, and he the said Walter R. Reese well knowing the same to be then false and untrue, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state."

The defendant's counsel moved to quash the bill of indictment: 1. Because the promise or representation was not in writing.

2. Because the property alleged to have been obtained was not sufficiently described.

3. Because the statute of limitations bars the bill as appears on the face of it.

4. Because the bill does not allege that the defendant promised to apply any article of produce or any property whatever or the proceeds to the discharge of any debt.

5. Because the law relied upon for conviction is *ex post facto*.

The motion was sustained and the bill quashed, from which the state appealed to the superior court of that county where at spring term, 1880, the ruling of the inferior court was reversed and the defendant appealed to this court.

Attorney General, for the State.
The defendant was not represented in this court.

ASHE, J. There were five grounds assigned for quashing the indictment, only one of which we think is worthy of the consideration of this court, and that is the second which assigns the want of certainty in the description of the property obtained as a fatal defect in the indictment. We hold this objection is well taken. The bill is informally and loosely drawn, and we think the allegation that the defendant obtained goods and money from Henderson Pritchard and John A. Pritchard is too vague and uncertain. As a general rule the same degree of certainty in the description of the goods obtained, in indictments for obtaining goods under false pretences, is required as in the description of goods alleged to be stolen, in larceny. The goods should have been described specifically by the names usually appropriated to them, and the money obtained should have been described at least by the amount, as for instance so many dollars and cents. An indictment before 1877 for stealing "money" without further description could not have been sustained, and the legislature to remedy the difficulty of describing and identifying bank bills, treasury notes, &c., which may be stolen, passed the act of 1876-'77, ch. 68, providing that in indictments in such cases it shall be sufficient to describe such money, treasury note or bank bill simply as "money." There are cases where indictments have been sustained for obtaining by false pretences so many dollars—say eighty dollars of the moneys of A. B.—and if this indictment had been so drawn we would have sustained

it notwithstanding its inartificial form in other respects. But we think the term "money" without anything added to make it more definite is too loose in indictments of this kind. There is error in the ruling of the superior court.

The judgment of that court is reversed. Let this be certified to the superior court of Bertie county, to the end that further proceedings may be had in conformity to this opinion and the law.

Error. Reversed.

STATE v. W. J. HINSON.

Forcible Trespass—Judge's Charge.

1. In forcible trespass, it was in proof that the defendant rode into the yard of prosecutrix after being forbidden by her, and asked where her husband was; she ordered him off; but he remained, cursing her and her husband; she told him a second time to leave, and that if he did not, she would call Mr. D., when the defendant left; *Held*, that the facts constitute a case of forcible trespass.

2. Upon the trial in such case, the defendant asked the court to charge, "that before the jury can convict, they must find that he entered with a display of weapons, or other force;" and the court told the jury, "there must be a sufficient display of force to intimidate, or such as was calculated to produce a breach of the peace, and they must judge from all the facts whether there had been a sufficient display of force to intimidate"; *Held*, no error, and a substantial compliance with the instruction asked.

(*Com'rs of Newbern* v. *Dawson*, 10 Ired., 436; *Burton* v. *March*, 6 Jones, 409; *State* v. *Neville*, *Ib.*, 423; *State* v. *Brantly*, 63 N. C., 518; *State* v. *Scott*, 64 N. C., 586, cited and approved.)

INDICTMENT for Forcible Trespass, tried at Spring Term, 1880, of MECKLENBURG Superior Court, before *McKoy*, *J.*

The case had been tried in the inferior court of Mecklenburg, and upon the conviction of the defendant he appealed to the superior court. Upon examination of the record and after argument, the judge held that there was no error and affirmed the judgment below, and the defendant appealed to this court.

Attorney General, for the State.

Messrs. Jones & Johnston, for defendant, cited *State* v. *King*, 74 N. C., 177.

ASHE, J. The facts of the case are, that on the first of October, 1880, one Elizabeth Holbrooks, wife of W. J. Holbrooks, in the absence of her husband, was sitting in the door of her house, when the defendant rode up and she forbade him from coming into the yard, but he rode into it and hallowed and asked where was Holbrooks. She told him she guessed he knew where he was, and for him to leave. The defendant said, "yes, d—n him, I have sent him to jail, and I intend to send him to the penitentiary," and that he had come by to give her a d—n cursing, and did curse her, and remained until she told him again to leave; that if he did not, she would call Mr. Douglas, when he turned and rode off.

On the trial in the inferior court, the defendant's counsel asked the following instructions to the jury:

1. That there is no evidence in the case tending to convict the defendant of the crime of forcible trespass as charged in the bill of indictment.

2. That bare words, however severe or violent, do not constitute the offence of forcible trespass.

3. That before the jury can find the defendant guilty, they must first find that he entered with a strong hand accompanied with a display of weapons or other force.

The court declined to give these instructions to the jury,

but charged them that there must be a sufficient display of force to intimidate, or such as was calculated to produce a breach of the peace, and that they must judge from all the facts whether there had been a sufficient display of force to intimidate.

The inferior court committed no error in refusing the first instruction, for we are of the opinion the facts of the case made out a clear case of forcible trespass.

Its ruling on the second instruction was not erroneous, because the instruction asked was not applicable to the facts of the case. The offence charged and proved was not simply the use of offensive language, but the riding into the yard of the prosecutrix against her will, and remaining there cursing her after having been ordered to leave.

Nor do we think there was error in refusing to give the third instruction prayed, in the very language used, for the charge given by the court to the jury was a substantial compliance with the instruction asked. A judge is never required to respond in the very words of an instruction prayed for by counsel. It is sufficient if he substantially meets the matter of law and puts the matter of fact directly to the jury. *Com'rs of Newbern* v. *Dawson*, 10 Ired., 436; *Burton* v. *March*, 6 Jones, 409; *State* v. *Neville*, *Ib*, 423; *State* v. *Brantly*, 63 N. C., 518; *State* v. *Scott*, 64 N. C., 586.

There is no error. Let this be certified to the superior court of Mecklenburg, that its judgment may be certified to the inferior court of that county, that further proceedings may be had according to law.

PER CURIAM. No error.

STATE v. JOHN GRADY.

Homicide—Evidence—Judge's Charge—New Trial.

1. Upon a trial for murder, the prisoner offered in evidence the examination in writing of a witness taken before the coroner's jury, and showed that the witness' name was endorsed on the bill of indictment, but not being called for the prosecution, the prisoner procured a summons to be issued upon which the sheriff made return that the witness could not be found; *Held*, that the evidence was incompetent and properly rejected.

2. If evidence favorable to the prisoner be omitted by the judge in recapitulating the testimony to the jury, it is the duty of prisoner's counsel to call it to the attention of the court that the same may be supplied. After verdict, an exception grounded upon such omission will not be sustained.

3. A new trial will not be granted for an erroneous statement of the law which the finding of the jury corrects.

4. Whether the effect of a new trial granted, in a case where the jury acquit of murder and convict of manslaughter, is to put the prisoner on trial a second time for the crime charged in the indictment—*Quære*. But the court intimate that the doctrine announced in *State* v. *Stanton*, 1 Ired., 424, should not be disturbed.

State v. *Young*, 1 Winst., 126; *State* v. *Taylor*, Phil., 508; *State* v. *McLeod*, 1 Hawks, 344; *State* v. *Valentine*, 7 Ired., 225; *State* v. *Scott*, 2 Dev. & Bat., 35; *State* v. *Haney*, *Ib.*, 390; *Whissenhunt* v. *Jones*, 80 N. C., 342; *State* v. *Caveness*, 78 N. C., 484; *State* v. *Cæsar*, 9 Ired., 391; *Reynolds* v. *Magness*, 2 Ired., 26; *Glenn* v. *R. R. Co.*, 63 N. C., 510; *Winburne* v. *Bryan*, 73 N. C., 47; *State* v. *Stanton*, 1 Ired., 424, cited and approved.)

INDICTMENT for Murder tried at February Term, 1880, of NEW HANOVER Criminal Court, before *Meares, J.*

The jury found the prisoner guilty of manslaughter, judgment, appeal by prisoner.

Attorney General, for the State.

Mr. D. K. McRae, for the prisoner.

SMITH, C. J. The prisoner is charged in a single count of the indictment with the murder of one John Taylor on the night of the 30th day of November, 1879, by giving him a blow on the head with a large pole, capped with iron at one end. There was little discrepancy in the testimony of the witnesses as to the facts attending the homicide, but there was a conflict as to the person who gave the fatal stroke. The facts are set out in the case accompanied with a detailed statement of the testimony delivered to the jury, and may be briefly summarized as follows:

An alarm of fire over the river (Cape Fear) and opposite the city (Wilmington) had attracted a fire company to the burning building, and the prisoner was one of a bucket company who were ordered to impress a boat to be used in carrying over coal for the fire engine. The deceased owned and was then in possession of a flat boat which was tied up to the wharf, and another lay outside against it. The officer in command of the bucket company, a large number of whom were present, ordered the boat of the deceased to be taken, to which the latter at first objected, but soon after consented to have taken and used when he had removed his store of provisions from it. Meanwhile some of the company had jumped into and taken possession of the outside boat and were pushing it along that of the deceased, when the officer in charge of the force and the deceased were observed to be engaged in a struggle—the deceased endeavoring to hold his boat to the wharf with a boat-hook, and the officer to break his hold and wrench the boat-hook out of his grasp. At this juncture some one cried out, "Don't you see they are fighting the captain?" and some one in the outside boat, ascertained by the verdict to be the prisoner, dealt a blow with a fire-man's pole on the head of the deceased, and from which he shortly after died.

The jury under the instructions of the court and upon the evidence heard by them rendered a verdict finding the pris-

oner "not guilty of the murder in manner and form as charged," but, "guilty of manslaughter."

During the trial the prisoner's counsel proposed to read in evidence the examination of one John Williams, taken and reduced to writing at the coroner's inquest held over the body of the deceased, and to remove objections to its competency proceeded to show that the witness' name was endorsed on the bill of indictment, and not being called for the state, a summons had been issued for him at the instance of the prisoner and the sheriff had made return that he could not be found, as, residing in the city, he had that morning left home and was absent. The evidence was refused and this was the first error assigned.

The prisoner's counsel moved the court to set aside that part of the verdict which convicts the prisoner of the felonious slaying, and grant a new trial of the charge; and as to so much as acquits of the crime of murder, that it be adjudged to stand.

In support of the application for a partial new trial the following errors are assigned:

1. In rejecting the deposition taken upon the inquisition of the coroner and offered under the circumstances set forth;

2. For omitting to recall to the attention of the jury, in recapitulating the evidence, certain testimony alleged to have been favorable to the prisoner; and

3. For erroneous instructions in the charge to the jury.

First Exception: The refusal of the court to permit the introduction of the examination of the witness, Williams, on behalf of the prisoner was correct and in strict accordance with the law as declared by the court in former adjudications.

In *State* v. *Young*, 1 Winst., 126, it is held that such examination is not competent evidence against a person on trial for homicide. But the very point is decided in the

subsequent case of *State* v. *Taylor*, Phil., 508, where the examination of the witness before a coroner's jury was offered and rejected. "The objection to the evidence," says BATTLE, J., speaking for the court, "was put upon two grounds; 1st, that the testimony was irrelevant, and, 2d, that it was not shown by the prisoner that Wheeler (the witness) was dead, or what had become of him. His Honor rejected the evidence without stating his reasons for it. We are inclined to think that either ground of objection was sufficient *and we are entirely satisfied that the last was.*"

The same principle had been previously applied to examinations before committing magistrates in *State* v. *McLeod*, 1 Hawks, 344, and *State* v. *Valentine*, 7 Ired., 225.

Second Exception: The second cause of complaint rests upon an alleged neglect to recite certain portions of the testimony, contained in the exceptions, in the charge to the jury: The facts stated in the case show that no legal grounds exist to sustain the objection. The testimony of the witnesses, in all the material details bearing upon controverted points, seems, as His Honor says, in a condensed form, to have been reduced to writing and read over to the jury in anticipation of any directions upon questions of law. At the close of the recital, the prisoner's counsel called attention to an omitted part of the statement of the witness, Allen, to-wit, "that the man who kept on shoving the flat after the blow was stricken was not the man who struck the deceased." To this the court facing the jury at once responded, "That is true, gentlemen, Allen did say so." No other omission was suggested and no further correction asked. It was the duty of counsel, if evidence important to the defence had been overlooked, then to call it to the attention of the judge and have the omission supplied. It would be neither just to him nor conducive to a fair trial to allow this neglect or oversight, attributable to the counsel quite as much as to the judge, to be assigned for error

entitling the accused to another trial, whatever force it might have in influencing the court in the exercise of an unreviewable discretion to grant it.

Besides, the omitted evidence is only set out in the exceptions submitted several days after the rendition of the verdict, and are, as His Honor states, in some respects incorrectly reported. This objection furnishes no ground for disturbing the verdict as has been often decided. *State* v. *Scott*, 2 D. & B., 35; *State* v. *Haney*, *Ib.*, 390; *Whissenhunt* v. *Jones*, 80 N. C., 342; *State* v. *Caveness*, 78 N. C., 484.

Third Exception: The third exception is to the instructions given to the jury upon matters of law: The facts of the homicide, upon the concurring testimony of the witnesses, and in their most favorable aspect for the prisoner, make the offence of manslaughter, and the jury are fully sustained in their verdict convicting of that offence, by the authority of the *State* v. *Cæsar*, 9 Ired., 391, and the cases cited in the opinions of NASH and PEARSON, JJ.

Numerous instructions in writing were asked for the prisoner, some of which were given, some refused, and others withdrawn. "No exceptions were taken by the prisoner's counsel," as the case states, "to the ruling of the court in regard to any of these instructions, and they are set out here for the reason that after being admitted by the court, they necessarily constitute a part of the instructions to the jury."

We have carefully looked over and considered the instructions, as well those delivered at the instance of the prisoner as those added by the court to complete the charge; and while many of them are but abstract undisputed propositions of law, the law applicable to the facts developed was in our opinion fairly explained to the jury, except in a particular noticed to avoid an inference of its meeting our approval. The instruction referred to is in these words:

"If the jury from the evidence believed that the prisoner

was standing on the outside flat with the fireman's pole in his hand, which was an instrument of a most deadly character, and while the flat was passing that of the deceased, and the deceased was holding on to his gig or flat-pole, and Nixon was trying to wrench the pole out of the hands of the deceased and some one on the wharf cried out, "Don't you see they are fighting the captain," or words to that effect, and at this time the prisoner struck and killed the deceased, this would be a case of murder, unless the jury were satisfied from the nature of the tussle between Nixon and the deceased the prisoner had good reason to believe that the deceased was about to commit a capital felony." The same view is more or less distinctly intimated in the other parts of the charge, and fails to recognize the extenuating legal effect of passion excited in the prisoner's breast by seeing his superior officer engaged in what was said and supposed to be a fight, under the immediate impulse of which he used the instrument in his hands. It was still in this view a case of manslaughter only, and the error of the judge is corrected by the finding of the jury and is rendered harmless.

A misdirection to the jury unless it has, or may have, misled them to a wrongful verdict does not authorize its being set aside. *Reynolds* v. *Magness*, 2 Ired., 26. Nor will a new trial be granted for an erroneous statement of the law which the finding of the jury corrects. *Glenn* v. *The Char. & So. Ca. R. R. Co.*, 63 N. C., 510; *Winburne* v. *Bryan*, 73 N. C., 47.

But as the errors alleged are assigned after verdict, and the prisoner is acquitted of the higher offence to which they relate, and by a conviction of which only would he have been prejudiced, he has no just ground for demanding another jury to try the charge for the minor and included offence.

As our opinion is against the prisoner upon his several

exceptions, it is needless to enquire whether the effect of a new trial granted is to put him on trial a second time for the crime charged in the indictment, or only for that of which he was found guilty. Upon this proposition discussed before us, the decisions in the courts of the different states are conflicting, and the opinions of elementary writers on criminal law and practice are not in entire harmony. In this state it has been ruled, Chief Justice RUFFIN delivering the opinion of himself and his able associates, that when at the instance of a convicted prisoner, charged in several counts in an indictment, on some of which he is found not guilty, a new trial is awarded, the entire verdict is set aside and he is put on trial as before upon the entire bill. *State* v. *Stanton*, 1 Ired., 424. We should be reluctant to disturb the doctrine laid down upon such high authority, and so long since acquiesced in, except upon the most cogent conviction of its error, notwithstanding the weight of modern authority to the contrary. But the question does not arise and we forbear the expression of an opinion upon it until it shall be presented for determination.

There is no error. This will be certified to the criminal court of New Hanover for further proceedings therein.

PER CURIAM. No error.

STATE v. BENJAMIN BAKER.

Indictment—Affray.

An indictment for an affray by fighting, which charges a mutual assault, need not set forth the place in which the fighting occurred, in order to enable the court to see that the same was a *public* place.

(*State* v. *Woody*, 2 Jones, 335; *State* v. *Brown*, 82 N. C., 585, cited and approved.)

STATE *v.* BAKER.

INDICTMENT for an Affray tried at Spring Term, 1880, of WILSON Superior Court, before *Avery, J.*

The defendant was indicted with one Cobb for an affray. A *nolle prosequi* was entered as to Cobb, the jury convicted the defendant who moved in arrest of judgment, and appealed from the refusal of the judge to grant his motion.

Attorney General, for the State.
Messrs. Murray & Woodard, for defendant.

SMITH, C. J. The sufficiency of the charge contained in the indictment, in form for an affray and for mutual assaults, to warrant the judgment upon a general verdict of guilty, is the only question presented in the record. The alleged defect consists in the averment that the criminal act was committed in a *public place*, instead of specifying the place, usual in the precedents, as a *highway* or *street*, so that the court could determine if it was public within the definition of the offence. The form adopted in this case, we believe, is that in common use in this state, and is indirectly sanctioned in *State* v. *Woody*, 2 Jones, 335. Indeed a street or highway does not comprehend all places which are public, and where the fighting of persons becomes an affray, within its definition. But if there were any force in the objection and the indictment was deficient in this particular, it clearly charges an assault and battery, and the verdict *convicts of the offence which is legally set out and charged.* We have recently held, where the bill was found by the grand jury against one only of the parties charged, that "an indictment in form for an affray becomes in legal effect one for assault and battery by him against whom it is found a true bill, and may be so described." *State* v. *Brown*, 82 N. C., 585.

The motion in arrest of judgment was properly overruled. This will be certified.

PER CURIAM. No error.

STATE v. RICHMOND PENDER.

Indictment—Removing Crop.

In an indictment under the act of 1876–'7, ch. 283, for removing a crop without satisfying the lessor's claims for rent, &c., it is sufficient to aver, in the words of the statute, that the act was done "wilfully and unlawfully," leaving it to the defendant to show in excuse, if he can, that such removal was made in good faith and for the preservation of the crop.

(*Harrison* v. *Ricks*, 71 N. C., 7, cited and approved.)

INDICTMENT for a Misdemeanor, in removing crop on which there was a lien, tried at Spring Term, 1880, of EDGECOMBE Superior Court, before *Gudger, J.*

The charge was substantially as follows: The jurors, etc., present that defendant agreed with one Newman to cultivate on a certain parcel of land (belonging to Newman) there situate, during the year 1878, a crop of cotton and corn and to divide said crop with Newman, the defendant to have all the cotton except two bales, and Newman to have two bales as his part; and by said contract it was not agreed between said parties that the crop should not be deemed and held to be vested in Newman before and until his share thereof was set apart to him; and by virtue of said contract, the defendant then and there entered upon said land, and from thenceforth until the 31st of December, 1878, raised a crop of cotton and corn thereon and had the same in his possession; and afterwards, to-wit, on the 14th of April, 1879, and before satisfying Newman's lien on the crop, the defendant did unlawfully and wilfully remove a certain portion thereof grown on said land during the year 1878, to-wit, seven bales of cotton and five barrels of corn, from and off said land, without first having obtained the consent of Newman, and without giving Newman or his

agent five days notice of the intended removal of the same, contrary, etc.

After conviction, a motion in arrest of judgment was made and overruled, judgment pronounced, from which the defendant appealed. See act of 1876-'77, ch. 283.

Attorney General, for the State.

The defendant was not represented in this court.

SMITH, C. J. The defendant is charged with the removal of a portion of the crop grown on rented land, without the consent or knowledge of his lessor and before the rent in kind (attaching as a lien thereto) had been delivered, contrary to the provisions of the act of March 12th, 1877, entitled, "an act to amend the landlord and tenant act." On the trial the defendant was found guilty and from the judgment thereon appeals to this court.

No statement of the facts accompanies the appeal, and no errors are assigned in the record, while upon the certificate of counsel that in their opinion the defendant has good ground for a revision of a sentence imposing a fine of ten dollars, and upon his oath of inability, the appeal is allowed without security, and this court called on, without the aid of argument on his behalf, or our attention directed to a single defect in the record or irregularity in the proceeding, to search for some matter apparent upon the face of the proceedings on which to arrest the judgment. The increased labor and responsibility thus imposed upon a court, diminished in number with enlarged duties to meet, and unaided by argument in the investigations required to be made, are obvious, and must render the conclusions reached unsatisfactory to its members and perhaps still more so to the profession. Whether the indiscriminate right of appeal allowed the defendants in criminal prosecutions, when the punishment imposed is nominal only, or trivial, does not require

some restrictions which without impairing any just right of the accused to have his case reviewed will lesson the accumulating evil, are matters which rest in the sound discretion of the law-making power, and our duty is discharged in directing its attention to the subject.

In examining the record in the absence of any defect suggested, we are unable to discover any sufficient grounds on which the appeal can be sustained. The indictment imperfectly describes the contract between the parties, but its effect according to our understanding of its terms is to vest an estate in the defendant during the crop-season at least and to create a lien upon the crop for the portion to be delivered as rent. This, in the absence of statutory regulation, would put the title to the crop made by the labor of the defendant in him, and require from him the separation and delivery of the rent-cotton to the lessor, as is held in *Harrison* v. *Ricks*, 71 N. C., 7. But the first section of the act on which the prosecution is founded puts the title to the crop thus raised in the lessor, to be held as a security until the rent is paid, and for the removal of it meanwhile from the premises, without the required previous notice to the lessor, and his assent, prescribes the penalty mentioned in section six.

The bill alleges the removal to have been "wilfully and unlawfully" made, and negatives the conditions on which it would have been permissible. While the obvious purpose of the statute is the protection of the lessor's interest against a fraudulent disposition or appropriation of the property inconsistent with his right and tending to defeat the lien for rent, the wrongful intent is not a constituent of the criminal act described, and the offence is sufficiently charged in the substantial words of the act. The removal when made in good faith and for the preservation of the crop, when shown on the trial, would undoubtedly constitute a good defence.

These are the only exceptions to the form of the indictment which occur to us, as being possibly in the mind of the counsel who advised the appeal, unless there were others taken before or during the trial, of which the record is silent, and we are of opinion that they are untenable. This will be certified to the end that the court below proceed to pronounce judgment on the verdict.

PER CURIAM. No error.

STATE v. FISHBLATE, Mayor, and others.

Indictment—Sufficiency of—Duty of Municipal Officers concerning Streets.

An indictment against the mayor and aldermen of a city for a neglect of official duty in failing to remove obstructions from a street and to keep the same in repair, is fatally defective if it fails to point out the particular public duty neglected, or to refer to the statute imposing it.

(*State* v. *Justices of Lenoir*, 4 Hawks, 194; *State* v. *Com'rs of Halifax*, 4 Dev., 345; *State* v. *King*, 3 Ired., 411; *State* v. *Patton*, 4 Ired., 16; *State* v. *R. R. Co.*, Busb., 234, cited and approved.)

INDICTMENT against the mayor and aldermen of the city of Wilmington, tried at February Term, 1880, of NEW HANOVER Criminal Court, before *Meares, J.*

The defendants moved to quash the indictment, the motion was allowed, and the state appealed.

Attorney General, for the State.

No counsel for defendants.

SMITH, C. J. The defendants, the mayor and aldermen of Wilmington, are charged with a neglect of official duty in

failing to remove certain obstacles in some of the streets of the city, impediments in the way of their use, and for suffering them to become ruinous and in decay for want of necessary reparation.

The defendants moved the court to quash the indictment for several defects specified in the record, and among others, that the indictment fails to point out the particular public duty neglected, or by what statute they are required to remove the obstacles or to repair the streets. The court sustained the motion, and from the judgment quashing the bill the state appeals.

We think there was no error in the ruling of the court, and that the bill is fatally defective in that it does not specify the duty imposed, nor how imposed, the neglect of which constitutes the offence. This will appear by reference to some of the cases determined in this court.

In *State* v. *Justices of Lenoir*, 4 Hawks, 194, the bill charged the defendants "whose duty it is to amend and repair" the jail of their county whenever it is necessary, with negligently and unlawfully permitting it to become and remain ruinous and in decay for want of reparation. The defendants demurred and the demurrer was sustained, Chief Justice TAYLOR saying: "There is no act which makes it the duty of the justices to repair the jail, and its going to ruin and decay may be the consequence of their neglecting the duty which is assigned, but the offence producing that consequence should be positively stated." HENDERSON, J., in a separate opinion says: "The justices of our county court are not obliged by their own exertions to build and repair jails; they are only to use the means to that end which the law has placed in their power; they are to lay the tax, make the order, appoint a treasurer of public buildings and appoint commissioners to contract for the building of the jail. An omission to perform one or all of these acts, when necessary, is a violation of their duty, and they being of public

concern, such omission is indictable. But the indictment must be conformable to the fact. It must charge which of those duties was omitted."

This case was followed by that of *State* v. *Commissioners of Halifax*, 4 Dev., 345, essentially the same as that before us, in which the defendants are charged with neglecting to keep in repair a certain street in the town, which they were "bound and obliged by the act of the general assembly of this state to keep and maintain in safe, convenient and complete repair." The judgment was arrested because the indictment did not specifically set out any official duty imposed on the commissioners, and GASTON, J., after a careful analysis of the law, prescribing the various public duties, adds: "We know of no public law which obliges the persons who may be commissioners of any incorporated town to keep the streets in order, and whenever an indictment is preferred against those who are not bound by the common law and of common right to repair, such indictment must set forth the matters, by reason whereof the obligation is devolved on the persons charged." The same principle is recognized and asserted in *State* v. *King*, 3 Ired., 411; *State* v. *Patton*, 4 Ired., 16; and in *State* v. *R. R. Co.*, Busb. 234.

Applying the principle thus declared to the present indictment, it will be found deficient in a similar failure to set out the particular duty devolved on the defendants in reference to the streets, or refer to the statu e which imposes it. The averment in the bill is "that during all the said time (while the streets were so obstructed and out of repair) it was incumbent upon and yet is the duty of the said mayor and aldermen (naming the defendants) to amend and repair said streets and highways and to remove therefrom the said bars of iron, cross-ties and rails of lumber (the alleged obstruction) which they unlawfully, wilfully and negligently did omit and yet do omit to do."

The mayor and aldermen, in the language of Judge

HENDERSON, "are not obliged by their own exertions" to keep the streets of the city in repair, but only to use the means placed at their disposal for that purpose. It nowhere appears that they have omitted any duty enjoined upon them by law. The act of incorporation authorizes the board of aldermen "to make and provide for the execution thereof, such ordinances, by-laws, rules and regulations as they may deem necessary and proper." Private Acts 1866, ch. 2, § 8. It is not alleged that they have failed to make such regulations as were needed in regard to public streets, or to appoint proper persons to see that they were kept in order, or to levy taxes when needed to defray expenses incurred thereby, nor is any other supposed official delinquency in respect to the streets or the removal of nuisances pointed out, nor any reference to a law by which they are imposed.

These imperfections are fatal to the prosecution, and following the precedents we must so declare. If the verdict had been given, judgment would be arrested, and while the motion to quash is sometimes refused, there is no reason for permitting a cause to proceed when it is clear no judgment can be rendered on conviction.

There is no error and the judgment must be affirmed.

PER CURIAM. Affirmed.

STATE v. SOLOMON JONES.

Justice's Jurisdiction—Disposing of Property under Mortgage.

Justices of the peace have exclusive jurisdiction of the offence of fraudulently disposing of personal property embraced in a chattel mortgage. (Acts 1874, ch. 31; 1875, ch. 215; 1879, ch. 92.)

(*State* v. *Upchurch*, 72 N. C., 146; *State* v. *Edney*, 80 N. C., 360, cited and approved.)

STATE *v.* JONES.

INDICTMENT for a Misdemeanor tried at Spring Term, 1880, of CAMDEN Superior Court, before *Graves, J.*

Upon the facts found by the special verdict, the court held that defendant was not guilty, and the solicitor for the state appealed. The decision of this court being upon the question of jurisdiction, a statement of the facts found by the special verdict is unnecessary.

Attorney General, for the State.
Messrs. Pruden & Shaw, for defendant.

SMITH, C. J. The defendant is charged with violating the act of 1874-'75, ch. 215, in disposing of part of his crop embraced in a chattel mortgage with intent to defraud the mortgagee-creditor, and on the trial the jury rendered a special verdict. The court being of opinion that the facts found do not constitute the criminal offence imputed and that the defendant was not guilty, so adjudged and the solicitor appealed.

The judgment of the court is sustained in the argument for the defendant upon several grounds:

1. The verdict fails to find the intent to defraud, which under the statute is a constituent element of the criminal act.

2. The conveyance of twenty barrels of a planted crop which yields thirty barrels of corn, is operative to pass title, and the mortgagee acquired no property of which he could be defrauded by a disposition of any part of it.

3. The verdict does not show that the defendant sold more than the excess to which he was entitled under the mortgage.

There is much force in each of these objections, but it is not necessary to pass upon them, since it is plain that the offence charged, whether supported by the verdict or not, is exclusively cognizable before a justice of the peace, and the

superior court has no original jurisdiction to hear and determine it.

The act upon which the indictment is framed, which is but a re-enactment of the previous act of 1873-'74, ch. 31, extending its provisions to those who knowingly purchase property so conveyed or under lien, or who aid and assist in its fraudulent disposition, prescribes the punishment of "a fine not exceeding fifty dollars or imprisonment not exceeding one month." As the amended constitution (Art. IV., § 27,) confers jurisdiction on justices of the peace "under such regulations as the general assembly shall prescribe," of all criminal matters where the punishment cannot exceed "a fine of fifty dollars or imprisonment for thirty days," the offence when committed was within the cognizance of the superior court alone, as a month may be more than thirty days. *State* v. *Upchurch*, 72 N. C., 146; *State* v. *Edney*, 80 N. C., 360.

But the law has been changed by the act of 1879, ch. 92, section four of which provides that the words "imprisonment for one month" whenever used in any statute shall be replaced by the substituted words, "imprisonment for thirty days"; and section seven vests in the justices of the peace exclusive original jurisdiction of all criminal matters where the punishment which now is or hereafter may be prescribed by law "shall not exceed a fine of fifty dollars or imprisonment for thirty days." The superior court therefore had no jurisdiction of the offence when the prosecution was instituted, and was not authorized to render judgment therefor.

There is no error in the refusal to proceed to judgment, and the defendant is entitled to his discharge. This will be certified.

PER CURIAM. No error.

STATE v. WILLIAM M. DUDLEY.

Justice's Jurisdiction—Entering on Land.

Justices of the peace have exclusive original jurisdiction of the offence of entering on land after being forbidden. (Act 1879, ch. 92.)

INDICTMENT for a Misdemeanor, tried at Fall Term, 1879, of CARTERET Superior Court, before *Eure, J.*

The defendant was indicted at a superior court opened and held for the county of Carteret, on the ninth Monday after the first Monday in March, 1879, for an unlawful and wilful entry upon the land of one Laughton, without a license therefor after being forbidden so to do. Upon plea to the jurisdiction of the court, the judge held that exclusive original jurisdiction of the offence charged in the bill of indictment was vested in a justice of the peace, and discharged the accused, and from that judgment *Galloway*, solicitor for the state, appealed.

Attorney-General, for the State.

Defendant not represented in this court.

DILLARD, J. We concur in the opinion of the court below. By the act of 1879, ch. 92, § 1, exclusive original jurisdiction is given to justices of the peace of divers offences mentioned in said section, with a power of punishment not exceeding a fine of fifty dollars or imprisonment for thirty days; and among the offences so made cognizable by a justice of the peace are those enumerated in section 116 of chapter 32 of Battle's Revisal.

Said section 116 enumerates three offences, (1) an unlawful and wilful entry without license after being forbidden, as charged in this bill of indictment; (2) an unlawful and

wilful entry by a person not being the present owner or *bona fide* claimant of the premises, and carrying therefrom any wood or other thing *without* a felonious intent, both of these being misdemeanors; and (3) such entry and carrying away of wood or other thing as specified in the last offence aforesaid *with* a felonious intent, which last offence in the words of the statute is to be deemed a larceny and punished as such.

The offence charged against the defendant is of the first kind described in section 116, and is a petty misdemeanor. It was therefore within the constitutional power of the legislature to give cognizance of it and such offences, to a justice of the peace, as authorized by the constitution. Art. I, § 13, and Art. IV, § 27.

The act of the legislature (1879, ch. 92, § 1) undertakes to clothe justices of the peace with jurisdiction of the misdemeanor charged in the bill of indictment *in this case*. It may be questioned whether it operates to confer on justices of the peace jurisdiction to try and determine the offence in the 116th section, which is *to be deemed a larceny and be punished as such*. But the question does not arise on this indictment, and we therefore express no opinion on that point. There is no error. Let this be certified.

PER CURIAM. No error.

STATE v. JAMES RICE.

Larceny—Sufficiency of Evidence.

Where, on an indictment for larceny, it was in evidence that two days after the larceny was committed, the stolen goods were found in an uninhabited house half a mile from where defendant lived, in which

the former occupant had left some turnips, etc.; that at one o'clock at night of the same day, the defendant and a woman went to the house, he going in at the window and she remaining outside; that when certain persons who were watching the house approached, the woman ran off, and the defendant being ordered to come out did so after some delay; *Held*, that the evidence did not warrant the conviction of the defendant.

(*State* v. *Patterson*, 78 N. C., 470; *Cobb* v. *Fogalman*, 1 Ired., 440; *Brown* v. *Kinsey*, 81 N. C., 245; *State* v. *Vinson*, 63 N. C., 335, cited and approved.)

INDICTMENT for Larceny, tried at Spring Term, 1880, of WAKE Superior Court, before *Gudger, J.*

Verdict of guilty, judgment, appeal by defendant.

Attorney-General, for the State.

Mr. J. H. Fleming, for defendant.

ASHE, J. The only question raised by the record in this case is whether there was any evidence against the defendant, and if any whether it was sufficient reasonably to warrant the jury in finding a verdict of guilty.

The store-house of one Holloman and another, in the county of Wake, was broken into on the night of the first of February, 1880, and a quantity of goods stolen therefrom, consisting of flour, tobacco, sugar, snuff and other articles. On the Wednesday after the Monday, on which the goods were taken, they were found in the loft of an uninhabited house on the plantation of one John Medlin, situated some three or four hundred yards from his dwelling house, and the defendant lived about one half mile from his house. This house had been abandoned some weeks before this by Medlin, and some plunder (turnips for one thing) left in it. The house was surrounded and watched on the Wednesday night after the theft, and about 1 o'clock at night a man and woman came to the house, he raised a window and entered

while she remained on the outside. When those watching approached, the woman ran, and when the man was ordered to come out, after some delay he said "it is Medlin's mother, don't be afraid," and when asked, "is that you Jim," he said "yes" and came out, and it proved to be the defendant.

The conduct of the defendant, and the woman by whom he was accompanied, was certainly very suspicious, but the fact of his going to the house at that time of the night, which is the only circumstance pointing to him as the guilty party, is consistent with the hypothesis of his innocence. It is possible he may have gone to the house after some of the plunder which Medlin had left there, or in pursuance of an assignation with his companion, or it may be that he discovered the goods in the loft, deposited there by the person who had stolen them, and he went there for the purpose of purloining them from their place of deposit.

The evidence to convict the defendant with the larceny is very slight, at least it only raises a suspicion of guilt and "where there is no evidence or if the evidence is so slight as not reasonably to warrant the inference of the defendant's guilt, or furnish more than materials for mere suspicion, it is error to leave the issue to be passed on by the jury and they should have been directed to acquit." *State* v. *Patterson*, 78 N. C., 470; *Cobb* v. *Fogalman*, 1 Ired., 440; *Brown* v. *Kinsey*, 81 N. C., 245; *State* v. *Vinson*, 63 N. C., 335.

There is error. Let this be certified to the superior court of Wake county that the case may be proceeded with according to this opinion and the law.

Error. Reversed.

STATE v. ALFRED GORAM.

Peace Warrant.

A peace warrant in which is alleged no threat, fact or circumstance from which the court can determine whether the fear of the prosecutor is well founded, should be quashed.

(*State* v. *Cooley*, 78 N. C., 538, cited and approved.)

PROCEEDING under a Peace Warrant heard at Spring Term, 1880, of WAKE Superior Court, before *Gudger, J.*

The warrant was issued, in behalf of one Malvina Goram, by a justice of the peace, and alleged "that she has reason to fear and doth fear that Alfred Goram will do her serious bodily injury, and hath prayed that he be bound with surety to keep the peace." Upon the hearing, the defendant moved to quash the proceedings on the ground that the warrant does not show that any threats were made by defendant. Motion overruled and the defendant appealed.

Attorney General, for the State.
Mr. J. H. Fleming, for defendant.

DILLARD, J. The defendant on the application of Malvina Goram was adjudged in a justice's court to find surety of the peace, and on appeal to the superior court he moved to quash the warrant on the ground that no threat, fact, or circumstance was alleged either in the warrant, or affidavit on which it was founded, from which it could be seen that the fear of the party praying surety of the peace was well founded. His Honor overruled the motion and adjudged that the defendant pay the costs, from which judgment the appeal is taken.

In this case, the application for surety of the peace was

in terms based on the allegation that the party applying, had reason to fear and did fear that defendant would do her serious bodily injury, and the case of appeal does not disclose whether any ground to bind was established by the evidence. In *State* v. *Cooley*, 78 N. C., 538, it is ruled that a peace warrant alleging no threat, fact or circumstance from which the court can determine whether the fears of the party praying surety of the peace were well founded, should be quashed; and upon the authority of that case we hold that the judge should have quashed the warrant in this case.

Let this be certified to the end that the warrant be quashed in the court below.

PER CURIAM. Error.

STATE v. FRANK HUGHES.

Practice—Judgment against prosecutor for Costs.

Where after the acquittal of the defendant in a criminal action, one M was marked as prosecutor and adjudged to pay the costs on motion of the defendant and the solicitor, but upon notice given by the defendant alone; *Held* not to be error. (Act of 1879, ch. 49.)

(*State* v. *Crosset*, 81 N. C., 579, cited and approved.)

INDICTMENT for Larceny tried at Spring Term, 1880, of STOKES Superior Court, before *Buxton, J.*

Upon return of a verdict of "not guilty" the defendant moved to have the name of the prosecutor, Martin, marked on the bill. This was resisted on the ground that the notice and motion in such case should have been made by the

state. The court allowed the motion and gave judgment against the prosecutor for costs, from which he appealed.

Attorney General, for the State.
No counsel, *contra*.

DILLARD, J. The defendant was indicted for stealing tobacco plants of James G. Martin, and on the trial was acquitted, and thereupon, on notice by defendant to said Martin, a motion was made by him, and also by the solicitor without other notice than the one given by the defendant, Hughes, to have said Martin set down as prosecutor and for judgment against him for costs, and from the judgment of the court ascertaining said Martin to be prosecutor and adjudging the costs against him, said Martin appeals to this court.

By act 1874–'75, ch. 207, it was enacted that in all criminal actions, in case of the acquittal of the accused or his discharge from the prosecution otherwise, the costs including fees to his witnesses, upon certificate of the judge or justice of the peace of their being necessary to the defence, should be paid by the prosecutor marked upon the bill, if any, upon the further certificate, that there was not reasonable cause for the prosecution and that the same was not demanded by the public interests. And under the act it was held that the person prosecuting in order to be liable should have been marked as such on the bill when sent to the grand jury, and that the court had no right to order him afterwards to be so marked without his consent. *State* v. *Crosset*, 81 N. C., 579, and cases there cited.

By the act of 1879, ch. 49, power is given to the judge, court or justice of the peace, before whom a trial is had, to ascertain and order marked a party as prosecutor at any stage of a criminal proceeding, with the proviso, that he is not to be so marked after bill found without notice to him

to show cause against it; and when a person is so ascertained and set down, he is liable in case of an acquittal, *nolle prosequi*, or arrest of judgment to pay the costs including the fees to accused's witnesses, whom the judge, court or justice of the peace shall certify to have been proper for the defence, and whenever such judge, court or justice of the peace shall be of opinion, that there was no reasonable ground for the prosecution and that the same was not called for by the public interests.

In this case at the return of the verdict of not guilty, the defendant then and there, as stated in the judge's case of appeal, notified Martin of a motion to be made to have him marked as prosecutor and for judgment against him for costs, and afterwards the motion was made the said Martin being present and resisting on the ground that the notice and motion should have been by the state and not by the acquitted party. On consideration of the motion the court adjudged the prosecution to be frivolous and not called for by the public interests and ordered that said Martin be set down as prosecutor and gave judgment against him for the costs, and thereupon, on motion of the solicitor, it was again adjudged that he pay the costs, and the appeal of the said Martin presents only the question of the legality of this judgment.

By the aforesaid act of 1879, ch. 49, the court unquestionably had the power to ascertain and set down Martin as prosecutor, and to enter judgment against him for the costs. That is conceded by Martin, but he urges that Hughes, having been acquitted and not asking any certificate as to the necessity of any witnesses summoned on his part to his defence, was not interested in the matter of costs, and it was error in the court below to act on *his notice and motion*.

The judge in his statement sent up sets forth that the judgment against Martin was on the notice and motion of Hughes, and also on the motion of the solicitor, and so the

question is narrowed down to the point, whether under the circumstances it was admissible to adjudge Martin to pay the state's costs on motion of the solicitor without other notice than that which had been given by the acquitted party.

The object of the notice to a party proposed to be set down as prosecutor and to be subjected to costs, is, that he may have a day in court to show cause against the application, if any he have; and here, on notice of motion from Hughes, the acquitted defendant, Martin was present and heard in opposition, and no reason appears to us why the court, although Hughes was asking nothing in respect of costs incurred by him, might not, at the hearing of the motion on a notice given by Hughes only, have ordered Martin to be marked as prosecutor and adjudged the costs against him. Martin under the notice from Hughes had his day in court and his opportunity of showing cause was as complete as if he had had another notice from the prosecuting officer of the state.

There is no error and this will be certified to the court below.

PER CURIAM. No error.

STATE v. GEORGE W. MCMINN.

Retailing without License—Evidence—Judge's Charge.

Upon the trial of an indictment for an unlicensed retailing of spirituous liquors, the evidence of the prosecuting witness was that defendant had a room wherein was a table with a hole in the top and a vessel on it containing such liquor; that on sundry times witness went into the room and poured out a drink of the spirits less than a quart, and hav-

ing drunk it, dropped some money, at the rate of a nickle for a drink, into the hole, the defendant being present and nothing being said by him or the witness; *Held*, that the court was not in error in refusing to charge that there was no evidence of a sale or contract for the sale of the liquor, and in charging instead that if the jury should believe from the testimony that the liquor drank by witness was the property of the defendant, and that he received the money put into the hole by the witness as payment therefor, and that this was a device to evade the statute against retailing, the defendant was guilty.

(*State* v. *Kirkham*, 1 Ired., 384; *State* v. *Bell*, 2 Jones, 337; *State* v. *Simmons*, 66 N. C., 622, cited and approved.)

INDICTMENT for selling liquor in violation of the statute, tried at Spring Term, 1880, of HENDERSON Superior Court, before *Schenck, J.*

The defendant was indicted for selling spirituous liquor to one Nelson by a measure less than a quart without having a license therefor, and on the trial the evidence by Nelson was, that the defendant had a room in the town of Hendersonville, and in the room was a table with a decanter on it containing spirituous liquor and tumblers, and in the top of the table was a small hole; that during a court week, as well as at sundry other times, he went into the apartment and poured out a drink of spirituous liquor less than a quart and drank it, and then dropped some money, at the rate of a nickel for a drink, into the hole in the table; that this was done in the presence of the defendant, and nothing was said between them.

Upon the evidence the defendant asked the court to charge the jury that there was no evidence of a sale or contract for sale of spirituous liquors on his part. This was refused, but in place thereof the court charged that if the jury should believe from the testimony that the spirituous liquor drank by the witness was the property of the defendant, and that he received the money put into the hole by the witness in payment therefor, and that this was a device on the part of the defendant to evade the statute against

retailing, the defendant was guilty. On being found guilty and judgment pronounced, the defendant appealed.

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

DILLARD, J. There is no error in the refusal of the charge requested, nor in the charge given. A sale is the transmutation of the property in a personal chattel from one to another on a *quid pro quo*, paid or agreed to be paid, and such a change of property in the retail of spirituous liquors by the small measure is usually effected by the delivery of the article and the payment of the price simultaneously, but it may be in other modes. If the liquor come directly or indirectly from the owner to another on a valuable consideration, it is a sale; and if so, it is perfectly immaterial as to the mode or manner of it. To constitute a sale under the statute against retailing, there is no necessity for a manual separation and delivery of the parcel by the retailer to the customer, but it will be a delivery sufficient in law if the keg, decanter or other vessel be so placed or prepared as that the customer can or may with the consent of the owner draw for himself; and so likewise, the price paid in completing the sale need not be paid into the hands of the proprietor, but it will be equivalent if it be deposited for him in a place of his appointment.

Now in our case, the particular drink for the sale of which this indictment was brought, was not poured out and delivered by the defendant to Nelson, but the proof was that the defendant had a room in the town in which was a table with a decanter thereon, and tumblers, and a small hole in the top of the table, and that Nelson during the week of court went into this room, as he had done divers times before, and poured out and drank a small parcel of liquor, and then dropped into the hole money at the rate of a nickel for a

drink, the defendant being present and nothing said between him and the witness. These facts, although no conversation passed between the witness and defendant, were some evidence of the alleged illegal sale to Nelson during court week, and not only warranted the judge to refuse the instruction asked by the defendant, but to authorize him to submit the same to the consideration of the jury as reasonably sufficient to establish the guilt of the defendant, if therefrom they should find that the liquor drank by the witness was the property of the defendant, and that he received therefor the money which was dropped into the hole in the table, and that the arrangement of things was a device to evade the statute. His Honor's charge was in accordance with the precedents in the cases, *State* v. *Kirkham*, 1 Ired., 384; *State* v. *Bell*, 2 Jones, 337; *State* v. *Simmons*, 66 N. C., 622, and we must declare there is no error. Let this be certified.

PER CURIAM. No error.

STATE v. AMERICUS COOPER.

Tales Jurors, Qualification of.

Tales jurors must own real estate of freehold situate in the county where the court is held in which they are to serve.

INDICTMENT for larceny tried at Spring Term, 1880, of WAKE Superior Court, before *Gudger, J.*

On the trial of this case, a tales juror was challenged for cause on the ground that he was not a freeholder within the county of Wake, (he owned land lying in the county of

Franklin) The challenge was disallowed by the court and the defendant excepted. Verdict of guilty, judgment, appeal by defendant.

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

ASHE, J. There was error in refusing to allow the challenge. By virtue of section 25, chapter 31, of the Revised Code, it was provided "that the courts of pleas and quarter sessions, at the first term which shall be held after the first day of January next and once at least in every two years thereafter, shall cause their clerk to lay before them the tax returns of the preceding year for their county, from which they shall select the names of such persons only as are freeholders, and as are well qualified to act as jurors, a list of which names shall be made out by their clerk and constitute the jury list; and such jury lists so made up shall continue for two years in its operation," &c. The 26th section of the same chapter provides how the names on the list shall be written on scrolls and put in a box prepared for the purpose with two divisions, marked No. 1 and 2, and the jurors to be drawn for each court from No. 1 and placed in No. 2., &c., &c. And then in section 29 of the same chapter it is further provided "that there may not be a defect of jurors, the sheriff shall by order of court summon from day to day, of the bystanders, other jurors, being freeholders within the county where the court is held, to serve on the petit jury, and on any day the court may discharge those who have served the preceding day."

The same qualification is required for tales jurors as for jurors on the original panel, to-wit, that they should be freeholders within the county where the court is held, which must mean that they must own real estate in the county where the court, to which they are summoned to serve as

jurors, is held. We do not see how there can be any doubt about the construction of the act as it stood in the code. The fact that in forming the list for a county the names of such persons only as are freeholders should be selected, and that that selection was required to be made from the tax returns of the preceding year, is conclusive that the legislature contemplated that the jurors should own real estate sufficient to qualify them as freeholders, in the county where the court is held. All the lands in the county owned by individuals or corporations are required to be listed for taxation and are presumed to be entered with the names of their owners on the tax returns of the county. It is the place where every one would look to find who of the citizens of the county were freeholders within its boundaries. They certainly would not expect to find there who of the citizens owned land in other counties. But the law in regard to the qualification of jurors on the original panel is now altered. By the act of 1868, ch. 9, § 2, the only qualification required is that they should have paid tax for the preceding year, and be of good moral character, and of sufficient intelligence, but it is different as to tales jurors. The provision in section 29 of chapter 31 of Revised Code above cited, has not been altered or amended, but has been carried forward in Battle's Revisal, page 860, in the very words of the Revised Code, as an addendum to the Code of Civil Procedure, § 229. The language of the section is explicit, "that there may not be a defect of jurors, the sheriff shall by order of the court summon, from day to day, of the bystanders, other jurors, *being freeholders within the county where the court is held,* to serve on the petit jury."

We think there can be no possible room for doubt about the proper construction of this proviso. It prescribes who must be summoned as tales jurors; first, they must be bystanders; and secondly, they must be freeholders within the county where the court is held. The term "within the

county where the court is held," evidently refers to the proprietorship of real estate within the borders of the county, and not to the presence within the county of the persons to be summoned who are freeholders in that or other counties; for this last requisite, if that is meant, would be superfluous, as they had been already required to be of the bystanders. There was a motion in arrest of judgment on the ground of a defect in the indictment, but it is unnecessary to consider that question, as the decision on the point discussed disposes of the case.

There is error. Let this be certified to the superior court of Wake county that a writ of *venire de novo* may be awarded the defendant.

Error. *Venire de novo.*

STATE v. JOHN MITCHELL.

Territorial Jurisdiction—Criminal Pleading.

1. The courts of this state have jurisdiction only of offences committed within its territorial boundaries, and if they are committed in another state, that is a matter of defence under the plea of "not guilty."
2. Such a defence does not call for a plea in abatement under Bat. Rev., ch. 33, § 70, which was enacted to cover cases where the offence was committed in the state, but which was charged to have occurred in the wrong county.

INDICTMENT for an Assault and Battery tried at Spring Term, 1880, of WATAUGA Superior Court, before *Gilmer, J.*

During the trial, the defendant offered to prove that the offence, if any, was committed beyond the county line of Watauga and in the state of Tennessee, but the court upon objection by the state refused to admit the testimony, unless

the defendant would withdraw the plea of "not guilty" and plead in abatement, which he declined to do. And thereupon the court rejected the evidence and the defendant excepted. Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.
Mr. G. N. Folk, for defendant.

ASHE, J. The ruling of His Honor seems to have been founded upon a misconception of the act of 1854–'55—Bat. Rev. ch. 33, § 70. This case does not come within the purview of that statute. The mischief intended to be remedied by it was the difficulty encountered by the courts in effecting the conviction of persons who had violated the criminal law of the state, where the offence was committed near the boundaries of counties, which were undetermined or unknown. And it often happened that where the boundaries were established and known, it was uncertain from the proof whether the offence was committed on the one or the other side of the line; and in consequence of the uncertainty and the *doubt* arising from it, offenders went "unwhipt of justice." This was the evil intended to be remedied. It had reference to the violation of the laws of this state committed near the boundaries of counties and not the borders of the state. The very terms and scope of the act support this construction, for it is enacted, "that in the prosecution of all offenders, 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, the truth whereof shall be duly verified on oath or otherwise, both as to substance and fact, wherein shall be set forth the proper county in which the supposed offence, if any, was committed; whereupon the court may on motion of the state commit the defendant, who may enter into recognizance as

in other cases, to answer the offence in the county averred by his plea to be the proper county; and on his prosecution in that county, it shall be deemed conclusively to be the proper county."

It is a necessary quality of a plea in abatement, that it should give a better writ, as in this case it is required by the act to set forth the proper county in which the offence, if any, was committed, which will be taken conclusively as the proper county to which the defendant may be recognized to appear to answer the charge of the state, unless it shall see proper to take issue upon the plea. When the act requires that the plea should set forth the county where the offence was committed, and that should be taken as the proper county for the trial to which the defendant might be recognized, it follows most conclusively that the offence referred to in the act was one committed within the borders of the state, in violation of the laws of the state, for our courts cannot take cognizance of the violation of the criminal laws of other states, and would have no right to recognize offenders to appear before their judicial tribunals.

The courts of this state have jurisdiction only of offences committed within its territorial boundaries, and if they are committed in another state, that is matter of defence under the plea of "not guilty." It is not a plea in abatement, because the plea could not give a better writ, that is, set forth the proper county which has jurisdiction of the offence, in which it might be tried. But a plea in abatement in this case in which the facts would have to be stated and verified, instead of *giving a better writ*, would defeat the prosecution, and therefore would not be a good plea.

There is error. A *venire de novo* is awarded. Let this be certified to the superior court of Watauga county that further proceedings may be had agreeably to this opinion and the law.

Error. *Venire de novo.*

STATE v. JULIAN MERRITT and others.

Violation of Town Ordinance—Sufficiency of Warrant.

1. In a criminal action before the mayor of a town, the warrant set out "that on or about May 9th, 1880, the defendants M and P did while driving out of town act in a disorderly manner by driving at a furious rate, etc., contrary to law and in violation of the sixth ordinance of said town and against the peace and dignity of the state;" *Held*, to be sufficient.
2. Since the general law for the government of towns (Bat. Rev., ch. 111), of which judicial notice will be taken, it is not necessary in criminal warrants for a violation of a town ordinance to aver an authority to pass the ordinance alleged to be violated.

(*Watts* v. *Scott*, 2 Dev., 1; *Com'rs* v. *Frank*, 1 Jones, 436; *Hendersonville* v. *McMinn*, 82 N. C., 532, cited, distinguished and approved.)

CRIMINAL ACTION commenced before the mayor of the town of Clinton, and heard on appeal at Spring Term, 1880, of SAMPSON Superior Court, before *Avery, J.*

The mayor of the town issued a warrant for the arrest of the defendants, in the following words: B. F. Boykin complains on oath and says that at and in the town of Clinton, on or about the 9th day of May, 1880, Julian Merritt and Avery Peterson did while driving out of town act in a disorderly manner by driving at a furious rate, and did whoop and hollow so loud as to disturb the quiet of the town, especially those persons living on the street on which they were driving, contrary to the law and in violation of the sixth ordinance of said town, and against the peace and dignity of the state.

The motion to quash the proceeding was allowed by the court below, and *Galloway*, solicitor for the state, appealed.

Attorney General and *E. T. Boykin*, for the State.

The defendants were not represented in this court.

SMITH, C. J. The criminal offence imputed to the defendants in the sworn complaint annexed to the warrant for their arrest is that of disorderly conduct in the streets of the town of Clinton in furious driving, whooping and hollowing and thereby disturbing its peace and quiet. The parties were brought before the mayor, and on the hearing required to pay a fine of two dollars and a half each, and the costs of the prosecution, and they appealed. In the superior court the defendants' counsel moved to quash the proceeding, and the motion being allowed, the solicitor in behalf of the state appealed to this court.

In *Watts* v. *Scott*, 2 Dev., 1, the warrant was for a penalty "for violating the 28th section of the ordinance of the said town" (Hillsboro) and after verdict two objections were made to its form. 1. The warrant did not state as a fact, the existence of the ordinance mentioned in it, nor the contents of such ordinance or any part thereof. 2. The warrant did not allege any act or omission, by which any penalty given in the ordinance had been incurred. The objections were sustained and the judgment arrested. On appeal the ruling was declared to be erroneous and the judgment was reversed.

In *Com'rs* v. *Frank*, 1 Jones, 436, the charge was that the slaves, "did on Sunday, 5th instant, violate town ordinance No. 5," and it was held insufficient for failing to "set forth the act of assembly by virtue of which the ordinance was passed."

Without attempting to reconcile these decisions and accepting the latter as the correct exposition of the law, we are of opinion the charge in the present complaint is sufficiently explicit. The arrest of judgment in the case last cited is based upon the want of an averment of authority in the commissioners to make the ordinance, which, if it existed, must have been conferred by a special statute. We have now a general law of which judicial notice will be

taken for the government of towns. Bat. Rev., ch. 111. Section 20 of the act vests in the corporate authorities of towns the power "to enforce their by-laws and regulations by imposing penalties on such as violate them." Section 30 gives criminal jurisdiction to their chief officers, and section 31 declares that "any person or persons violating any ordinance of any city or town of this state, shall be deemed guilty of a misdemeanor."

It is not therefore necessary now to aver an authority to pass the ordinance conferred by a general and public law as it was when that authority was derived under a special act of incorporation. It appears from the complaint: 1. That the acts of the defendants were disorderly, a disturbance of the public peace and proper to be suppressed. 2. That the specific ordinance violated is pointed out by its number, from which the defendants know the accusation made against them. 3. That their criminal conduct is "contrary to the law and in violation of the 6th ordinance of the town."

These averments are clearly sufficient when proved to the satisfaction of the jury to warrant the judgment of the court. It cannot be expected, nor is it required, that summary proceedings before an inferior tribunal, such as first passed on this charge, should be conducted with the care and precision necessary in indictments for crimes of higher grade, prosecuted in courts of general and superior jurisdiction, and in our opinion the order to quash is erroneous.

The case is distinguishable from *Hendersonville* v. *McMinn*, 82 N. C., 532. There, the reference to the violated ordinance was wholly indefinite and vague, whereas in the case before us it is explicitly designated.

The judgment must be reversed and the court below directed to proceed, and it is so ordered.

Error. Reversed.

STATE v. T. ALLEN.

Witness before Grand Jury—By whom Sworn.

The act of 1879, ch. 12, creates and authorizes an additional mode of swearing witnesses to testify before a grand jury, and does not abrogate the mode formerly prevalent of swearing them in open court.

(*State* v. *Cain*, 1 Hawks, 352, cited and approved.)

INDICTMENT for Assault and Battery tried at Fall Term, 1879, of HALIFAX Superior Court, before *Avery, J.*

On conviction of the defendant in the court below, a motion was made to arrest judgment, on the ground that the bill of indictment was found on the evidence of witnesses sworn in court and sent to the grand jury, instead of on that of witnesses sworn by the foreman of the grand jury and by him endorsed on the bill, under the act of 1879, ch. 12. The motion was refused by the inferior court, but allowed by the superior court, and the solicitor appealed.

Attorney General, for the State.
Messrs. Mullen & Moore, for defendant.

DILLARD, J. The motion in arrest was properly refused by the inferior court and should have been refused by the judge below. It is conceded in the terms of the motion, that the bill was found on the testimony of witnesses sworn in court and endorsed on the bill by the clerk of the court, and the question is whether the witnesses might have been so sworn and sent, or must have been sworn only by the foreman, and by him endorsed on the bill under chapter 12 of the act of 1879.

The law and practice has been ever since the act of 1797,

(construed in *State* v. *Cain*, 1 Hawks, 352, and brought forward in all the Revisals of our laws) that bills of indictment should be found on the testimony of witnesses *sworn in court* and sent to the grand jury. And so the only matter for our decision is, whether that mode of proceeding has been repealed by the late act giving to the foreman of a grand jury the power to swear and endorse on the bill the witnesses examined before that body.

In our opinion the act of 1879 creates and authorizes an additional mode of swearing witnesses to testify before a grand jury, and was not intended to abrogate and does not abrogate the mode so long prevalent, of swearing them in open court. The act in terms vests in the foreman the power to swear as witnesses only those whose names are endorsed on the bill by the officer prosecuting in behalf of the state, or by direction of the court, with a mandate to endorse on the bill such of those already endorsed as he shall swear and examine. There is nothing in the language of the act which requires the former mode of swearing the witnesses in open court to give place to the new mode; and the matter of the late statute is not so clearly repugnant to the former law and practice as to negative its continuance.

The rule in the case of two statutes is, that where they both are merely affirmative and in substance such that both may stand together, the latter shall not repeal the former, but they shall have a concurrent efficacy. Broom's Legal Maxims, 12; Dwarris on Statutes, 156. Here, both the old and the new law affirm modes of furnishing evidence to the grand jury, and there is nothing in the late act which expressly or by a necessary implication repeals the authority to swear witnesses in court, so long existing. The intent of the legislature, in our opinion, was to vest the power to swear witnesses in the foreman as an additional mode to the one already in use, as a convenience whereby to save

the time of the court in session, spent in the calling and swearing of witnesses to go to the grand jury, and thus increase the opportunity of trying matters already at issue on the docket.

There is error in the arrest of judgment by the superior court, and the same is reversed. Let this be certified.

PER CURIAM. Error.

In *State* v. *Donaldson*, from Beaufort:

ASHE, J. There is no appeal bond filed in the case nor any order allowing the defendant to appeal without giving security. The invariable rule of this court in such cases is to dismiss the appeal. *State* v. *Walker*, 82 N. C., 696; *State* v. *Patrick*, 72 N. C., 217; *State* v. *Spurtin*, 80 N. C., 362.

The appeal is therefore dismissed. Let this be certified to the superior court of Beaufort county.

PER CURIAM. Appeal dismissed.

In *Turner* v. *Foard*, from Iredell:

ASHE, J. This is an action to foreclose a mortgage heard before *Schenck, J.*, at Spring Term, 1880, of Iredell Superior Court, upon the pleadings, report of referee, exceptions thereto, and argument of counsel. Judgment was given for plaintiff and the defendant appealed.

The plaintiff moved in this court to dismiss the appeal for want of a compliance with the requirements of section 301 of the Code. It is the established practice of this court, where upon an appeal there is no bill of exceptions nor statement of the case accompanying the record sent up, to affirm the judgment of the court below, unless upon examination error be found in the record. It is the duty of the appellant to this court to see the case so made out as distinctly to present the points upon which the judgment below is sought to be reviewed. *Fleming* v. *Halcomb*, 4 Ired., 268; *State* v. *Orrell*, Busb., 217; *State* v. *Murray*, 80 N. C., 364.

And then it is expressly provided in section 301 of the Code, that the appellant "shall cause to be prepared a con-

cise statement of the case embodying the instructions of the judge as signed by him if there be any exceptions thereto, and the requests of the counsel of the parties for instructions if there be any exception on account of the granting, or withholding thereof, and stating separately in articles numbered, the errors alleged."

There was no statement of the case under this section nor any bill of exceptions under the former practice, and we are unable to discern any error in the record. The judgment of the court below must therefore be affirmed.

No error. Affirmed.

In *Brown* v. *Williams*, from Duplin:

SMITH, C. J. The plaintiff's motion to dismiss the appeal must be allowed. The record shows that the appeal was entered by consent on July 2, 1869, the undertaking on appeal executed August 29 following, and the transcript filed in this court June 14, 1880, during the present term.

Neither was the undertaking given in time, nor the appeal prosecuted as required by the rules of this court, as determined in *Sever* v. *McLaughlin*, 82 N. C., 342, and *Smith* v. *Lyon*, *Ibid.*, 2.

PER CURIAM. Appeal dismissed.

In *Weil* v. *Everitt*, from Wayne:

DILLARD, J. This is a motion by defendant at her arrival at full age to vacate and annul the proceedings and decree of sale of land had in the probate court during her minority, on the ground of alleged irregularities and defects in the institution and conduct of the cause, and in the manner of the defence made for her.

The appeal papers consist of nothing but a certified copy of the facts as found by the clerk, although they mostly appear of record in the cause and ought regularly to accompany the appeal, so that we might see for ourselves what are the facts, as they therein exist.

The main ground on which the amendment or opening of the decree of sale is asked, is, that the whole proceedings in law were *coram non judice*, and it is not satisfactory to us to proceed on the facts as found by the clerk in the absence of a transcript of the record proper. It may be that the clerk has misinterpreted the facts of the cause, or undesignedly left out some facts material to the proper consideration of the questions presented or intended to be presented for our determination.

For want of a transcript of the record of the original cause in which the motion was made, the papers will be remanded, to the end that the appeal may be perfected as herein indicated.

PER CURIAM. Remanded.

In *Ammons* v. *Ammons*, from Macon:

DILLARD, J. In this case a sale of several tracts of land was made under a decree of this court for partition by J. Johnson (formerly clerk and master to the court of equity for Macon county) as a commissioner for that purpose, and on his report of the sales, the same was confirmed. The war coming on soon after, the cause was dropped from the docket, without any distribution of the proceeds of sale or order of title to the purchasers, and at the last term of this court, with a view of conducting the cause to its proper conclusion, the cause was reinstated on the docket and a rule ordered to issue to said commissioner, Johnson, to report his doings with the bonds taken for the purchase money or the proceeds thereof, and the number and names of the purchasers, and also to report whether any of the purchase money was still due and by whom as may be seen by the order of this court in 82 N. C., 398.

The commissioner, Johnson, having filed his answer to the said rule, it now appears therefrom that he sold tracts of land to six different persons for $946, payable at one and two years, of which sum he collected a portion of the money, leaving in his hands, after deducting the costs, $491, which was never distributed among the heirs; and it further appears from said report that only two of the purchasers have paid in full their bonds, and no title by authority of this court has ever been executed.

Upon such a state of facts disclosed in the answer to the rule, it is now ordered, to the end that further and final proceedings may be had, that an order may be drawn appointing the clerk of this court, or some competent person in Macon county more convenient to the parties, to take and report to this court the kind and quantity of the purchase money received by Johnson; when received, from whom, the value thereof at the time, and any facts deemed perti-

nent going to charge or discharge him; and also to ascertain and report the number and names of the purchasers, the amounts due from each, and the situation of the title in respect of each purchaser; and further to ascertain and obtain if possible and file with his report the bonds and other evidences of debt representing the unpaid purchase money, with a view to orders of performance of their contracts or a resale.

And this cause will be continued for further orders and directions on the coming in of the report of the commissioner to be appointed under this order.

RULES

OF THE

SUPREME COURT,

(ADOPTED JUNE TERM, 1880.)

Order in which the districts will be called.

1. The first district will be called on Wednesday of the first week, and, if necessary, the call will be continued until and including Tuesday of the next week.

2. The second district will be called on Monday of the second week if causes from the first have then been disposed of, and the call continued through that and the following week.

3. The third district will be called on Monday of the fourth week, and allowed one week.

4. The fourth district will be called the fifth week, commencing on Monday, and allowed one week.

5. The fifth district will in like manner be allowed the sixth week.

6. The sixth district, the seventh week.

7. The seventh district, the eighth week.

8. The eighth district, the ninth week.

9. The ninth district, the tenth week.

On Monday of the eleventh week the court will enter upon the call of causes at the foot of the docket and proceed therewith until they are disposed of.

BRIEFS.

Briefs of counsel hereafter filed for the use of the court must be printed and should contain a concise statement of the facts set out in the record, necessary to an understanding of the errors assigned; but oral arguments will be heard and written briefs may be read in place or as part thereof as heretofore.

INDEX.

CONTEMPT.

1. When in the course of proceedings supplementary to execution a witness is examined by a referee under section 268 of the code, no *trial* can be said to take place before the referee, and a contempt in refusing to answer questions on such examination must be punished by the court making the reference. *La Fontain* v. *Southern Underwriters*, 132.

2. The essential and inherent common law power of the courts to punish as a contempt the refusal of a witness to answer proper questions is expressly confirmed by Battle's Revisal, ch. 24, § 7 (4). *Ib.*

3. Where a witness refuses to answer a question on the ground that such answer will tend to convict him of a crime, it is the province of the court to determine whether a direct response to the question will have that tendency. *Ib.*

4. Since by the provisions of sections 264 (5) of the code the answer of one examined under proceedings supplementary to execution cannot be used against him in any criminal proceeding or prosecution, a witness called to testify on such an examination as to his dealings in behalf of a defunct corporation of which he was an officer cannot excuse himself on the ground that the evidence thus elicited might be used on the trial of indictments pending against him and others, for conspiring to cheat and defraud divers persons in the management of the affairs of such corporation. *Ib.*

5. *Semble*, that if the witness himself states his belief that such indictments are prosecuted solely for black-mailing purposes, as to which he could only thus speak on the supposition of his en-

(4) That the growing crop on the Dodson farm belongs to the widow. *Ib.*

(5) That the growing crop on the twenty-four acre lot does not belong to the daughter of R, but vests in the executor. *Ib.*

(6) That the money arising from the sale of the Dodson farm after the death of the widow must be divided among the children of C and R *per capita*. *Ib.*

(7) That the machinery in the shoe manufactory as well as the buildings belonging to the firm are embraced in the words "the residue of my capital invested, &c.," and after deduction of debts and funeral expenses are devised in three equal parts to the testator's daughter H, the children of C and the daughter of R. *Ib.*

3. A memorandum of a declaration, made by a testator intermediate between the making of his will and his death, is not admissible in evidence to show an intent different from that expressed in the will. *Ib.*

4. The will of a testator made the following disposition of a portion of his estate: "I give and bequeath to my son James, in trust for the use and benefit of my son Boyd, the sum of $2,000 to be paid out by my son James, as trustee, to the support and maintenance of my son Boyd, from time to time as his necessities may require; the said $2,000 to be kept at interest, and the interest only to be used unless circumstances make it necessary to use and spend a portion of the principal.
There was no limitation over of the fund upon the death of Boyd, and no residuary clause to the will. The said Boyd was of feeble intellect and afterwards became a lunatic; *Held*, that the bequest to the use of Boyd was an absolute interest and at his death went to his administrator. *McMichael* v. *Hunt*, 344.

5. A testator devised certain lands to his grandson, he to take care of his father and mother during their lives, and to hold the aforesaid property his life-time, and if he should take care of his parents, &c., and have issue, said property to be theirs in fee at his death; but if he should die without issue, then it was to "descend" to the testators's daughters in fee; *Held*, (1) That a due support of the parents of the devisee was not a condition precedent to the vesting of the remainder in fee in his issue; (2) That even if such were a proper construction of the will, only