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NORTH CAROLINA REPORTS.

VOL. LXXXIV.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA,

JANUARY TERM, 1881

REPORTED BY

THOMAS S. KENAN.

(Vol. 9.)

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NEWS & OBSERVER, State Printers and Binders.

1881.

JUSTICES OF THE SUPREME COURT,

January Term, 1881.

CHIEF JUSTICE:

WILLIAM N. H. SMITH.

ASSOCIATE JUSTICES:

THOMAS S. ASHE, *THOMAS RUFFIN.

*Appointed by Gov. Jarvis on 11th Feb., 1881, *vice* John H. Dillard who resigned during the term.

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 "
*R. T. BENNETT,	4th "	ALPHONSO C. AVERY,	8th "

JAMES C. L. GUDGER, 9th Dist.

*Appointed by Gov. Jarvis on the 25th of August, 1881, *vice* Ralph P. Buxton, resigned.

SOLICITORS:

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

GARLAND S. FERGUSON, 9th Dist.

JUDGE OF THE CRIMINAL COURT.

OLIVER P. MEARES, Wilmington.

SOLICITOR:

BENJAMIN R. MOORE, Wilmington.

LICENSED ATTORNEYS.

JANUARY 1881.

William R. Allen,
Charles B. Aycock,
Edwin F. Aydlett,
William Black,
William C. Blackmer,
George McD. Bulla,
Evan D. Cameron,
Jesse G. Cherry,
Frank L. Cline,
Frank A. Daniels,
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Neill Dumont,
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James M. Hedgecock,
Thurston T. Hicks,
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Thomas A Love,
John C. Marsh,
James M. Moody,
William C. Newland,
Joseph E. Robinson,
John H. Small,
Harry W. Stubbs,
Henry T. Watkins,
Hugh M. Wellborn,
Francis D. Winston,
Kenneth Yarborough.

JUNE, 1881.

Charles H. Armfield,
David Bell,
Claude M. Bernard,
Richard L. Blount,
Robert B. Boone,
James K. Bridgers,
William B. Councill,
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Mills C. Eure,
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Herbert E. Norris,
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James W. Rumple,
William Sheppard,
George H. Smathers,
Henry L. Stevens,
William O. Temple,
Samuel J. Turner,
Washington L. Wakefield.
Francis M. Williams,
Forney Willis,
Robert W. Winston.

CASES REPORTED.

CASES WHERE APPEALS WERE DISMISSED FOR IRREGULARITY, AND JUDGMENTS AFFIRMED, NO ERROR APPEARING, &C., &C.

FOR CASES CITED, SEE INDEX.

Page 9, line 6, strike out the word " what."
Page 29, line 4, for "1862," read "1762."
Page 693, line 16 from bottom, for "whom," read "where."
Page 693, line 10 from bottom, for both," read "latter."
Page 695, line 12 from bottom, for "state," read "statute."
For cases cited, see Index.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

JANUARY TERM, 1881.

SARAH HALLMAN *v.* MONROE DELLINGER.

Surety and Principal—Pros. Bond.

A surety on a prosecution bond is not liable to his principal for costs. (Remarks of RUFFIN, J., on the condition in the bond in this case as affecting the liability of plaintiff and her surety to defendant for his costs.)

CLAIM and DELIVERY tried at Fall Term, 1880, of LINCOLN Superior Court, before *Seymour, J.*

On the 15th of October, 1877, the plaintiff brought her action of claim and delivery for a horse, in the court of a justice of the peace, against the defendant, and at the same time gave a bond with one Jacob Kiser as her surety, in which they acknowledged themselves bound in the sum of one hundred dollars to the defendant, "for the prosecution of the action and for the return of the property, if the return

be adjudged, and for the payment of such sum as may be for any cause recovered against the plaintiff."

The justice issued his order to the sheriff for the seizure of the property and its delivery to the plaintiff, but the defendant giving a delivery bond, he was allowed to retain it until the trial before the justice on the 18th of the month, when the plaintiff had a judgment and the defendant appealed."

In the superior court at fall term, 1878, the defendant moved to dismiss the plaintiff's action, because of a defect in her original affidavit, and the plaintiff asked to amend, and was allowed to do so " upon payment of the costs up to and including said term." At the same term the action was tried by a jury who found all issues in favor of the plaintiff, and thereupon the court gave her judgment for the delivery of the horse, and in default thereof, for double its value, and for " the costs of the action accruing after the day of trial."

The case was dropped from the docket of the court, and no further action taken until the 27th of October, 1879, when a notice signed by W. M. Reinhardt as clerk of Lincoln superior court was served on Jacob Kiser (the appellant here) that a motion would be made at the next term in the case of *Hallman* v. *Dellinger*, " to enter judgment against him on the prosecution bond for the amount of the costs in said action against the plaintiff." Accordingly, at spring term, 1880, such a motion was made and continued until fall term, when it was adjudged that *the plaintiff*, Sarah Hallman, recover of the said Kiser the sum of fifteen dollars and seventy-six cents, the court costs, and the further sum of sixteen dollars, the amount of fees due the defendant's witnesses, together with the costs of the motion to be taxed by the clerk. From this judgment, Jacob Kiser appealed.

Mr. B. C. Cobb, for appellant.

No counsel *contra*.

RUFFIN, J. It will be seen from the facts that the only bond executed by the appellant, Kiser, was one to the defendant, Dellinger, as surety of the plaintiff, and surely he cannot be liable thereon to his principal for anything. We cannot gather certainly whether the plaintiff, in order to get the amendment asked for, actually paid the costs that had accrued up to the trial; though, as the amendment was allowed *only upon the condition* that she did pay them, and as the transcript shows there was a trial at the very same term which resulted favorably to her, the most natural inference would be that she immediately paid the amount she was adjudged to pay, made the desired amendment, and went to trial. If this be so, then certainly she can have no recourse upon her surety. Or if it be that she has not paid, but is only liable by reason of the judgment against her, then it is equally clear that she can have no claim to be indemnified by him. So that, in no point of view can she, the plaintiff and principal on the bond, have any relief against her surety.

We do not go with the counsel of the appellant to the full extent of his argument, which if we apprehend him correctly was, that inasmuch as the bond executed by his client was given for the prosecution of the plaintiff's action against the defendant, and the transcript showed that it had been successfully prosecuted, there had been no breach thereof, and therefore he could not be liable for the costs which his principal was required to pay during the progress of the action, as the price of an amendment, the effect of which amendment was to enable her to conduct her action to successful issue.

True it is, that the bond was in part what is known as a "prosecution bond," but it had a further condition and bound his principal and himself to pay to the defendant "such sum as may be for any cause recovered against the plaintiff in the action," thus embracing in its very terms

the defendant's costs, whether for witnesses or for the services of officers of the court incurred up to the moment of the trial. So that if the cause were here in such a shape as to permit it, we should have no hesitation in determining that the plaintiff and the appellant are both liable to the defendant for all *his* costs: but that in no event is he liable for any part of the plaintiff's costs, not even for services rendered her by the officers, commonly known as "court costs."

From the well known care with which His Honor below investigates causes that come before him, and his usual accuracy, we very much suspect that the case presented to us differs materially from the one considered and determined by him; but there being no suggestion of any imperfection in either the record or the case, we are constrained to consider it as it is.

Let this be certified to the superior court of Lincoln to the end that the costs of the court below may be retaxed in accordance therewith.

Error. Reversed.

JACOB STIREWALT v. P. S. MARTIN.

Surety and Principal—Effect of Release.

A contract entered into between a creditor and principal debtor to release the debtor "from all the indebtedness he holds against him individually, but not the securities which the debtor has given him upon notes or in any other manner," does not operate a discharge of the surety. (Remarks of Smith C. J. upon an equitable release of principal, and as to the mode of asserting the right of surety after judgment.)

(*Kesler* v. *Linker*, 82 N. C., 453; *Howerton* v. *Sprague*, 64 N. C., 451, cited and approved.)

MOTION heard at Fall Term, 1880, of CABARRUS Superior Court, before *Seymour, J.*

The motion was made by defendant to enter satisfaction of a judgment on the ground that a certain release to the principal debtor of his individual liability, but not the securities upon notes held by the creditor, operated a satisfaction of the judgment and discharge of the surety. The motion was denied, first, because the alleged release is not under seal, (*Smithwick* v. *Ward*, 7 Jones, 64), and secondly, because it is only of the indebtedness of the debtor individually and to the exclusion of others, and offsets only his unsecured debts. From this ruling the defendant appealed.

No counsel for plaintiff.
Mr. W. H. Bailey, for defendant.

SMITH, C. J. The plaintiff in the year 1868, entered into an agreement with the defendant, Bortian, to sell him a tract of land, called the "Ochlee mill property," for the purchase money of which the latter gave his individual notes in the aggregate sum of about one thousand, eight hundred and seventy dollars; another with the defendant Gouger as surety for four hundred and fifty dollars; and the last with the said Gouger and the defendant Martin as co-sureties in the sum of one thousand, six hundred and eighty dollars, payable in specie and due on January 2d, 1869. The plaintiff at the same date made and delivered his bond to the said Bortian to convey the land to him on payment of the purchase money, and at once put him in possession.

None of the notes being paid, the plaintiff brought suit on the last mentioned note in the superior court of Cabarrus and recovered judgment at spring term, 1870, against all the parties liable thereon, but was unable to make anything

by execution on account of the exemptions allowed the debtors.

On the 26th day of December, 1871, the plaintiff and Bortian entered into another agreement whereby the latter contracted to restore possession of the premises and surrender the title bond and the former to release the said Bortian "from all the indebtedness that he, the said Stirewalt, holds against him *individually* but not the securities which the said Bortian has given Stirewalt upon notes now in his possession or in any other manner." This agreement has been carried into effect by the parties to it.

At fall term, 1880, a motion was made on behalf of the sureties, both or one of them, on affidavits filed in its support, to have satisfaction of the judgment entered on the ground that the release of the principal debtor, Bortian, was a discharge of the other defendants, his sureties. The motion was refused and the defendant Martin appealed.

The plaintiff's counter-affidavit states that the plantation became greatly depreciated in value while in the hands of Bortian, and the mill thereon "nearly worthless," and that in the partial rescission of the original contract of sale, the judgment was retained as compensation for the use and deterioration of the property while in Bortian's occupancy. The equitable estate vesting in him under the contract has not been perverted by the vendor to purposes inconsistent with the right of the sureties to have the security provided by the debtors put in front of their own liability, but has been appropriate to the reduction of the unsecured part of the debt due for the purchase money. Whether upon the principle that a creditor having a fund of his debtor equally applicable to several debts may apply it to that which is most precarious, without just complaint on the part of the surety to another, the plaintiff could thus use the fund in this case, it is plain that the equity of the surety does not extend beyond a *pro rata* distribution which would not

extinguish the debt for which he was bound, but be only a partial payment. We do not decide the point, while fully recognizing the authorities cited for the defendant and the doctrine they establish. We have had occasion to consider the subject in *Kesler* v. *Linker*, 82 N. C., 456.

If however the facts were such as to entitle the sureties to relief, we are not disposed to admit that it can be obtained after final judgment by a motion made more than ten years after its rendition and nearly nine after the rescinding contract was made, if this summary method were admissible at all. Certainly, satisfaction could not be entered on the judgment as to any one of the debtors, for that would be a discharge of the judgment itself, and the exoneration of all. Most obviously that motion ought not to be allowed. The equity of the surety is only to be relieved from so much of his debt as would have been paid by the misapplied security, and hence questions arise that show the propriety, if not necessity of a new action for their solution and for the adjustment of the equities growing out of the transaction among all. Thus in *Howerton* v. *Sprague*, 64 N. C., 451, this equitable release was sought in the superior court by an injunction against the enforcement of a judgment rendered by a justice of the peace, and objection was made that it could have been obtained before the justice himself, and PEARSON, C. J., says: "Where a creditor by a binding contract, and not a mere *nudum pactum*, gives further time to the principal debtor the surety is discharged by matter *in pais*, as it is termed in the books. Of this equitable discharge the justice of the peace had no jurisdiction. The equity could only be enforced by the superior court. "*It would have been otherwise if the debt had been discharged.*" The argument of *Mr. Bailey* takes a wider range than seems to be authorized by the record. On the trial before His Honor it was claimed that the rescinding instrument operated itself as an equitable release of the principal debtor, and con-

sequently of his sureties, and not that the right to be exonerated grew out of the plaintiff's disposition of the fund. We interpret the contract with His Honor as discriminating between the unsecured and secured notes, representing the consideration to be paid for the land, the former of which are denominated *individual* debts and to be surrendered, while the others are not.

The motion to enter satisfaction was proper in itself if warranted by the facts of the case, but was rightfully denied. It was not the appropriate remedy, if the sureties were entitled to a discharge, total or partial, according to the value of the property by reason of the conduct of the plaintiff.

We must therefore declare there is no error and affirm the ruling of the court.

No error. Affirmed.

H. M. GOODMAN v. W. N. LITAKER.

Surety and Principal—Defence of Suretyship.

Where the defence set up is that the party sued is only a surety and the fact of his suretyship does not appear from the instrument signed by him, he must in order to derive any advantage therefrom, prove that the creditor had knowledge of the suretyship.

(*Welfare* v. *Thompson*, 83 N. C., 276,; *Cole* v. *Fox*, Ib., 463, cited and approved.)

CIVIL ACTION tried at Fall Term, 1880, of CABARRUS Superior Court, before *Seymour, J.*

On the 23d day of Sept., 1873, one J. L. Litaker and the defendant executed and delivered to the plaintiff a bond of which the following is a copy: "Three months after date with in-

terest at eight per cent., we promise to pay to H. M. Goodman or order, one hundred dollars for value received." (Signed and sealed by J. L. and W. N. Litaker.) The action was brought in a justice's court on the 5th day of January, 1880, against the defendant alone, the other maker being dead, and what the defence relied on was that the defendant was only a surety on the bond and the statute of limitations. The plaintiff recovered judgment and the defendant appealed to the superior court, and on the trial in that court it appeared that there were two payments endorsed on the bond —one dated January 1st, 1879, for $20.25, and the other dated January 1st, 1880, for $15.60. After hearing the evidence the presiding judge made the following findings, a jury being waived: 1. That the defendant did not make the payments credited on the bond, but the same were made by the other maker of the bond. 2. There was no agreement or understanding between the plaintiff and defendant, that the defendant was to be a surety, but that such agreement was only between the two makers of the bond, and was not communicated to the plaintiff. And being of opinion with the plaintiff, the court gave judgment against the defendant, from which he appealed.

Mr. W. H. Bailey, for plaintiff.
No counsel *contra*.

RUFFIN, J. In the view we take of the case, it is not necessary that we should inquire how the defendant was affected, if at all, by the payments made by his co-obligor on the bond. Nor do we propose to discuss the correctness of the decision of this court in the case of *Welfare* v. *Thompson*, 83 N. C., 276. For be these matters as they may, it is our conclusion that the ruling of His Honor was a proper one.

We find the authorities somewhat divided upon the point

as to whether a joint maker of a note may for any purpose be shown by parol to be but a surety, when that fact does not appear on the face of the instrument. But the weight of authority and analogy seem inclined to the opinion that he may; but all, even those who go the farthest in upholding this right of the surety, concur in saying in the most emphatic terms, that before the party thus seeking to set up his new relationship can derive any benefit therefrom, he must first bring home to his creditor a knowledge of its existence.

The very recent work of Brandt on the law of Suretyship and Guaranty, at section 20, thus states the rule: "Where a surety sets up claims depending on that relation and the fact of suretyship does not appear from the instrument signed by him, he must in order to sustain such claims prove that the creditor had knowledge of the suretyship." And in support of the proposition, he cites a very large number of decisions rendered in the highest courts of the several states. To the same effect is the decision of the supreme court of Massachusetts in the case of *Wilson* v. *Foot*, 11 Metc., 285. In the trial of the case of *Manley* v. *Boycott*, 75 E. C. L. Rep., 45, when counsel was urging upon the court the right of the maker of a promissory note to show that he signed the instrument as surety only, LORD CAMPBELL interposed the remark *that it must be shown that the note was so made with the knowledge of the payee; that allegation is indispensable.* Such a conclusion seems not only to address itself to our reason, but to be eminently just; and especially so under a system which like our own prescribes different periods for the protection of principals and sureties.

Between the makers themselves the relation of principal and surety subsists, and out of it arise duties that the law will enforce, and rights which the law will protect. It will not allow even the creditor, after a knowledge of the existence of their rights is brought home to him, to do aught to

impair them. But this is not upon the ground that they entered into and made a part of his contract with the parties, for how could they, when he was ignorant of the very existence of the relation out of which they grew? but upon a distinct and independent principle of equity altogether, that he must do nothing to lessen the security or impair the rights of the surety against his principal, after being fixed with a knowledge of such rights. And it matters not when this knowledge reaches him, whether at the time of the execution of the original contract, or at any time subsequently thereto. Among the rights of the surety so protected, is the one of having the debt paid so as to terminate his liability; and if with a view to having this done, he gives his creditor notice of his real standing in the matter, and demands that such steps shall be taken to enforce collection as the law authorizes him to insist upon, then the creditor is bound to comply, and a failure to do so is at his peril; and in order thus to fix the creditor with notice and raise this equity for the surety, parol evidence is competent. This we understand to be the extent of the decision rendered in *Cole* v. *Fox*, 83 N. C., 463. In this case now under consideration, there is no such point made for the defendant, and no pretence that the creditor ever had any notice of his claim to be treated as surety.

We therefore hold there is no error in the judgment of the court below.

No error. Affirmed.

SARAH HAMILTON v. ADOLPHUS MOONEY.

Liability of Surety on undertaking for Stay of Execution.

In a proceeding to subject a surety on an undertaking for the stay of execution to payment of residue of plaintiff's judgment, it appeared that the judgment debtor had a large stock of goods which were levied on and sold under various executions and proceeds distributed under an order of court; a part of the goods were demanded by, and delivered to the debtor's assignee in bankruptcy for the benefit of creditors; the levy was made before commencement of bankruptcy proceedings; *Held*, that the goods so delivered to the assignee did not operate as a discharge *pro tanto* of plaintiff's execution; and the surety was held liable under the bond given by him. (Bat. Rev., ch. 63, § 63, and act of 1879, ch. 68).

(*Parker* v. *Jones*, 5 Jones Eq., 276; *Smith* v. *McLeod*, 3 Ired. Eq., 390; *Forbes* v. *Smith*, 5 Ired. Eq., 369; *Nelson* v. *Williams*, 2 Dev. & Bat. Eq., 118; *Kesler* v. *Linker*, 82 N. C., 456, cited and approved.)

MOTION heard at Fall Term, 1879, of RUTHERFORD Superior Court, before *Buxton, J.*

This was a motion for judgment and execution against the defendant surety upon an appeal bond. The facts are stated in the opinion. Motion allowed and the defendant appealed.

Mr. W. J. Montgomery, for plaintiff.
Messrs. Hoke & Hoke, for defendant.

SMITH, C. J. The plaintiff, on November 16th, 1877, before a justice of the peace, recovered judgment for $220.31, whereof $200 is principal money, against Robert Simpson, James A. Miller and C. E. Guthrie, constituting the partnership firm of Simpson, Miller & Co., who, on their appeal to the superior court, entered into an undertaking for a stay

of execution, with the defendant as their surety, according to the requirements of Battle's Revisal, ch. 63, § 63.

The same judgment was rendered in the superior court, on March 25th, 1878, and execution issued thereon on May 3d following. This, and numerous other executions were levied on a stock of goods belonging to the firm, from the sale of which the sheriff received $1,496.44 and applied, after paying the costs, the sum of $68.04 to the plaintiff's debt. The present proceeding was then instituted against the defendant, surety to the undertaking on appeal, to subject him to the payment of the residue of the plaintiff's judgment. The defendant denies his liability, alleging that the property levied on was amply sufficient to satisfy the execution, and such was, in law, its effect; and further, that part only of the goods were sold, and the remainder delivered over wrongfully to the assignee in bankruptcy of the said firm, by reason of which, he, the surety, became and is exonerated from all liability upon his said undertaking.

Upon the trial before the court (as we interpret the record) with consent of parties, it was shown that a large stock of goods of the debtors', differently estimated in value, was levied on and sold under various executions, and a part, on the demand of the assignee in bankruptcy of the debtors, delivered by the sheriff to him. That the proceeds of sale were distributed among the executions, under the directions of the judge presiding when they were returned, and whose advice had been sought by the sheriff, after due notice to the creditors; and that the levies were made before the commencement of the proceedings in the bankrupt court. Upon these facts, the court held that the goods surrendered to the assignee for the benefit of the bankrupt's creditors, did not operate as a discharge, *pro tanto*, of the plaintiff's execution, and gave judgment against the defendant for the residue of the plaintiff's debt.

Copies of the various executions that were in the sheriff's

hands, accompanying the transcript, which we infer from the argument were intended to elicit the opinion of the court upon the correctness of the ruling under which the fund was apportioned among the several claimants. But they are not referred to as exhibits in the case; and the decision of the preceding judge passed on, in rendering the judgment, are not now under review. We cannot therefore go outside the record to consider them.

The only matter of law presented in the appeal is the sufficiency of the exception to the ruling, that the goods levied on and surrendered were not a satisfaction of the plaintiff's execution, to the extent, that the proceeds of their sale would have been applicable to it.

While a levy of an execution upon the goods of the debtor is a specific appropriation to, and discharge of, the debt, even when wasted or lost, for the reason that he ought not to be compelled, nor his other property taken, to pay the same debt a second time, yet if the goods have been restored to him, or used in the discharge of his other liabilities, their value does not go in satisfaction of the execution. If this were not so, the same property would discharge two independent debts, and the debtor would be relieved from liabilities in double the amount in value of the property taken. "If a sheriff levies upon personal property," says PEARSON, C. J., in *Parker* v. *Jones*, 5 Jones Eq., 276, "the title is thereby vested in him, and the execution is satisfied, *unless* the property gets back into the possession of the debtor, or is otherwise applied to his use." "The simple act of levying is no satisfaction whether he (the debtor) has been permitted to retain the property by his own misconduct, or by his request, or by the voluntary act of the officer, because neither works any wrong to him." Herman Ex., § 176, and numerous references in notes.

While the liability of the principal debtor remains unimpaired, when the property is restored to him, or other-

wise used for his benefit, the surety is discharged, whenever the creditor surrenders any lien he has acquired on the property, or other security furnished by the debtor, since the property of the latter, being primarily liable, must be applied in exoneration of the surety. *Smith* v. *McLeod*, 3 Ired. Eq , 390; *Forbes* v. *Smith*, 5 Ired. Eq., 369; *Nelson* v. *Williams*, 2. D. & B. Eq., 118.

But the rule does not apply when the creditor does not participate in the misapplication of the fund, nor in any wise assent thereto. *Kesler* v. *Linker*, 82 N. C., 456.

The right to proceed against the surety is not forfeited nor postponed, because there is also a right of action against the officer for his misconduct and breach of official duty. The defendant in express terms contracts "that if judgment be rendered against the appellant and execution thereon be returned unsatisfied in whole or in part, he will pay the amount unsatisfied," the precise contingency that has occurred, and there is nothing in the facts set up as a defence to release him from his obligation. It is not necessary to consider what rights the defendant may have by subrogation against the sheriff for his alleged misfeasance and dereliction in duty, as the question is not referred to us. There is no error and the judgment is affirmed.

No error. Affirmed.

JOHN H. LONG v. LOUISA MASON, Admx.

Notes and Bonds—Effect of material alteration—Presumption of Fraud.

The addition of the words "at ten per cent" to a bond without consent of the parties thereto, is a material alteration and vacates the same;

and where such alteration is made, a presumption of fraud arises and remains until rebutted.

(*Davis* v. *Coleman*, 7 Ired., 424; *Dunn* v. *Clements*, 7 Jones, 58, cited and approved.)

CIVIL ACTION tried at August Special Term, 1880, of ROWAN Superior Court, before *McKoy, J.*

The suit was begun in a justice's court in which the plaintiff declared upon a bond made by the defendant's intestate as surety to one John B. Kerns. The bond was for one hundred dollars and was payable to the plaintiff as guardian of Thomas M. Kerns. When produced on the trial, it appeared that the words "at ten per cent" had been written in the left lower corner of the bond, as an addition thereto; and it was agreed that these words had been so written after it had been signed by both principal and surety, and that it was done by the principal and in the absence of the surety, and without his knowledge or sanction, and also without the knowledge or sanction of the plaintiff; but that the same was done at the suggestion and with the sanction of his ward, who was about nineteen years old. The defence set up was that the addition of the above words was an alteration of the bond which rendered it void, and the court so holding gave judgment for defendant, from which the plaintiff appealed.

No counsel for plaintiff.

Mr. John S. Henderson, for defendant.

RUFFIN, J. An alteration of a bond in a material part by a party to it, vacates the same, except as to parties consenting thereto. *Davis* v. *Coleman*, 7 Ired., 424; *Draper* v. *Wood*, 112 Mass., 315. An addition of the words "interest at six per cent," written in a corner of the bond after it had been signed, is an alteration of it in a material particular.

3 Addison on Contracts, § 1280. The intent with which the alteration is made seems according to the weight of authorities to be immaterial; but however that may be, it has been decided by this court in *Dunn* v. *Clements*, 7 Jones, 58, that whenever a material alteration has been made, a *presumption* of fraud arises, and remains until rebutted. There was no evidence offered on the trial to remove this presumption.

We therefore concur with His Honor in the opinion that the defendant was entitled to judgment.

No error. Affirmed.

W. H. CAPELL v. N. M. LONG.

Notes and Bonds—Assignment after Maturity—Equities—Principal and Surety.

A negotiable note or bond executed by a principal and surety, which relation is known to the payee or obligee, and transferred after maturity for valuable consideration, is subject to all equities and defences existing between the original parties, whether the transferee took with or without notice; *Therefore*, if more than three years have elapsed between the maturity of a bond and action brought on the same, the surety may plead the statute in bar of recovery.

(*Knight* v. *Braswell*, 70 N. C., 709; *Welfare* v. *Thompson*, 83 N. C., 276; *Turner* v. *Beggarly*, 11 Ired., 321; *Little* v. *Dunlap*, Busb., 40; *Haywood* v. *McNair*, 3 Dev., 231; *Harris* v. *Burwell*, 65 N. C., 584; *Mebane* v. *Patrick*, 1 Jones, 23; *Seawell* v. *Bunch*, 6 Jones, 195; cited and approved.)

CIVIL ACTION commenced before a justice of the peace and tried on appeal at November Special Term, 1880, of HALIFAX Superior Court, before *Graves, J.*

CAPELL *v.* LONG.

This action begun on the 22d of January, 1879, was founded on a bond executed by J. A. Turpin and N. M. Long, which is not set out in the return made by the magistrate to the superior court, but the defendant, Long, had leave to file his answer in that court, in which he stated that one J. A. Turpin and he executed their bond whereby they promised to pay W. T. Whitfied, treasurer, &c., the sum of one hundred dollars with interest on the same at eight per cent. from the 22d of November, 1875, the date of the bond; and that on the 13th of March, 1876, said Whitfield transferred and assigned the bond to the plaintiff, Capell, for value. By a written agreement signed by counsel, it was admitted that the bond was made payable ninety days after date.

The plaintiff filed a reply to the answer in which he stated that he had no notice that defendant was surety on the bond, but he believed when accepting the bond that defendant was joint principal with Turpin.

At said term the matter was heard upon a case agreed, and the facts admitted were, that the bond was executed by Turpin as principal and Long as surety for him; that this was known to Whitfield, the payee, and the bond was sold and transferred to plaintiff for value received, after it was due; that plaintiff did not know the defendant was surety, and that the bond was due more than three years before this action was commenced.

Upon this state of facts, the court being of the opinion that the action was barred by the statute of limitations, rendered judgment in behalf of the defendant, and the plaintiff appealed.

Messrs. Day & Zollicoffer, for plaintiff.

Messrs. R. B. Peebles, Thos. N. Hill and *J. B. Batchelor*, for defendant.

ASHE, J. It having been admitted in the "case agreed" that the defendant was surety on the bond in suit, and that that fact was known to Whitfield, the payee, and that it was assigned by him after its maturity to the plaintiff, who paid value therefor, and had no notice at the time of accepting the same that Long was surety, the only question left for our consideration is, whether under these circumstances the plaintiff's action was barred by the statute of limitations.

If the bond had not been assigned, and the action had been brought in the name of Whitfield, the payee, we suppose there would have been no controversy on that point, as it has been expressly decided by this court that three years is a bar to an action brought against a surety on a note under seal. *Knight* v. *Braswell*, 70 N. C., 709; *Welfare* v. *Thompson*, 83 N. C., 276.

The bond bore date the 22d day of November, 1875, and was due the 22d day of February, 1876, and was assigned to the plaintiff on the 13th day of March, following, just twenty days after its maturity. The question then arises, how does the fact of the plaintiff's being an assignee for value, without notice, by an assignment after maturity affect the case? It is well settled not only by elementary writers, but by the decisions of this and other courts, that a negotiable bond or note overdue is dishonored, and one who takes it in that state is considered as taking it upon the credit of the endorser, and is to stand in place of the holder at and since its maturity. *Turner* v. *Beggarly*, 11 Ired., 521; *Little* v. *Dunlap*, Busb., 40; *Haywood* v. *McNair*, 3 Dev., 331. In which last case, Judge HENDERSON says: "A note that is overdue is dishonored, by which is meant, that if assigned, it is subject to all defences and exceptions to its payment in the hands of the assignee, to which it was open in the hands of the assignor."

According to these authorities, if this action had been brought upon a promissory note, assigned after maturity,

and three years had elapsed before the assignment, the action would have been certainly barred; but this action is on a bond that does not appear to be endorsed, to which the statute of limitations had no application, and such defence could not have been set up, at the time the decisions cited were made.

But important changes in the law in this respect have been made by the legislature of 1868. In section 55 of the Code of Civil Procedure, it is provided "that every action shall be prosecuted in the name of the real party in interest, except as otherwise provided, when the thing in action arises out of contract, and in the case of an assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or defence existing at the time of, or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due."

A construction was given to this section by the court in *Harris* v. *Burwell*, 65 N. C., 584, where PEARSON, C. J., says it "abrogates the principle of the common law, that a chose in action cannot be assigned—confers an unlimited right to assign 'anything in action' arising out of contract, and subjects the assignee to any set-off or other defence existing *at the time of or before notice of the assignment;* the only saving being in regard to 'negotiable promissory notes and bills of exchange transferred in good faith and upon good consideration, before due.' This language is as broad as it well can be; so that a note assigned after it is due a half dozen times will be subject to any set-off or *other defence* that the maker had against any one or all of the assignees, at the date of the assignment or *before notice thereof.*"

In our case it does not appear from the record that the defendant had any *notice* of the assignment before the institution of the action, and as more than three years had

elapsed before then, after the maturity of the bond, the action is barred.

But there is another view of the case which is equally fatal to plaintiff's right to recover. The bond sued on was overdue, dishonored, when assigned; and the plaintiff received it subject to all equities, defences, defects and infirmities to which it was open in the hands of the obligee, and the statute had begun to run before the assignment; and when it once begins to run, nothing will stop its course, not even supervening disabilities. *Mebane* v. *Patrick*, 1 Jones, 23; *Seawell* v. *Bunch*, 6 Jones 195.

There is no error. The judgment of the superior court is affirmed. Let this be certified.

No error. Affirmed.

S. WITTKOWSKI Surviving Partner, &c., v. S. W. REID.

Debtor and Creditor—Right to apply Payment.

Where a debtor owes notes and accounts to the same creditor and pays money on general account without directions as to its application, the creditor has the right to appropriate it to either debt.

(*Sprinkle* v. *Martin*, 72 N. C., 92, cited and approved.)

CIVIL ACTION tried on appeal from a justice of the peace at Fall Term, 1880, of MECKLENBURG Superior Court, before *Seymour, J.*

Verdict and judgment for plaintiff, appeal by defendant. Same case, 82 N. C., 116.

Messrs. Dowd & Walker, for plaintiff.

Messrs. Jones & Johnston and *Bynum & Grier*, for defendant.

SMITH, C. J. This action, commenced before a justice of the peace and carried by appeal to the superior court, is brought upon a note executed by the defendant to the firm (of which the plaintiff is the surviving member) in the sum of $275 with a credit of $125 endorsed thereon by the plaintiff as a payment from moneys received from the defendant, and the point presented in the appeal is his right to make the appropriation and thus bring the claim within a justice's jurisdiction.

The concurring testimony of the plaintiff and the defendant on the trial of the issues before the jury was substantially this: The indebtedness of the defendant, over $600, consisted of two notes of $275 each, (this in suit being one of them) and two open accounts of about $80. On the morning of January 27th, 1876, the defendant came to the plaintiff's store and handed him $250 in money, remarking, "this is all I can pay to-day, and you must wait a while longer for the balance," and the plaintiff replied, "let us arrange the debt you owe and make a final settlement." To this the defendant assented and requested the plaintiff to have the papers ready in the afternoon on his return. The plaintiff thereupon directed his book-keeper to add up the amounts of the notes and accounts, deduct the money paid, draw three notes in equal sums for the balance, payable in twenty, forty, and sixty days, and cancel the old notes. This was done, and when the defendant came in the afternoon, the new notes were handed to him for his signature, when he remarked, "why not have them all in one note?" and the plaintiff answered, "why not have all in three notes?" The notes were not signed, and without giving any further directions the defendant left. During that evening or on

the next morning, the plaintiff entered a credit of $125 on each one of the notes.

There were several issues submitted presenting the transaction, as detailed, in different legal aspects, the first of which was in these words: "Did the defendant on the morning of the 27th of January, 1876, pay the $250 on general account, or did he then reserve the right to make the application in the afternoon?" and the jury responded, "it was paid on general account." The finding of the jury upon this in the opinion of His Honor dispensed with the finding upon the other issues, and in this we concur.

The facts testified and which are not controverted are few and simple, and their effect is a question of law to be decided and declared by the court. The general rule governing the application of payments when there are several debts and the sum paid is insufficient to discharge them all, is well settled, and is stated in clear and concise terms in *Sprinkle* v. *Martin*, 72 N. C., 92, following other previous cases cited: "A debtor owing two or more debts to the same creditor and making a payment, may at the time direct the application of it; if the debtor does not direct the application at the time, the creditor may make it; if neither debtor nor creditor makes it, then the law will apply it to that debt for which the creditor's security is most precarious."

In the present case it is plain the defendant made no application, nor did the plaintiff in preparing the statement of the aggregate indebtedness. This, as contemplated by both, was to be an extinguishment of all existing claims in whatever form and the substitution of a new security for the residue. No discrimination between the debts was intended by either. As the proposed plan of settlement failed by reason of the disagreement as to the giving of one or three new notes for what remained of the debt, it did not impair the rights of either or change their respective rela-

tions as to the disposition and appropriation of the money. The plaintiff then had and soon after exercised the right vested in him by law to make the appropriation, and his act is binding upon both. The judge should have instructed the jury that as the previous facts did not amount to an application by the debtor nor a reservation of the right to make it afterwards, and such power has not been attempted to be exercised, the appropriation by the plaintiff was valid and effective; and the omission is supplied by the finding of the jury. There is no error in the ruling of the court of which the defendant can complain, and the general charge in relation to the application of payments, though not called for perhaps by the evidence, is not erroneous in law nor unfavorable to the defendant. The verdict of the jury is fully supported by the evidence. The judgment must therefore be affirmed.

No error. Affirmed.

FIRST NATIONAL BANK OF NEW WINDSOR v. BYNUM & DANIEL.

Negotiable Instrument—Assignment—Counter-Claim.

1. The assignee for value of a non-negotiable instrument who takes it, even before due, and without notice of any equities between prior parties thereto, will hold it subject to all equities or counter-claims between the original parties existing at the time of assignment.
2. A paper to be negotiable must be certain as to the time of payment and the amount to be paid.
3. An instrument (in other respects) in the form of a note, which contains a promise to pay a certain sum, with current rate of exchange in New York, together with counsel fees and expenses in collecting it, if

placed in the hands of an attorney for collection; and which further provides that the payees shall ha e power to declare said note due at any time they may deem it insecure, even before maturity, is non-negotiable for uncertainty; (1) as to the *amount* to be paid, by reason of the stipulation for attorney's fees and rate of exchange, and (2) as to the *time* of payment, by reason of the provision which makes it payable before maturity at the future option of the payee.

(*Goodloe* v. *Taylor*, 3 Hawks, 458; *Harris* v. *Burwell*, 65 N. C., 584, cited and approved.)

CONTROVERSY submitted without action, under section 315 of the Code, and heard at March Special Term, 1880, of WILSON Superior Court, before *Avery, J.*

The facts agreed upon are as follows: On the 5th of July, 1878, the defendants made and delivered to the Taylor Manufacturing Company of Westminster an instrument of writing of which the following is a copy: On September the 1st, 1879, we jointly and severally promise to pay to the order of the Taylor Manufacturing Company two hundred and fifty dollars, payable at the First National Bank of Wilson, N. C., for value received, with exchange on New York, and if not paid when due, to bear interest from maturity at the rate of eight per cent. per annum as agreed for negotiating and carrying this loan so long as it remains unpaid, and also all counsel fees and expenses in collecting the note, if it is sued on or placed in the hands of an attorney for collection. The express condition of the sale and purchase of the engine separator for which this note is given, is such, that the title, ownership or possession does not pass from the said Taylor Manufacturing Company of Westminster, and said company have full power to declare this note due and take possession of said engine separator at any time they may deem this note insecure, even before the maturity of the same. (Signed by Bynum & Daniel, at Wilson.)

The said company for a valuable consideration endorsed said note in the state of Maryland to the plaintiff bank before maturity and without any notice of any defence to the

same. And at the time of the endorsement to the plaintiff, the said company was indebted to the defendants in the sum of three hundred and five dollars and fifteen cents, which indebtedness still subsists in favor of said defendants, and against said company.

Upon these facts the court held that the instrument declared on by the plaintiff was not a negotiable paper, and that defendants were entitled to a counter-claim against the original payees of said paper to the full extent of the plaintiff's demand; and adjudged that the plaintiff recover nothing of defendants, and that they go without day, and that plaintiff pay the costs of this proceeding. From this judgment the plaintiff appealed.

Messrs. Connor & Woodard, for plaintiff.

Mr. Hugh F. Murray, for defendants.

If this paper is non-negotiable, plaintiff though assignee for value purchasing in good faith before maturity takes it subject to all counterclaims existing between original parties thereto before assignment. *Burroughs* v. *Bank*, 70 N. C., 283. Any paper is non-negotiable where its payment depends on contingency as to amount or time of payment. Chitty on Bills 32. And contingency here as to attorney's fee renders it non-negotiable, *Woods* v. *North*, 84 Penn. St. Rep. 407; 63 Mo. 33; 23 Alb. L. J. 13; also provision making it payable before maturity, destroys negotiability. 21 Mich. 255; so, as to stipulation for exchange which leaves amount uncertain. *Lowe* v. *Bliss*, 24 Ill. 168; 1 Cowen, 707. The fallacy on which *Gaar* v. *Bank*, and like cases are based, are, first, in assuming that overdue paper is not negotiable (see *Leavitt* v. *Putnam*, 3 Comst. 494); negotiability matter of form and applies to paper as much in its inception as at any time thereafter. *Alexander* v. *Oaks*, 2 Dev. & Bat. 513. And secondly, in assuming that provisions which make a

paper more desirable to holder would increase its negotiability.

ASHE, J. The only question presented by the appeal is whether the indebtedness to the defendants can avail them as a set-off, counterclaim, or defence against the demand of plaintiff, and that depends upon the character of the writing declared on—whether it is negotiable or not?

The essential element of a negotiable promissory note, is, that it should be certain. Certainty, first, as to the payee; secondly, as to the maker; thirdly, as to the amount to be paid; fourthly, as to the time when the payment is to be made; and fifthly as to the fact itself of the payment. 1 Parsons on Bills and Notes, 30. The instrument under consideration is wanting in two of these qualities, to-wit, in the *amount* to be paid and the *time* of payment. In addition to the specific sum promised, it stipulates for the payment of "all counsel fees and expenses in collecting the note if it is sued on or placed in the hands of an attorney for collection;" and it is made payable in current rate of exchange on New York. The stipulation in a written promise to pay a certain sum and also "all fines according to rules," "all other sums that may be due, the current rate of exchange to be added," or "deducting all advances or expenses," have been held to deprive the instrument of the character of negotiability. 1 Parsons, 37.

In *Wood* v. *North*, 84 Penn. State Rep., 407, where the action was on a note in which there was a promise to pay a certain sum, and five per cent. collection fee, if not paid when due, SHARSWOOD, J., says: "It is a necessary quality of a negotiable paper that it should be simple, certain, unconditional, and not subject to any contingency." And it was held in that case that the insertion in the note of the clause, "and five per cent. collection fee if not paid when

due," rendered the note uncertain and destroyed its negotiability.

In Missouri it has been held that an instrument whereby the maker promises to pay a specific sum, and agrees, if the sum be not paid at maturity and the note is placed in the hands of an attorney for collection, to pay ten per cent. in addition as an attorney's fee, is not a promissory note, as a part of the amount agreed to be paid is uncertain and contingent. *Bank* v. *Gay*, 63 Mo., 33; *Goodloe* v. *Taylor*, 3 Hawks, 458.

But there is another serious objection to the claim set up for the negotiability of this instrument. It stipulates that the payees shall have full power to declare the note due at any time they may deem the note insecure, even before the maturity of the same. This divests it of the quality of certainty in the time of payment, which as has been shown is one of the essential elements of negotiability. The time of payment may be hastened at the option of the payees, and is therefore uncertain. And it has been held in Michigan that it is essential to a promissory note that it be payable at a time that must certainly arrive in the future, upon the happening of some event, or the completion of some period, not depending upon the volition of any one. *Brooks* v. *Hargreaves*, 21 Mich., 254.

Relying upon these authorities we hold that the instrument in question is not negotiable.

The next inquiry is, can the defendants, the note being assigned before maturity, avail themselves of the indebtedness of the assignor to them, as a valid defence to the action?

In the early history of the law, the transfers of all choses in action, including bills and notes, were forbidden by the common law, the rigid rule of which was first relaxed by the use of bills of exchange, which was the result of commercial convenience; and hence the law on this subject is

termed the "Law Merchant." Promissory notes were first made negotiable in England, like inland bills of exchange, by the statute of 3 and 4 Anne, ch. 9, and in this state by our act of 1862, which is a literal copy of that statute. But to attain the negotiability intended to be conferred by that act, it must possess all the attributes of an inland bill of exchange as to certainty, &c.; and if it should lack any of its essential qualities, it would still be a common law instrument and subject to the principles of that law in regard to choses in action. As for instance, where a non-negotiable note is assigned, the action at law must be brought by the assignee in the name of the assignor; and the assignee is put by the assignment in no better condition than the assignor, and only steps into his shoes, and the note assigned is subject to all the equities and defences which existed between the original parties before notice of the assignment; and it made no difference whether the note was assigned before or after maturity. The rule that the endorsee of a bill or note before maturity takes it freed from all equities and defences, except endorsed payments, is a principle of the Law Merchant, and applies to negotiable instruments, but has no application to notes that are not negotiable. Where an action is brought on a note of the latter class by the assignee in the name of the assignor, the rule is, that the equities set up by the defendant against the assignee must be such as subsisted at the time the defendant received *notice of the assignment.* 1 Danl. Neg. Instr., 555; 1 Parsons, 46; *Harris* v. *Burwell,* 65 N. C., 584. But the common law rule that an action by the assignee of a paper that is not negotiable must be brought in the name of the assignor has been changed in this state by section 55 of the Code, so as to enable him to sue in his own name, but without prejudice to any set-off or other defence existing at the time of or before notice of assignment. This section, it will be seen, makes no change whatever in the law, except as to

allowing the assignee to sue in his own name, instead of that of the assignor.

There is no error, and the judgment of the superior court of Wilson must be affirmed.

No error. Affirmed.

FIRST NATIONAL BANK OF CHARLOTTE v. R. B. ALEXANDER.

Findings of Jury—New Trial—Presentation of Check.

1. Where the findings of the jury are irreconcilable it is not error to set aside the verdict and grant a new trial.
2. The holder of a check upon a bank located in the town of his residence may present it for payment on the day after the same is drawn, and his omission to present it sooner is no defence to the drawee bank, unless he had information of its precarious condition.

CIVIL ACTION tried at Spring Term, 1880, of MECKLENBURG Superior Court, before *McKoy, J.*

O. F. Noel, a creditor of the defendant, as a means of payment, drew his check on the latter for the amount of his debt in favor of the plaintiff bank. It was presented to the defendant who after one o'clock on the 6th day of August, 1875, took it up and gave his own check for the same amount on the bank of Mecklenburg (whose banking house was about 200 feet distant from that of the plaintiff) payable to said Noel or bearer, and delivered it to the plaintiff. No demand was made on the bank of Mecklenburg during that day, and it suspended and closed its doors at the opening of banking hours the next morning and became and has since been insolvent. The defendant says in his answer, and, as the allegation seems not to have been controverted

on the trial, we assume it to be true, that he had moneys on deposit in bank on which his check was drawn sufficient to meet it, and he insists that the fund has been lost by reason of the plaintiff's neglect to make demand of payment in time.

Two issues were submitted to the jury who find that,

1. There was no negligence on the part of the plaintiff in failing to present the check on the day it was received, and

2. The bank of Mecklenburg was then insolvent, and while the fact was not known to the officers of the plaintiff bank, they had sufficient reason to suspect it.

The court charged the jury (and there was no exception taken to its correctness) that twenty-four hours were allowed by law for the presentation of the check, unless the plaintiff's officers had notice of the failing condition of the drawee, and if they had such notice it was their duty to present the check at the first opportunity. There was a verdict for plaintiff, and the court holding the findings of the jury upon the issues to be irreconcilable set aside the verdict and granted a new trial, and the plaintiff appealed.

Messrs. Bynum & Grier, for plaintiff.
Messrs. Shipp & Bailey and *Dowd & Walker*, for defendant.

SMITH, C. J., after stating the case. The law is well settled that the holder of such check, unless his diligence is quickened by information of the precarious condition of the drawee, and he then unreasonably delays to make demand of payment, may present it during business hours on the next day. "Banks would be kept in a continual fever," remarks a recent author on this subject, "if they were compelled to send out a check the moment it was received." 2 *Danl. Neg. Inst.*, § 1590. If the bank be in the same place in which the check is drawn, and suspends payment after

the opening of business hours on the following day, so that the money cannot then be collected, the omission to present it earlier when it might perhaps have been paid is no defence to the drawee. *Ib.*, §1591.

The verdict, inconsistent with itself on the first issue under the explanation of the court, repels the imputation of negligence in the plaintiff, and while responding to the second issue and acquitting its officers of personal knowledge, it charges them with having good reason (or as we understand it sufficient information) to awaken their suspicion of impending insolvency.

Upon these conflicting findings we think the course pursued by His Honor right and proper in setting aside the verdict and remitting the matter to another jury.

In doing this there is no error, and this will be certified.

No error. Affirmed.

LAURA KING v. E. P. KING.

Divorce—Service of Process by Publication.

In a divorce suit, where the party complained against is a non-resident and that fact appears by affidavit, service of process may be made by publication under Battle's Revisal, ch. 17, § 83, (5.)

CIVIL ACTION for divorce *a mensa et thoro*, tried at June Special Term, 1880, of HENDERSON Superior Court, before *Schenck, J.*

The plaintiff had issued a summons on the 19th of November, 1879, returnable to spring term, 1880. The defendant is a non-resident of the state. Publication was made according to law, and the only question is, whether the

plaintiff could proceed to trial and judgment against defendant without a personal service of process. The court being of opinion that no judgment in the case would be valid without personal service, under the ruling of *Pennoyer* v. *Neff*, 95 U. S. Rep., 714, refused to allow the plaintiff to proceed, to which ruling the plaintiff excepted. Judgment, appeal by plaintiff.

Messrs. Jones & Martin, for plaintiff.
No counsel for defendant.

ASHE, J. We are of opinion His Honor was in error and his ruling is not sustained by the authority which he relied on to support it. On page 734 of the case as reported, Mr. Justice FIELD who delivered the opinion of the court, used the following language: "The jurisdiction which any state possesses to determine the civil status and capacities of all its inhabitants, involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The state, for example, has absolute right to prescribe the conditions upon which the marriage relations between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties, guilty of acts for which by the law of the state a dissolution may be granted, may have removed to a state where no dissolution is permitted. The complaining party would fail if a divorce were sought in the state of the defendant, and if application could not be made to the tribunals of the complainant's domicil in such case, and proceedings be there instituted without personal service of process, or personal notice to the offending party, the injured citizen would be without redress." And in support of the position he cites Bishop on Marriage and Divorce, § 156, where that author, after having discussed the proposition whether for purposes of divorce husband and wife have different domi-

cils, and having come to the conclusion that they may, he holds that it follows that the courts of the actual *bona fide* domicil of either party may entertain jurisdiction; and he proceeds to say, "if it were not so, then both states, when the domicil of the one was in the one state and that of the other was in another state, would be deprived of the right to determine the status of their own subjects. Each must yield to foreign power in the management of its domestic concerns. * * * The granting of a divorce by the one state under these circumstances, does not interfere with the rights of either of the other states, or of its apparently divorced subject. Probably the decree is not directly binding upon the person of such subject, unless he appears and answers to the suit, or at least has notice of it served upon him within the jurisdiction of the court rendering it. He is not necessarily bound by any collateral clause in it, as that he pay alimony, and that he only ceases to be a husband because he has ceased to have a wife." The same doctrine is fully sustained by Cooley in his work on Constitutional Limitations, p. 403, *et seq.*, where in treating of the subject of proceedings against non-residents, he says: "In such cases as well as *divorce* suits it will often happen that the party proceeded against cannot be found in the state and personal service upon him is therefore impossible, unless it is allowable to make it wherever he may be found abroad. But any such service would be ineffectual. No state has the authority to invade the jurisdiction of another, and by service of process compel parties there resident, or being, to submit their controversies to the determination of its courts; and those courts will consequently be sometimes unable to enforce a jurisdiction within the state, which a state possesses in respect to the subject within its limits, unless a substituted service is admissible. A substituted service is provided by statute for many such cases, generally in the form of a notice published in the public journals, or posted,

as the statute may direct, the mode being chosen with a view to bring it if possible home to the knowledge of the party to be affected, and to give him an opportunity to appear and defend. The right of the legislature to prescribe such notice and to give it effect as process, rests upon the *necessity* of the case and has long been recognized and acted upon." The doctrine here asserted directly applies to our case, for in sub-division 5, section 83, chapter 17 of Battle's Revisal, it is expressly provided that "when the action is for divorce in the cases prescribed by law," the service of the summons may be made by publication in cases where the person upon whom the service is to be made cannot after due diligence be found within the state, when the fact is made to appear by affidavit to the satisfaction of the court.

Upon these authorities we hold there is error, and it must be certified to the superior court of Henderson county that further proceedings may be had in conformity to this opinion.

Error. Reversed.

CHARLES B. MUSE v. CYNTHIA MUSE.

Divorce and Alimony.

In an action for divorce, the wife in her answer denied the allegations of the complaint and charged the husband with abandoning and failing to provide for herself and children, and prayed for a divorce from bed and board and moved for an allowance; on the hearing of which motion the plaintiff denied he had any property, but admitted he was an able bodied man; and thereupon the court ordered an allowance without inquiry into the value of his property; *Held* no error.

MUSE *v.* MUSE.

CIVIL ACTION for divorce *a vinculo matrimonii* tried at Fall Term, 1879, of CABARRUS Superior Court, before *Buxton, J.*

The plaintiff brings this action for a divorce, and in his complaint alleges that the defendant, his wife, has been guilty of adultery. His wife in her answer denies every allegation of her guilt, and in turn charges the plaintiff with having abandoned her in the month of February, 1877, since which time he has in no wise contributed to the support of herself, or children (of whom there are five, all infants); that by dint of great industry and the aid of friends she has barely been able to support them, and is wholly without means necessary to their maintenance and the defence of the plaintiff's suit; and thereupon she prays for a divorce from bed and board and for an allowance, such as might be deemed right, with which to defend the action. At fall term, 1879, the defendant moved the court to make her such allowance, having given due notice of her intention to make the motion to the plaintiff, who appeared and resisted the same. On the hearing, the plaintiff "denied that he had any property, but conceded himself to be an able bodied man." His Honor granted the motion of the wife and directed the husband to pay into court three dollars per month for her use and benefit. The plaintiff complains of this order, because it was made without any inquiry into the extent and value of his property, and appeals therefrom to this court.

Mr. W. H. Bailey, for plaintiff.
No counsel for defendant.

RUFFIN, J. We see no error in the order complained of, and certainly none for the reason assigned. Why inquire into his property and its value, when he admits he has none?

A husband is not excused from the maintenance of his wife because he lacks an estate. He must labor if need be for her support; and if reluctant, it is fortunate that it happens, as in this instance, that he may be compelled to do so.

If His Honor had fixed the wife's allowance at such a sum as to leave any doubt as to the ability of the plaintiff fairly to earn the amount, and at the same time provide for his own necessities, it could be seen that some good could come of an inquiry into his ability to work and the probable amount of his earnings. But as the court adopted the very minimum that "an able bodied man" can earn, ten cents a day, there can be no error of which the plaintiff can complain, however his wife might.

No error. Affirmed.

REYNOLDS BROS. v. IRVING POOL.

Agricultural Partnership.

1. An agricultural agreement between two persons, one to furnish the outfit and the land, and the other to hire the laborers and superintend the farm during the year, the former to provide money to carry on the business half of which to be repaid him and the profits to be divided between them, creates the relation of partners.

2. Where the land owner in such case executed an agricultural lien to R for advancements to carry on the common business, a partnership debt was thereby created and the property in the crop vested in R to secure its payment.

(*Holt* v. *Kernodle*, 1 Ired., 199; *Lewis* v. *Wilkins*, Phil. Eq., 303, cited and approved.)

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

The plaintiffs claim the cotton in question by virtue of a mortgage giving a lien upon the crop raised on the land described in the pleadings. The facts are as follows:

James G. McPheeters, the owner of the land, was indebted to F. A. Belvin on the 31st of December, 1877, in the sum of one thousand dollars. In 1878, A. M. McPheeters, agent of James G., entered into a contract with Belvin, the evidence in regard to the terms of which is set out in the opinion of this court. The said mortgage lien was executed by McPheeters to the plaintiffs, and Belvin raised the crop and sold thirteen bales thereof to the defendant with the alleged consent of McPheeters. The defendant testified that he had no knowledge of the existence of the lien until some time after he had bought the cotton.

The plaintiffs asked the court to charge that taking all the evidence most favorably for defendant, McPheeters and Belvin were partners, which was refused. Verdict for defendant, judgment, appeal by plaintiffs.

Mr. D. G. Fowle, for plaintiffs.

Messrs. T. M. Argo and *W. H. Pace*, for defendant.

SMITH, C. J. The plaintiffs were entitled to have the instruction asked given to the jury, that, taking all the evidence most favorably for the defendant, McPheeters and Belvin were partners in the cultivation of the farm during the year in which the cotton in dispute was raised. The agreement entered into is thus described by Belvin: "On the first Monday in February, 1878, I agreed with McPheeters (acting for the owner of the land) to farm for the year 1878 on these terms: He was to furnish the outfit and the land; I was to hire hands and superintend the making of the crop; he was to provide money to pay the hands and carry on the business; for one-half of which, as well as for the like proportion of the hire and costs of feeding the mules and

horse, he was to be repaid by having the amount applied in reduction of his indebtedness to me previously incurred, and we were to divide the profits." The testimony of the agent differs mainly in that he confines the moiety of the expenses to be credited on the indebtedness to the hire and feeding of the mules and horse, and both agree that operations were to be conducted at their joint and equal expense, and the net proceeds to be equally divided between them. The concurring statement of both creates the relation of partners between them, and so the jury should have been instructed. We deem it necessary to recur to but two adjudications in this court in support of the proposition.

In *Holt* v. *Kernoldle*, 1 Ired., 199, a contract was entered into between the proprietors of a blacksmith shop and one who followed that calling, whereby the former were to furnish the shop and everything needful in carrying on the business and a house and provisions for the blacksmith and his family; and after reimbursement of all these advancements for the conduct of the business, the payment for provisions supplied and for rent of the house *out of the profits*, the residue was to be equally divided between them. This was held to constitute a co-partnership, and RUFFIN, C. J., delivering the opinion, says: "The ordinary test, however, of a person being a partner, is his participation in the profits of the business; and we believe there can be no instance in which there is to be a participation in them, *as profits*, in which every person having a right to share in them, is not thereby rendered a partner to all intents and purposes. It is so between the parties themselves, because the one of them does not look to the other personally for restoring to him his capital or remunerating him for his labor, but *each looks to the assets or joint fund for these purposes, and ascertains his interest by taking an account of the concern.*" Not less pertinent and decisive is the case of *Lewis* v. *Wilkins*, Phil. Eq., 303. There, the agreement was

that the owner should furnish the farm for two years with the stock thereon, and the mules, farming implements and provisions; the other party to supply the necessary labor, and to give his personal attention to the business, and the two were *to share equally in the products of the farm.* This was declared to establish a co-partnership. The facts of the case before us clearly bring it within the operation of the principle enunciated in those cited, since the expenses were to be paid and the residue of the farm products then divided *as profits* between the parties. The special arrangement for the advancement of the needed funds by one and the payment of the ratable share thereof by the other out of a pre-existing indebtedness, can in no manner affect their relation as co-partners in their transactions with others, or impair the just claims of creditors of the co-partnership. The funds supplied by the plaintiffs for the purpose of carrying on the common business—all of it thus used, according to the testimony of one, and a part only, according to the testimony of the other, are a sufficient consideration for the creation of a partnership debt; and the instrument forming an agricultural lien vests the property in the crop in the plaintiffs for its security and payment.

There is error in the refusal of the court to give the required instruction, and there must be a new trial, and it is so ordered.

Error. *Venire de novo.*

ALEXANDER CURTIS v. ROBERT CASH and others.

Agricultural Partnership—Landlord and Tenant—Jurisdiction—Practice—Issues.

1. Where one furnishes land, team and its feed, and another gives the time and attention and meets the expenses requisite to the making of a crop upon such land, under an agreement that the gross products are to be evenly divided between the parties, the relation of copartners is thereby constituted between them.
2. Even if the contract should be treated as one of tenancy, the relation would terminate upon the division of the crop, (there being no unsatisfied lien for advances or to secure the performance of other stipulations) and the land-owner would be guilty of a trespass in forcibly seizing and carrying away the share of the other party stored in a barn on the premises.
3. An action for such a trespass would fall within the original jurisdiction of the superior court.
4. Where a party does not tender such issues as he may desire, in the court below, and show their pertinency, he cannot complain here that those issues were not framed by the court and submitted on the trial.

(*Lewis* v. *Wilkins*, Phil. Eq., 303; *Kidder* v. *McIlhenny*, 81 N. C., 123, cited and approved.)

CIVIL ACTION tried at Spring Term, 1878, of GRANVILLE Superior Court, before *Seymour, J.*

The action is to recover damages from the defendants for their forcible seizure and removal of a lot of tobacco, claimed by the plaintiff, and in his possession.

It appeared from the evidence that the plaintiff, in the year 1877, leased from the defendant, Abner J. Veazey, a small one-horse farm, and cultivated the same under an agreement that the latter should furnish, in addition to the land, a horse to work it, and his feed, and that the plaintiff should supply the labor and whatever else was necessary in making the crop, and that the crop should be equally divided between them. The crop made was divided; the said

defendant received and removed his share; and the share of the plaintiff in the tobacco, the subject of the action, was set apart to him, and secured in a barn and smoke house on the premises. The defendants came on the land, forced open the doors of the houses, and seized and carried away the tobacco, in the presence of the plaintiff, who forbade their doing so, and was intimidated and overawed by their demonstrations of violence.

The defendants resisted the recovery on the ground that the possession of the entire crop, under the act of 1877, chapter 283, was by law in the said Veazey, and he had a right to enter upon the premises and remove the same, and asked the court so to instruct the jury. The court declined to do so, and told the jury that upon this evidence, if believed by them, the plaintiff was entitled to recover, and they would proceed and assess the damages sustained by him.

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

Mr. Geo. V. Strong, for plaintiff.
Messrs. Edwards & Batchelor, for defendants.

SMITH, C. J. The points insisted on in the argument, for the appellants here, are:

1. The want of jurisdiction in the superior court to entertain the action; and

2. The alleged error in refusing to give the instructions asked.

We are clearly of opinion with his Honor, that upon the undisputed facts disclosed in the testimony, the plaintiff was entitled to a verdict. The parties were under their agreement constituted partners in the making the crop, the one contributing the land and the horse and his feed; the other his labor and attention and whatever else might be required in making and gathering the crop; and then an

equal division of the gross products to be made between them. *Lewis* v. *Wilkins*, Phil. Eq., 303. When the separate shares of each were allotted to him, their joint ownership ceased, and their respective portions became the sole individual property of each. If the arrangement did not amount to a copartnership, but created other and different relations, such as would be affected by the statute referred to, the same consequences would follow the division and assignment to each of his share in the whole. The statute ceases to operate when the lessor has received his rent, whether in kind or in money, and there are no breaches of contract for which the crop is made liable; and its sole object is to secure the performance of all the stipulations of the contract on the part of the lessee.

The action is in tort for the unlawful taking and carrying away plaintiff's goods, and is properly brought in the superior court.

The objection made in this court that an issue ought to have been submitted as to an indebtedness of the plaintiff, cannot be entertained for the following reasons:

1. There were no formal issues submitted, the case presenting the single question of the legality of the defence under the statute.

2. It was the appellants' duty to ask for such issue, if they desired it, and they cannot complain of the consequences of their own neglect. *Kidder* v. *McIlhenny*, 81 N. C., 123.

3. The debt is not alleged to be such as the statute gives a lien for its security upon the crop.

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

No error. Affirmed.

J. W. FISHER v. T. H. WEBB.

Justices' Jurisdiction—Equitable Power.

1. A justice of the peace has jurisdiction to try an action upon a lost note wherein a sum less than two hundred dollars is demanded, and is competent to exercise the power of requiring in such case the indemnity of the defendant.

2. The equitable power of the superior court and the courts of justices of the peace, and its exercise under the provisions of the constitution, discussed by RUFFIN, J.

(*Cotton* v. *Beasley*, 2 Murp. 259; *Allen* v. *Bank*, 1 Dev. & Bat. Eq., 3; *Fisher* v. *Carroll*, 6 Ired., 485; *Chancy* v. *Baldwin*, 1 Jones, 78; *Murphy* v. *McNeill*, 82 N. C., 221, cited and approved.)

CIVIL ACTION tried at August Special Term, 1880, of ROWAN Superior Court, before *McKoy, J.*

Verdict and judgment for plaintiff, appeal by defendant.

Mr. John S. Henderson, for plaintiff.

Messrs. W. H. Bailey, Walter R. Henry and *J. M. McCorkle*, for defendant.

RUFFIN, J. It is needless to make any statement of the facts of the case as it was intended to present and in fact does present for our consideration the single question whether the court of a justice of the peace can entertain an action on a lost note for a sum less than two hundred dollars, the defendant who is the appellant insisting that such a court being strictly one of law, as distinguished from a court of equity, no such jurisdiction attaches to it.

It has rarely happened in the history of jurisprudence that any one question has given rise to so many conflicting and contradictory decisions by courts as this one, touching the competency of courts of law to determine actions based upon lost notes and other evidences of debt, and such conflicts are not confined to the decisions of different courts,

but are very often to be found in those rendered by the same tribunals at different periods, and such is the uncertainty pervading them that it is absolutely impossible to extract from them any general principle or rule.

Seeing then the difficulties in which other courts have become involved by allowing their decisions in regard to the point to fluctuate, we are the more disposed to adhere rigidly to those principles which were enunciated by this court when the question was first presented for its consideration, and by a recurrence to which its decisions have at all times been kept uniform and consistent.

The first case upon the point was *Cotton* v. *Beasley*, 2 Murp., 259, decided in 1813, in which it was determined that a court of law was competent to try such a cause, provided the plaintiff could make proof of the loss of the instrument sued on, by a disinterested witness, but otherwise not. And the reason assigned was, that, because of the danger to which the defendant would be exposed in case the plaintiff were allowed to testify to the loss of the instrument, while he himself was excluded from showing its payment, or other defence, by his oath, the law excepted the case from the *general rule* which allowed parties, though incompetent on the trial, to prove by their own affidavits the loss of papers as preliminary or auxiliary matters; and having deprived the plaintiff of this privilege, in order that he might not be remediless, it allowed him to appeal to a court of equity for its aid. In delivering the opinion of the court as to the competency of the plaintiff at law to prove the loss, Judge HALL recognizes the general rule, and does not hesitate to declare that the plaintiff should have the benefit of it, if without the aid of his own testimony he could get no relief. But he observes "that in such a case a party has a remedy in the court of equity where he will be at liberty to swear to the loss and the defendant to make any answer he can upon oath;" and again he says,

"it seems not to be right that the plaintiff shall be permitted to become a witness at law and not the defendant. Suppose the plaintiff swears at law that he has lost the bond, the defendant will not be permitted to swear that he has paid it, taken it up and destroyed it; the parties ought to stand on equal grounds. In a court of equity they will both be heard upon oath. *The plaintiff can require no more than that he may proceed at law, if he can make out the loss of the bond by disinterested witnesses.*"

The point as to the jurisdiction of the law courts was next discussed in the case of *Allen* v. *State Bank*, 1 Dev. & Bat. Eq., 3, decided in 1834, where Judge GASTON delivered the opinion of the court. After commenting on the diversities to be found in many of the decisions and the repugnancies existing in those of the courts of England, and being perhaps more or less influenced thereby, he admits that it was still an unsettled question and declares it to be one of so much consequence that the court should *weigh* it well in all its bearings and not decide it until it should become necessary, by its being the direct point involved in a case—which he held it not to be in the one then under consideration: for however it might be as to the jurisdiction of a court of law there could be no question, he declares, as to the jurisdiction of a court of equity in such case, growing out of its peculiar power to relieve against accident and mistake.

The point was next considered in the case of *Fisher* v. *Carroll*, 6 Ired., 485, and from the labor there bestowed upon it and the care to explain why and when the plaintiff was forced to seek the aid of a court of equity and why that aid was given him, and to correct even certain *dicta* of some of the judges in regard to it, it is plain to be seen that the court then felt that the time had come when a *decision* was necessary, and therefore they did what Judge GASTON said should be done, weighed well the point with all its bearings and consequences, so as to reach a safe judgment which

might be accepted as its final settlement by the court. Judge PEARSON, who wrote the opinion of the court, says that the fact that equity requires slighter proof of the loss of the instrument is the *main reason* to induce the plaintiff to sue in that court, and it is that too which distinguishes its mode of proceeding from that of a court of law, where strict and competent proof of the loss must be made; that ordinarily, the loss of a deed or other paper may be proved in a court of law by the oath of a party so as to let in secondary evidence of its execution and contents, "and the only reason why the same principle is not followed in those courts in reference to lost notes is the want of power to require an indemnity as a *condition* to the judgment," and he expressly declares that "if the party *can prove* the loss, it is *better for him to sue at law.*" And it is clear that he means it to be better not merely for the party to the action, but for the court and the country; for he adds "that the mode of trying facts at law by the examination of the witnesses in the presence of a jury is preferable to the mode of trial in a court of equity, particularly when the very defective manner of taking depositions is considered."

The only subsequent case in which the court has recurred to the point is that of *Chancy* v. *Baldwin*, 1 Jones, 78. This was an action on a lost note begun by a warrant before a justice of the peace and taken by appeal to the superior court, where on the trial the plaintiff offered to prove by his own oath the loss of the instrument which was admitted to be a negotiable one, and being rejected as incompetent appealed to this court. The competency of the party to testify was the only point presented in the case and Judge PEARSON, who again delivered the opinion of the court, discussed it at considerable length and after calling attention to the hazard to which the defendant might be exposed in case the note should be afterwards found in the hands of an endorsee declares, "that no defendant should be put in such a pre-

dicament *upon the mere oath of a plaintiff;*" and therefore it was held that the party was properly excluded as a witness. But why did that very able judge, always so astute to discern the point that lay nearest to the root of a case, discuss the question as to the competency of the witness at all, and make his decision turn upon it, if he could have had a doubt in his mind as to the jurisdiction, over the subject matter, of the justice before whom the action began? We will look in vain throughout the entire case for the slightest intimation, proceeding either from himself or the court, looking to any such want of jurisdiction in that tribunal. It is true that in the course of his opinion, the judge does go on to state the reason why the court of equity will allow the party to testify while a court of law will not, to be because that court can impose a condition upon the plaintiff of giving an indemnity to the defendant which the other could not; but that is spoken of as a power to be exercised by the court of equity, and not at all as the source or even an element of its jurisdiction over the cause.

From the foregoing decisions we deduce the following principles: That a court of law at all times had jurisdiction over the subject matter of a lost note; that it would not allow the plaintiff to testify even as to the preliminary matter of its loss because the defendant could not be heard to contradict or explain; that a court of equity took jurisdiction because of the accident, it being its peculiar province to relieve in such a contingency; that having the parties before it, it would hear both, and if deemed necessary, would compel the plaintiff to indemnify the defendant.

As the only obstacle in the way of such a plaintiff having certain and complete relief in a court of law grew out of the incompetency of the parties to testify for themselves, it would seem to follow, necessarily, that it must have been removed when that incompetency was put an end to by a statute that annulled almost every restriction upon their

right thus to testify; and it being conceded that a justice's court is a court of law, it must have the right to entertain an action on a lost instrument, unless there be something peculiar in its constitution to prevent. The defendant says that it should not be permitted to do so because of the fact that it lacks the power to exact from the plaintiff a bond for his indemnity against possible loss; but to this it may be answered that just the same lack of power was said to have existed in the law courts under the old system, and yet as we have just seen, they were allowed in many instances to entertain and determine such causes. But supposing that it might once have been a valid objection, we hold that an end has been put to it under the court system established by the present constitution. The power exercised by the court of equity, under our old system, of requiring indemnities for defendants when sued upon lost instruments, had nothing to do with the jurisdiction of that court. It neither originated nor enlarged it, but was simply an exercise of a power which it had over all its suitors and could exert whenever necessary in any case that was brought before it. When, then, the constitution abolished all distinctions between actions at law and suits in equity and declared that there should be but one form of action to be denominated a "civil action," and at the same time gave to the justices the exclusive jurisdiction of "civil actions" founded on contract wherein the sum demanded shall not exceed two hundred dollars, it must have intended to confer upon them every power essential to a proper exercise of that jurisdiction. There is no clause of the constitution, neither is there any statute, which bestows upon the superior courts as now constituted the powers of the old courts of equity, any more than upon the justices' courts. They are given alike to both, to be used within their respective spheres, and just so far as is necessary to the proper discharge of their several functions.

We hold, therefore, that in an action founded on a lost note wherein a less sum than two hundred dollars is demanded, the justice's court has exactly the same incidental power to require an indemnity for the defendant that the superior court would have in a like action for a larger amount. If this be not so, then is that power conferred upon no court, for as the jurisdiction of the justice to the extent of its limit is *exclusive*, the superior court and no other court can entertain *any* action to enforce a contract for less than two hundred dollars.

To avoid a misunderstanding, we repeat, we do not understand that in this change of systems, any portion of the *jurisdiction* of a court of equity has been apportioned to the justice's court, so as to enable it to try any action, however small the amount involved and though incidentally connected with a contract which was heretofore solely cognizable in a court of equity. And as an illustration of our meaning, we refer to the case of *Murphy* v. *McNeill*, 82 N. C., 221, in which it was held that the court of a justice of the peace could not entertain an action to foreclose a mortgage given to secure a debt less than two hundred dollars, the reason assigned being that such an action was not founded upon the contract *merely*, but upon an equity to have the premises sold, growing out of the relation in which the parties stood towards each other. So too, an action upon the contract of a married woman appears to us at present to be another fit illustration of our meaning. Inasmuch as she is incapable of contracting a *debt* so as to subject her to a judgment *in personam*, and can only contract so as to charge her separate property and thereby make it subject to a judgment *in rem*, it was formerly held that such an action was strictly cognizable in a court of equity; and it would seem now to be outside of the jurisdiction of a justice. But in the action before us now there is nothing to take it out of the general rule. It is founded on the con-

tract and is for its direct enforcement, and we hold that it was properly begun in a justice's court and indeed could not have been properly brought elsewhere.

No error. Judgment affirmed.

MARY MASON v. A. J. WILSON.

Promise to pay debt of another—Statute of Frauds.

A parol promise to pay the debt of another out of property placed by the debtor in the hands of the promisor, who converts the same into money, is not within the statute of frauds. It is an original and independent promise founded upon a new consideration.

(*Draughan* v. *Bunting*, 9 Ired., 10; *Hall* v. *Robinson*, 8 Ired., 56; *Hicks* v. *Critcher*, Phil., 353; *Threadgill* v. *McLendon*, 76 N. C., 24; *Stanley* v. *Hendricks*, 13 Ired., 86, cited and approved.)

APPEAL from a justice of the peace tried at Fall Term, 1880, of MECKLENBURG Superior Court, before *Seymour, J.*

The plaintiff both before the justice and in this court based her claim upon the promise of the defendant Wilson to pay a debt due by one Green to the plaintiff.

The facts disclosed by the evidence on the trial were as follows: On the 11th day of March, 1874, the said Green made and delivered to plaintiff a promissory note for the sum of eighty dollars for money borrowed, and shortly thereafter Green was charged with a crime and fled the county, leaving all his property in the hands of defendant Wilson. This property consisted among other things of a small stock of groceries in a storehouse in the suburbs of the city of Charlotte.

The plaintiff introduced herself as a witness in her own behalf, and testified that on the day after the flight of Green,

she went to the defendant and informed him that Green on the day of his flight had come to her house and informed her of his intended departure, and that he had left all of his property in the hands of the defendant Wilson, out of which her debt would be paid, as he had given Wilson instructions to that effect. To which Wilson replied that he had the property and that so soon as he could sell it, he would pay her debt. That the defendant had since sold the property, and that she had after such sale demanded payment which the defendant refused.

The defendant then introduced himself as a witness and testified that he had received the property of Green at the time of his departure, which he held to secure a debt due himself and denied that he had at any time promised to pay the plaintiff's debt out of the proceeds of the property, and that the proceeds of the property when sold, did not amount to enough to pay his own debt.

At the time the action was tried before the justice the note was lost, and there appears on the records of the justice's court an affidavit of the plaintiff to that effect, but on the trial in the superior court the note was produced, having been found in the meantime. Before the jury were impaneled and again in the course of the trial, the defendant moved to dismiss the action for the want of jurisdiction in the justice to try an action upon a lost note. The court overruled the motion and the defendant excepted.

In the course of the trial the defendant's counsel asked the court to charge the jury that the alleged promise on the part of the defendant not being in writing was void, and that there was no evidence to support the demand of the plaintiff. His Honor declined to give the charge, but told the jury that if they believed that the defendant Wilson received the property from the defendant Green promising to pay the plaintiff's debt out of the proceeds, and had thereafter verbally promised plaintiff to pay her debt in

the manner described by her, and afterwards refused to do so, that plaintiff was entitled to their verdict. To this charge of His Honor and to his refusal to charge as requested, the defendant excepted. Verdict and judgment for plaintiff, appeal by defendant.

Messrs. Platt D. Walker and *Jones & Johnston*, for plaintiff.
Messrs. W. H. Bailey and *J. M. McCorkle*, for defendant.

ASHE, *J.* The question of jurisdiction raised by the defendant's exception cannot be sustained, for the action is not upon the lost note (see *Fisher* v. *Webb, ante,*) but is in nature of *assumpsit* for money had and received to the use of the plaintiff. The defendant contends that the action cannot be sustained, for the reason that the promise of the defendant is to pay the debt of Green and is within the statute of frauds.

In construing this statute, (our act of 1819), it may be laid down as a general rule, "that a promise to answer for the debt, default or miscarriage of another for which that other remains liable, must be in writing to satisfy the statute of frauds; *contra*, when the other does not remain liable." 1 Smith L. C., 371. But there are numerous exceptions to the rule. Chief Justice KENT, in the case of *Leonard* v. *Vredenburgh*, 8 Johns. Rep, 29, went very fully and elaborately into the discussion of the many diversified and vexed questions arising in the construction of this statute, and he divided the subject into three classes:

1. Cases in which the promise is collateral to the principal contract, but is made at the same time and becomes an essential ground of credit given to the principal or direct creditor.

2. Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of

the promise without any distinct and unconnected inducement.

3. A third class of cases is where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the original contracting parties.

He says the two first classes are within the statute and the last is not, and the reason given why this last class does not come within the statute is because the promise is made upon a *new and independent* consideration, and it matters not whether the original debt continues to subsist or not. In 1 Smith L. C., 385, as coming under the last class, a promise to pay an antecedent debt in consideration of property placed in the hands of the promisor by the debtor, or of some new engagements or contracts entered into by the creditor, has been held not to require a writing to give it validity. *Olmstead* v. *Gouls*, 18 Johns., 12. And in *Wait* v. *Wait*, 28 Vermont, 350, it is decided that a parol promise to pay the debt of another in consideration of property placed by the debtor in the promisor's hands is not within the statute of frauds. It is an original promise and binding upon the promisor, and in this respect it is immaterial whether the liability of the original debtor is continued or discharged.

The same doctrine has been recognized and adopted by several decisions in this court, upon the ground that the promise made and the liability incurred are to be regarded as an original and independent promise founded upon a new consideration and binding upon the promisor, but it applies only where the property has been converted into money, and the money received. *Draughan* v. *Bunting*, 9 Ired., 10; *Hall* v. *Robinson*, 8 Ired., 56; *Hicks* v. *Critcher*, Phil., 353; *Threadgill* v. *McLendon*, 76 N. C., 24, *Stanley* v. *Hendricks*, 13 Ired., 86. In the last cited case, Chief Justice PEARSON says: "The principle is this: when, in considera-

tion of the promise to pay the debt of another, the defendant receives property and realizes the proceeds, the promise is not within the mischief provided against; and the plaintiff may recover on the promise or in an action for money had and received. For although the promise is in words to pay the debt of another and the performance of it discharges that debt, still the consideration was not for the benefit or ease of the original debtor, but for a purpose entirely collateral, so as to create an *original* and *distinct* cause of action."

The case of *Threadgill* v. *McLendon* seems to be directly in point. There, the plaintiff furnished supplies to a cropper of the defendant upon a promise by the defendant to pay for the same, and afterwards took into his possession cotton belonging to the cropper and sufficient to pay the plaintiff's account, and thereafter promised to pay the same; and it was held that the promise was not within the statute, and that defendant was liable, for the reason that the promise was not made by defendant as surety for his cropper but for himself, because the *fund* out of which the debt was to be paid was in his *hands*. It was insisted in this case by defendant's counsel, that the case did not come within the principal of *Draughan* v. *Bunting*, and other cases, because the cotton had not been sold; but the objection was met by the answer that cotton was a cash article and might be readily converted into money.

Upon these authorities we hold that the promise of the defendant to pay the debt of Green to the plaintiff was not within the act of 1819, and that there is no error upon that point. The judgment of the superior court is therefore affirmed.

No error. Affirmed.

G. W. FOUSHEE Adm'r v. H. O. DURHAM and others.

Sale of land under Decree—Confirmation of, necessary.

Confirmation *by the court* of a sale of land made under its decree is necessary to divest the title out of the party applying for the order of sale, and to validate a deed made by its commissioner to the purchaser.

(*Brown* v. *Coble*, 76 N. C., 391; *Latta* v. *Vickers*, 82 N. C., 501; *Mebane* v. *Mebane*, 80 N. C., 34, cited and approved.)

SPECIAL PROCEEDING to sell land for assets commenced in the probate court and heard on exceptions to a referee's report, at Spring Term, 1880, of CHATHAM Superior Court, before *Seymour, J.*

The heirs at law of the plaintiff's intestate, James Edwards, appealed from the judgment of the court below.

Mr. John Manning, for plaintiff.

Messrs. H. A. London, Jr., and *J. B. Batchelor*, for defendants.

SMITH, C. J. The plaintiff, administrator of James Edwards, finding the personal estate insufficient, applied for and obtained leave to sell and convert into assets for the payment of debts certain real estate of his intestate which is described in the petition. The sale took place on July 3rd, 1876, when the defendant, Andrew J. Riggsbee, became the purchaser at the price of $2,242, for which sum he executed his bond with surety. The intestate was indebted to Riggsbee in the amount of $800, which with a small sum paid in money was credited on the bond. The sale was reported and confirmed by the court, and the administrator directed to make title when the residue of the purchase money was paid.

Riggsbee, discovering a defect in the title of the intestate

to the land, upon affidavit thereof applied to the court to be relieved from his contract by the surrender of the bond, the return of the money and the surrender of the evidences of debt with which the partial payment had been made. Pending the application, and to remove the grounds of complaint, a rule seems to have been made, though the record is silent on the subject, requiring S. W. Gattis and Lucetta J., his wife, (supposed to possess an estate in the premises) to appear and show cause why they should not be compelled to execute a deed of release to the purchaser, and thus perfect his title. In obedience to this rule, these parties answer and say that the land formerly belonged to Espie Ann Burnett, and at her death descended to her two infant daughters, Antoinette and defendant, Lucetta, subject to the life estate of their father, Lucien Burnett, as tenant by the courtesy; that the said Lucien filed a petition in the name of himself and his said daughters, they being then respectively of the age of seventeen and twelve years, in the court of equity for a sale of the land, and that pursuant to a decree therein the same was sold by the clerk and master in November, 1846, for $200, to Isaiah Burnett, father of said Lucien; that on October 22d, 1847, Isaiah Burnett, for the consideration of $1,200, sold and conveyed the same to Wesley Edwards, and at his death it descended to his sister and brothers, one of whom is the intestate of the plaintiff; that Antoinette died in 1871, and defendant Lucetta is her only heir at law; that the records show no confirmation by the court of the report of sale, no order for title, and no disposition of the funds, and that the said Lucien is still living. It was thereupon referred to James H. Headen to make inquiry and report the action of the court in the premises, and the validity of the intestate's title. The report was accordingly made at fall term, 1879, accompanied with memoranda from the docket of the court, the deposition of

Lucien Burnett and other evidence, and the referee finds as follows:

Espie Ann Burnett, to whom the land belonged, with her husband Lucien, contracted with Edwin P. Snipes to sell the land to him at the price of two dollars an acre, and received payment, but she died, without having executed a deed, in 1843, leaving the said Antoinette and Lucetta, aged ten and fifteen years, the former of whom has since died leaving her sister sole heir at law; that the said Snipes has sold and conveyed his estate to Wesley Edwards, a brother of the intestate; that at fall term, 1844, the petition was filed by Lucien in the name of himself and his daughters for a sale of the land; that a decree made directed a sale by the clerk and master; that he sold the land on February 12th, 1845, and reported the sale at spring term following; that the report was confirmed, the purchase money paid, title ordered, and a deed executed November 9th, 1846, to the said Isaiah Burnett, conveying the lands; and that Wesley Edwards died and the plaintiff's intestate was his heir at law. As the result of these facts the referee finds that the intestate had an estate in fee in the land, and the purchaser will under the order of the court for a conveyance acquire a good and indefeasible estate therein.

Numerous exceptions were taken to the report some of which were sustained and others overruled by the court. Upon a review of the evidence, His Honor adjudged that the sale reported by the clerk and master was never confirmed, and that the contrary finding of the referee is not supported by the evidence. The cause was thereupon remanded to the probate judge, to the end that there be a re-sale of the life estate of said Lucien Burnett and other proceedings had therein.

As the finding of the facts by the court conclusively determines that the clerk and master's sale was never sanctioned by the court, nor the deed subsequently executed

authorized, the only question of law raised by the appeal is as to the necessity of such confirmation to divest the estate out of the petitioners and give efficacy to the deed by which this is attempted to be done.

It cannot be necessary to discuss the proposition or cite authority in its support, that the concurrence and approval of the court are essential to the validity of the proceedings in every stage of its progress up to the final decree. While a former order for title may be dispensed with, when all that has been done is regular and in accordance with the orders of the court and the purchase money paid, for the security of which alone the title is retained, and the assent of the court will be presumed when the action is terminated, as is held in *Brown* v. *Coble*, 76 N. C., 391, and *Latta* v. *Vickers*, 82 N. C., 501, yet it is equally true that the court will not surrender to its commissioned agent that discretion and the exercise of those judicial functions which the law confides to the court alone. *Mebane* v. *Mebane*, 80 N. C., 34.

There is no error, and this will be certified.

No error. Affirmed.

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*In the matter of ANNA MACAY and others *ex parte*.

Sale of land under Decree—Actual payment of Purchase Money necessary.

The authority conferred on a commissioner to make a deed to land sold under decree of court retaining title until the payment of the purchase money, can only be exercised when the same is *actually* paid—not when it is secured by note.

(*Lord* v. *Merony*, 79 N. C., 14; *Mebane* v. *Mebane*, 80 N. C., 34, cited and approved.)

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

MACAY EX PARTE.

MOTION in the cause heard at August Special Term, 1880, of ROWAN Superior Court, before *McKoy, J.*

This was a motion in the cause upon notice to T. J. and P. P. Merony, substantially as follows: You will take notice that at next term I shall move the court to require you to pay a note for $827.21, dated on the 22d of January, 1863, with interest from date, payable to Luke Blackmer, guardian of Anna Macay, and executed by Josephus W. and Newberry F. Hall; and on default of payment on or before a day to be fixed by the court, that judgment be rendered against you for the sale of land (describing it,) the said note having been given for the purchase of said land at a sale made by the clerk and master under a decree rendered at spring term, 1857, of the court of equity for Rowan county in the case of Anna Macay and others *ex parte,* the said note having never been paid, and a deed made to said Hall by the master in violation of the decree—the land at the time of sale belonging to Anna Macay, now the wife of Stephen F. Lord, who joins in this motion. Signed, &c. Petition and answer were filed, and upon the death of said Anna, her husband administrator and the heirs at law were made parties to the proceeding, and a summons issued making Luke Blackmer a party defendant, who also answered the petition.

Upon the trial the jury rendered a verdict in favor of plaintiff, Stephen F. Lord, administrator, and from the judgment thereon the Meronys appealed.

Messrs. J. S. Henderson and *J. M. McCorkle,* for petitioners.
Mr. W. H. Bailey, contra.

SMITH, C. J. When the same essential facts were before us, upon a former appeal from a judgment rendered in an independent action to charge the land sold by order of the court of equity with the unpaid purchase money, repre-

sented in an insolvent note accepted by the clerk and master and made payable to him as guardian, he acting in both capacities, the plaintiff's equity was fully recognized, but it was held the remedy had been misconceived. Commenting on the case then presented, and delivering the opinion of the court, BYNUM, J., thus speaks:

"The Meronys can be in no better condition than Hall, the first purchaser, for they bought as confessed in their answer with *actual notice* that the purchase money had not been paid by Hall, but that in lieu thereof only a guardian note for the money had been given. The land therefore remained bound for the purchase money, and this proceeding is in the nature of a proceeeding *in rem* to subject that specific property to its payment * * *. The right of the plaintiffs to the relief they claim is so clear that it is a matter of regret that they have resorted to the wrong jurisdiction for redress." *Lord* v. *Merony*, 79 N. C., 14.

The present proceeding is by motion after notice in the original cause, in conformity with the suggestions there made, and supported by a similar statement of facts. The plaintiffs allege that the decree directed the retention of title until full payment of the purchase money, and that the clerk and master, after his appointment as guardian, accepted the note of the purchaser with the personal security, drawn payable to him in his latter capacity, and thereupon executed a deed undertaking to convey the premises to Hall, and that of these facts the defendants had notice.

The defendants in their explanatory answer say that the clerk and master in this transaction "treated the purchase money as paid to himself as commissioner, and then lent to the purchaser, Hall, in the capacity of said Blackmer as guardian," and that thus "the purchase money so due was in fact and legal intendment paid." They further say in reply to the charge of notice, that their information was to the effect that Blackmer as guardian agreed to lend to Hall

the amount due him as clerk and master, and that "instead of going through the formality of receiving the actual cash with one hand and lending it with the other, Blackmer receipted the bid of the purchaser, Hall, contemporaneously taking from him as on an actual tradition of money, a guardian note for the amount well secured."

These unequivocal admissions, notwithstanding the labored effort to assimilate the transaction to a case of actual payment within the requirements of the order of the court, would seem to entitle the plaintiffs to immediate judgment, yet His Honor prepared and submitted a single issue to the jury: "Was the purchase money for the sale of the land in controversy paid by Hall?"

The defendants tendered two additional issues, one before and the other after the hearing of the evidence.

1. Was the note settled in full by Hall with the commissioner?

2. Did the defendants purchase for value and without notice of the equity of Anna Macay?

These were properly refused by the court, the first as being included in the issue that was submitted, and the other for the reason assigned that the fact of notice of the non-payment is not controverted in the answer.

In his examination before the jury upon the matter, Blackmer thus testifies: "Dr. Hall offered to pay me in Confederate currency for his purchase; I refused to take it. He asked me if I would take his brother, Newberry F. Hall, as surety on a guardian note, payable to me as guardian of Anna Macay. I agreed to do so. The note was amply good. I took the note in January, 1863; I can't say I took it as a loan of money, for I did not loan Dr. Hall any money. I considered and treated the note as a payment for the land."

Under the instructions of the court that there was no evidence of actual payment of money and that the giving

of the note was not a payment in accordance with the decree until the note itself was paid, the jury responded to the issue in the negative.

While the facts upon which the plaintiffs' equity rests are not controverted in the answer and do not call for the intervention of a jury, the appellant cannot complain of the order of the court in submitting to them the question of payment and the opportunity of proving it, nor of the instructions of the court as to its force and effect in determining the verdict. The equity itself to charge the land is so fully and clearly established by the opinion in the former appeal under the same circumstances, as to render a further discussion needless.

The authority conferred to make title could only be exercised when the purchase money *was paid, not secured* as attempted here; and the defendants admit that they had information of what had been done.

The plaintiffs are entitled to have a resale of the land for the payment of the debt, under the directions of the court according to the suggestions in *Mebane* v. *Mebane*, 80 N. C., 34, and in other cases. There is no error and this will be certified for further proceedings in the court below.

No error. Affirmed.

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*In the matter of ANNA MACAY and others *ex parte*.

Witness—Tax Sale, what estate passes—Notice, on whom to be served—Scale.

1. Under the act of 1879, ch. 183, a party to a suit on a bond executed

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

prior to the first day of August, 1868, is not a competent witness to prove its payment. And objection to such witness testifying may be taken after he is sworn in chief and when the incompetency first appears, a *voire dire* not being necessary.

2. Nor in such a case is the deposition of a witness (now deceased and if living would be incompetent) which was read before the passage of the act of 1879, upon a former trial, admissible under said act.

3. Where one is let into possession of land under a contract of purchase and fails to pay the tax upon it and the sheriff sells to secure the same, his deed to the purchaser passes only such estate as the vendee (or mortgagor) has. To affect the interest of the owner of the legal estate in such case, notice of the tax sale must be served upon him.

4. A note executed in 1863 for the purchase money of land sold in 1859, and bearing interest from the day of sale, is not subject to the legislative scale of depreciation of confederate currency.

(*Cannon* v. *Morris*, 81 N. C., 139; *Tabor* v. *Ward*, 83 N. C., 291; *Meroney* v. *Avery*, 64 N. C., 312; *Whitehurst* v. *Gaskill*, 69 N. C., 499; *Boykin* v. *Barnes*, 76 N. C., 318; *Mebane* v. *Mebane*, 80 N. C., 34, cited and approved.)

MOTION in the cause heard at August Special Term, 1880, of ROWAN Superior Court, before *McKoy, J.*

There was judgment for petitioners, from which the Beards appealed. See preceding case.

Messrs. J. S. Henderson and *J. M. McCorkle*, for petitioners.
Mr. W. H. Bailey, contra.

SMITH, C. J. The present proceeding commenced by motion in the cause, like that in the *Merony* case at the present term, seeks to subject to the payment of the purchase money another tract bought at the same sale by one Margaretta L. Beard from the clerk and master, Luke Blackmer, and for which she executed her bond payable to him as guardian of Anna Macay. During the progress of the cause the said Anna who had intermarried with Stephen F. Lord, a co-plaintiff, died intestate and her said husband (who administered on her estate) and her heirs at law were made par-

ties plaintiff. The said Margaretta also died intestate and the defendants are her administrator and heirs at law, two of whom are infants and represented by their guardian.

The defence set up is: 1st. That the note has been paid and a deed conveying the land to the ancestor of the defendants executed by the clerk and master pursuant to the decree, and lost before registration. 2d. That the defendant, Julia M. Beard, has acquired the title to part of the land by purchasing at a sheriff's sale for taxes and his deed to her. Two issues were accordingly submitted to the jury which with their findings are as follows:

1. Has the note for the purchase money as described in the complaint, been paid? Answer. It has not been paid.

2. Is Julia M. Beard the owner of and entitled to the possession of nine acres of land described in the complaint, by reason of purchase under sale for taxes? Answer. She acquired the title of Margaretta L. Beard by the purchase under sale for taxes.

The exceptions are to the ruling out of certain evidence offered by the defendants, and to the instructions of the court as to the title vested in the defendant, Julia M., by the sale for taxes and the sheriff's deed.

I. The defendants offered the said Julia M., as a witness upon the first issue and she was duly sworn without objection. They then proposed to prove the payment of the note to the guardian by the said Margaretta previous to the action. On objection of the plaintiffs the court declared the witness incompetent and ruled out the testimony. The witness, though not disabled by C. C. P., § 343, from testifying to what occurred in the lifetime of said Margaretta between herself and the guardian still living, since it is not a transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, as a witness against a party then prosecuting or defending the action as executor, administrator, heir at law,

&c., is clearly excluded from giving the proposed evidence by the proviso annexed by the act of 1879, ch. 183. This amendment declares that no party to a suit founded on a judgment rendered, or note under seal for the payment of money, or conditioned to pay money, executed previous to August 1st, 1868, shall be a competent witness, but the rules of evidence in force at the rendition of the judgment or execution of the note shall apply to the suit. The bond now to be enforced was given in 1863, and is within the terms of the enactment. We have had occasion heretofore to construe this proviso and will simply refer to the cases of *Cannon* v. *Morris*, 81, N. C., 139, and *Tabor* v. *Ward*, 83 N. C., 291.

It has been argued that the objection to the competency of the witness should have been taken on "*voire dire*," and herself examined before she was sworn in chief. This seems to have been the former practice, but as remarked by Mr. GREENLEAF, the objection is now usually taken after one is sworn in chief. 1 Greenl. Ev., § 421. "This peculiar form of oath," observes a recent writer of high authority, "is now however seldom administered, and the facts on which the objection rests, if not admitted by the opposite side, are elicited by questions put to the witness after being sworn in chief." 2 Tay. Evi., § 1257. When the witness proceeds to give in his evidence, the objection may be deemed waived and yet when the incompetency first appears after testimony has been given in and the exception is promptly taken, it will usually be stricken out. *Meroney* v. *Avery*, 64 N. C., 312. Alluding to numerous citations of counsel in support of the practice, LORD ALVANLEY says: "I can add the testimony of my own experience which has been of more than forty years, that whenever a witness was discovered to be incompetent the judge always strikes the evidence which he had given from his notes." *Jacob* v. *Layborn*, 11

M. & W. Ex., 685. To the same effect is *Shurleff* v. *Willard*, 19 Pick., 202.

II. The defendants introduced also to prove payment of the note, the deposition of said Margaretta taken, passed on and ordered to be read in the former action between the same original parties, which was dismissed (*Lord* v. *Beard*, 79 N. C., 5,) because improperly commenced. This on objection was also excluded from the jury. If the witness were living and remained a sole defendant, she could not be examined *viva voce* under the inhibitions of the act of 1879. Nor would it be permitted to be read or taken *de bene esse*. No party or person interested in the results of a suit could testify under the law in force when the contract was entered into, and the disability in the limited cases to which it is applicable is perpetuated by the statute. We see no grounds upon which the admissibility of the deposition can be defended, and not the oral testimony of a witness under similar circumstances. That it was read on a former trial when the act was not in force is no reason for admitting it now when it is prohibited by the law.

III. The title set up by the defendant, Julia M., to a part of the premises under the sale for taxes. The intestate Margaretta was let into possession after her contract of purchase, and failed to pay her taxes for the years 1875 and 1876. The sheriff upon her default levied on the land, returned his levy to the clerk's office, gave her notice of the sale, and at the court house door on the 6th day of August, 1877, sold "the right, title and interest of the said Margaretta L. Beard" to the said Julia M, for the amount of the taxes and expenses, she "taking the smallest part of the premises," and gave her a deed for the nine acres claimed. The court was of opinion that the effect of these proceedings was to vest in Julia M, only such title as was vested in Margaretta, and no notice being given to S. F. Lord and wife, the estate acquired was still liable for the purchase

money, and so charged the jury. We assent to the conclusion of His Honor that the plaintiff's redress upon the land has not been disturbed by the tax sale and the substitution of the purchaser thereat to the estate of her ancestor. Aside from the enquiry whether the requirements of the statute have been strictly observed, and the sale effectual as to the delinquent tax-payer, it is plain her interests alone in the property have been transmitted to the purchaser. The statute throughout speaks only of the party who owes and is in default in paying the tax. The sheriff is directed to "levy on the lands of the delinquent." Act 1876-'77, ch. 155, § 29, par. 3. The effect given to the deed which must be registered in six months is to "*convey to the grantee all the estate in the quantity of land which the said purchaser bid, which the delinquent, his agent or attorney had, at the time of the sale for taxes,*" § 33. The sheriff seems to have acted in full recognition of these provisions of the law directed against the delinquent. No notice was given to the owner of the legal estate and this is essential to the validity of the proceeding and to the impairment of her rights. In *Whitehurst* v. *Gaskill*, 69 N. C., 449, the notice was served upon the mortgagor and it was held to be insufficient. READE, J., declaring that the mortgagee is the legal owner of the land and has a substantial interest in it and is the person entitled to the notice, and for want of it the estate of the mortgagee was not affected by the sale.

IV. The defendants also insist upon the application of the scale as of the date of the bond. The sale was in 1859, and the debt for the purchase money then contracted. The note itself, though dated and executed in 1863, bears interest from the day of sale, and thus recognizes the obligation as a subsisting one, from that date. The case is not in principle distinguishable from *Boykin* v. *Barnes*, 76 N. C., 318, and is governed by that decision. There, the defendant under an agreement with one Eure took up a note of

the latter executed in September, 1860, and substituted his own for the same amount antedated to correspond in August, 1863. The latter note was held not subject to the scale, the statutory presumption being repelled. The relation of the note to the date of the contract which it undertakes to comply with, is as obviously within the contemplation of the parties to it in the one case as in the other, and the same considerations exist to exempt this from the operation of the scale.

The exceptions of the defendant must therefore be overruled and a decree for a sale entered in accordance with the practice in such cases as pointed out in *Mebane* v. *Mebane*, 80 N. C., 34, and against the administrator of Margaretta for the amount due by his intestate. Let this be certified that further proceedings may be had in the court below.

No error. Affirmed.

G. J. GREEN and others v. W. A. & G. W. BARBEE, Admr's, and others.

Confederate currency—Scale—Commissions—Practice.

1. An administrator is not liable for claims made worthless by the results of the war, where he shows that the exigencies of the estate did not require their collection during the war and that he has made diligent efforts to collect the same since its close. The scaling process in the settlement of this estate is confined to the several balances due to and from the administrator.

2. Commissions allowed personal representatives will not be reduced by this court unless the amount is excessive.

3. This court will not disturb the conclusion reached alike by the probate

and superior court as to the preponderance of proof relating to a matter about which there is conflicting evidence.

(*Currie* v. *McNeill*, 83 N. C., 176; *Shepard* v. *Parker*, 13 Ired., 108; *Peyton* v. *Smith*, 2 Dev. & Bat. Eq., 325; *Spruill* v. *Cannon*, *Ib.*, 400; *Walton* v. *Avery*, *Ib.*, 405, cited and approved.)

PETITION for account and settlement heard on exception to referee's report at Spring Term, 1880, of CHATHAM Superior Court, before *Seymour, J.*

The plaintiffs appealed from the judgment below.

Mr. J. H. Headen, for plaintiffs.

Messrs. J. M. Moring and *John Manning*, for defendants.

SMITH, C. J. The plaintiffs' appeal is from the rulings of the court upon four (numbered respectively 6, 9, 11 and 12) of their numerous exceptions to the account taken before the probate judge of the administration of the estate of Christopher Barbee by the defendants W. A. Barbee and G. W. Barbee, his administrators. These we proceed to consider:

Exc. 6. The plaintiffs object that the administrators are not charged with certain notes and judgments, numbered from 48 to 57 inclusive, alleged to be lost by their negligence. We have recently declared that a fiduciary was not bound to collect a well secured debt in his hands during the war when confederate money was the only currency in use, and this could not be advantageously used or invested, and the exigencies of the trust estate did not require the collection, and he is not responsible for their loss where the debtors have been rendered insolvent by the results of the war and he will not be held responsible if he shows such insolvency, or that he has made diligent efforts to collect since its close and they have been fruitless. *Currie* v. *McNeill*, 83 N. C., 176.

The testimony of the defendant, W. A. Barbee, is to the effect that these notes and judgments were solvent at the

commencement of the war and became insolvent at its close. Several of the claims were put in the hands of the plaintiff, C. J. Green, a constable for collection, and no money was made except the one fifth paid on No. 54. The testimony of the plaintiff, Green, is that Nos. 48, 49, 52, 53, 54, 55, 56 and 57 could have been collected in 1861 and 1862, but he does not say that they could have been collected after the close of the war. We therefore concur with the court in holding that the administrators are not personally liable for the loss of these claims and in overruling the exception by which they are covered.

Exc. 9. This exception is to the charge against the several distributees for $500 paid to each on December 23d, 1860, for that, the evidence shows that nothing was paid in fact for which the receipts were given. The witness, W. A. Barbee, on his examination states that he collected a large sum in deposit in the bank of North Carolina ($3,827.17) which with $669 in the possession of the intestate at his death (of which latter sum between $200 and $300 was in gold and silver) he used in paying to each distributee $500, and that this distribution was made at the date of the receipts and before their execution. C. J. Green testifies that the receipts were written by him at the request of the administrator and in anticipation of his receiving the money, but that he failed to get it and according to his recollection, the leaves of the book on which they were written were torn out. That he received no money, and if money was then paid to the others, he did not observe it; that he wrote the receipt for $1,000 also at the request of the administrator, and this as he understood covered all antecedent payments. Simpson Barbee, defendant, introduced by the plaintiff and examined, stated that he had no recollection of receiving the $500, but did receive about that date some paper money, gold and silver, less than $100 in amount, but gave no receipt for it. The memory of these witnesses appeared upon their

cross-examination very much at fault in regard to specific facts, and the former as to conflicting statements about which he was interrogated relating to these transactions.

The administrator, G. W. Barbee (who committed the management of the administration to his brother mostly) testifies that the $500 was paid to each distributee, according to their several receipts, and that he himself had $500; that the two went twice to Raleigh to get the deposit money and failing they went again about two weeks later and collected it. W. A. Barbee explains his failure to withdraw the intestate's bank deposit on his first visit because he did not carry with him proof of the grant of letters of administration, and positively declares that all were present together when the money was distributed for the separate shares of which a receipt was taken from each. In this conflict of evidence we are not disposed to disturb the conclusions reached alike by the probate judge and His Honor as to the preponderance of the proof and we sustain the ruling of His Honor.

Exc. 11. This relates to the allowance of commissions at the rate of five per cent. on the total amount of receipts and expenditures which it is claimed are excessive. This allowance is on moneys received, $24,738, and expended $2,234, the commissions on both sums being $1,348.60. The compensation allowed the personal representative for his services, within the limit of five per cent. on both sides of his account rests in the sound discretion of the tribunal called to pass on the question, and, while reviewable on appeal to this court, is involved in the determination of the cause, (*Shepard* v. *Parker*, 13 Ired., 108,) yet the court will not disturb the allowance of the probate judge, sustained in the superior court, unless manifestly excessive. In the former practice, the court of equity would not as a general rule depart from the rule of compensation fixed by the master, and where it had been determined in the county court,

would follow that as the safer guide. *Peyton* v. *Smith*, 2 D. & B. Eq., 325; *Spruill* v. *Cannon*, *Ib.* 400; *Walton* v. *Avery*, *Ib.* 405. The exception must be overruled.

Exc. 12. The plaintiffs object to the finding of fact that the administrators collected and paid out, in confederate currency at its nominal value and in like manner the residue to the distributees, and that as a matter of law the scale was not applicable. His Honor overruled the exception but adjudged that the balance due from the distributees to the administrator on account of over-payment, and from the latter to such as have not received their full shares, as appears from the report, be reduced by applying the scale of the date of the last distribution, except so far as concerns the distributee, Bartlett Barbee, as to whom and whose interests a different disposition was made in the same judgment. We discover in examining the evidence transmitted no sufficient grounds of objection to the finding by the probate judge that the funds collected were paid out, and consequently the application of the scale to the several items was not called for as suggested in the case of *Currie* v. *McNeill*, *supra*, and in our opinion the scaling process was properly confined to the several balances due to and from the administrators.

The transcript contains an obvious error in the report of the probate judge which fixes the value of the several distributive shares, in the apportionment, at $3,658.53 instead of $2,658.52, which is really one-ninth of the amount $23,926.80 to be distributed.

The error of $1,000 does not however enter into the computations by which the several balances are ascertained, and these are correct. We advert to this to prevent any mistake in the further reference necessary to reform the account in accordance with the rulings of this court. It will be referred to the clerk of this court to make the necessary

corrections and report the account as thus reformed and the cause is retained until such report is made.

PER CURIAM. Judgment accordingly.

A. J. DUKE v. JOSEPH H. WILLIAMS and others.

Confederate Currency—Evidence.

1. Evidence as to the currency intended by the parties to a note executed in January, 1863, for land, that a proposition was made to sell the same for $1,000 in confederate money which was declined, the party (declining) at the time expressing the opinion that it was worth $600 in good money, is competent to confirm the statutory presumption arising upon the face of the note as to the kind of money in which it was solvable.

2. Where no particular species of money is designated in such note, and sundry credits are endorsed thereon (paid in national currency in 1867–1870), the debt and the partial payments should alike be reduced to a specie basis in order to an adjustment of the claim.

(*Brown* v. *Foust*, 64 N. C., 672; *Hall* v. *Craig*, 65 N. C., 51; *Wimbish* v. *Miller*, 72 N. C., 523; *Walkup* v. *Houston*, 65 N. C., 551, cited and approved.)

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

There was judgment for plaintiff and the defendants appealed.

Messrs. Gilliam & Gatling, for plaintiff.
Messrs. Pruden & Shaw, for defendants.

SMITH, C. J. The plaintiff on January 1st, 1863, purchased from John L Williams the land mentioned in his

complaint at the price of twelve hundred dollars, of which sum he paid $328 in confederate currency and executed his note under seal for $872 the residue and received title. John L. Williams died soon after intestate and the defendant Henry C. Williams became his administrator.

On the 6th day of October, 1866, the plaintiff conveyed the land to Henry C. in trust to secure the said note, describing it, and with a power of sale in the trustee. Sundry payments were thereafter made in national currency and endorsed on the note as follows: On January 1st, 1867, $200; January 1st, 1869, $50; and on January 1st, 1870, $150.

In December, 1876, after advertisement the land was sold by the trustee, according to the provisions of his deed and bid off at $705 by the defendant Hardy C. Williams, who, as receiver for the intestate's infant children, then held the note, and transferred his bid to the defendant Joseph H. Williams, also a son of the intestate, who, after deducting his own share, paid over the remaining proceeds of sale in cash to the trustee and took his deed conveying the title. The material facts brought in controversy by the pleadings were submitted in a series of issues to the jury whose finding in substance is:

1. The note executed by the plaintiff is solvable in confederate currency.

2. Neither Hardy C., who bid off the land, nor Joseph H., his assignee, was induced to buy the land by the conduct of the plaintiff, and both had notice of the plaintiff's claims when it was sold.

3. The plaintiff after the trustee's sale did rent the land from Joseph H. to whom it had been conveyed.

During the trial of the issue as to the currency intended by the parties in the execution of the plaintiff's note and to sustain a witness who had testified that he made the original contract of purchase with the intestate for confed-

erate money and allowed the plaintiff to assume his place in the contract, another witness was allowed, after objection, to prove that he proposed to sell the land to his father for $1000 payable in confederate money and the latter declined to give his bond for that sum, but at the same time expressed an opinion that the property was then worth $600 in good money. This is the first exception. We think the evidence was competent to confirm the statutory presumption arising upon the face of the note and to repel the evidence offered in rebuttal.

The court was asked to give the following instructions to the jury:

1. "When a sale is publicly made and a third person is present who knows his title, fails to make it known, he shall not afterwards be permitted to set up his title against the purchaser at such sale for value and without notice."

2. "The purpose to deceive is presumed when one's conduct is such as to mislead a reasonable man, on the principle that between two innocent persons the loss must fall on him who causes it." These may or may not be correct abstract propositions of law, but the court properly declined to give them to the jury for the reasons set out in the record, that the issues before the jury involve facts only to which the law would be applied if necessary on the finding, and which were entirely out of the controversy and inapplicable by the finding that there was no such conduct on the part of the plaintiff as the instructions pre-supposed and the purchasers were fully cognizant of the plaintiff's claims.

The court adjudges that the endorsed payments extinguished the indebtedness due on the plaintiff's note when reduced according to the legislative scale to its equivalent in gold before the sale took place, and the trusts being thus discharged the trustee had no authority to sell and his deed was inoperative to pass the title, and that the plaintiff recover possession and damages as rents for the time the

possession was withheld. The correctness of this ruling is presented by the defendant's appeal.

When partial payments, though made in depreciated currency, are endorsed for their nominal amount on a bond executed when there was no such currency and which is payable in good money, their effect is to extinguish the debt *pro tanto* because as was remarked by SETTLE, J., "they have been accepted by the plaintiffs and amount to a discharge to the extent of their nominal values." *Brown* v. *Foust*, 64 N. C., 672; *Hall* v. *Craig*, 65 N. C., 51; *Wimbish* v. *Miller*, 72 N. C., 523. If the bond be drawn payable in specie and the endorsed payments are in currency, they operate in reducing the indebtedness only to the value of such credits reduced to coin at their respective dates. This also rests upon the presumed intent of the parties. *Walkup* v. *Houston*, 65 N. C., 501.

First. If the reverse of the rule declared in the case first cited be correct and the rule thus made universal, that where no particular species of money is designated in the body of the note to be paid, and the same is true of the endorsed credits, it is to be assumed that the latter were intended to extinguish an equal amount of the debt due without reference to the kind and value of the money thus applied, or of the indebtedness to which it is applied. In this aspect of the matter the payments are but little in excess of the accruing interest due at the time of the sale, and if the residue of the principal be then scaled, the proceeds of the sale of the land will discharge the debt and leave a considerable sum to be paid over to the plaintiff.

Second. If, however, the confederate currency intended in the contract and the national currency used in the partial payments be alike reduced to their equivalent in gold at the respective dates of each, and an estimate be made upon the basis of one currency for all, the result may be (we cannot say how it is, since we do not know the specie

value of national currency when the credits were put on the note) that there was still a subsisting indebtedness in December, 1876, when the trustee made his sale.

Third. If the debt is reduced to specie and the payments are admitted at their nominal amount, the conclusions of His Honor are correct, that no indebtedness existed when the land was sold and the trustee ought not to have sold.

Of these three modes of adjustment, we think that most equitable and in consonance with the past adjudications of the court which proposes to reduce to a specie basis alike the debt itself and the successive payments thereof, as suggested in the second method of computation. As the judgment must have been rendered upon the basis of the third method of settlement, and this is in our opinion erroneous, it must be reversed, and the cause remanded to be proceeded with according to this opinion; and if it shall turn out that the sale was warranted, so that if the specific relief asked cannot be obtained in the present form of the action, application may be made for such amendment as will enable the court to grant such relief as the plaintiff may be entitled to.

Error. Reversed.

JAMES K. MELVIN, Adm'r, v. CHARLES H. STEVENS, Adm'r.

Evidence—Confederate Currency—Presumption.

1. While it may be that evidence that confederate money was the only currency generally in circulation in a given locality at the time of a certain payment may not be sufficient in itself to establish a payment in such currency, yet, it is clearly admissible to corroborate other evidence tending to the same end.

2. There is no presumption that a receipt for a certain number of dollars given in this state by a clerk and master in equity, in the course of his

official duty, during the war, was meant to acknowledge the payment of that sum in gold or silver. If there is any presumption at all, it is the reverse of this.

(*Utley* v. *Young*, 68 N. C., 387; *Emerson* v. *Mallett*, Phil. Eq., 234; *Atkins* v. *Mooney*, Phil. Law, 31, cited and approved.)

CIVIL ACTION tried at Fall Term, 1880, of Bladen Superior Court, before *Avery, J.*

The action was brought by the plaintiff to recover of the defendant administrator *cum test. annex.* of George W. Melvin and his surety, Duncan Cromartie, upon his administration bond, the amount of a decree which the plaintiff as administrator of Angus McLelland had recovered against the defendant administrator in the court of equity of Bladen county. The defendant relied upon the plea of payment, and only one issue involving that question was submitted to the jury.

The defendant introduced Dr. Lewis as a witness who testified that the signature of D. Lewis, clerk and master of said court of equity, to a receipt put in evidence and dated the 2d of February, 1864, was the handwriting of said D. Lewis, who was the father of the witness. This receipt was for one hundred and sixty-three dollars and five cents in full of the judgment or decree. The witness testified on cross-examination that he had no recollection of the particular transaction and did not distinctly recollect when payment was made to his father, but he felt satisfied the payment was not made in gold or silver because the entry of the payment on the book or docket was in his, witness', handwriting, and he generally knew when his father received money and took charge of it for him; and that his father did not to his knowledge receive any payments as clerk and master in gold or silver, and for the reasons given he was satisfied that the payment was not made in gold or silver, and that confederate money was the currency generally used in the year 1864.

R. A. Lytle was then introduced as a witness for plaintiff, and it was proposed to prove by him that confederate currency was the currency generally circulating at the time of the payment in 1864, and that the same was the only currency in circulation at the date of the receipt of February 2d, 1864. The defendant's counsel objected and the objection was sustained, and plaintiff excepted.

The plaintiff admitted that the payment to H. H. Robinson (clerk and master in 1861) of seventy-five dollars and sixty-six cents, the costs in the suit in equity when the said decree was rendered, was a valid payment, and that the receipt dated February 2d, 1864, was signed by D. Lewis, clerk and master.

Under the ruling of the court (which is set out in the opinion here) the jury found the issue submitted to them in favor of the defendant, judgment, appeal by plaintiff.

Mr. R. H. Lyon, for plaintiff.
Mr. D. J. Devane, for defendant.

ASHE, J. His Honor in the court below held that the receipt having been admitted to have been executed by the clerk and master, the presumption of law would be that the payment was made in good money, and while the plaintiff had the right to offer competent evidence to show that in fact the said payment was made in confederate money, proof that confederate currency was the currency generally circulating at the time, would not tend to show that the particular payment in question was made in confederate money. But assuming that there was such a presumption of law, it was a presumption that might be rebutted by proof, and to that end all competent evidence of facts and circumstances tending to that result should have been allowed to go to the jury to be considered by them in determining whether the presumption had been rebutted.

We hold that the excluded evidence that confederate money was the currency generally in circulation at the time of payment, and that it was the only currency in circulation at that time, was competent and should have been submitted to the jury to be considered by them in connection with the testimony of Dr. Lewis, which was received without objection, and which would have been very much strengthened by the admission of the rejected proof. We concede that the fact of confederate money being generally in circulation would have been, by itself, a very slight circumstance tending to prove the character of the currency in which the decree was paid, but assuredly, the fact that confederate money was the only currency in circulation would tend to establish that fact, and yet it was excluded by the judge, but upon what principal we do not understand.

In the case of *Thorington* v. *Smith*, 8 Otto, 1, (U. S. Rep.) which was an action brought on a promissory note given at Montgomery, Alabama, for ten thousand *dollars*, dated November 28th, 1864, the question arose as to what was the the meaning of the word *dollar* in that contract—whether confederate treasury notes, or gold and silver, or United States treasury notes—and evidence was admitted to show that no gold or silver coin, nor notes of the United States were in use in that state, and that the only currency in ordinary use in which current daily business could be at all carried on, were treasury notes of the Confederate States; and the Chief Justice who delivered the opinion of the court, said: "We are clearly of opinion that such evidence must be received in respect to such contracts in order that justice may be done between the parties." And in this state, in several cases, where it was a question whether payments in confederate money were good, it has been held to be competent to prove that confederate currency, about the time and in communities where such payments were made, was received by prudent men in discharge of debts due them.

Utley v. *Young*, 68 N. C., 387; *Emerson* v. *Mallett*, Phil. Eq., 234; *Atkins* v. *Mooney*, Phil. Law, 31. If the evidence admitted in these cited cases was competent, we cannot see why upon the same principle that offered and rejected in our case was not also competent. Holding, then, that the evidence was competent, it must follow that the proposition laid down by His Honor as to the presumption of law cannot be sustained. If there is any presumption at all, it must be the reverse of that stated by him, for aside from the evidence adduced in any case on this subject, the court cannot shut their eyes to the condition of the country and the state of its finances during the latter days of the war. It was a notorious fact that the only currency used in the common transactions of business was confederate treasury notes, and whenever any other currency was used, it was a noted exception entirely too rare, too infrequent, upon which to found any such presumption as that assumed by His Honor.

We hold, therefore, that there was error in the ruling of the court below in rejecting the offered proof, and that a *venire de novo* should be awarded. Let this be certified, &c.

Error. *Venire de novo.*

R. B. & J. B. BRICKELL, Exr's, v. CATHARINE BELL and others.

Confederate Currency—Scale—Jurisdiction—Trial.

1. A bond executed in February, 1865, "for two hundred and forty-five dollars in current funds," nothing appearing to the contrary, is presumed to be payable in confederate money, and is subject to the legislation scale of depreciation.

2. The superior court has jurisdiction of an action upon such bond, the

sum demanded (meaning the principal) being in excess of two hundred dollars. But it was error in the court, on overruling a demurrer to the jurisdiction, to proceed to judgment without the intervention of a jury.

(*Palmer* v. *Love*, 75 N. C., 163; *Hilliard* v. *Moore*, 65 N. C., 540; *Howard* v. *Beatty*, 64 N. C., 559; *Davis* v. *Glenn*, 72 N. C., 519; *McKesson* v. *Jones*, 66 N. C., 258; *Chapman* v. *Wacaser*, 64 N. C., 532; *Hedgecock* v. *Davis*, 64, N. C., 650; *Dalton* v. *Webster*, 82 N. C., 279; *Derr* v. *Stubbs*, 83 N. C., 539, cited and approved.)

CIVIL ACTION heard on complaint and demurrer at November Special Term, 1880, of HALIFAX Superior Court, before *Graves*, *J.*

This action was brought in the superior court to recover the amount due upon the following bond: On demand the first of January, 1876, we, or either of us promise to pay to John Whitfield or order two hundred and forty-five dollars in current funds. Dated February 18th, 1865. Before the suit was commenced, the bond was assigned to plaintiffs' testator for value. The defendants demurred to the complaint upon the ground that it appeared on its face the court had no jurisdiction of the subject of the action, in that the amount claimed was under two hundred dollars, and upon the hearing it was adjudged that the demurrer be overruled and the plaintiffs recover of defendants the sum of four hundred and sixty-three dollars and thirty-one cents, from which judgment the defendants appealed.

Mr. Thomas N. Hill, for plaintiffs.
Messrs. Kitchin & Dunn, for defendants.

ASHE, J. The questions presented for our consideration by the appeal are:

1. Was the bond sued on subject to the scale?
2. If it was, did the superior court have jurisdiction?

By the ordinance of the convention of 1865, all executory contracts solvable in money, whether under seal or not, made after the depreciation of said currency, before the first

day of May, 1865, and yet unfulfilled (except official bonds and personal bonds payable to the state) shall be deemed to have been made with the understanding that they were solvable in money of the value of said currency, subject nevertheless to evidence of a different intent of the parties to the contract; and by the act of 1866, ch. 44, §1, it is provided that the scale shall be construed to apply to debts herein mentioned, at the date of contracting the same, and not at the time the debts become due. At the time this bond was executed, confederate money was the only currency of the country, and where it does not otherwise appear upon the face of the note or bond, or there was no agreement of the parties to the contrary, it was presumed to be payable in confederate money. *Palmer* v. *Love*, 75 N. C., 163; *Hilliard* v. *Moore*, 65 N. C., 540. The bond sued on therefore having been given during the war, and nothing appearing to the contrary, it is presumed to be payable in confederate money, and subject to the scale.

But it is contended that the terms "current funds," rebuts the presumption, and is evidence of the intention of the contracting parties that the bond should be paid in some other than confederate currency, to-wit, in such funds as might be in circulation at the time when the bond should fall due; but it has been expressly decided to the contrary. In the case of *Howard* v. *Beatty*, 64 N. C., 559, which was an action upon a bond, payable at twelve months, "in current money," and dated April 6th, 1865, it was held subject to the scale; and in the case of *Davis* v. *Glenn*, 72 N. C., 519, which was an action on a single bill dated August 15th, 1864, and payable six months after date, in current funds, it was decided that this note was solvable in confederate money, and subject to the scale. To the same effect is the case of *Sexton* v. *Wendell*, 23 Gratt., 534.

There are some cases, that at first seem to conflict with these, as *McKesson* v. *Jones*, 66 N. C., 258; *Chapman* v. *Waca-*

ser, 64 N. C., 532, and some others. But upon looking into them, it is found that the bonds or notes sued on, contain some such stipulations as to be paid in current funds or money, *when the note falls due*—ten days after peace, or some such like terms, which indicated the intention of the parties that the note or bond was to be paid in some other funds than confederate money.

And it is insisted, if the bond sued on is subject to the scale, then the superior court had no jurisdiction, for the sum sued for is less than two hundred dollars. This ground of demurrer cannot be sustained. By the constitution of 1868, it is declared that the several justices of the peace shall have exclusive original jurisdiction, under such regulations as the general assembly shall prescribe, when the *sum demanded* shall not exceed two hundred dollars, and the legislature has provided by section fifteen, chapter sixty-three, of Battle's Revisal, amended by the acts of 1877, ch. 63, that where it appears in any action, brought before a justice of the peace, that the *sum demanded* exceeds two hundred dollars, the justice of the peace shall dismiss the action, and render judgment against the plaintiff, unless the plaintiff shall remit the excess of principal above two hundred dollars, with the interest on said excess, and shall, at the time of filing his complaint, direct the justice to make this entry: "The plaintiff in this action forgives and remits to the defendant so much of the principal of this claim as is in excess of two hundred dollars, together with the interest on said excess." The words "sum demanded," have been construed to mean the principal of the note. *Hedgecock* v. *Davis*, 64 N. C., 650; *Dalton* v. *Webster*, 82 N. C., 279; *Derr* v. *Stubbs*, 83 N. C., 539.

There is no error in overruling the demurrer, but there is error in proceeding to judgment without the intervention of a jury.

Let this be certified to the superior court of Halifax county,

that further proceedings may be had in conformity to this opinion and the law of the state.

Error. *Venire de novo.*

J. F. HOLMAN and wife v. CHARLES PRICE and others.

Construction of Will.

Where a testator bequeathed one share of proceeds of property to a married daughter absolutely, and one share to his daughters, A, B and C, minors, and one share each to two other married daughters during their natural life; *Held*, that the infant legatees are each entitled to an equal share with the others.

(*Lassiter* v. *Wood*, 63 N. C., 360; *Macon* v. *Macon*, 75 N. C., 376, cited and approved.)

CONTROVERSY for the construction of a will submitted upon a case agreed and heard at Fall Term, 1880, of DAVIE Superior Court, before *McKoy, J.*

The defendant appealed from the ruling and judgment of the court below.

Mr. J. M. Clements, for plaintiffs.

Messrs. J. A. Williamson and *W. H. Bailey*, for defendants.

SMITH, C. J. Moses Wagner on July 8th, 1866, made his will in which after a devise of the land whereon he resided to his wife for life and a bequest of certain personal estate, are contained these clauses:

Item 4. "I will and bequeath that my daughters, Amanda, Anna and Clara, shall receive a good English education at the cost and charge of my estate before the division takes place, which is provided for hereinafter."

Item 5. "I will all my real estate, not devised to my wife, to be sold by my administrator as soon as is practicable after my decease, and also all the land willed my wife in like manner to be sold after her death by my administrator, and the proceeds of sale shall be equally divided as follows, to-wit: one share to Melinda, wife of McDonald VanEaton, one share to Amanda Wagner, Anna Wagner and Clara Wagner, and one share to the sole and separate use of Margaret, the wife of John H. Allen, free of any control of her said husband, the said Margaret to have and enjoy the interest accruing from the same during her natural life, and after her death to be divided among her children, or their issue if any be dead. And in like manner I will and devise one share thereof to the sole and separate use of my daughter Mary Ann, wife of Marion VanEaton, free of any control of her said husband, to receive and enjoy the interest accruing from the same during her natural life, and after death, the same be divided among her children or their issue, if any be dead."

Item 6. "After the payment of my debts, and the legacies, costs and charges of executing my will, I will that the proceeds of all notes or other evidences of debt due me, also all moneys on hand and the proceeds of sale of all personal property sold, and not herein specifically bequeathed, and all the residue of my estate, real, personal and mixed, I will and bequeath that the said fund shall be divided in the same manner among my children, as the moneys arising from the real estate, and devised in the 5th item of this will, and subject to the same conditions in all things and especially that the shares willed to my daughters, Margaret and Mary Ann, shall entitle them to receive the interest on the same during their respective lives, to their sole and separate use, free of the control of their said husbands; and after the death of each of them the shares to descend to their chil-

dren in the same manner as is set forth as to the real estate in the 5th item."

In the 7th item the testator directs the sale of certain mill property and a similar disposition of the proceeds of his other estate. At the date of execution of the will the six daughters mentioned in it were living, and those who were married had removed, and were residing beyond the limits of the state. Two of them, Margaret and Mary Ann, died during the life time of their father, leaving issue, and he died in July, 1875. The three younger daughters, Amanda, Anna and Clara, were minors and living with their parents when the will was made.

The controversy is as to the proper construction of the clauses which distribute the funds produced by the sales among the legatees, and especially whether the unmarried daughters take an equal share each with their older sister and the successors to the shares of those deceased, or together take a single and equal share to be divided among them. His Honor was of opinion that Amanda, Anna and Clara were entitled to one-sixth each of the distributable estate and an equal share with the others, and in this interpretation we concur.

Wills are so diversified in form and expression, written often in haste and by persons not skilled in the accurate use of language to convey the meaning of another, that the court can seldom derive much aid from the examination of adjudicated cases, and hence the necessity of general rules as guides in the difficult task of arriving at and giving proper legal effect to the instrument. A leading principle in the interpretation of wills is to ascertain and recognize the general pervading purpose of the testator and to subordinate thereto any inconsistent special provisions found in it. This principle was pressed into service and carried to its extreme limits in the recent cases of *Lassiter* v. *Wood*, 33 N. C., 360, and *Macon* v. *Macon*, 75 N. C., 376. In the former,

READE, J., employs this language, which in the other is cited and approved: "It is apparent that the leading purpose of the testator was to make all his children equal. The purpose of the testator, as gathered from his will, is always to be carried out by the court, and minor considerations, when they come in the way, must yield. Especially is this so when the purpose is *in consonance with justice and natural affection.*"

A fair and equal distribution of his estate among his children, with restrictions upon the shares of two of his married daughters, is the manifest predominant intent discovered in the will of the testator. To effect this object the three younger remaining under his roof, are to have "a good English education at the cost of the estate," as, we must infer, had already been furnished to the three older who had left.

The funds, when discharged of this imposed obligation, are then to be "*equally divided,*" as follows, to-wit: One share to Melinda wife of McDonald VanEaton, one share to Amanda Wagner, Anna Wagner and Clara Wagner, and one share to the sole and separate use" of the other daughters respectively with contingent limitations over. The proper construction of the terms of the bequest to the minor children, inserted between the absolute gift to one and the restricted gift to the two other married daughters, is, that they are to take distributively as the others take and in the same sense as if the word "each" had been added after their names.

These daughters are grouped together, not to make a joint bequest to all, but because there was nothing peculiar in their social or personal relations to separate them as objects of the bounty to be provided by the common parent. This is not a strained interpretation of the words in their connections and is most obviously necessary to carry out the general intent of the testator. Why, it may be asked,

should the father give those unprotected daughters equal opportunities for mutual improvement with their older sisters, and then to cut down each in the general division of the estate to one-third only of the shares which the others are to receive? This is not in harmony with that sense of moral duty and parental affection for all his children alike, so strongly impressed upon the instrument itself and indicating an intent to make his bounty equal to each.

We therefore hold that the legatees, Amanda, Anna and Clara, are entitled to an equal share each with the others, and that the one share prefixed to their names was intended to be and is, a bequest of one share to each of them.

There is no error and we affirm the ruling of the court below.

No error. Affirmed.

SARAH J. WILLIAMS v. MARY PARKER and others.

Construction of Will.

A testator devised all his land to his wife and grand-daughter, and his personal property during the life of his wife; and at her death, "if there should be any property or money left," he bequeathed certain pecuniary legacies; *Held* that the will conveyed to the grand-daughter an estate in fee of half the land. The testator makes his bequests depend upon the contingency that there be *personal* property left.

CIVIL ACTION to recover land, tried at Fall Term, 1880, of LINCOLN Superior Court, before *Seymour, J.*

A jury trial was waived and the case was submitted to His Honor to be tried upon the law and the facts. The following are the facts of the case:

The land mentioned in the pleading belonged to John

Williams and is the land referred to in his will, which contains the following clauses which are material to the case: "I give and bequeath to my wife, Polly Williams, and my grand-daughter, Sarah Jane Williams, all my land whereon I now live, and all my personal property of every order, during my wife, Polly's, lifetime, and at my wife, Polly's, decease, if there should be any property or money left, I then give and bequeath to my two grand-sons, John Franklin Wise, William Franklin Wise, five dollars to each one of them."

"I give and bequeath unto my four grand-children, Sarah Jane Williams, Thomas George Washington Williams, and John Tillman Williams, and Lawson Perry Williams, five dollars to each one of them. And should there be any part of my estate left, then it shall be equally divided among all my heirs." That Sarah J. Williams the plaintiff is the grand-daughter of the testator, and the person mentioned in item first of the will. That Polly Williams, mentioned in item first of said will, died before the institution of the action, and that Mark Williams and Mary Ann Williams now the wife of the defendant George Wise, are the only children, heirs at law of the testator, at the time of his death. That defendant, Parker, has a regular chain of title from said Mark Williams, and that the defendants, with Geo. Wise and his wife Mary Ann, are in possession of the land.

His Honor gave judgment in favor of the plaintiff for one-half of the land, and that a writ of possession issue to the sheriff of Lincoln county to put her into possession of the same. The judgment of His Honor was based upon the following opinion expressed by him and found in the record: "The only question in this case, is, whether the will of John Williams conveyed to plaintiff an estate in fee in the *locus in quo*. I hold that it does. It is inartificially drawn, but may be read as follows: I give to my wife

and grand-daughter Sarah Jane, all my land where I live, and all my personal property, during my wife's life, and at my wife's decease, if there shall be any personal property, or money, left, then I give, &c. This view is strengthened by the fact that the testator makes his bequests depend upon the contingency that there be property left—of course he must be referring only to personal property—and also by the fact that the legacies are of money." From this ruling the defendants appealed.

Messrs. Hoke & Hoke, for plaintiffs.
No counsel for defendants.

ASHE, J. We think the construction put by His Honor on the will of John Williams, the testator, is correct; and we adopt the opinion of His Honor as that of this court, and holding that there is no error, the judgment of the court below must be affirmed.

No error. Affirmed.

ELIJAH ELLIS, Executor, v. J. A. MEADOWS and others.

Construction of Will.

A testator provided in his will that the residue of his estate, if any, should be distributed among his legatees (before named) *pro rata*, and if the estate should be insufficient to pay all the legacies in full, then all the legacies are to be abated *pro rata*, and the executor had in his hands a considerable sum after paying debts, &c; *Held* that the fund belongs to the legatees and must be distributed among them according to the value of their bequests. The devisees as such are entitled to no part thereof.

(*Tayloe* v. *Bond*, Busb. Eq., 5, cited and approved.)

ELLIS *v.* MEADOWS.

PROCEEDING for the construction of a will submitted without controversy, under section 315 of the Code, and heard at Spring Term, 1880, of CRAVEN Superior Court, before *Gudger, J.*

The defendant, Thomas S. Howard, appealed from the ruling of the court below.

Mr. W. W. Clark, for plaintiff.
Messrs. A. G. Hubbard and *Merrimon & Fuller*, for defendant.

SMITH, C. J. Amos Wade died in December, 1879, leaving a will in which, after devising certain lots in Newbern, and making several pecuniary and other bequests, some with, and others without, contingent limitations over, he disposes of the residue of his estate in the eleventh clause, as follows:

The residue of my estate, if any, I give to the foregoing legatees, to be distributed among them *pro rata*, and if my estate should be insufficient to pay all of the said legacies in full, then all the said legacies are to be abated, *pro rata*.

The plaintiff, his executor, after payment of the debts, expenses of administration, and the several legacies, has in his hands a considerable sum of money, held under this clause, about which the defendants set up conflicting claims, and the controversy as to the proper construction thereof is submitted without action upon an agreed statement of facts for the judgment of the court.

The contentions among the defendants are thus summarily stated:

1. The defendants, Mary Chadwick, Nancy Willis and Elizabeth W. Pearce, insist that the fund shall be divided *per capita* among the legatees, and the same sum paid to each.

2. The defendants, Jane K. Meadows, R. P. Williams and

Sarah A. Williams, that the distribution shall be according to the value of the several legacies.

3. The defendant, Thomas C. Howard, that the lands devised to him shall be added to his legacy, and their aggregate value measure his share in the apportionment of the fund.

4. The defendant, Thomas S. Howard, claims a share proportional to the value of the land devised to him in the original will, notwithstanding the revocation of the devise and different disposition of the property made in the first codicil thereto.

The interpretation of the clause of the will recited, and the determination of the conflicting claims for the exoneration of the executor are the objects of this proceeding.

In the construction of a testamentary instrument, some general rules have been adopted to aid in arriving at the general and controlling intent of the testator, which, when ascertained, must prevail in giving effect to his words, and the court can do little more than apply them to the infinite diversity of terms in which that intent unaided by counsel, finds expresssion. One of these rules, in careful and guarded language, is thus laid down, the first of a series of propositions, by SIR JAMES WIGRAM:

A testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless, from the context of the will, it appears he has used them in a different sense; in which case, the sense in which he thus appears to have used them, will be the sense in which they are to be construed. Wig. Wills, 58.

1. Under the guidance of this rule the devisees of the land, as such, are entitled to no part of the fund for the sufficient reason that they are not *legatees*, and there is nothing in the context, or in the entire instrument to extend the operation of the word beyond its usual and proper meaning.

2. The fund belongs to the legatees, and must be distributed among them according to the value of their bequests, including the furniture with the sums of money given. Two aspects of the case were present in the testator's mind. His estate might prove insufficient to make good the legacies, and then they were to abate ratably; or there might be a surplus, and then each legacy was to be increased in the ratio they bore to each other. There is no ground whatever to put upon the same word, *pro rata*, used in the alternative parts of the same clause, a different import. As in one event the legacies abate *pro rata*, so in the other, they are increased *pro rata;* and the entire estate is disposed of upon the basis on which the beneficiaries of the testator's bounty would take, if there had been no surplus at all.

4. The question as to what estate in the land devised to Thomas C. Howard vests in him on his arriving at full age, is not a proper subject for the consideration of the court in this proceeding, nor within its province to determine in advance. With it the executor has nothing to do, and if he had, in the language of PEARSON, J., the court "will not give advice to an executor in respect to his future conduct or future rights. *Tayloe* v. *Bond*, Busb. Eq., 5.

The judgment rendered in the court below must be modified in conformity with this opinion, and in other respects is confirmed, and a judgment will be entered here accordingly.

Error. Modified and judgment here.

JOHN HATHAWAY and wife v. MARGATET HARRIS and others.

Construction of Will—Enlargement of Life Estate.

A testator devises land to his son, Henry, during his life, and if he should die leaving a lawful child, then to him and his heirs; but if he should die without a lawful child, then to his widow, &c. The devisee after his father's death had issue, a daughter, conveyed the devised land, and died: *Held*, that upon the happening of the contingency, the life estate of the devisee was enlarged into a fee, the title to which passed by the deed to his grantee.

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

Richard Harris, who formerly owned the land, the title to which is in controversy in this action, died on the 6th day of April, 1836, leaving a will wherein he devises the same in these words: "It is my will that my son Henry have land, (describing its boundaries) and that he have the use of it during his life; and if he should die with a lawful child, then to him and his heirs forever. But if he should die without a lawful child, then to his widow, if living, during her life or widowhood, and after her death or widowhood, to Richard Albert, his heirs and assigns forever."

Henry Harris, the devisee, after his father's death had issue, a daughter, who is the feme plaintiff, and after her birth he conveyed the land to one Spencer Harris, the husband of one, and the ancestor of the other, defendants, his heirs at law. Henry Harris and Spencer Harris both died before the institution of the suit.

These facts are found in the special verdict, and the question submitted to the court is as to the meaning and legal effect of the recited clause of the will, and whether, thereunder, an estate in fee or for life only, vests in the devisee Henry; if for life, the plaintiffs are entitled to judgment; if in fee, they fail in the action. The court adjudged that

Henry Harris took only a life estate, and could convey no greater estate to Spencer Harris under whom the defendants claim; and that upon the death of Henry, the land descended to the plaintiff, Margaret Hathaway, who was entitled to recover. From this judgment defendants appealed.

Mr. Jas. E. Moore, for plaintiffs.
Messrs. Latham and *Skinner*, for defendants.

SMITH, C. J. We differ with His Honor in the construction he places upon the limitation over, contingent upon the death of Henry with a lawful child, "*then to him and his heirs*," whereby these words are applied to the *child*, and in this case, designates the daughter, who takes the fee. In our opinion, they refer to the devisee, Henry, and enlarge his preceding life estate into a fee, and for the following reasons:

1. In every other part of the entire clause, (except the concluding words) where the pronouns *he* and *his* are used, the reference is plainly to the son, Henry, and must be so understood, to give meaning to the sentence, "If he (Henry) should die with a lawful child, then to him (Henry) and his (Henry's) heirs forever; but if he (Henry) should die without a lawful child, then to his (Henry's) widow," &c., plainly indicating the presence of the son, in the testator's mind, in making these contingent dispositions of the estate. It would be unreasonable to separate this brief paragraph from its context, and assign it a reference altogether unlike its associates.

2. In both sections of the clause, the testator speaks of a *lawful child*, avoiding any allusion to its sex, and thus comprehending both a son and a daughter, and yet in the limitation over "to him and his heirs," the masculine pronoun is used, which, in strictness, would exclude the daughter, if applied to the more general preceding word, *child*.

3. From the other clauses of the will, it will be seen that he devises lands to his other sons unconditionally, and without the limitations which fetter the gift to Henry. It may be inferred, though the fact is not stated in the verdict, that the other sons had issue when the will was made, while Henry had none, and therefore the testator intended to place him upon the same footing with his brothers, if he had issue living at his death, and to provide for the uncertainty of his dying without.

The will having been executed since the act of 1827, it must be read by force of the enactment, as if the testator had added to the words immediately preceding the limitation, the words "living at the time of his death, or born to him within ten months thereafter." Bat Rev., ch. 42, § 3.

The declarations of the testator were entirely incompetent to vary the construction to be given to his will, and were properly ruled out. Wig. on Wills, Prop. 6. But they become immaterial, as our interpretation of the testator's intent, derived from the language he employs, is, that which the proposed declarations were intended to disclose.

There must, therefore, be judgment for the defendant.

Error. Reversed.

ELEANOR GORDON and others v. T. D. PENDLETON, Guardian of the minor heir of D. P. Brite.

Will—Lapsed Devise.

Where a devisee dies in the lifetime of the devisor, the devise lapses, except where he is the *lineal* descendant of the devisor; and in such case the issue of the devisee will take.

(*Scales* v. *Scales*, 6 Jones Eq., 163, cited and approved.)

GORDON *v.* PENDLETON.

CIVIL ACTION pending in PASQUOTANK Superior Court and heard by consent at Washington, Beaufort county, on the 10th of December, 1880, before *Schenck, J.*

Mary Temple died in 1879, leaving a last will and testament, executed in 1866, wherein she devised the tract of land on which she lived to her son George for life with remainder to his children living at his death or the issue of such, and in the event of his death without a child or the issue of such, she devised the same tract to her brother, David P. Brite in fee. Both of the devisees died in the lifetime of the testatrix; her son, the said George, without a child or children or the issue of such, and the said David P. Brite, leaving an only child, who is the defendant in this action. The plaintiffs and defendant are the heirs at law of the testatrix.

Upon these facts, set out in a case agreed, it was submitted to the court below, whether the said devise to David P. Brite lapsed on his death in the lifetime of the devisor; and on consideration thereof the court held that the devise lapsed and the land descended to the heirs at law of the devisor, from which judgment the defendant appeals to this court.

Mr. C. W. Grandy, for plaintiffs.
No counsel for defendant.

DILLARD, J. The only question made upon this transcript of the record in the case is, whether the devise to David P. Brite, a brother of the devisor, lapsed or became void on his death in the lifetime of the testatrix, or vested an estate which passed to the defendant, his only child and heir at law.

We concur in the opinion of the court below. It is undoubtedly the rule that a devise lapses whenever the devisee dies in the lifetime of the devisor. 1 Jarman on Wills, 304

and 305. And under the general rule, the estate on the death of Brite, anterior to the death of the testatrix, certainly went to her heirs general according to the canons of descent, unless by some statute, this case is made an exception.

An exception was made by our statutes, first, by enacting that in case of devise and bequest to a *child or children* and the devisee or legatee died in the lifetime of the testatrix, leaving issue, no lapse should take place, but that the estate should vest in the issue; and afterwards the exception was enlarged so as to save from lapse in case the gift were to a child or other issue, as per Rev. Code, ch. 119, § 28, which is the present law on the subject, and is brought forward in Battle's Revisal, ch. 45, § 111.

The exception created by statute, it will be noted, embraces only devises and bequests by a parent to a child or other more remote lineal descendant, but extends not to a collateral relation, and therefore the defendant stands under the general rule; and under that, no interest could pass to him, under the devise to his father, David P. Prite, who was a brother to the testatrix. *Scales* v. *Scales*, 6 Jones Eq., 163.

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

No error. Affirmed.

JAMES T. DAWSON, Sheriff v. GEORGE W. GRAFFLIN.

Sheriff's Fees and Commissions.

By the provisions of chapter 105, section 21 (12) of Battle's Revisal, a sheriff is entitled to commissions only on moneys actually collected by

himself under execution, and not where the same is paid the plaintiff by defendant after levy. (The statutory law regulating the subject discussed by DILLARD, J.)

(*Mallock* v. *Gray*, 4 Hawks, 1, cited and approved, and *Willard* v. *Satchwell*, 70 N. C., 268, commented on.)

CIVIL ACTION commenced before a justice of the peace and tried on appeal at November Special Term, 1880, of HALIFAX Superior Court, before *Graves, J.*

The case was submitted to the judgment of the superior court upon a state of facts in substance as follows: Three writs of *fieri facias* were duly issued on the 4th day of December, 1878, in each of which R. H. Smith was a party defendant, and on the 7th of the month next after, the plaintiff as sheriff levied the same on the "river plantation" of said Smith, and notified him thereof. Thereupon, and before advertisement of sale, the several execution creditors instructed the sheriff not to proceed to sell until so directed by the defendant Grafflin's attorney. Grafflin purchased of Smith the land levied on and received a deed in fee from him, on the day the executions were issued, subject to a mortgage thereon in favor of Elliot Brothers, and also to the judgment liens then existing in favor of said execution creditors. Afterwards, on the 14th of January, 1879, the execution creditors transferred their executions and the judgments on which they were founded to the defendant, who had the plaintiff to return the execution to the clerk's office, "indulged." The lands levied on are admitted to be valuable and worth enough to have paid all the executions. The legal fees due to plaintiff for his levies and notice thereof were three dollars and thirty cents, and the commissions on the amount of the executions were ninety-one dollars; and for the aggregate of said sums it is admitted demand was made on defendant; and upon his refusal to pay the same this action was brought.

Upon the facts agreed as above, the court held that plaintiff was entitled to judgment and the defendant appealed.

Messrs. Kitchin & Dunn, for plaintiff.
Mr. Thomas N. Hill, for defendant.

DILLARD, J. The only question for our determination is as to the legal sufficiency of the agreed facts to warrant the judgment which was given.

Under the act of 1784, a sheriff was allowed two and a half per centum commissions for *executing an execution against the body or goods*, which in practice with us extended to lands also. And a question arose in the case of *Matlock* v. *Gray*, 4 Hawks, 1, whether the sheriff was entitled to commissions, he having levied the *fi. fa.* and been stopped from selling by the plaintiff therein, who had privately received the amount thereof from the judgment debtor after the levy; and the court held, although the expression "executing an execution" as used in the act imported an actual raising of the money by the sheriff, that the sheriff as he had levied and was prevented from selling by the creditor was entitled to stand upon the footing of a full obedience to the writ, and on that principle had a right to commissions.

In conformity to this decision the statute law as contained in the Revised Statutes, ch. 105, § 21, allowed a commission at the same rate as before, on all moneys *collected by virtue of any levy*, and the like commission on all moneys paid *by defendant to the plaintiff* while the precept was in the hands of the sheriff. In the Revised Code, ch. 102, § 21, the same provision for commissions in substance was retained, with the alteration as to payments by defendant to the plaintiff while the execution was in the sheriff's hands, that such right should not exist except in the case that the payments were after levy made.

By these statutory provisions it clearly appears that the

sheriff's right to commissions attached in two events, first, in the case of collections by himself; and secondly, in the case of collections by the plaintiff of the defendant after levy of the execution. And so the law continued to be until the adoption of the Code of Civil Procedure, when a schedule or specification of the sheriff's fees was enacted; whereby it was provided in terms that the sheriff should have "for collecting executions for money in civil actions two and a half per centum on the amount collected," omitting all mention of any rate of compensation in respect of payments made by the debtor to the creditor after the levy by the sheriff, as provided for in the Revised Statutes and afterwards in the Revised Code. See C. C. P., § 567 (14). And this enactment in the Code operated an implied repeal of section 21, chapter 102 of the Revised Code; or if it did not, its repeal was put beyond question by the act of 1868-'69, ch. 148, § 2; and thus the result is, that the sheriff's right to commissions is altogether regulated by said section 567 of the Code.

At the session of the general assembly in 1870-'71, a new act in relation to the fees of county officers and the supreme court clerk was passed, (ch. 139) and therein it will be seen that the legislature readopts (in section 4, sub. 12) *in totidem verbis* the 14th subdivision of section 567 of the Code, in regard to the sheriff's commissions, and declares all laws repealed whereby any fees were given other than those specified in that act. And this act is the one brought forward in Battle's Revisal, ch. 105, and is the law regulating the sheriff's commissions in this case.

From this course of the legislation, and having regard to the literal import of the language employed in the present act, we think it plain, beyond doubt, that the compensation now allowed is upon the actual collections made by the sheriff himself, with the view to stimulate him to greater diligence, and that it was not intended to extend the right

to payments on private arrangements between the parties as formerly. The omission, in the Code § 567 (14) readopted by the act of 1870-'71, ch. 139 (12) and brought forward in Battle's Revisal, of the provision in our former statute law for commissions on private collections by the execution creditor, cannot be accounted for otherwise than by the fact, that the legislative will was that thereafter the sheriff should be restricted in his commissions to the money actually collected by him.

On the argument before us, our attention was called to the recent case of *Willard* v. *Satchwell*, 70 N. C., 268, as definitely settling the sheriff's right under our present statute. That action was brought to recover back the sum paid to the sheriff under protest for commissions on the debt paid into the clerk's office for the use of the creditor after the levy of the execution; and the decision was that as the judgment debtor by his act prevented a sale by the sheriff after a levy, the law considered the writ as executed, and the sheriff was entitled to keep the sum which had been paid to him. It was also held that if the execution creditor receives the money after levy and causes the execution to be returned unexecuted, the sheriff would be entitled to commissions as against him. That case was decided in conformity to our law before the recent statutes, and the authorities cited in support of the conclusion arrived at were expositions of the law, as in the Revised Statutes and Revised Code. On reference to the reported case, it will be seen that no allusion is made by the court to our recent statutes on the subject of a sheriff's fees, and no discussion thereof. Under these circumstances we do not accept the decision as an authority establishing the right of the sheriff to commissions on sums not collected by himself under the law as it now stands.

We conclude that the declared will of the legislature is, that the sheriff has no right to commissions on money paid

by the debtor to the creditor while the precept is in his hands after levy, as under the Revised Code. And consistently with this ruling, we hold, that as to the three dollars and thirty cents for making the levy and giving notice thereof, that service was performed for the execution creditors before their transfer to the defendant, and the sheriff must look to them therefor; and as a sum claimed for commissions, the sheriff has no right of action for it under our present statute.

The judgment of the court must therefore be reversed and judgment entered for defendant and for costs. This will be certified.

Error. Reversed.

BATTLE BRYAN v. COMMISSIONERS OF EDGECOMBE.

Sheriffs—Fees—Jury.

The law makes no provision for paying sheriffs for services in summoning tales-jurors.

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

This is an appeal from a justice's judgment, tried upon the following state of facts agreed upon by the counsel of both parties, viz: the plaintiff is, and was at the time of matters herein set forth, sheriff of Edgecombe county, and as such, by order of the court, at February term, 1879, of the inferior court of said county, summoned seventy-four tales-jurors and others at different times. Before this action was brought, the plaintiff presented his account to the defendants and they refused to audit it, or any account for

summoning tales-jurors, claiming that the plaintiff was entitled to no compensation for such services. The court intimated that plaintiff was not entitled to recover and thereupon he took a nonsuit and appealed.

Mr. W. P. Williamson, for plaintiff.
Messrs. Fred. Phillips and *Gilliam & Gatling*, for defendants.

ASHE, J. There is no law prescribing the fees of sheriffs for summoning jurors, except that which is found in Battles's Revisal, ch. 105, § 21, sub. § 18, which provides that sheriffs shall have for "summoning a grand or petit jury, for each man summoned, thirty cents, and ten cents for each person summoned on a special venire." There is no provision now, and none is to be found in the Revised Statutes or the Revised Code, giving sheriffs compensation for the service of summoning tales-jurors. This is one of the many gratuitous services expected to be performed by sheriffs. The legislature, no doubt, deemed such service too trivial to be the subject of compensation, for all a sheriff has to do in the performance of the duty is to stand at his desk or table in the court house, and when a deficiency of jurors occurs, order A, B and C to take their seats in the jury box, and yet he prefers a charge against this county at the rate of thirty cents per head, for every juror summoned by him in this way, when the law only allows him ten cents for each person summoned on a special venire. Talesmen are summoned from the bystanders in the court house, while summoning a special venire, he must go into the streets and often into the country to make up the list.

The plaintiff, as we have said, cannot recover the compensation claimed by virtue of a statute, for there is none that gives it to him; nor can he recover upon a *quantum meruit*. When he assumed the office of sheriff, it is to be presumed he knew the burthens and emoluments of the

office. He must have known what fees were provided by law for the performance of certain services, and what duties he was expected to discharge without remuneration. In accepting the office, then, there was an implied agreement on his part that he would, without charge, perform those duties incident to his office, for which the law had made no provision for his compensation. There are many of these duties: He is required to open and adjourn court, to preserve order in the court room, to arrest and bring before the court disorderly persons in contempt, convey prisoners to and from the jail to the court house, call witnesses and parties into court, jurors into the box, and discharge numerous other such services, for which the law has provided no compensation, and which he undertook to perform gratuitously when he accepted the office.

In many of the counties it has been the practice of the county authorities to make extra allowances to their sheriffs for the performance of such services, as no remuneration was provided by law, but these allowances were gratuitous, and such as the sheriff had no right to demand as his legal dues.

There is no error. The judgment of the superior court must be affirmed.

No error. Affirmed.

BENJAMIN MILLIKAN, Sheriff, v. M. L. FOX and another.

Sheriff—Practice in directing application of money raised under Execution.

The practice of advising and directing sheriffs as to the proper distribution of proceeds of sale of debtor's property under several executions

in favor of different plaintiffs, extends only to cases where the sheriff has *raised the money* and holds the same subject to the order of the court.

(*Bates* v. *Lilly*, 65 N. C., 232; *Washington* v. *Saunders*, 2 Dev., 343; *Palmer* v. *Clark*, Ib., 354; *Ramsour* v. *Young*, 4 Ired., 133; *Whitaker* v. *Petway*, Ib., 182; *Williams* v. *Green*, 80 N. C., 76; *Motz* v. *Stowe*, 83 N. C., 434; *Whitehead* v. *Latham*, Ib., 232, cited and approved.)

APPEAL from a judgment rendered at Fall Term, 1880, of RANDOLPH Superior Court, by *Eure, J.*

There were several executions in the hands of the plaintiff sheriff against one Lutterloh, the defendant in the executions. They were levied upon the lands of said Lutterloh, and at the fall term, 1880, of the superior court of Randolph county, the sheriff proceeded to sell the land so levied upon, and it was bid off by Fox, the defendant, (who claimed to have control over two of the executions, as trustee of the judgments,) for a sum less than the amount of his judgments. Fox refused to pay the purchase money, expressing a willingness to pay the costs, but claimed a credit on his judgments for the residue of the amount of his bid. Staley, the other defendant of record, objected to the arrangement, and insisted that he was entitled to have the proceeds of the sale applied to his execution. Millikan, the sheriff, not knowing what to do, under these circumstances, applied to the superior court for advice, and asked that the parties claiming the proceeds of the sale might be notified to appear before the court and litigate their rights, and for a decree or order of the court directing and settling who is entitled to the proceeds of the sale.

It was therefore ordered by the court that the sheriff retain the executions, without making any returns thereon, until the questions in litigation as to the application of the money raised should be decided by the court, and that he hold the money arising from the sale subject to the order of the court. It was further ordered that Fox and Staley be re-

quired to litigate before the court the question of the right application of the funds arising from the sale of the land by the sheriff of Randolph county by virtue of their executions. Accordingly, the parties proceeded to litigation, by a case of submission without controversy, on application to the court for instructions, as to the application of money raised upon the executions; in which case Millikan appears as plaintiff, and M. L. Fox and William Staley as defendants. The facts agreed upon were set out, but were not verified by an affidavit, and His Honor, after hearing arguments from counsel on both sides, adjudged that the sheriff apply the proceeds of the sale to the execution in his hands in favor of William Staley. From this order Fox appealed.

Mr. John N. Staples, for defendant Fox.
Messrs. Scott & Caldwell, for plaintiff Staley.

ASHE, J. We refrain from expressing any opinion upon the question presented by the record, because it is a case of such an anomalous character that we cannot entertain it as before us on this appeal.

In no view of the case can this court take cognizance thereof; not as an interpleader, for the right of interpleader, given by section 65 of the Code of Civil Procedure, applies only to an action properly constituted in court, and not to rules or motions as to funds in the hands of a sheriff (*Bates* v. *Lilly*, 65 N. C., 232); nor as a controversy submitted without action, because this submission is not verified by an affidavit, as is required by section 315 of the Code; and besides, that proceeding only lies when there is a question in difference between the parties, which might be the subject of a civil action.

It cannot be entertained as an application on the part of the sheriff for advice as to application of money in his hands raised by sale under execution in favor of different creditors,

because there is no money in his hands. This advisory jurisdiction is not authorized by the common law, nor by any statute, but is a practice which has grown into use under the tolerance of the court, and has only been exercised when a sheriff has *raised money* under several executions, issued at the instance of different plaintiffs, and is in doubt how to distribute. In every instance when this court has given such advice on appeals, it has been in cases where the money has been collected and is in the hands of the sheriff. *Washington* v. *Saunders*, 2 Dev., 343; *Palmer* v. *Clark*, Ib., 354; *Ramsour* v. *Young*, 4 Ired., 133; *Whitaker* v. *Petway*, Ib., 182; *Williams* v. *Green*, 80 N. C., 76; *Motz* v. *Stowe*, 83 N. C., 434; *Whitehead* v. *Latham*, Ib., 232.

The proceeding must be dismissed. Let this be certified to the superior court of Randolph county.

PER CURIAM. Appeal dismissed.

THOMAS C. WILSON and wife v. W. L. SEAGLE and others.

Appeal, method of perfecting.

1. An appellant who merely prays an appeal in open court and files a bond with the clerk, does not *take* an appeal within the meaning of the statute.

2. Remarks of RUFFIN, J., upon the method of perfecting appeals so as to take the case without the jurisdiction of the superior court.

(*Campbell* v. *Allison*, 63 N. C., 568; *McRae* v. *Commissioners*, 74 N. C., 415; *State* v. *Hawkins*, 72 N. C., 180; *Smith* v. *Lyon*, 82 N. C., 2, cited and approved.)

APPEAL from an order made at Fall Term, 1880, of LINCOLN Superior Court, by *Seymour, J.*

From the transcript and the case for the appeal, the following facts appear: In the year 1877, the plaintiffs filed a petition in the probate court of Lincoln county for partition of lands between the defendants and themselves. Upon the filing of answers raising issues, the cause was transferred to the superior court of that county, and at spring term, 1878, a decision was rendered adverse to the defendants, and a writ of *procedendo* ordered to be issued to the probate court to grant the partition prayed for, from which judgment the defendant Seagle prayed an appeal to the supreme court. That he filed with the clerk an appeal bond, but prepared and tendered no case for the supreme court, and procured no transcript of the record to be forwarded here. That at the fall term of said court an entry was made in the case, "off the docket." That on the 26th of September, 1878, the judge of probate decreed partition, and appointed commissioners who, on the 22d of October, allotted the land, charging the share of the defendant Seagle with the sum of seventy-five dollars, in favor of the lot assigned to the plaintiffs, and made report thereof to the clerk, who, on the 12th of December, confirmed the same. That of the action of the commissioners the defendant Seagle had full notice, and took possession of the lot of land set apart to him, but he had no notice of the order confirming the report. That in August, 1879, the plaintiff gave said defendant notice of a motion to subject his land to the payment of the seventy-five dollars, which motion was heard on the 13th of September, and allowed, though resisted by defendant on the ground that his appeal to this court was still pending, and therefore it was not competent to the clerk to make any order in the cause. From the order of the clerk, he appealed to the superior court, and at fall term, 1880, when His Honor holding that the case was in this court, reversed the order of the clerk and overruled the plaintiff's motion, and the plaintiff appealed.

Messrs. Hoke & Hoke, for plaintiff.
Mr. B. C. Cobb, for defendant.

RUFFIN, J. The question presented for our determination is, was the appeal prayed for by the defendant in 1878, still pending? Or did his subsequent conduct amount to an abandonment thereof?

According to the practice which obtained before the adoption of the Code, an appeal was *allowed* by the court, and the preparation and perfection of it was the act of the court. But the Code makes a notable change in this particular; an appeal is no longer prayed for, but it is *taken*. Bat. Rev., ch. 17, § 299. As said by RODMAN, J., in delivering the opinion in the case of *Campbell* v. *Allison*, 63 N. C., 568, "the judge below has nothing to do with the granting of an appeal, it is the act of the appellant alone."

After prescribing the time in which it must be taken, the statute imposes upon the appellant the duty of causing his appeal to be entered by the clerk on the docket, and notice thereof to be given to the adverse party. *He* shall give the undertaking required to make his appeal effectual. *He* shall cause to be prepared a concise statement of the case, embodying the instructions of the judge, and his exceptions thereto. *He* shall cause a copy of this statement to be served on the respondent, and if approved it is *his* duty to file it with the clerk, or if returned with objections, to request the judge to settle the case; and when it is settled, it is *his* duty to furnish it to the clerk, that it together with the transcript of the record may be certified to the clerk of this court. So that from first to last he is the chief actor in the whole matter, and without his active agency, his appeal cannot be perfected; and it is only when an *appeal is perfected*, as declared by BYNUM, J., in the case of *McRae* v. *The Commissioners of New Hanover*, 74 N. C., 415, "that the judge below has no further jurisdiction of the matter."

The statute not only imposes this duty on the appellant but it enjoins upon him to be prompt and energetic in its discharge. Within ten days from the rendition of the judgment, he must *take* his appeal and within the same time cause it to be entered of record, and notice thereof given; within five days next after its entry, a copy of the statement of his case is to be served on the appellee, who is required to consider and return it within three days; if returned with objections he shall *immediately* request the judge to fix a time and place for settling it; this the judge must do within twenty days. When settled, he is to file it with the clerk within five days, and the clerk is to transmit it to the clerk of the supreme court, within the next twenty days, and the appellant is to see that it is so transmitted; for, as said in the case of *State* v. *Hawkins*, 72 N. C., 180, "an appeal when taken, is to the next term of the supreme court, and if not prosecuted, by the default of the defendant, it is lost;" and this case is approved in the very late one of *Smith* v. *Lyon*, 82 N. C., 2.

Now contrast all this with the conduct of the appellant in this case, and it would seem strange indeed if an indifference and gross neglect, such as he has been guilty of, should have worked no injury to his appeal, and that his appeal, taken more than two years ago, without a single step in all that time towards perfecting it, should still survive. It is true, as argued by counsel here, the appellee might, under Rule 7 of this court, have filed a transcript of the case upon the failure of the appellant so to do, and moved for the dismissal of the appeal, but this was a privilege given him, and no indulgence to the appellant, and it is not to be expected that this court will tolerate a perversion of its rule, adopted to expedite its business, into an excuse for gross and inexcusable negligence.

It will be seen that we lay no stress upon the conduct of the defendant in taking part in the partition and accepting

as his the lot of land appropriated to him by the commissioners. It may be that he should be held to be estopped by this, but we wish to place our decision upon the express ground that he has lost his appeal by his laches, and that the court below should have so adjudged; lost it, because he did not so perfect it as to take his case without the jurisdiction of the superior court, and therefore it was competent for that court to proceed in the premises.

As to whether there has been any irregularity in the course of the proceedings, or any judgment for want of proper notice, we do not undertake now to determine, but simply that the defendant, by merely praying an appeal in open court, and filing a bond with the clerk, which is all the record discloses he ever did, did not *take* an appeal within the meaning of the statute, and that by his laches and subsequent conduct, he has lost the right, now, to do so, and that His Honor below was in error in holding that the case was in this court.

Let this be certified that the case may be proceeded with.

Error. Reversed.

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*ANDREW SYME, Adm'r, v. N. B. BROUGHTON and others.

Appeal—Certiorari.

A *certiorari* will be granted the petitioner where the omission to perfect his appeal was occasioned by the failure of the prevailing party to have the judgment properly prepared and entered of record.

PETITION for a *certiorari* heard at January Term, 1881, of THE SUPREME COURT.

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

SYME *v.* BROUGHTON.

Messrs. Geo. V. Strong and *Battle & Mordecai*, for plaintiff.
Messrs. Gilliam & Gatling and *D. G. Fowle* for defendants.

RUFFIN, J. This is a petition for a *certiorari* filed at June term, 1880. The plaintiff says that he was the caveator in an issue of *devisavit vel non* tried at January term, 1880, of Wake superior court, in which there was a verdict against him; whereupon he moved for a new trial and upon his motion being overruled, gave notice of an appeal and procured the appeal bond to be fixed at twenty-five dollars, that no judgment was drawn or signed by the judge, and none, indeed, rendered in open court; and waiting for the same to be done, no appeal bond was given and no case on appeal prepared within the ten days next after the expiration of the court; that learning on the 21st of February, 1880, that the counsel for the propounder insisted that his right of appeal had been lost by delay beyond the time prescribed, his counsel prepared his case for appeal and caused it to be served on the opposing counsel on the 25th of the month, who declined to entertain it upon the ground that a final judgment had been rendered at the time when the case was tried and that more than ten days thereafter had elapsed; that plaintiff's counsel, on looking to the minute docket, on the 27th of the month, found entered thereon as an entry in the cause, the words "verdict and judgment" of which entry they had had no previous notice; that he had after giving notice, moved the court to strike out the entry on the docket, but his motion had been refused.

Taking the statements of the petitioner to be true, and they seem reasonable and are not contradicted, we are unable to see that he has been guilty of any such laches as should deprive him of his appeal. His appeal could not be perfected until the judgment in the cause was rendered; and the law contemplates that, when rendered, it shall be reduced to writing and signed by the judge. It is true we

have held that the judge's signature is not absolutely essential to its validity as a judgment; still that is the regular course of the court and a party will be excused who, depending upon the established usage of the court, is misled. The judgment roll and not a mere entry upon the clerk's docket is the best evidence of the judgment, and to it we are accustomed to look in order to ascertain, as well, whether there be a judgment, as its terms. Such being the course of the court and the order prescribed by the statute, the party prevailing in the action is himself guilty of laches if he fail to prepare the proper judgment and procure the judge's signature thereto, and if by such failure he should contribute to a mistake of his adversary, he ought not to be allowed to derive any advantage therefrom.

PER CURIAM. Motion allowed.

C. G. BROWN and others v. HARPER WILLIAMS.

Appeal—Certiorari.

A *certiorari* will not be granted where it appears that the petitioner failed to apply for the same at the term of this court next succeeding the rendition of the judgment against him.

PETITION of plaintiffs for a *certiorari* heard at January Term, 1881, of THE SUPREME COURT.

No counsel for plaintiffs.
Mr. D. J. Devane, for defendant.

RUFFIN, J. This is an application for a *certiorari* filed at June Term, 1880, of this court, in which the petitioners say

that at spring term, 1879, of the superior court Duplin county, judgment was recovered against them in an action for the foreclosure of a mortgage, and that the judgment was not rendered in fact during the term, but at Burgaw (Pender county) about the last of June following, the judge having till then (with the consent of all the parties) taken the case under consideration. That the petitioners had notice of the filing of the judgment, and on the 2d of July entered their appeal and immediately made up and had served their case and endeavored to perfect their appeal by giving the bond within ten days, but were unable to do so because they could not get the opposing party to agree upon the amount for which it should be given, and as the judge was gone, there was no one to determine the matter between them. That finally getting the amount agreed on, the petitioners were enabled to give the bond and did give it by mortgaging all their property as an indemnity. That they used every effort to get the clerk to send up the transcript in the case, and were at all times ready to pay his fees, but that he deferred them from time to time, and until after the next term of the supreme court had passed, and that the fault of the delay was not their own, but the clerk's. The counter-affidavit of the clerk is filed in which that officer says that no fees were offered him for making up the transcript in the case, until some time in January, 1880, and then it was during the sitting of a special term of the superior court, and when it was impossible for him to give it attention, but that he had been at all times, both before and since that time, ready to have made it out, if the petitioners had requested him to do so and paid his fees.

While the case of the petitioners appeals somewhat to our sympathies, it is still impossible to avoid the conclusion even from their own statement that they have been guilty of laches. If unable to pay the fees due the clerk for making out and forwarding the transcript in their case, they should

have applied to the judge for an order directing that officer to perform such service without a charge, for that we think in a proper case the judge might do, from analogy to the power given him, in case he allows a party to sue *in forma pauperis*, to direct that no officer receive fees for services rendered in the case. But whether able to pay the fees or not, the parties should have either had their appeal here or applied for their *certiorari* setting forth their inability to do so at the term of this court next succeeding the rendition of the judgment against them.

According to their own showing, and so far as we can see without any just excuse, they allowed the January term of the court to pass without any motion or application, thus making a delay of one entire year, during all which time the hands of the party in whose favor the judgment was rendered and thereby creating a presumption in his favor, have been tied.

This is not that diligence required by the law of those who ask favors of it, nor is it such as is usually practiced by parties who are really in earnest in prosecuting their appeals. The petition must therefore be dismissed.

PER CURIAM. Motion denied.

R. H. PARKER, Admr. v. WILMINGTON & WELDON RAILROAD COMPANY.

Appeal—Certiorari.

A writ of *certiorari* will be ordered where it appears that the conversations and correspondence between the parties as to extending the time to perfect an appeal reasonably had the effect of misleading the petitioner, and where there is no material conflict in the statements contained in their affidavits.

(*Walton* v. *Pearson*, 82 N. C., 464; *Wade* v. *Newbern*, 72 N. C., 498; *Hutchison* v. *Rumfelt*, 83 N. C., 441, cited and approved.)

PETITION for *certiorari* filed by plaintiff on the 8th of January, 1880, and heard at January Term, 1881, of THE SUPREME COURT.

Messrs. Day & Zollicoffer, T. N. Hill and *J. B. Batchelor*, for petitioner.

Mr. Spier Whitaker, for defendant.

ASHE, J. This is a petition for a writ of *certiorari* as a substitute for an appeal in this case. The action was to recover damages on account of the negligent killing of the plaintiff's intestate, by a train of cars run under the management of the defendant company. The trial resulted adversely to the plaintiff, and judgment against him and the sureties on his prosecution bond was signed by the judge on the 26th day of September, 1879.

The petition states that before the adjournment of the court, one of the counsel for the plaintiff requested one of the counsel for the defendant to give the plaintiff time in which to perfect his appeal, longer than the time fixed by the statute for perfecting appeals to the supreme court, and the said counsel was understood by petitioner's counsel to say that he would give a reasonable time. It states that petitioner's counsel made preparations to draw up the case on appeal and file the appeal bond on the 4th of October, 1879, but before doing so sent the following telegram to defendant's counsel at Enfield where he resided: "Give until the 15th to appeal. Reply." In reply to this, counsel for petitioner before 1 o'clock P. M. of the same day received a telegram signed by the defendant's counsel in these words: "Will see you the next week in Jackson." It further states that counsel for petitioner met counsel for defendant at Jackson on the 10th day of October, and making known to him

his intention to appeal, reminded him that he had telegraphed him that he would see him about the appeal at Jackson, defendant's counsel replied, "I do see you at Jackson;" and after some further conversation about what Mr. Batchelor had said concerning the appeal, petitioner's counsel said, "You have misled me." To which defendant's counsel replied, "he could not help it."

The facts stated in the petition are either admitted or not denied by defendant's counsel in his affidavit filed in answer thereto, except that he says the application by petitioner's counsel for the extension of time at Jackson was on the 9th instead of the 10th of October, and "that at no time during the progress of the trial of said cause, nor at any time afterwards did he give to said Hill or to any of the other counsel for plaintiff, any cause for believing that he would grant them any indulgence whatever, and that your affiant's entire conduct of said cause had plainly indicated that he would neither give nor ask any favors."

While the general rule adopted by this court in regard to appeals is that the statutory requirements must be complied with, some exceptions have been admitted, as where the record shows a written agreement of counsel waiving the lapse of time, or when the agreement is oral but disputed, and such waiver can be shown by the affidavit of the appellee rejecting that of the appellant. *Walton* v. *Pearson*, 82 N. C., 464; *Wade* v. *Newbern*, 72 N. C., 498. But a further exception has been recognized by this court in the case of *Hutchison* v. *Rumfelt*, 83 N. C., 441, where it was held that if the waiver of the statutory requirements is expressly denied and the petitioner fails to bring himself within one of the above exceptions the writ will be refused, unless relievable on the ground of being misled by an alleged conversation between the counsel of the petitioner and the opposing counsel, within the spirit of section 133 of the Code. In this case the petitioner does not allege that there

was an explicit waiver of the "code time," but that his counsel was misled by the telegram received on the 4th of October from the defendant's counsel. But it may be insisted that when such conversation or correspondence is relied upon, the terms thereof and the reasonableness of the petitioner's counsel being misled thereby, as in the case of special agreements, rest upon the affidavits of the opposing counsel or parties, and if denied, this court cannot hold that the petitioner has been misled, unless it can be seen from the affidavit of the counsel resisting the application, rejecting that of the petitioner or his counsel. This we hold to be the proper rule. But conceding that to be so, there is no material conflict in the affidavits of the petitioner and the opposing counsel. The affidavit of defendant's counsel does not directly deny any allegation in the petition. It is true, he says that he never gave Mr. Hill or any one else any cause for believing that he would give him an extension of time. This denial is argumentative and depends upon the construction of the telegram. It admits of a different interpretation, and while defendant's counsel may think it gave no cause to petitioner's counsel for believing that he would grant the indulgence, the petitioner's counsel it seems put a different construction upon it, and we think he was warranted in so doing. If defendant's counsel did not intend at the time he sent the telegram to extend the time, why not say so at once? It was quite as easy to say, I refuse the indulgence as to say, I will see you next week at Jackson. If it was his purpose, as he says in his affidavit, to grant no favors in the case, why not inform Mr. Hill of his determination? and not excite his expectation by saying he would see him at a future day, when possibly it might be too late to perfect the appeal if the indulgence was refused.

At the interview in Jackson, petitioner's counsel told defendant's counsel that he had misled him, showing that

he had interpreted the telegram favorably to his application. It is not necessary to hold that defendant's counsel intended by the vague telegraphic answer to beguile petitioner's counsel and lull him into inactivity, and we do not wish to be understood as intimating such an opinion, yet if it reasonably had that effect, however well intended, and the petitioner has thereby been deprived of his appeal, he is entitled to the writ.

Viewing the facts of the case as stated by defendant's counsel himself, we are of the opinion that the counsel of the petitioner has been reasonably misled by the counsel of the defendant. The writ of *certiorari* will therefore be issued upon the petitioner's giving a proper bond.

PER CURIAM. Petition granted.

JAMES M. HINES, JR. v. JAMES M. HINES, SEN.

Appeal—Practice—Pro Forma Judgments.

An appeal from the ruling on one of several issues will be dismissed. The trial must be of all the issues raised by the pleadings, so that the appeal may present for review the exceptions taken and *questions of* law arising upon the *whole* case. Appeals from *pro forma* judgments will not be considered.

(*State* v. *Locust*, 63 N. C., 574, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1880, of LENOIR Superior Court, before *Gudger, J.*

The action was heard upon a case agreed and founded upon the construction of the following instrument:

"STATE OF NORTH CAROLINA. WAYNE COUNTY:

"Know all men by these presents that I, Enoch Cobb, for the consideration of the good will, favor and affection that I bear towards my son-in-law, James M. Hines, I give to the said James M. Hines the following negroes: Old Kedar, Catherine, Edwin, Teanor and Alfred, and four head of horses, one yoke of oxen, nine sows and pigs, and twelve head of cattle, one hundred barrels of corn, ten stacks of fodder, and working tools, seven head of sheep. In witness whereof I hereunto set my hand and seal this 23d day of February, 1839." (Signed) "E. COBB."

"I also place and set over and appoint James M. Hines agent of the hereafter named property, to be to use and benefit of my daughter Cartha, and the lawful heirs of her body, to them and their successors, to-wit: Patsea, Winney, Ellic, Little Kedar, Abram and Smitha, and the following tracts of land, beginning at a stake in the river, 18 poles above the mouth of the marsh gut and runs S. 87, E. 116, then N. 69, E. 80 poles to a post oak and sassafras, then S. 50, E. 10 poles to a gum, then down a small drain to a sweet-gum on the north edge of the marsh gut, and then up the said edge to the corner named by the John O. Whitfield deed to me, then S. 4 poles to a pine stump, then S. 27½, W. 81 poles to the centre of three pines, then to a hickory 65 poles, then 22 W. 46 poles, then N. 65, E. 93 poles to a water oak on the road, then down the road to a stake in the river at low water mark, then up the meanders of the river to the beginning, be the same more or less, but the above named land may be better distinguished and known by reference to three deeds, one from Carroway Hines, one from Ichabod Herring and Grady Herring, and one from John O. Whitfield, supposed by estimation to contain one thousand and eighty-eight acres. In witness whereof I hereunto set my hand and seal this 23d day of February, 1839."

(Signed in presence of witnesses) "E. COBB, [Seal]."

The deed was duly proved and registered. Cartha died before the late war, and the plaintiff is her only living child, and the defendant was her husband, referred to in the above deed. The defendant received the rents of the said land, and the hires or profits of said negroes, until the close of the war in 1865.

The plaintiff and defendant reserving all issues and questions of fact for future consideration, now submit the above to the court upon the issue of law presented, *i. e.* can the plaintiff maintain his action, or is he entitled to his account of said rents and profits?

It is agreed that if the court is of opinion on this case for the plaintiff, then it shall proceed to try the issues of fact raised by the pleadings, but if of opinion against the plaintiff, then the defendant shall have judgment against the plaintiff and his sureties for costs.

Upon the case agreed it was adjudged by the court that the plaintiff can maintain his action and that he is entitled to an account as prayed in his complaint, from which judgment the defendant appealed.

Messrs. H. F. Grainger and *G. V. Strong*, for plaintiff.
Messrs. W. T. Faircloth and *W. T. Dortch*, for defendant.

ASHE, J. The case, by the appeal, in the manner it is brought before this court is fragmentary. The law involved is by a "*pro forma*" judgment sent to this court, while the facts and merits of the case are retained in the court below to await the opinion of this court upon the question of law. Such a proceeding is an innovation upon the practice of the court; and to entertain the appeal would be establishing a bad precedent, to which this court cannot give its sanction.

Questions of law involved in a case may be decided by this court in advance of a trial upon the merits, when they

are properly raised, as by a demurrer, but we will not consider cases brought to this court by appeals from *pro forma* judgments submitted to by the parties, "to feel their way" in cases of doubtful litigation. In the case of *State* v. *Locust*, 63 N. C., 574, the court reminds the judges of the superior courts that it would not consider cases sent to this court upon *pro forma* judgments.

The parties in this case should have gone on regularly to trial of the case upon all the issues raised by the pleadings, according to the regular practice of the court, and if the court should have erred in its judgment or any of its rulings, then to have brought the whole case before this court by appeal, that its decision upon the questions of law involved and controverted might be finally adjudicated.

The appeal must be dismissed. Let this be certified to the superior court of Lenoir county, that further proceedings may be had, according to law.

PER CURIAM. Appeal dismissed.

E. TURLINGTON v. H. WILLIAMS.

Appeal—Practice—Pleading.

An appeal from the refusal of the court to strike out a part of defendant's answer will not lie. The question as to the sufficiency of the defence set up should have been raised by a demurrer to the answer, or by an objection on the trial to an issue involving the matters pertaining thereto.

(*Crawley* v. *Woodfin*, 78 N. C., 4; *McBride* v. *Patterson*, *Ib.*, 412; *Hull* v. *Carter*, 83 N. C., 249, cited and approved.)

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

The plaintiff appealed from the ruling of the court below.

Mr. W. E. Murchison, for plaintiff.
Messrs. W. A. Guthrie and *N. W. Ray*, for defendant.

ASHE, J. This was an appeal from the ruling of His Honor in a case depending in the superior court of Harnett county. It was an action to recover land brought by the plaintiff against the defendant. The defendant claims title and the right of possession to two tracts of land lying adjacent, the one containing three hundred acres, and the other two hundred and six acres.

The plaintiff claims title and the possession to a tract of land of two hundred and twenty-five acres, which lapped upon each of the tracts claimed by defendant. The defendant disclaimed title to any of the lands sued for outside of the boundaries of his said two tracts, and denied possession of the same, but admitted that he was in possession of that part of the land claimed by plaintiff, which lapped upon his two hundred and six acre tract.

The defendant by way of counter-claim alleged that the plaintiff was in possession of and withheld from him the possession of that part of his three hundred acre tract which was lapped upon by the land to which the plaintiff set up title, and demanded judgment that the plaintiff be removed therefrom, and that the defendant be adjudged entitled to the possession of the whole of said tract, and for five hundred dollars damages and for costs. When the case was called for trial, the plaintiff moved the court to strike out that part of the defendant's answer which set up a counter-claim, but His Honor refused the motion and the plaintiff appealed.

The point intended to be raised and presented for our consideration by this appeal is, whether there was error in the refusal of His Honor to strike out the counter-claim?

But we think the question really presented is, whether an appeal in the case will lie?

We cannot see that there was any substantial right claimed by the plaintiff which was affected by the refusal of the court to strike out that part of the defendant's answer any more than there is in a refusal to continue a case, to enter a non-suit, dismiss an action, or strike out or disregard a sham plea. It has been held that an appeal will not lie from a refusal to continue a case, to enter a non-suit, or dismiss an action. *Crawley* v. *Woodfin*, 78 N. C., 4; *McBride* v. *Patterson*, 78 N. C., 412. And in the case of *Hull* v. *Carter*, 83 N. C., 249, this court intimated a strong impression that no appeal would lie from the refusal of His Honor to strike out or disregard a frivolous plea.

If the plaintiff wished to raise the question whether a counter-claim could be pleaded in an action to recover land, he should have demurred to the answer and thereby raise an issue of law, from the judgment upon which an appeal would lie; or he might have gone to trial and objected to an issue under the counter-claim, have his exceptions noted, and if that point should have been ruled against him, and the action finally determined adversely to him, he might have had the benefit of his exception upon appeal.

PER CURIAM. Appeal dismissed.

*JOHN H. KERR, Receiver, v. H. F. BRANDON and others.

Suit on Official Bond—Surety, when not liable—Receiver—Evidence.

The sureties on the official bond of a clerk are not liable for the default of their principal in administering a fund as receiver. The statute in reference to the appointment of receivers and the order in this case imposed upon the defendant a personal obligation only. Bat. Rev., ch. 53 § 22. But it is not competent to show by evidence *dehors* the record that he and his sureties so understood it.

(*Judges* v. *Deans*, 2 Hawks, 93; *McNeill* v. *Morrison*, 63 N. C., 508; *Cox* v. *Blair*, 76 N. C., 78; *Wade* v. *Odeneal*, 3 Dev. 423, cited and approved.)

CIVIL ACTION on an official bond tried at Fall Term, 1880, of CASWELL Superior Court, before *Eure, J.*

The plaintiff appealed from the judgment below.

Messrs. A. E. Henderson and *Graham & Graham*, for plaintiff:

The fund received by defendant by virtue of his office; and his sureties are liable. *Broughton* v. *Haywood*, Phil., 380. Cases cited in opinion of court discussed. Clerk must account for all moneys received, &c. *Havens* v. *Latham*, 75 N. C., 505; *State* v. *Gaines*, 8 Ired., 168. This case distinguishable from *Gregory* v. *Morisey*, 79 N. C., 559. See also 1 Dev. & Bat. 414; *Becton* v. *Becton*, 3 Jones Eq., 419; *State* v. *McAlpine*, 4 Ired., 140. Record cannot be explained by parol. *Harrell* v. *Peebles*, 79 N. C. 26.

Mr. Thos. Ruffin, for defendants.

*Ruffin J., was of counsel in this case.

KERR v. BRANDON.

SMITH, C. J. In an action instituted by the solicitor of the judicial district of which Caswell county forms a part, pursuant to sections 21 and 22, of chapter 53, Bat. Rev., for securing the estate of certain infants in the hands of their removed guardian, Martha J. Womack, the order following was made at Fall Term, 1870:

"On motion, it is ordered by the court that Henry F. Brandon be appointed a receiver to take into his possession the estate of Sarah B. Russell, Ann E. Russell and Willie Russell, and manage the same to the best interest of the said minors; to lend their money upon good security, and that he rent out the lands to the best advantage for the minors; to collect the rents and lend the same upon good security."

The appointee, who was then clerk of the court, continued to be such until the end of his term of office in September, 1874, when he surrendered all the papers and effects belonging to the office to his successor, retaining however the estate of the infants in his hands and acting thereafter, as before, under his appointment as receiver. At spring term, 1875, the defendant, Brandon, rendered his account of the administration of the estate, with the vouchers and effects thereof, and tendered his resignation, when the court suggested the name of another person in his place, who refused the appointment, and no further action was then had. At this time the defendant had faithfully managed the funds —making regular annual returns—and had wasted and misapplied no part of it.

At fall term, 1878, the following order was entered:

"This cause coming on to be heard, and it being made known to the court that the estates of the following named infants (naming them) are in the hands of Henry F. Brandon, as receiver, who has given no bond or other security for the protection of the same, it is therefore, on motion of F. N. Strudwick, solicitor, acting on this behalf, ordered that the said Brandon give a bond with good and sufficient

sureties, in double the amount of the value of the estates in his hands, and justify the same before the clerk of this court, within thirty days from the last day of this term ; or, in case he fail to do so, then that he file with the clerk a sworn statement of his account as receiver of said estates, and that he pay all that may be in his hands for said infants, without further delay, to the clerk of this court, who is appointed receiver of the estates of said infants."

The defendant, Brandon, failing to comply with the order the present action is instituted against him and the other defendants, sureties to his official bond, given for securing the faithful discharge of his duties as clerk, to charge them with the trust fund wasted and misapplied while in his hands as receiver ; and the only question presented in the record for us to solve is, whether the defendants are responsible in damages for his default.

To repel the allegation that the receivership was conferred upon the said Brandon in his official capacity as clerk, and to show that the appointment was entirely personal, the defendants were permitted, after objection, to prove by witnesses that at the time when the order appointing a receiver was entered, it was distinctly understood and admitted by the solicitor and the special counsel appearing and acting for the infants, in open court, before the presiding judge, that the appointment was, in legal effect and so intended to be, individual and imposing no obligation on the sureties to the official bond, and that until this assurance was given Brandon declared his unwillingness to bind his sureties for this new duty, and sooner than do so, he would resign his office; and that it was then made known that a guardian would soon be appointed and the appointment of receiver was intended to be temporary only.

Upon the facts thus proved, the court ruled that the sureties were not bound for the default of the receiver, the appointment being personal, and that they recover their costs

against the plaintiff, and from this judgment the plaintiff appeals.

The cases cited in the brief of the plaintiff's counsel establish the proposition that when an officer of the court, designated either by his official or individual name in the order, is commissioned to make sale of real or personal estate, he acts in his official capacity and his sureties undertake for the fidelity of his conduct. *Judges* v. *Dean*, 2 Hawks, 93; *McNeil* v. *Morrison*, 63 N. C., 508; *Cox* v. *Blair*, 76 N. C., 78. In such sales, when of land, the statute provides that "the court may authorize *any officer thereof*, or any other competent person to act." Bat. Rev., ch. 84., § 15. And when of personal property, that "the court shall order a sale to be made by *some officer of the court*, or other competent person." *Ibid.*, § 29. So READE, J., declares in *McNeil* v. *Morrison*, that "whenever the person who is clerk is appointed, it is to be taken that he is appointed in his official capacity." To the same effect is the language of BYNUM, J., in *Cox* v. *Blair*. These decisions rest upon the phraseology and presumed intent of the statute, which differs somewhat from that employed when a receiver is to be appointed, and which directs the designation "of some discreet person" for that place. Bat. Rev. ch. 53, § 22.

The plain import of the order of appointment without the aid of extrinsic evidence, in our opinion, and the subsequent action of the court in the cause, restrict it to the defendant as an individual, in like manner as if he were not the clerk. No reference is made to the office in the statute nor in the order, and we see no reason for giving it a wider scope or different effect than it would have in other cases. While then we interpret the judgment from its own terms as having the legal operation intended by the court and by the parties, as the evidence discloses, and to impose upon the appointee a personal obligation only, we do not admit that it can be controlled or modified by evidence

dehors the record as to what it was understood to be. "The records may be identified by testimony," says RUFFIN, J., in *Wade* v. *Odeneal*, 3 Dev., 423, "but their contents cannot be altered or meaning explained by parol." It would lead to mischievous consequences if the written memorials of the action of a court could be varied or explained by outside evidence of their meaning. They may be amended so as to speak the truth and in furtherance of right, but while they stand, their import is a pure matter of construction as other writings, and for reasons quite as strong.

But the error in admitting the testimony is harmless, since our construction of the order is the same as if it had not been heard, and the exception is consequently without practical force.

It must therefore be declared there is no error in the ruling of the court and the judgment must be affirmed. Let this be certified that the cause may proceed in the court below.

No error. Affirmed.

State *ex. rel.*, &c., W. L. HOOVER, wife and others v. W. R. BERRYHILL and others.

Suit on Administration Bond—Jurisdiction—Demand—Parties.

1. In an action on the bond of an administrator, several breaches may be joined even though they relate to several persons, provided they are all covered by the bond. In such case the superior court has jurisdiction to establish the amount of the debt claimed, and no demand is necessary before suit brought.
2. The similarity between rules of equity courts and those established by the code in determining the proper parties to actions and special proceedings for accounts, discussed by RUFFIN, J.

HOOVER *v.* BERRYHILL.

(*Heilig* v. *Foard*, 64 N. C., 710; *Vaughn* v. *Stephenson*, 69 N. C., 212; *Green* v. *Green*, *Ib.*, 294; *Burns* v. *Ashworth*, 72 N. C. 496; *State* v. *McKay*, 6 Ired., 397, cited and approved.)

CIVIL ACTION in the name of the State *ex rel.*, upon the bond of an administrator, tried at Fall Term, 1880, of MECKLENBURG Superior Court, before *Seymour*, *J.*

The plaintiffs allege in their complaint that Joseph C. Nicholson died intestate in 1872, leaving as his next of kin five children, amongst whom were the two female plaintiffs; and that in the same year administration on his estate was granted to J. B. Nicholson, who executed a bond with Samuel Berryhill and the defendant Herron as his sureties. That in 1879, the plaintiffs filed their petition in the probate court of their county against said administrator, asking for a settlement of the estate, and in pursuance thereof an account was taken, and it was ascertained that the said administrator was due the estate of his intestate the sum of $475.45, and a decree was entered against him in favor of each of the said female plaintiffs for the sum of $95.09, that being one-fifth of the whole sum.

That the surety, Samuel Berryhill, died in 1878, intestate, and the defendants, W. B. Berryhill and C. B. Todd, are his administrators. That the administrator, Nicholson, has committed breaches of his bond by not paying the amounts due the plaintiffs according to the decree of the probate judge, and hence this action on the bond, in which they seek to recover those amounts.

The defendants demur to the complaint, assigning four grounds therefor:

1. The defect of parties, in that the other three children of the intestate, Joseph C. Nicholson, were not joined in the action.

2. A misjoinder of parties, in that the two decrees ren-

dered by the probate court in favor of the plaintiffs, being several in their nature, could not be joined in one action.

3. That no demand was made upon the defendants before action was brought.

4. That the superior court had no jurisdiction of the subject matter of the action.

The judge below overruled the demurrer, and the defendants appealed.

Messrs. Jones & Johnston, for plaintiffs.

Messrs. Wilson & Son and *Bynum & Grier*, for defendants.

RUFFIN, J. As the question of jurisdiction goes to the root of the matter, we will consider of it first.

The act of 1868–'69, Bat. Rev., ch. 45, § 133, provides that the creditor of the decedent may bring an action against his executor or administrator, on a demand at any time after it is due, but no execution shall issue without leave of court, and upon proof that the executor or administrator has failed to pay the creditor his ratable part of the assets. In construing this act, it was decided at a very early day after its enactment, that any court having jurisdiction of the amount sued for, could entertain the suit of the creditor so far as to establish his claim and give him judgment therefor. *Heilig* v. *Foard*, 64 N. C., 710; *Vaughn* v. *Stephenson*, 69 N. C., 212. This settles the question of jurisdiction.

As to the absence of a demand upon the defendant administrator before suit, we know of no law requiring it to be made. It is true, that a party suing before making such a demand does so at his own expense; for the law is peremptory that no executor or administrator who does not delay or neglect payment unreasonably, shall pay costs in any action, and no delay could be deemed unreasonable until there was a demand upon him.

This brings us to the question of the defect and the misjoinder of the parties plaintiff.

When the constitution of 1868 was adopted, whereby all the distinctions between actions at law and suits in equity, and the forms of all such actions and suits, were abolished, it became to be a matter of imperative necessity that there should be new rules provided for our courts in regard to the parties to the actions to be thereafter instituted. It was open to the law-making power of the state to have retained either the technical common law rules, or those that had been adopted by the chancery courts, and which were regarded as being more liberal; but as the two were inconsistent, and in many particulars contradictory, they could not co-exist in the same court, and be administered at the same time. Accordingly the provisions of the code were adopted, which, with a few modifications, are the same with the rules that had prevailed in the courts of equity; so that those old equity rules are our best guides in determining the proper parties to actions brought under the code; and this court very early manifested a purpose to adopt them as such.

In looking into the authors who have treated of equity pleadings, it will be discovered that courts of chancery had but few, and those very simple, rules for determining the proper parties to a suit; and that a leading one was that every person who had an interest in the subject matter of the suit should be a party thereto; and this, with the two-fold idea of making it safe to the defendant to perform the decree, and of avoiding unnecessary litigation. And especially was this principle adhered to and rigidly enforced whenever the object of the suit was to obtain an account from the defendant. In every suit, the object of which was to assert the right to have an account on the part of the plaintiff, as belonging to a class of persons, all the individuals who compose the class must be parties and before the

court; and the case of a suit by the next of kin or distributees against the personal representative of an estate for an account, is always cited in the books as an illustration of the rule, it being universally held that they must all in one capacity or another be parties to the action.

But this rule did not obtain unless all the persons were concurrently interested, not equally, for it may have been partially, in the fund of which the account was sought. So that, if some of the individuals who originally had interests had been accounted with, they need not be made parties to a suit brought by the others. Or again, where the shares of the different parties had been kept separate and distinct, so that no one was interested in that of the other, although all due from the same party and in the same way, they need not all join. Or, still again, where several persons were each entitled to certain *fixed* portions of an ascertained sum in the hands of a trustee, each might have sued for his own share, without joining those who had similar interests.

This distinction Pomeroy in his Treatise on Remedies in section 259, says is important, and thus proceeds to state it more fully: "If a trustee holds a fund which he is bound to distribute to different beneficiaries in unequal proportions, and the proportionate share of each has not been ascertained, all the persons interested in the distribution are necessary parties to an action brought to enforce the trust; but when the proportionate share of each has been definitely ascertained by a proceeding binding on the trustee, each is entitled to demand payment of the share belonging to himself, and if not paid, to maintain a separate action for it." To the same effect is Story's Equity Pleading, §§ 207, 212; and 1 Daniel's Chancery Practice, 265. In the light of these authorities, this court does not think there is any defect of parties in the case before us.

When sued for an account before the probate judge, as the case states he was, a demurrer, similar to the one here

relied on, would have been sustained, provided the parties plaintiff in that proceeding were the same as in this action; but failing to interpose the objection there, and allowing that court to proceed to judgment against him, so as to have "the proportionate share of each definitely ascertained," he placed it in the power of each to sue him; for the interests of the several persons composing the class of distributees were no longer concurrent.

Nor do we think the demurrer can be sustained upon the ground of misjoinder of the parties. Indeed, there is no such thing as a demurrer for a misjoinder as there is for a defect of parties allowed by the code; C. C. P., § 95, and the cases of *Green* v. *Green*, 69 N. C., 294; *Burns* v. *Ashworth*, 72 N. C., 496; such misjoinder of unnecesssary parties being treated as surplusage. But we presume the draftsman intended to demur upon the ground that several causes of action have been improperly united, and as we wish to try causes upon their merits and not upon mere technicalities, we shall consider it in that light.

We presume that it will hardly be maintained that the effect of the code, with its freer and more elastic provisions has been to *prevent* the union of parties plaintiff, when the same was permitted by the common law. The right to join, under the old system, has not been repealed or restricted, but enlarged and extended under the new; so that if the action which we are now considering could have been maintained at common law in the names of the two plaintiffs, and their union would not have furnished good ground for a demurrer, it must be safe to say that it can be under the code, which detracts nothing from, but adds to, the privileges allowed under the former.

In the *State* v. *McKay*, 6 Ired., 397, which was a suit brought by several distributees on the bond of the administrator, and the point was made for the defendants, that, as the rights of the plaintiffs were separate, they must sue sep-

arately, and that two persons could not unite as relators, unless they were jointly interested in all the damages that could be assessed under the declaration, the court held that the bond taken by the state was a single security for the performance of each and every duty imposed upon the administrator, and that the right to sue and recover on it must be co-extensive with the security, and that therefore it was competent to assign just so many breaches of the bond as the parties saw fit, whether one or more, and whether for a failure of duty to one or to several persons.

We therefore see no error in the ruling of the judge below.

No error. Affirmed.

NEWTON COX and others v. LEVI COX, Ex'r.

Trial—Account—Issue—Executors and Administrators—Statute of Limitations.

1. Where a case involves both an account and the trial of an issue by a jury, it is not error to postpone the reference until the issue is passed upon.
2. An executor or administrator who pleads the statute of limitations under section 32 (2) of the code, must show that the seven years have expired next after his qualification before suit brought, and that he has advertised according to law. Without proof of the advertisement the plea of the statute will not avail him.

(*R. R. Co.* v. *Morrison*, 82 N. C., 141; *Barham* v. *Lomax*, 73 N. C., 76; *Cooper* v. *Cherry*, 8 Jones, 323, cited and approved.)

CIVIL ACTION on a guardian bond tried at Spring Term, 1880, of RANDOLPH Superior Court, before *Seymour, J.*

The action was brought upon the guardian bond of Thomas Cox, the testator of the defendant. William Cox, late of Randolph county, died in the year 1856, testate. His will in which his son Thomas Cox was appointed executor

was admitted to probate at the August term, 1856, of the court of pleas and quarter sessions for Randolph county. The testator bequeathed in his will ten dollars to each of his grand-children, being seven in number, to-wit: Newton Cox, Sarah E. Cox, Eliza Cox and Nancy Cox (now intermarried with William Craven), Mary Ann Cox (intermarried with Calvin Wells) and Joshua S. Cox. Thomas Cox on the probate of the will was duly qualified as executor and afterwards in 1864 was appointed *guardian* of the said grandchildren of his testator and then executed the guardian bond, sued on, dated the 3d of February, 1864.

Thomas Cox died on the 9th of May, 1872, and on the 20th of the same month his will was admitted to probate and the defendant, Levi Cox, who was appointed executor therein, qualified and took upon himself the burthen of executing said will. The wards of his testator all being of age (except Sarah Cox) when he qualified as executor, he tendered to them their respective shares of the identical bank bills which he had received from his testator constituting the fund owing to the plaintiffs as wards of his testator, and all of them refused to receive the same except Joshua S. Cox and Mary Ann Cox, wife of Calvin Wells. They received their shares and therefore have not joined in this action. The defendant relied upon the statute of limitations, pleading that he had made due advertisement according to law for all creditors of his testator's estate to present their claims and that the plaintiffs have not brought this action within seven years, neither after the death of the said Thomas Cox, defendant's testator, nor within seven years next after this defendant's qualifying as his executor. Upon a call of the case, the plaintiffs moved for a reference to the clerk to take an account of the guardianship, and His Honor refused the motion on the ground that the defendant had interposed the plea of the statute of limitations and a reference should be postponed

until the issue raised by the plea was tried, and accordingly submitted the issue to the jury, to which ruling the plaintiff excepted.

Upon the issue submitted, the jury found a special verdict as follows: "That the testator, Thomas Cox, died on the 9th day of May, 1872, that the defendant, Levi Cox, qualified as executor on the 20th of May, 1872, on the probate of the will, and that on the same day he put up written notices at the court house door and four other public places in the county of Randolph, notifying creditors to present their claims within twelve months and five days. That all the relations except Sarah Cox were of the full age of twenty-one years, more than seven years before the commencement of this action, and that the said Sarah Cox became twenty-one years of age within three years, viz.: 1876."

Upon the rendition of this verdict His Honor adjudged that the action was barred by the statute of limitations as to the plaintiffs, Newton Cox, E. H. Cox, Eliza Cox, and William Craven and wife Nancy Craven, and that they take nothing by this action; and that they pay four-fifths of the costs of this action up to and including the costs of this term to be taxed by the clerk. It is further ordered that the clerk of this court take an account of the guardianship of Thomas Cox as guardian of Sarah Cox only, and report the state of the account and condition of the fund to the next term. To which judgment the plaintiff excepted and appealed.

Messrs. Scott & Caldwell, for plaintiffs.
No counsel for defendant.

ASHE, J. The first exception taken by the defendant's counsel is to the ruling of His Honor in regard to postponing a reference for an account until the issue made by the pleadings upon the statute of limitations was tried. When a case

involves both an account and the trial of an issue by a jury, they cannot be investigated at the same time—the one must precede the other—and it would be needless to increase the expense and trouble of a reference when the case might result adversely to the plaintiff upon the finding of the jury. But when the issue is first tried, if the verdict should be for the defendant the account could still be taken; but if for the plaintiff, that would put an end to the case and save the necessity of an account. This practice is recognized and recommended in the case of *A. T. & O. R. R. Co.* v. *Morrison*, 82. N. C., 141. See also *Parham* v. *Lomax*, 73 N. C., 76.

The other exception taken was to the judgment rendered by His Honor upon the special verdict in relation to the statute of limitations. In this there was no error. The jury found that all of the plaintiffs were of full age on the 20th day of May, 1872, that the defendant qualified as executor on that day and on the same day put up written notices at the court house door and four other public places in the county of Randolph, notifying creditors to present their claims within twelve months and five days from that date. The statute of limitations applicable to this case is chapter 17 of Battle's Revisal, Title 3, section 32, subdiv. 2, which provides that actions must be brought "by any creditor of a deceased person against his personal or real representative, within seven years next after the qualification of the executor or administrator and the making the advertisement required by law for creditors of the deceased to present their claims, &c. We do not think it was intended by this statute that the seven years should begin to run from the time of "making the advertisement." If that was the intention of the legislature they would not in the same connection have employed the words "next after the qualification of the executor or administrator" as that is an event which must precede the advertisement and which under the pro-

visions of the law may do so, by the space of twenty days. To give the act that construction, there would be two events and leave it doubtful from which the time is to be computed. We are of the opinion, the words "and making the advertisment required by law," &c., were used simply to qualify the provisions of the act, and that the act should be construed as if it read within seven years next after the qualification of the executor or administrator, provided he shall have made the advertisement required by law for creditors of the deceased to present their claims, &c. So that for an executor or administrator to make out his defence of the statute of limitations, he must show that seven years have transpired after his qualification before the commencement of the action and that he has advertised as required by law. Without proof of the advertisement, the plea of the statute of limitations cannot avail him. We are sustained in this construction by the interpretation which has been put by this court upon the act of 1789. That act (Rev. Code, ch. 46, § 16,) provided that every executor or administrator should advertise within two months after qualification for creditors to present their claims within the time prescribed by law, and by chapter 65, section 12, a part of the same act, that all creditors residing in the state should present their claims within two years from the qualification of the executor or administrator, and if they should fail to do so, they should be forever barred from the recovery of their debt. Though the failure to present the claims is declared to be an absolute bar (except against those laboring under disabilities) without any qualification as to the advertisement, this court has held that this statute did not protect an administrator unless he had paid over the assets to the distributees and taken refunding bonds as well as advertised in conformity to the act. *Cooper* v. *Cherry*, 8 Jones, 323. The judgment of the court below must be affirmed.

No error. Affirmed.

W. H. HURST, Ex'r v. W. M. ADDINGTON and another.

Executors and Administrators—Pleading.

A demurrer to a complaint, in an action brought by an executor, upon the ground that it does not show the probate of the will and qualification of the executor *before suit brought*, is frivolous and will not be sustained. The allegation that probate and qualification were had in the probate court (which has jurisdiction of the same) *before filing the complaint*, is sufficient.

(*Swepson* v. *Harvey*, 66 N. C., 436; *Boyden* v. *Henry*, 83 N. C., 274; *Daniel* v. *Harper*, *Ib.* 4, cited and approved.)

CIVIL ACTION tried upon complaint and demurrer at Fall Term, 1880, of BUNCOMBE Superior Court, before *Gilmer, J.*

The complaint is as follows: 1. That on the 12th of February, 1878, E. Morrow died leaving a last will and testament in which the plaintiff was appointed sole executor, and that said will was duly proved and admitted to probate according to law, and letters testamentary were thereafter issued and granted to the plaintiff as sole executor by the probate judge of Buncombe county, and the plaintiff thereupon qualified as such executor and entered upon the discharge of his said office.

2. That on the 18th of April, 1876, the defendant executed to said Morrow a promissory note of which the following is a copy: Twelve months after date, we W. M. Addington, as principal, and J. L. Robinson, as surety, promise to pay to Ebenezer Morrow or order five hundred and sixty-nine dollars and seventy-six cents for value received, with interest from date at eight per cent. per annum. (Dated April 18th, 1876, and signed and sealed by said principal and surety). Upon which note is the following credit: Received on the within note forty-five dollars and ninety-two cents, Aug. 2, 1880.

3. That the balance of said note is still due and unpaid by the defendants; wherefore the plaintiff demands judgment, first, for five hundred and sixty-nine dollars and seventy-six cents and interest according to law, and secondly, for costs of action.

To which complaint, the defendants jointly demurred and assigned for cause thereof, "that the complaint does not state facts sufficient to constitute a cause of action, in that, "it does not state that the will of E. Morrow was admitted to probate and the plaintiff qualified as executor of said will prior to the bringing of this action; and further, the plaintiff does not show that the judge of probate of Buncombe county had jurisdiction to admit said will to probate; therefore the defendants demand that the action be quashed, and that they recover their costs."

The demurrer was overruled by the court, and the following judgment rendered: The plaintiff by his counsel moves for judgment on his complaint upon the ground that the demurrer is frivolous, and the motion having been argued by counsel and considered by the court, the court is of opinion that the demurrer is frivolous; and it was therefore adjudged that the plaintiff recover of the defendants the amount of said note with interest at eight per cent. and costs of action, from which judgment the defendants appealed.

Messrs. M. E. Carter and *Reade, Busbee & Busbee*, for plaintiff.
Mr. Jas. H. Merrimon, for defendants.

ASHE, J. We concur with His Honor in the court below, that the demurrer was frivolous and should have been stricken out or disregarded, and judgment rendered for the plaintiff.

In the case of *Swepson* v. *Harvey*, 66 N. C., 436, it was held that if the defences set up in the answer are worthy of con-

sideration, they cannot be declared frivolous; and in such case the plaintiff should either reply or demur, and if the demurrer be overruled, it became the duty of the judge to allow him to plead over, unless it is manifest that such demurrer is frivolous and does not raise any question of law worthy of serious consideration, and is interposed merely for delay. And again, a frivolous answer has been defined to be one which is manifestly impertinent, as alleging matters which if true do not affect the right to recover. *Brogden* v. *Henry*, 83 N. C., 274; *Dail* v. *Harper*, *Ib.*, 4.

Applying the principles enunciated in these cases to our case, we must concur with the judge below that the demurrer is frivolous. We cannot see how it affects the recovery of the plaintiff, and it does seem to have been filed merely for the purpose of delay. The complaint sufficiently shows that the will was proved and the executor qualified before the filing of the complaint; these facts are stated in the complaint, and it is perfectly immaterial whether the probate was had before or after the issuing of the summons, so it was done before the filing of the complaint, for it is common learning that an executor may commence an action before he has proved the will, but cannot declare before probate. Toller on Executors, 46; 1 Williams on Executors, 260. That ground of demurrer then cannot be sustained.

And the other ground is equally without foundation. The court of probate of Buncombe county has jurisdiction of the probate of wills. It has taken jurisdiction in this case and has adjudicated upon the matter. Its action must be presumed to be correct, and its judgment like that of any other court of competent jurisdiction must stand until set aside or shown to be void.

There is no error. The judgment of the court below is affirmed.

No error. Affirmed.

J. A. EVANS, Adm'r, v. THOMAS M. SMITH, Ex'r.

Executors and Administrators—Accounting of.

1. In an account and settlement of a decedent's estate, the personal representative is chargeable with interest on all moneys from the date of his receiving the same.

2. Where an executor in 1862 was required by a legatee to collect and pay over the legacy, and confederate money was collected and set apart for that purpose, and an account of the administration taken and reported in 1864 when the legatee refused to accept the funds tendered; *Held*, that the loss should not fall upon the executor, but a credit for the amount be allowed him.

3. Where an inventory of a testator's estate specified a certain note as a part thereof, the duty of showing that it was used in an alleged transaction to pay a debt of the estate thereby removing his liability to account for the same, rests upon the executor; without such explanation, he will be charged with it as assets of the testator.

4. In such account it is not error for a referee to separate and classify debits and credits in different kinds of currency according to their respective dates, when he is not informed as to date of actual payments; and where there is no evidence as to bank notes the presumption is they were used in administering the estate before any depreciation.

5. The motion to dismiss this proceeding for the reasons assigned was properly overruled.

(*Pickens* v. *Miller*, 83 N. C., 548; *McNeill* v. *Hodges*, *Ib.*, 504, cited and approved.)

SPECIAL PROCEEDING for an account and settlement commenced in the probate court and heard upon exceptions to referee's report at Fall Term, 1879, of COLUMBUS Superior Court, before *Seymour*, *J.*

Upon the hearing of the case, the court overruled the exceptions and the defendant appealed.

Mr. A. T. London, for plaintiff.
Mr. T. H. Sutton, for defendant.

SMITH, C. J. Bythel Rouse died in the year 1859, leaving a will in which he bequeathed his entire estate, subject to the payment of debts, to Betsy Sellers, who afterwards became the wife of the defendant, and died intestate; and this action, instituted March 17th, 1875, in the probate court of Columbus county, against the defendant, the executor, is for an account and settlement of the testator's personal estate in his hands, and for the recovery of said legacy. The defendant moved, upon several grounds, to dismiss the proceedings, and, his motion being denied, put in his answer, and set up various defences, to-wit:

1. The want of jurisdiction in the probate court.

2. The bar of the statute of limitations.

3. The auditing of the administration account by the county court in the year 1864.

4. A prior adjudication in other similar suits of the subject matter of the action; and

5. The conversion of the estate into confederate money at the instance of the legatee and her husband, and their subsequent refusal to receive it, whereby it had been lost, and the defendant absolved from liability therefor.

Upon the coming in of the answer and the refusal of the court to dismiss for the matters therein set out, the defendant appealed to the judge of the superior court, who on the hearing sustained the judgment of the probate court and ordered a reference to the clerk to take and state the account of the defendant's administration of his testator's estate. The clerk made his report at fall term 1876, where without further action it remained until spring term 1878 when it was recommitted with instructions to the referee to state the account in detail, distinguishing between the receipts and disbursements in confederate and other currency and report the evidence in reference thereto. At the ensuing term the referee again reported the account with the evidence accompanying it, showing to be due from the

defendant with interest computed to September 23d, 1878, in confederate money $720.97, and in other currency $2,929.05.

Many exceptions were taken by the defendant's counsel from the judgment overruling which he appeals to this court. These exceptions will be considered and disposed of in the order in which they are enumerated in the record:

1. The defendant is charged with interest on all the moneys received, from the respective dates of each.

The exception is overruled upon the authority of the cases of *Pickens* v. *Miller*, 83 N. C., 543; and *McNeill* v. *Hodges*, *Ib.*, 504.

2. Interest is erroneously charged upon the confederate money offered to the legatee and her husband in 1864, and refused, from which time it should cease.

This exception is dependent upon another, in regard to the allowance of the principal sum as a credit, and will be considered in connection with that.

3, 4 and 5. These exceptions relate to interest and fall within the principle applied to the first exception.

6. The referee, while he charges the defendant with all funds coming into his possession, disallows a credit for the sum of $1722, the balance ascertained to be due in the audited account, and which, collected by the direction of the legatee, with her husband's assent, he, as her administrator, when the same was tendered in February, 1864, refused to receive towards the legacy.

While the testimony is conflicting, the weight of it is to the effect that while the defendant was not disposed to reduce solvent securities into a depreciating confederate currency, he was required by the legatee with the privity, if not the approval of her husband, in 1862, to collect and pay over the legacy; and that he proceeded to do so, and was prepared with the funds to pay over the sum found by the auditors to be due, as soon as they made their report in

February, 1864, and that the plaintiff refused to accept the money. The defendant swears to these facts. The plaintiff admits the offer of settlement and his declining it, because of his duties in the military service. Another witness who was present, testifies to the defendant's proposal to settle with the plaintiff, at that interview, and to his having money, and that the defendant refused to take it, saying he would take gold and silver, or the new issue of confederate treasury notes. The defendant explains his delay until early in 1864 in offering to settle, by saying that the debts due the testator were not collected, nor were all his liabilities discharged until about that time. The defendant further testifies that he labelled a package containing $2000 in confederate notes, with the name of "Evans," a large portion of which was paid him as executor, and belonged to the trust fund, which was set apart for the payment of the legacy, and laid with (but not intermixed) the moneys of others. It does not appear that the defendant demanded the acceptance of the sum which he then supposed he was owing in full satisfaction of the legacy or that it was refused on that ground. The evidence is, that the defendant then proposed to have a settlement, and had reserved and held the sum stated to pay over to the administrator of the legatee. Under these circumstances, the loss of this money ought not to fall upon the defendant, and he should be allowed a credit therefor with interest to the time to which the referee's computations are made. This, and exception 2 are therefore sustained, and the ruling of His Honor reversed.

7, 8 and 9. These exceptions all relate to the charge of the note of one Batten for $400, the objections to which are presented in different aspects, and may be considered together.

The note is specified in the inventory as part of the testator's estate, and the removal of the defendant's liability to account for it rests upon himself. With presumed full

knowledge of all matters in exoneration, he makes no explanation in his testimony. A witness examined in reference to the note says that himself and the testator were co-sureties for one "Owen in the sum of $800, given in purchase of a lot, and, fearing loss, they took and sold the land for that sum to Batten, who executed two sets of notes to them, for one moiety of the purchase money to each. It does not appear that the testator, or his executor, paid any part of the surety debt, or that the Batten notes were applied to its discharge. Unless they have been so used, and the settlement made outside of the administration account, they constitute a part of the testator's estate. If the notes were delivered to the holder of the Owen note in payment, the defendant is not chargeable with them. The duty of showing the facts necessary to the defendant's relief, devolved upon him, as being within his knowledge, and in the absence of explanation, they are properly treated by the referee as assets of the testator, for which he is liable.

10. The referee separates the funds received and paid out as required by the order without evidence, except as to the receipts in bank notes.

The referee, for want of information of the dates of actual payments, has classified the claims according to their several dates, and such debts as existed before confederate notes came into use, and were therefore payable in other currency. As the plaintiff fails to show when and in what money they were collected in part, he properly charges the executor with the money in which they ought to have been paid. The exception is untenable.

11. There being no evidence as to the value of bank notes, they ought not to be charged as good money and at their face value. Two witnesses, J. J. High and A. J. Noy, testify to payments made to the defendant by them in bank bills, and in both cases the transaction took place before the war. What disposition of the notes was made by them does

not appear, and they are not produced. It must therefore be assumed they were used before any depreciation, and the defendant must be held responsible accordingly.

12. This exception is too vague and indefinite to be considered.

13. The referee improperly charges the executor with the balance due from him, in good, instead of confederate currency. The balance in the latter currency will be extinguished by the allowance of the item of $1722, in exception 6, and no further answer is required to meet the objection as to the other balance due.

14. This exception is but a repetition of the 10th exception, and needs no further remark.

The motion to dismiss for any of the reasons assigned, was properly refused.

The account will be referred to the clerk for reformation in conformity with our rulings, unless the parties themselves agree upon the corrections, and upon the confirmation of his report, the plaintiff will be entitled to judgment.

Error. Judgment modified.

M. W. ROBINSON v. J. A. HOWARD and another.

School Committee—Public Officers—Mandamus—Jurisdiction.

A school committee agreed in writing to pay a teacher of a free school the sum of thirty dollars per month, and the teacher brought an action in a justice's court against the committee to recover the same; *Held*, (1) School committeemen are public officers and not personally liable on contracts made in the line of their duty; nor will this action lie against them in their corporate capacity.

(2) In such case a *mandamus* to compel the committee to give an order

on the county treasurer for the sum due for plaintiff's services, is the only remedy; and of this, a justice of the peace has no jurisdiction. (*Taylor* v. *School Com.*, 5 Jones, 98, cited and approved.)

CIVIL ACTION tried at Fall Term, 1880, of LINCOLN Superior Court, before *Seymour, J.*

The plaintiff sued in a justice's court upon a contract of which the following is a copy: "We the undersigned committee of Edward's district authorize M. W. Robinson to teach the free public school in this district, to commence on Monday, July 15th, 1878, and continue until funds are exhausted. Wages $30 per month." (Dated July 2d, 1878, and signed by J. A. Howard and J. H. H. McConnell, school committee). The plaintiff alleged that he had performed the services and the committee had refused to pay him the wages agreed on.

From the justice's court the case was carried by appeal to the superior court, where judgment of nonsuit was entered, and the plaintiff appealed.

Messrs. Hoke & Hoke, for plaintiff.
Mr. R. C. Cobb, for defendants.

RUFFIN, J. If the plaintiff seeks to recover of the parties whom he styles, "school committee," in their individual capacity, then his action will not lie; for being public officers and contracting with the plaintiff as such, they are not personally responsible; it being the law, that public officers are not liable on any contract they may make within the line of their duty. If he seeks to recover of the "school committee" in its corporate capacity, then he has mistaken his remedy.

The school committee is not allowed by law to have any of the school fund under its control. It could not, if it would, pay the plaintiff out of the proper fund. Its duty

consists in giving the teacher an order on the county treasurer for the sum due for his services. And should the plaintiff get a judgment against the "committee," he would be no nearer his money than now. His appropriate and only remedy is by means of *mandamus*, (*Taylor* v. *School Committee*, 5 Jones, 98) of which a justice of the peace has no jurisdiction.

No error. Affirmed.

State *ex. rel.* of C. C. KING v. JOSEPH A. McLURE.

Office and Officer—Constable, term of office of.

1. The provision in article four, section twenty-five, of the constitution that "all incumbents of said offices shall hold until their successors are qualified," does not embrace the office of constable.
2. Where a constable was elected in 1875 for two years and no election was had in 1877; *Held* that a vacancy occurred which the county commissioners had the power to fill. Const. Art. IV., § 24.

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

CIVIL ACTION in the nature of *quo warranto* tried at Fall Term, 1880, of MECKLENBURG Superior Court, before *Seymour, J.*

This action was instituted in the name of the people of the state on the relation of the plaintiff, King, to try the title to the office of constable. The facts are stated by Mr. Justice RUFFIN in the opinion of this court. His Honor held that the defendant was entitled to hold the office, and the plaintiff appealed.

Messrs. Shipp & Bailey, for plaintiff.

Messrs. Dowd & Walker and *A. Burwell*, for defendant.

RUFFIN, J. In this action the relator seeks to recover of the defendant the office of constable for the Charlotte township in Mecklenburg county.

At the regular election, held to fill that office in August, 1875, the relator was elected and soon thereafter was inducted into office. There was no election in 1877 for constable in that township, the county commissioners having failed to provide for one. On the 6th of August, 1877, the said commissioners notified the relator to file a bond, which he did on the 8th, and the same was accepted. On the first Monday of September, 1877, the county commissioners declared the office of constable of the township to be vacant and appointed the defendant thereto, who gave the bond and was inducted into office. The relator at the same time tendered a bond which the commissioners declined to receive.

Under these facts the relator claims that he had the right to hold over in his office until an election, and that there was no vacancy which the commissioners could fill by the appointment of the defendant; and that is the point presented for our determination.

It is stated as an admitted fact in the case, that the action of the commissioners in giving notice to the relator to file a bond and their acceptance of it on the 8th of August, 1877, was the result of a misapprehension, and that he bases no part of his claim to the office thereon; so that those circumstances will not enter at all into our consideration of the rights of the parties.

These rights depend upon the construction to be given to the 24th and 25th sections of article four of the amended constitution of 1875. This article after providing for the election of judges of the supreme court, and judges of the superior courts for the state, and sheriffs and coroners for the several counties, provides, in the 24th section, for the election of a constable for each township, who shall hold

his office for two years, and in case of "vacancy existing for any cause in the office, the commissioners of the county may appoint to the same for the unexpired term;" and in the 25th section it provides that "all vacancies in the offices provided for in this article of the constitution shall be filled by the appointments of the governor unless otherwise provided for, and the appointees shall hold their places until the next regular election for members of the general assembly, when elections shall be held to fill such offices. If any person elected or appointed to any of said offices shall neglect and fail to qualify, such office shall be appointed to, held and filled as provided in case of vacancies occurring therein. *All incumbents of said offices shall hold until their successors are qualified.*"

The relator insists that the words which we have italicized apply not only to those offices provided for in the previous part of the section, the appointment to which in case of vacancies is conferred upon the governor, but to all offices provided for in any part of the fourth article, including that of constable, and that therefore he has a right to hold over in his office until a successor is qualified.

Keeping in view the rule, which is a cardinal one, that in giving a construction to the constitution the spirit and intent of its framers is the safest guide, and that in order to ascertain this intent, especially in the case of an amended constitution which is supposed to be changed because of newly discovered or newly arisen exigencies, the mischief intended to be remedied is the surest test, we have felt constrained to give to the clauses under consideration an interpretation differing from that insisted on by the relator.

It will be observed in the first place, that section 24 of article four of the amended constitution, in which the election for the office of constable is provided for, is in *ipsissimis verbis* with the 30th section of the same article in the constitution of 1868: and that the 25th section of the former

contains the whole of section 31, as it stood in the latter, with a modification and two additions.

This leads us to the conclusion that the provisions of the new constitution were merely substituted for those of the old, and that the modification and additions were intended to affect the subject matters embraced in the original section, but in nowise to multiply them; and since the section, before amendment, extended only to those offices which could be filled in case of vacancies by appointments made by the governor, so we hold it to be now after the adoption of the amendments.

As to the mischief intended to be remedied, we are forced to take notice of the fact, that the construction of that provision of the constitution of 1868, which gave the appointees of the governor in certain instances the right to hold their places until the next regular election, was at one time a vexed question, and that when brought here for a judicial determination, this court was itself divided as to the construction proper to be given to it, Judge READE, in a very able dissenting opinion, giving to the clause a meaning essentially differing from that given to it by other members of the court.

Again, we know that a grave doubt as to the real effect and meaning of that other clause of the older constitution, which extended the term of certain officers until their successors were elected and qualified, existed in the minds of the people of the state, and that it was not put entirely to rest even after the question had been the subject of a decision by this court, though that decision seemed to be supported by very sound reasoning and very high authorities. When those who framed the amendments to the constitution in 1875, came to perform their work, their purpose and intent were to render it certain in those particulars which had been the subject of controversy, and this they sought to do by specifying what general election it was, until which

the appointees of the governor should hold their places, and by declaring it to be the election to be held for members of the general assembly next after the time of their appointments, and hence the necessity for adding that last clause which the relator makes the foundation of his claim; for inasmuch as the election for the members of the general assembly might be held at a time when it was impossible for the person declared elected to qualify by taking the oaths of office, it was essential, in order to avoid the inconvenience of being without any officers, to provide that the incumbents, that is, those in under the appointment of the governor, should continue to hold until such qualification of their successors.

This being our interpretation of the constitution, it is not necessary for us to determine what would have been the the rights of the relator in the premises, in case the office of constable had been included in that class, the incumbents of which were allowed to hold over until their successors were qualified. But inasmuch as the right would have extended, not as in *McIver's* case, 68 N. C., 467, to the *election and qualification* of his successor, but to his *qualification merely*, we incline to think that the two cases might be distinguished. But in August, 1875, the relator was elected constable for the term of two years, which term expired in August, 1877; and in the absence of any law giving him a right to hold over, the office became vacant, so far at least as to devolve the duty of filling it upon the commissioners for the county.

As to the unseemliness so earnestly urged upon us by counsel, of permitting them, after creating the vacancy, to fill it with their appointee, we can only say that if guilty of any dereliction of duty they are amenable to the law, though this court can but be aware that about that time, owing to the shifting of the times for holding elections, some irregularity occurred in many parts of the state in regard to the

elections for offices of minor importance, and we presume the failure in this instance proceeded from some such cause. Be that however as it may, it can in no wise add to or detract from the rights of the relator under the law.

No error. Affirmed.

ROBERT SIMPSON and others v. COMMISSIONERS OF MECKLENBURG.

Fence Law—Counties and Townships—Injunction—Taxes.

Under the act of 1873, ch. 193, an election was held in township No. 6 of Mecklenburg county, which resulted in favor of a "fence law," and the county commissioners thereupon ordered that the township trustees make an estimate of the expenses of erecting a fence enclosing the township as provided by the act, and directed them to levy and collect a tax sufficient to defray the same, the amount assessed being submitted to and approved by the commissioners. Upon an application for an injunction to prevent the collection of the tax, *it was held;*

(1) That upon the commissioners ascertaining and declaring that at the election which was properly held a majority of the voters favored the provisions of the act, the same is conclusive and gives effect to the enactment.

(2) Irregularities in the details of the undertaking will not be allowed the effect to annul the tax-levy and defeat the entire work.

(3) The sanction of the commissioners to the tax levy of the trustees, made it their act.

(4) It was not error in the court below to dismiss the action.

APPLICATION by plaintiffs for an injunction heard at Fall Term, 1879, of MECKLENBURG Superior Court, before *Buxton, J.*

The purpose of the present action is to restrain the enforcement of a tax levied and in process of collection to meet the expenses incurred in constructing a fence around the territorial limits of township No. 6, usually known as

Clear Creek township, under the act of March 3d, 1873 (Acts 1872-'73, § 193). The operation of the act is confined to Mecklenburg and four other counties and was to take effect in each when its provisions were adopted by a popular vote taken therein. In case of an adverse vote in the county it is enacted in section seven that then "upon the written application of twenty-five farmers in any one township in such county, the commissioners of said county shall order an election to be held in said township, according to the provisions in this act at any time after giving public notice at three or more public places in said township for thirty days, and if the commissioners of the county, the returns having been made to and examined by them, shall declare that a majority of the legal voters of said township have voted for the acceptance of the provisions of this act, then the provisions of this act shall have full force and effect in such township, but not until the citizens thereof shall have erected a good and substantial fence around its territory, with gates on all the public roads where they enter into or pass out of its borders."

Under the directions of this section an election was ordered and held in the said township on December 10th, 1874, and the result reported to the county commissioners, from which it appears that sixty-eight votes for, and sixty-six votes against, accepting the provisions of the act were cast at the election.

Upon this report the commissioners at their meeting on January 4th, 1875, made the following order: "It appearing to the board that a majority of the voters of Clear Creek township No. 6 have voted in favor of the proposed fence law aforesaid, it is ordered by the board that the trustees of said township proceed to make an estimate of the expense of enclosing said township and report their proceedings to this board, and that they proceed to enclose said township as directed by said act of the general assembly aforesaid."

The subsequent action of the commissioners, as shown by the record of their proceedings, may be thus summarily stated:

At the session held on May 17th, 1875, the township trustees were directed to levy upon the real and personal property within the township a tax sufficient to defray the expense of erecting the fence and make report thereof.

At the session on October 4th, 1875, the township trustees were required to proceed to collect the tax so levied.

Upon complaint of the insufficiency of the fence, a committee appointed by the commissioners examined the fence and finding it defective, the commissioners ordered that it be made by the trustees, "strictly as the law directs."

At the session on February 28th, 1876, the commissioners passed an order authorizing the trustees to levy a tax on the property and polls of said township to defray the expense of enclosing the township, to be submitted for their approval.

At the session on March 6th, 1876, a tax of $2 on the poll and $1.20 on property of the assessed value of $100, in the aggregate not to exceed $1500 nor be less than $1400, the estimated cost of the work, was submitted to and approved by the commissioners.

The grounds upon which is based the application for an injunction against any further proceedings for the collection of the unpaid taxes, necessary to meet the costs incurred in putting up the enclosing fence, are:

1. The registry of voters shows that a majority of those entitled to vote did not cast their votes at the election for the acceptance of the act.

2. A portion of the township territory is left outside of the enclosing fence.

3. Territory beyond the township and county limits is included within the surrounding fence.

4. The taxes were not levied in accordance with the re-

quirements of law, in that, the discretion reposed in the commissioners was exercised not by them but by the township trustees.

The answers of the defendants to the general averments of the fact upon which the plaintiffs' imputations are dependent are to this effect:

1. The report of the election made by those who conducted it, showed that a majority had voted for the adoption of the act and it was so adjudged by the commissioners. No one appeared to contest the legality or result of the election, nor was any complaint heard from any source until after the fence had been built and the tax imposed for payment. The registry of voters was made out about 1870, and successive names have been since added thereto, without purgation of names of such as have since died or removed, and it does not contain an accurate list of those now entitled to vote, and hence cannot be relied on to show that a majority vote was not cast at the election favorable to the proposition then submitted.

2. Two residents are left outside the fence at their own request and for the reason that the township line severed their farms which lay on either side, and the fence, if pursuing it, would have been of great inconvenience and of little or no benefit to the respective owners.

3. The fence extends beyond the boundary line and takes in a small strip of land lying in Union county, belonging to three residents therein. This was at the special request of these parties, and for the same reasons that prompted the exclusion of the others, and upon conditions, expressed in a contract that they pay their *pro rata* part of the expenses, and that this deviation saves to the township about one hundred dollars which would have been necessarily incurred in following the exact township boundary.

4. The commissioners in the exercise of their own judgment levied the tax, aided by the trustees in their advice as

to the mode of levy and in their estimate of the cost of the undertaking.

It was ordered by the court at fall term, 1879, that the cause be dismissed at plaintiffs' costs, from which ruling they appealed.

Messrs. Shipp & Bailey, for plaintiffs.
Messrs. Wilson & Son, for defendants.

SMITH, C. J., after stating the above. There was no evidence before the court in dismissing the action, so far as the record discloses, except what is furnished in the sworn complaint and answers. The judgment of the court must therefore have been rendered upon the allegations made by the plaintiffs, with the admissions and explanations of the defendants; and no special error is assigned in the rulings of His Honor from which the appeal is taken.

1. We think, under the statute which requires the commissioners after examination of the returns, to ascertain and declare the result, their decision upon the returns of an election regularly and properly held is final and conclusive of the question. When they declare that a majority have thus voted, then and not upon a further inquiry into the vote, "*the provisions of this act shall be in full force and effect.*" Upon the fair and honest exercise of their judgment in determining the vote, the validity of the enactment is suspended, and its operation is not left to the uncertainties of a future enquiry. As the law is left contingent upon the acceptance or rejection of the voters, it is important that the event upon which it depends should be conclusively determined in some way, and the act commits this determination to the commissioners by whom the returns are to be examined and the result announced.

2 and 3. The deviations of the fence from the precise boundaries of the township with the explanations in refer-

ence thereto cannot be allowed to have the effect of rendering the proceedings under the act illegal and annulling the tax levy by which the means are to be raised to meet the costs of the undertaking. If irregularities, they can be be easily corrected, without defeating the entire work.

4. The taxes are levied by the proper legal agency, in the co-operation of the township trustees with the commissioners. The former made their estimate of the taxes required and of the levy sufficient to meet the costs of the work, and the sanction of the commissioners made it virtually and truly their act. The township trustees "under the supervision of the county commissioners, have control of the taxes and finances, roads and bridges of the township as may be prescribed by law." Const., Art. VII., § 5. If the act of February 12th, 1875, is effectual in transferring the power to levy taxes for township purposes from the trustees to the commissioners, its requirements have not been disregarded in the manner in which the present tax has been imposed.

We do not deem it necessary to pursue the enquiry further, since in our opinion no injunction could properly issue upon any of the grounds set out in the complaint to arrest the proceedings under the law, and thus withhold payment to those whose labor and money have been expended in this public work for the common benefit of all having lands to cultivate and be protected within the township.

It must be declared there is no error and the judgment is affirmed.

No error. Affirmed.

J. N. WALLACE v. BOARD OF TRUSTEES of Sharon Township.

Board of Township Trustees deprived of corporate powers—Public and Private Corporations—Rights of Party dealing with same.

1. The county government act of 1877, ch. 141, deprived the board of township trustees of its existence as a municipal corporation, and hence it cannot be a party to a suit.

2. A party dealing with a municipal corporation has no such vested right growing out of his contract with the same as is protected by the federal constitution. It is a public institution and the state may destroy its corporate powers, leaving the party endamaged to seek relief by an appeal to the legislature. But the rule is otherwise with regard to private corporations.

(*Mitchell* v. *Trustees*, 71 N. C., 400, cited and approved.)

CIVIL ACTION tried at Fall Term, 1880, of MECKLENBURG Superior Court, before *Seymour, J.*

The plaintiff appealed from the ruling of the court below.

Messrs. Wilson & Son, for plaintiff.
Messrs. Dowd & Walker, for defendant.

RUFFIN, J. In 1874 the plaintiff made a contract with the then board of trustees of Sharon township of Mecklenburg county, in pursuance of which he furnished the necessary rails and built a certain fence, and was to receive in compensation the sum of $550; and the object of this action is to recover of the defendant that sum. When the case was called for trial in the court below, the judge presiding refused to allow it to be proceeded with upon the ground that there was no defendant; and thereupon the plaintiff submitted to a nonsuit and appealed.

The constitution of 1868 directed the several counties of the state to be divided into convenient districts which it

designates as "townships," and invested with "corporate powers for the necessary purposes of local government;" and provided for the biennial election of a clerk and two justices, who should constitute a board of trustees for each township, and upon whom it conferred the control of the taxes and finances of the same, subject to the supervision of the county commissioners. Art VII, §§ 3, 4, 5.

In order to give effect to these provisions of the constitution, the act of 1868–'9, (Bat. Rev., ch. 112,) was enacted, wherein it was provided that all actions and proceedings by and against a township, in its corporate capacity, should be in the name of its board of trustees, and that the board should have the power to lay and collect all taxes requisite to defray the necessary expenses of the township. Section 2 and 19.

Thus stood the law at the time the plaintiff made his contract with the board of Sharon township, and also when he performed his part thereof. But subsequently the act of 1873–'4, ch. 106, was passed, whereby the provisions of the act of 1868–'9 were expressly repealed; and again in 1876–'7 the general assembly, under the power given it in the amended constitution of 1875, enacted what is generally known as the "county government act," whereby all the provisions of the constitution of 1868, in regard to township board of trustees were abrogated, and the provisions of the act substituted in the place thereof. The substituted provisions were to the effect that the townships already established and those thereafter to be created should be distinguished by well defined boundaries; "but that no township" have or exercise any corporate powers whatever, unless allowed by act of the general asssembly to be exercised under the supervision of the board of county commissioners." So that the question presented for our consideration and determination is, how far the right of the plain-

tiff to maintain his action has been affected by this subsequent legislation.

In reaching a conclusion we have not laid much stress upon the act of 1873–'4, whereby the act of 1868–'9 was repealed; for inasmuch as the constitution of 1868 was then in operation, and by it the board of township trustees were declared to be corporate bodies clothed with the power to levy and collect taxes within their respective townships, there might be some question as to the power of the legislature to deprive them of their corporate existence and powers, though that point does not seem to have been raised when the case of *Mitchell* v. *The Board of Trustees of Township No.* 8, reported in 71 N. C., 400, was before the court for consideration, and when full force was given to the statute.

There can however be no such doubt suggested as to the law of 1876–'7; as, then, the constitution had been amended, and full power lodged in the assembly to make what changes it might deem proper in regard to the municipal corporations of the state.

Acting upon the authority thus given it, the general assembly, by the said "county government act," repealed that clause of the constitution which gives corporate powers to the board of trustees for the township; also, that one which provided for the election of officers of the township who *ex officio* should constitute the board of trustees; also, that one which gave such trustees the control of the taxes and finances of their township; and in lieu thereof declared that "*no township should have or exercise any corporate powers whatever*," unless allowed to do so by act of the assembly.

It is true that the same act provides that the territorial limits of the townships, as established, should be preserved; but this, we think, was for the convenience of the citizens thereof, and because the law required that in all general elections for the state there should be at least one polling

place in each township, and could not have the effect, as argued by plaintiff's counsel, to continue them as corporations but with dormant powers. If corporations still, whence do they derive their existence, now that every clause of the constitution which gave them being has been abrogated, and every section of every act which could possibly be so construed has been repealed?

The counsel still urging that the townships were corporations, cited us to the third section of article eight of the constitution, wherein it is provided that "all corporations shall have the right to sue and be sued in all courts" and contended that, though the townships might be deprived of all other powers, they still retained the one of maintaining or defending an action; and hence it was error in the presiding judge to have dismissed the action upon the ground that there was no defendant to it. But we cannot concur in this, for the simple reason, if no other, that the provision he refers to is declared in the very article of the constitution cited, to be applicable to "corporations other than municipal;" and in article seven, which treats solely of municipal corporations, no such provision is found. Hence we conclude that there can be no doubt of the purpose of the legislature to take away from the township board of trustees all corporate powers; and that it has not only done so, in express words, but has destroyed their very existence as corporate bodies.

And this brings us to the last position assumed by the counsel, to-wit, that the repealing act was void as to the plaintiff, because it had the effect to impair the obligation of his contract with the defendant; or in some way to interfere with his vested rights growing out of that contract.

Private corporations can have vested rights, for being designed to regulate private interests, and indeed being themselves private property, they do partake of the nature

of a contract; so that a violation of corporate rights and powers is inhibited just as a violation of any other private contract or property would be; and those who deal with them will receive exactly the same protection and acquire the same rights as those who deal with individuals.

But it is otherwise with municipal corporations, which never become the subject of property; they are public institutions, established for the advantage of the public, and they may lend their aid in conducting the government; their powers are public trusts to be exercised for the public good; and hence they must be liable in order to fulfil the very object of their creation, to be changed or modified according to the necessities and exigencies of the state, or to be abolished whenever they became hurtful or inconvenient. Such being their nature and inherent characteristics, it necessarily follows that neither they nor those who deal with them, can acquire any vested rights such as may enforce a continuance of their corporate existence. Every one is bound to take notice of their revocable nature, and is presumed to deal with them in the light of this notice.

It is useless to multiply citations in support of this position, as it is the well recognized rule of action with our courts both state and national, and has very recently been applied by the supreme court of the United States in a case not yet reported, growing out of the repeal of the charter of the city of Memphis by the legislature of the state of Tennessee. There, it was held that the creditors of the city could not be heard to complain of such repeal; and that after it no suit could be maintained against the city, it being defunct, though its assets might be seized and administered by a court of equity for the benefit of its creditors, and that if damaged, its creditors could only have relief by an appeal to the legislature. So we hold in this case.

The board of trustees of Sharon township having been

shorn of its powers and deprived of its corporate existence by the will of the legislature, it was incapable of defending the action of the plaintiff, and His Honor was right in refusing his permission to proceed with the trial; and if plaintiff has sustained loss by the action of the legislature, he must seek his relief at the hands of that body. It is impossible for us to hold otherwise, since to admit the position of the plaintiff here would be to concede that by the establishment of townships under the law of 1868, the right of the state to amend its constitution had been limited—a conclusion we presume that no one will contend for.

No error. Affirmed.

BANK OF STATESVILLE v. TOWN OF STATESVILLE.

Municipal Bonds—Validity of.

The municipal authorities of Statesville were authorized by the act of 1861. ch. 176, subject to a vote of the qualified voters of the town, to issue certain coupon bonds, with a provision that they shall be signed by the town-magistrate, treasurer and commissioners thereof. After a vote approving the same, the bonds were issued, but signed only by the town-magistrate and treasurer; *Held*, that the act was directory, and the omission of the commissioners to sign the bonds was not fatal to a recovery upon them. (Remarks of SMITH, C. J., upon effect of payment of interest on the bonds and want of proof as to corporate existence of railroad company.)

(*Belo* v. *Com'rs*, 76 N. C., 489; *Rollins* v. *Henry*, 78 N. C., 342; *McRae* v. *Russell*, 12 Ired., 324.)

CIVIL ACTION tried at August Special Term, 1879, of IREDELL Superior Court, before *Gudger, J.*

The plaintiff bank brought this action to recover the amount alleged to be due from the defendant town on account of the non-payment of certain coupon bonds issued by the defendant in aid of the construction of the Atlantic, Tennessee and Ohio railroad. Verdict and judgment for plaintiff, appeal by defendant.

Messrs. Reade, Busbee & Busbee and *R. F. Armfield,* for plaintiff.

Messrs. J. M. McCorkle, J. M. Clement and *D. M. Furches,* for defendant.

SMITH, C. J. By an act of the general assembly, ratified and taking effect on January 26th, 1861, the town of Statesville was re-incorporated with prescribed boundaries, and its government committed to a board, consisting of a town magistrate and four commissioners, to be chosen by the electors therein, on the last Monday in February following, and every two years thereafter, on the same day. Acts 1860-'61, ch. 176.

It is enacted in section 7, that the said town magistrate and commissioners, or a majority of them, shall have full power and authority, by and with the consent of the majority of the voters within the limits of the corporation of the town of Statesville, to subscribe a number of shares to the capital stock of any work or works of internal improvement, in which they may have an interest, a sum not exceeding thirty thousand dollars.

The next section directs the manner of ascertaining the will of the electors, and, if it shall favor the proposed subscription, section nine declares, that "it shall be the duty of the said town magistrate and commissioners, to issue coupon bonds, signed by the town magistrate and commissioners, (and) by the town clerk and treasurer" (one and the same person) "in sums not exceeding five hundred dol-

lars, bearing interest at six per cent., payable semi-annually, and redeemable within twenty years from the dates thereof, at any point or points within the state." A proviso annexed, requires the levy of a sufficient tax to meet the interest and principal, as they fall due.

In pursuance of this authority, and after the approval of a popular vote, by the direction and in behalf of, the board of commissioners, a subscription was made for five hundred shares, of the par value of fifty dollars each, in the capital stock of the Atlantic, Tennessee and Ohio railroad company, and a stock certificate issued therefor. The stock was afterwards sold by the board, for twenty thousand dollars, and the proceeds applied to the use of the town. In part payment for the stock, the board caused to be prepared and, on its behalf, authenticated by the signatures of the town magistrate and the treasurer, coupon bonds, in the sum of fifteen thousand dollars, and delivered to the agent of the railroad company, of which the following is the form:

STATE OF NORTH CAROLINA,

Statesville, Iredell County. $500.00

On the first day of July, Anno Domini eighteen hundred and eighty-one, the town of Statesville promises to pay to the Atlantic, Tennessee and Ohio railroad company, or bearer, the sum of five hundred dollars, with interest at the rate of six per centum per annum, payable semi annually on the first days of January and July in each year. This bond is issued in accordance with an act passed by the general assembly of the above state, in part payment of a subscription of twenty-five thousand dollars, made by said town, under said act.

In testimony whereof, the town of Statesville has authorized the town magistrate to sign, and her treasurer to coun-

tersign, and the seal of said town to be affixed, this the first day of July, 1861.

C. L. SUMMERS,
Town Magistrate.

C. A. CARLTON,
Treasurer.

Coupons attached to correspond.

These bonds were accepted by the treasurer of the railroad company, and a written acknowledgment thereof given, but, under an arrangement between the treasurer of the company and the treasurer of the town, were left in the hands of the latter to be sold for the benefit of the company, and most of them were disposed of through this agency, and such as were not, and the moneys received for such as were sold, were delivered to the company. A portion of the sold bonds were bought by R. F. Simonton, who conducted a banking business in the name of The Bank of Statesville, the coupons from which, as from others (from what source derived does not appear), are now in suit, at the instance of the plaintiff, his executrix, made a party during the progress of this action. The bonds sold to the testator by the company's agent were purchased, part at 90 and part at 95 cents on the dollar. The interest on all the bonds issued was regularly paid by the board from 1867 up to 1873, as proved by a witness who filled the office of clerk and treasurer during that interval, but no interest has been paid since.

The instructions asked and refused, may be condensed, and are embodied in these propositions:

1. The bonds are void for non-compliance with the directions of the statute, and the absence of the names of the commissioners.

2. The payment of interest was not an act of ratification, which imparts any additional efficiency to the bonds.

3. There being no proof of the act of incorporation, nor of the corporate existence of the said railroad company, the bonds are a nullity, for the want of an obligee.

The substance of the charge given was, in effect, that the non-conformity of the bonds to the statute, if an objection was remediable by a ratification, and if the bonds were issued by the defendant, and accepted by the railroad company in payment *pro tanto* for the stock, and the stock appropriated to the benefit of the town, and interest afterwards paid, this would be a recognition and ratification of the debt and impart to it a binding force, and that the mode of transfer of the bonds and their remaining in the hands of Carlton, then constituted an agent of the company, for their sale, and their subsequent sale to the testator, would not affect their obligation in his hands as a *bona fide* purchaser for value before maturity and his right as such to a recovery. Upon the evidence, and under these directions, the jury found that there was a subscription of $25,000 made by the defendant to the stock of the railroad company, and that the plaintiff as executrix, was the *bona fide* owner of the coupons in suit.

The exceptions are untenable or immaterial.

1. The corporate organization of the Atlantic, Tennessee and Ohio Railroad Company and its capacity to contract are recognized by several unequivocal acts of the board of commissioners, which if not conclusive, put the burden of showing that it does not legally exist upon the defendant. They consist in, first, accepting the stock issued to the board as property possessing value; secondly, selling the same and using the proceeds for the benefit of the town; thirdly, in issuing and delivering the bonds to its agent and treasurer.

2. While a ratification cannot remove from the bonds the infirmity of a want of power to issue them, which involves a like want of power to confirm, the instruction in this regard is harmless, since, if valid in their inception,

they needed no subsequent confirmation, and this point will be considered in noticing the remaining exception. 1 Dillon Mun. Corp. § 385.

3. The want of the signatures of the commissioners of the town: The numerous references made in the argument do not bear directly upon the question of the effect upon the validity of the bonds of a deviation in the form of execution from that prescribed in the law, by whose authority they are issued.

In the cases cited for the plaintiff, objection is taken to the want of compliance with some essential condition prerequisite to the exercise of the power of making a binding municipal obligation, and this defect it was proposed to show, in contradiction of the recitals contained in the instrument against a *bona fide* purchase without notice. This was held inadmissible against the declaration of such compliance made by those who were to determine the fact and issue the bonds. The cases determined in the supreme court of the United States are collected and examined with great care and ability by Judge DILLON in his two works. 1 Dill. Mun. Corp. § 416, *et seq.*, Dill. Mun. Bonds. See the recent cases *Block* v. *Bourbon Co.*, 99 U. S., 686; *Pompton* v. *Coop. Un.*, 101 U. S., 196. In harmony with these is *Belo* v. *Com'rs*, 76 N. C., 489, wherein the rule is thus concisely stated by BYNUM, J.: "If a municipal corporation has the power to issue bonds only on a compliance with conditions precedent, as for instance as here in pursuance of a popular vote, and the bonds are issued, the presumption is that the conditions have been observed, and they are *prima facie* valid, though the defendant may show the contrary, unless he is estopped by his own acts from doing so."

In the cases referred to by the defendant's counsel, the authority was conferred under restrictions and the mode pointed out in which it was to be exercised, admitting of no substantial departure. In both references, the objection is

based upon a total want of power. The case to which our attention was called by a brief newspaper paragraph, decided in the supreme court of the United States, and since reported in 101 U. S., 665, (*Scipio* v. *Wright*) falls within the same principle, as a brief examination will show. The state of New York, on the 6th day of April, 1862, passed an act "to authorize any town in the county of Cayuga, to borrow money for aiding in the construction" of certain railroads, and in its first section authorized certain officers "to borrow on the faith and credit of the town, such a sum of money as they may deem necessary, not to exceed $25,000, for a term not to exceed twenty years, with such rate of interest as may be agreed upon, not exceeding 7 per centum per annum, and to execute therefor, under their official signatures, a bond or bonds, in which the interest shall be made payable semi-annually, &c. All moneys borrowed are directed to be paid over to the officers of the road to be expended in its construction and maintenance. Some of the bonds issued under the act were delivered to the road in payment for stock subscribed in the name of the town. It was held, in deference to the construction put upon the statute by the state court, and with some reluctance, that this delivery of unsold bonds was not a compliance with the law, and that they were void, in the hands of the plaintiff who took them with notice of the manner in which they had been acquired. The decision does not meet the enquiry how far the omitted signatures of the commissioners, who assented to the authentication of the town magistrate for all, impairs the obligation assumed on behalf of the town. Here, every material condition is met, and the only defect the absence of the names of some who ought to have signed the bonds. This question is not involved in the adjudications referred to.

We are of the opinion that the omission is not a fatal defect, and that the statute in this regard is directory only. There are analogies supporting this view. Thus, every

order or judgment made by a judge of the superior court, the statute declares shall be authenticated by his signature, (Acts 1868–'69, ch. 93, § 6), and yet the judgment is valid without. *Rollins* v. *Henry*, 78 N. C., 342. So a bond given for the first instalment of stock instead of a payment in money as the law directs, is nevertheless effectual to bind the obligor. *McRae* v. *Russel*, 12 Ired., 324.

Without referring to other cases of like import, we think that while the commissioners ought also to have signed the bonds for their authentication and the protection of the public, the town having received the consideration is responsible for the indebtedness thus incurred on its behalf, and represented in the bonds issued therefor. There is no error, and the judgment is affirmed.

No error. Affirmed.

THERCY J. BEST v. NORRIS FREDERICK.

Practice—Issues.

It is not error to refuse to submit an issue to the jury when there is no proof to support it.

(*Albright* v. *Mitchell*, 70 N. C., 445; *McCombs* v. *R. R. Co.*, 67 N. C., 193; *March* v. *Verble*, 79 N. C., 19; *Wittkowsky* v. *Wasson*, 71 N. C., 451, cited and approved.)

CIVIL ACTION tried at August Special Term, 1880, of DUPLIN Superior Court, before *Schenck, J.*

The facts are stated in the opinion. The plaintiff submitted to a nonsuit and appealed.

Messrs. Allen & Isler, for plaintiff.

Mr. D. J. Devane, for defendant.

ASHE, J. The action was brought by the plaintiff, who was then and still is a feme covert, to recover the sum of six hundred dollars with interest, which it is alleged the defendant promised to pay her upon the considerations hereinafter mentioned. On the 12th day of April, 1870, one A. M. Faison paid the sum of two thousand and thirteen dollars and twenty four cents, the balance due on a note theretofore given by the defendant and Henry Best, the husband of the plaintiff, to Wm. Reston, cashier, to which note the said Faison was surety. Prior to this, Frederick had gone into bankruptcy, and had obtained his certificate of discharge on the 11th of December, 1868. At the time Faison paid and took up the note given as aforesaid to Reston, the defendant promised him that he would pay or try to pay whatever amount he might have to pay on the note, and did pay him two notes of five hundred dollars each, the market value of which was seven hundred and eighty dollars. Afterwards Faison brought suit against Best and Frederick to recover the balance of the money he had, as surety, paid to their use. He recovered judgment against Best and sold his land to satisfy the same; and whilst the action was still pending against Frederick, he as testified by Faison, approached the latter and asked him to compromise the matter between him and Best. Frederick then said that "he could not pay them; but if he would wait four years, he would pay six hundred dollars, and could not pay sooner." The witness further states "that Mr. Best then came to us and we made a compromise. Mr. Best was not present. I was to wait four years and take twelve hundred dollars at eight per cent. interest. The debt, interest and costs amounted to about eighteen hundred dollars. I proposed to lose six hundred, and Frederick pay six hundred and Best six hundred dollars. They agreed to this. No particular person mentioned to whom payment wa s to be made. We were to meet at Warsaw next week

and have the mortgage drawn. Mr. Allen (attorney) was to draw the papers. Met at Warsaw. All present but Frederick, who did not come. The mortgage was drawn and executed. * * * * * The mortgage was given as a compromise in pursuance of the promise of Frederick. Frederick was to pay Mrs. Best, if she would pay the debt. She was to wait four years with him. She gave the mortgage running four years accordingly."

Henry Best, a witness for the plaintiff, testified that he was the husband of the plaintiff; that in the month of May, 1874, a compromise was proposed to him. He refused, as he had no property. He refused until he saw his wife and then acted for her. The defendant said, "if your wife will sign a mortgage of her property and pay Faison, he would pay her within four years." The defendant knew he was acting for his wife. He promised witness several times to pay, and on the 18th of September, 1875, promised to pay mill rock, gin, flour and bacon, and did pay a barrel of flour and one hundred pounds of bacon on the 22nd of September, 1875. Frederick said when the compromise was made, "if the old woman will pay Faison, I will repay her in four years. If Faison would wait four years, he would pay her six hundred dollars." Frank Best, a son of Henry, was examined on the part of the plaintiff, and stated that he was sent by his father for the flour and meat, and said Frederick was to credit it on the Faison debt.

The defendant was then introduced as a witness for himself and testified that the flour and bacon were not to be credited on the Faison debt, but on a small debt of twenty-seven dollars, which he owed to Best. He knew that by the compromise he had six hundred dollars to pay to somebody, but he did not know to whom; that he could not remember ever to have spoken to Mrs. Best about the matter. The mortgage given by Mrs. Best was upon her separate property. The compromise was made on the ..... day

of May, 1874, and the writ issued on the 27th day of April, 1878. The defendant for a defence relied upon the statute of limitations.

His Honor, after hearing the evidence, intimated to the plaintiff that she could not recover, for the reason that he should instruct the jury, as a matter of law arising upon the testimony in the case, that the plaintiff's right of action was not complete until May, 1878, four years from the time of the promise detailed in the evidence as having taken place at Kenansville in May, 1874.

The plaintiff insisted that while it was the province of the court to construe the contract, yet the time at which the contract fell due was a question for the jury. His Honor held that there was no evidence to submit to a jury, tending to show that the contract was due before the issuing of the summons in the case. The plaintiff insisted there was evidence, and asked that an issue might be submitted to the jury on that point; but His Honor refused. The plaintiff thereupon excepted, and submitted to a nonsuit and appealed.

When issues are made up by the pleadings, parties have the right to have those material to the deliberation of the case submitted to the jury; and for the presiding judge to withhold such material issues and substitute others, is error. *Albright* v. *Mitchell*, 70 N. C., 445. This case has been relied upon by the plaintiff's counsel as authority for ascribing error to the court below, in refusing the issue proposed. But we cannot see that the principle decided in that case is applicable to the facts in this case. There is no issue made up by the pleadings as to the time when the contract was to mature. The plaintiff alleged, in general terms, that the defendant, upon certain considerations, promised to pay her six hundred dollars, and the defendant denied it and relied upon the statute of limitations. The proof in the case was clear that the defendant, at the time of the compromise at

the May term of Duplin superior court, was to have an extension of four years upon his promise to pay the six hundred dollars. Faison testified that "the mortgage was given as a compromise in pursuance of the promise of Frederick. Frederick was to pay Mrs. Best if she would pay the debt. She was to wait four years with him. She gave the mortgage—running four years accordingly." Best, the husband and agent of the plaintiff, who made the compromise for her, testified that Frederick said, when the compromise was made, "If the old woman will pay Faison, I will repay her in four years. If Faison would wait four years, he would pay her six hundred dollars." There was no evidence offered in the case which contradicted or varied this evidence as to the time when the contract was to fall due. An attempt to do so was made by offering proof that the defendant promised to pay the plaintiff in mill rock, gin, flour and meat; and that in 1875 he did send to the plaintiff a barrel of flour and one hundred pounds of bacon. But this proves nothing. It is too slight a circumstance to be left to the jury, to be weighed against the direct and positive testimony of Faison and Best, in establishing the terms of the contract. The payment of the flour and bacon, even if paid on the Faison debt, which is denied by the defendant, is not at all inconsistent with the contract that the defendant was to have a forbearance of four years. The kindest relations seem to have subsisted between the Bests and the defendant. Whether they are connected by the ties of blood or marriage, we are not informed, but the circumstances connected with the execution of the mortgage given by Mrs. Best on her separate or individual property, to relieve the defendant, indicate close and kindly relations between the parties. If then, while the defendant is owing the plaintiff a large debt she should need supplies and he has them, it would be most natural for him to furnish them to her, not merely as a matter of accommodation, but upon the principle of jus-

tice; especially when such advances would reduce the amount of his debt. When the defendant promised that he would pay the plaintiff within four years, it seemed to have been in his contemplation to pay the debt from time to time during that period.

While it is the duty of the court to submit all issues to the jury which are raised by the pleadings, it is its duty on the other hand, when there is no evidence to sustain the declaration of the plaintiff, so to instruct the jury; and to withhold from their consideration testimony which merely raises a conjecture or suspicion of a controverted fact. *McCombs* v. *N. C. R. R. Co.*, 67 N. C., 193; *March* v. *Verble*, 79 N. C., 19.

Whether there be *any* evidence is always a question of law for the judge; whether it is sufficient is a question of fact for the jury; but what is meant by *any* evidence is not whether there is literally no evidence, or the slightest *scintilla* of evidence, but whether there is no evidence that ought reasonably to satisfy the jury that the fact sought to be proved is established. *Wittkowsky* v. *Wasson*, 71 N C., 451.

What if there had been an issue submitted in this case, whether the contract was to mature before May, 1878? His Honor must have charged the jury that there was not *any* evidence offered on the part of the plaintiff which could reasonably satisfy them that the contract fell due at an earlier day than May, 1878. What was the use of making up and submitting such an issue to the jury, when there was manifestly no proof to support it?

The ruling of His Honor was correct. There is no error. The judgment of the superior court of Duplin is affirmed.

No error. Affirmed.

MAY MURRILL and others by their G'd'n v. A. J. MURRILL and another.

Practice—Motion in the Cause.

A new action between the same parties touching a matter that might be settled by motion in the original action will be dismissed.

(*Council* v. *R s*, 65 N. C., 54; *Lord* v. *Beard* and *Merony*, 79 N. C., 5 and 14; *Faison* v. *McIlwaine*, 72 N. C., 312, cited and approved.)

MOTION of defendants to dismiss the action heard at Fall Term, 1880, of Onslow Superior Court, before *Gudger, J.*

The motion was allowed and the plaintiffs appealed.

Messrs. George V. Strong and *H. R. Bryan*, for plaintiffs.
Messrs. A. G. Hubbard and *Allen & Isler*, for defendants.

RUFFIN, J. A brief statement of the case only is needed, that the point presented by the appeal may be understood.

The plaintiffs in the present action allege in their complaint that in 1851, Sarah D. Murrill, Daniel R. Ambrose and Mary J. Ambrose, being tenants in common of a certain parcel of land filed their petition in the late court of equity for Onslow county for the sale of the same for partition, when a sale was decreed and made by one Jasper Etheridge, as a special commissioner of the court; that A. J. Murrill who was then the husband of the petitioner, Sarah D., became the purchaser and gave his bond, with surety, to the commissioner for the purchase money, no part of which has ever been paid, and both parties to the note are insolvent; that there was never any decree for title to be made, but still the commissioner had made a deed, and that the said Mary J. Ambrose, after intermarriage with the plaintiff,

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

John F. Murrill, died, leaving the other plaintiffs as her only heirs, and the relief prayed for is, that the plaintiffs may have a lien on the land for their share of the purchase money, that the commissioner's deed be declared void and that the land be sold. When the present action was called for trial, the defendants moved to dismiss it upon the ground that the plaintiffs might have the relief sought in the original action and could not therefore maintain an independent suit, and His Honor being of that opinion dismissed the plaintiffs' action. The plaintiffs then moved the court to treat their action as a motion in the original cause and proceed with it accordingly, which the judge declined to do and the plaintiffs appealed.

Feeling ourselves controlled as doubtless His Honor did by the cases of *Council* v. *Rivers*, 65 N. C., 54; *Lord* v. *Beard*, 79 N. C., 5, and *Lord* v. *Merony*, *Ib.*, 14, we are most reluctantly led to say that the plaintiffs' action was properly dismissed. Those cases go to the length of deciding that when a proceeding is begun in any court of competent jurisdiction for a sale of lands for partition, the court acquires such exclusive control over the parties and subject matter of the action as to oust the jurisdiction of every other tribunal, and that if a new action be begun between the same parties touching any matter that might be settled in the original action and before its termination, the court will dismiss it as soon as informed thereof. We are sensible of the hardship of the rule upon the present plaintiffs whose action was begun in 1873 and put at issue by the filing of complaint and answer at fall term, 1874, since which time it has been pending, with two efforts for a trial resulting in mistrials, until fall term, 1880, when for the first time the motion to dismiss it is made. We can but wish His Honor had yielded to the prayer of the plaintiffs and consented to treat their proceeding as a motion in the original cause, and if we could see that his refusal proceeded from any supposed want of power

to do so, we should not hesitate to grant the plaintiffs a new trial notwithstanding what is said in *Faison* v. *McIlwaine*, 72, N. C., 312, for if the discretion to allow such a motion was ever lodged in the court it is there still, and its exercise is in keeping with the new order of procedure. But as we cannot perceive that in refusing the plaintiffs' motion His Honor did anything more or less than in his discretion he thought to be right, we are neither at liberty nor disposed to enquire into the correctness of his judgment, and the same is affirmed.

No error. Affirmed.

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* State ex rel. City of GREENSBORO v. DAVID SCOTT and others.

Jurisdiction—Practice—Referee's Account, exception to, made in apt time.

1. The jurisdiction given to this court by article four, section eight, of the constitution over questions of fact, does not extend to a case which under the former practice would have been an action at law and in which only errors of law could have been corrected on appeal.

2. Where a reference was ordered for an a count between the parties and a report ascertaining the result prepared and submitted, an exception of the plaintiff to the allowance of a counterclaim of defendant upon the ground of its insufficiency in form, is not in apt time; and so, in respect to an exception to matters of inquiry and evidence not objected to during the progress of the examination. The exception to the allowance of commissions to the defendant constable in this case is sustained.

(*Moore* v. *Hobbs*, 79 N. C., 535; *State* v. *Shirley*, 1 Ired., 597, cited and approved.)

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* Ruffin, J., was of counsel and argued this case before his appointment as associate justice.

GREENSBORO *v.* SCOTT.

CIVIL ACTION on a constable's bond, heard upon exceptions to the report of a referee, at Fall Term, 1879, of GUILFORD Superior Court, before *McKoy, J.*

The plaintiff appealed from the judgment below.

Messrs. Scott & Caldwell, for plaintiff.
Messrs. Thos. Ruffin and *J. N. Staples,* for defendants.

SMITH, C. J. The defendant Scott, having been duly appointed to the office of constable by the proper authorities of the city of Greensboro, under the charter granted in March, 1870, and amended in March, 1875, on June 28th, 1876, entered into bond payable to the state in the penal sum of three thousand dollars, with the defendants, C. N. McAdoo, J. F. Cousey and Seymour Steel as sureties, with condition that "the said Scott shall well and truly discharge the duties of his office, collect all taxes levied by the board, all license tax due under the charter and ordinances, and fines and penalties imposed by the mayor, and shall, with fidelity, collect and account for all moneys due the city from any source and pay the same over to the treasurer of the city at least once a week during his term of office, and in all things faithfully and properly discharge the duties of city constable."

On November 14th, 1876, he executed another bond for the like sum, and payable to the state also, with the defendants, M. F. Hughes, Thos. McDonald and W. K. Buchanan, sureties, with condition, as well that the said Scott shall within the next three months thereafter, collect seventy-seven hundred and six dollars and twenty five cents, the amount of the property and poll tax list then placed in his hands, as that he should also collect and account for and pay over to the city treasurer all fines and penalties accruing and all moneys due from whatever source at least once a week during his term of office, and in all other respects faith-

fully discharge his official duties. The term of office for which the bonds were given was for one year, beginning on the first Monday in May, 1876.

The action is brought to recover damages for alleged breaches of the bonds, in that the said Scott has collected and failed to account for and pay over large sums collected by him in his official capacity and due the said city. Answers were put in by the defendant Scott and separately by the sureties to the respective bonds, setting up various defences; and among them the defendant Scott sets up a counterclaim, not specifying particulars, as justly due him, which he says is in amount two thousand dollars; and this defence alone is necessary to be considered.

On motion of plaintiff's counsel and against the objection of counsel for the defendants, a reference to the clerk was ordered and he directed to take and state the account of the said Scott as constable, and report the evidence touching his liability for taxes and other matters specially set forth in the complaint, and also the relative liabilities of the sureties upon the respective bonds, and his conclusions of fact as well as of law. The report was made and exceptions thereto filed by both parties. The plaintiff's appeal brings up for consideration the judgment of the court in overruling the exceptions of the plaintiff and sustaining those of the defendants. Most of these are to the weight and sufficiency of the evidence to support the conclusions of the referee, the decision of the court upon which is not open to controversy in the appeal, since under the former practice this would have been an action at law, and errors of law only could have been corrected on an appeal. Thus narrowed, our jurisdiction is restricted to the examination of these propositions:

First, the admissibility of any counterclaim under the answer. Secondly, the competency of any proof of the matters and claims involved in the plaintiff's several excep-

tions, numbered 4, 10, 11, 13 and 14, and the legal effect of the settlement of October, 1876, in excluding enquiry into the particulars of that adjustment in the absence of any evidence directly impeaching its fairness and validity. Thirdly, the allowance of compensation as commissions to said Scott for collecting money due the city for market leases.

1. We concur with the plaintiff's counsel that the counterclaim is too indefinite to be sustained, if objection to its sufficiency had been made in apt time. A counterclaim is in substance a cross action, and we see no reason why it should not be set out with the same particularity and accuracy required in stating the cause of action in the complaint; and a complaint as vague, would be inconsistent with the requirement of the code. *Moore* v. *Hobbs*, 79 N. C., 535. But no objection was then made by demurrer or otherwise, and the matters were investigated by the referee upon a construction of the order that the referee was to ascertain the true relations existing between the city and its constable, and the resultant indebtedness of one to the other. It is too late after the examination is closed and the result ascertained to object to what has been done on the ground of the insufficiency of the form in which the opposing demand is asserted.

2. The referee adopted the settlement known as the "Gray settlement," and charged the said Scott with the sum of $2061.20, thus ascertained to be due from him. The credits allowed him in reduction of that indebtedness were many of them for errors in calculation, for double charges and incurred in omissions and in mistakes, which it is not necessary to state in detail, and, so far as they impeach the correctness of the settlement, seem to have been matters of enquiry and evidence, prosecuted without objection until the report was prepared and submitted. This acquiescence during the progress of the examination, in our opinion,

takes from the plaintiff the right to object to the action of the referee upon such ground when his work is done and its result known, and this exception must be disallowed.

3. The remaining exception to the allowance to the constable for collecting market rents must be sustained. Section 33 of the act of incorporation prescribes the duties of the constable and declares that "he shall execute all precepts lawfully directed to him by the mayor or others, and in the execution thereof, he shall have the same powers which the sheriffs and constables of the county have, and he shall have the same fees on all process and precepts executed or returned by him which may be allowed to the constable of the county in like process and precepts, *and also such other compensation as the commissioners may allow.*" The constable accepts his appointment on these conditions, and for any services, the compensation for which is not prescribed by law, he must seek from the commissioners such remuneration as they may see fit to allow. Without their concurrence, he is legally entitled to none, and it does not appear that allowance has been made by them.

The answer of the sureties to the second bond denies its execution, by which we suppose is meant the want of a legal delivery to any authorized party under the principle declared in *State* v. *Shirley*, 1 Ired., 597, and subsequent cases. The point may not be properly before us on the plaintiff's appeal, but may arise, unless concluded by the finding of the referee, when judgment is entered on the reformed account. We will only say that the act of January 26th, 1843, evidently remedial in its scope and purpose, seems to provide for the case in giving the sanction of the state to bonds taken in its own name, "by any person acting under or in virtue of any public authority for the performance of any duty belonging to any office or appointment, notwithstanding any irregularity or invalidity in the

conferring of the office or in making of the appointment," etc.; and with greater force does the statute apply when the appointment was entirely regular. Rev. Code, ch. 79, § 9.

PER CURIAM. Modified.

JOHN MURPHY v. R. H. T. HARPER.

Practice—Reference—Exceptions.

It is not error to overrule exceptions to the report of a referee, which are immaterial or not sustained by the facts.

(*State* v. *Cheek*, 13 Ired., 114; *Jackson* v. *Love*, 82, N. C., 405, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1880, of Greene Superior Court, before *Gudger*, *J.*

The plaintiff sues to recover two demands, set out as separate causes of action in his complaint, to wit: $322.80, due on the defendant's note under seal, with interest from January 22d, 1878, the date of its execution; and the further sum of $74.97, for goods sold, and money paid, during the year 1878. The defendant, in his answer, admits giving the note, but alleges that it was given when a settlement of various claims, which the plaintiff then held, and enumerated in a statement made out by him and not examined by defendant, was had; and that the amount specified in the note is in excess of his then subsisting indebtedness; he asks for a reformation and correction, and to this end, that there may be a reference. An order of reference to state the account was accordingly made.

The only evidence before the referee was the testimony of

the plaintiff, and the exhibits produced by him, the first of which was a statement of the debits and credits, upon the adjustment of which the note was given for the balance found to be due; and the second, a copy of the account sued on, taken from the plaintiff's books.

The plaintiff testified that the goods and money charged in the account were all sold and delivered, and paid to the defendant, and the other persons therein named, by his direction, and at the prices affixed to each. The several items constituting this claim, were, one by one, read, and the witness stated that he recollected each one of them, apart from the fact of their entry upon the book.

Upon this evidence, the referee found, and so reported to the court, that the note was given upon a full settlement had between the parties, at its date, of all outstanding matters, and that the articles charged for the year 1878 were sold, and the money paid to the defendant, or by his order, to the others mentioned, and that the defendant's indebtedness was for the full amount specified in the note, with interest, and the further sum of $74.97 on the subsequent account; for all of which the defendant was liable, except a credit of $3.25, to which he was entitled by plaintiff's admission, in reduction of the principal money due on the note.

The defendant filed several exceptions:

1. For that the referee had not specifically reported upon the errors and overcharges alleged by the defendant in the statement of the claims for which the note was given.

2. For that the plaintiff was permitted, after objection then made, to testify to what had been entered on his book.

3. For that there was no evidence of the surrender of all the claims adjusted by the giving the new security to the defendant.

4. For that the value of the cotton delivered by the defendant is not ascertained.

5. For that the account for 1878 is not reported.

6. For that the referee permitted the items in the account to be called over, and the witness to respond to each.

The exceptions were all overruled, the report confirmed, and judgment entered for the plaintiff, from which the defendant appeals.

Mr. H. F. Grainger, for plaintiff.

Mr. W. C. Munroe, for defendant.

SMITH, C. J., after stating the case. We concur in the ruling of the court that no sufficient grounds are furnished in the facts of the case to sustain any one of the exceptions. There was no evidence to authorize the finding the errors and overcharges mentioned in the first exception, nor of the failure to deliver to the defendant the evidences of debt, for the aggregate of which the new note was given, referred to in the third exception. Proof was made of the correctness of every charge contained in the account for 1878, upon the personal recollection of the witness, and the book containing the articles entered was used only to refresh his memory, and not as original evidence. Nor do we see any reasonable objection to the reference to the written memorial of the dealings between the parties, whether it is examined by the witness or the articles are separately called to his attention. It could hardly be expected of an unaided memory to recall the particulars of which it consists. 1 Greenl. Evi. § 436; *State* v. *Cheek*, 13 Ired., 114.

The eleven bales of cotton are credited to the defendant in the first exhibit, at a value in no manner impeached, and which must, therefore, be assumed to be correct.

The exceptions are founded upon a misconception of the legal effect of the allegations contained in the answer. *They are not evidence for the defendant*, and his denials only put upon the plaintiff the necessity of proof. The plead-

ings are looked to, for the purpose of eliminating issues of controverted facts, but are not admissible as evidence, upon the trial of those issues. *Jackson* v. *Love*, 82 N. C., 405.

Upon an examination of the answer, we are not able to determine whether the validity, or amount, of the claim set out in the statement of the second cause of action, is disputed. The sixth article pronounces the second allegation of the complaint to be untrue, and if this be understood as applying to the second cause of action, it is a denial. If it means the allegations thus numbered in the statement of the causes of action, there is no such denial, as in the one case the controverted averment of non-payment, and in the other, that of the time when the indebtedness becomes due, are alone put in issue. But, assuming the denial, the referee's report fully establishes the correctness of the claim.

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

No error. Affirmed.

R. O. BURTON, Jr., Adm'r v. WILMINGTON & WELDON RAILROAD COMPANY.

Practice—Exceptions—Judge's Charge—New Trial—When Partial Only.

1. It is error to admit evidence, competent for one purpose only, to be considered and acted on generally by the jury, without instructions restricting it to the special purpose for which it is admissible.
2. The rule which forbids the hearing of an objection, not taken, and which ought to have been taken at the trial, does not embrace the case where the judge in response to a request for instructions or of his own accord misdirects the jury upon a material question of law, injuriously to the appellant, by which they have been, or may have been, misled in rendering their verdict, and the error is patent upon the

record, but such error is open to correction, though pointed out for the first time in this court.

3. Ordinarily, for error in the charge, or the reception or rejection of evidence, the verdict is set aside entirely, but it may be set aside in part and as to certain issues only when it plainly appears that the erroneous ruling would not and did not affect the findings upon the other issues.

(*State* v. *Ballard*, 79 N. C., 627; *Williamson* v. *Canal Co.*, 78 N. C., 156; *State* v. *Johnson*, 1 Ired., 354; *Bynum* v. *Bynum*, 11 Ired., 632; *State* v. *Caveness*, 78 N. C., 484; *State* v. *Austin*, 79 N. C., 624; *Grist* v. *Backhouse*, 4 Dev. & Bat., 302; *Ring* v. *King*, *Ib.*, 164; *Bailey* v. *Pool*, 13 Ired., 404; *Key* v. *Allen*, 3 Murp., 523; *Holmes* v. *Godwin*, 71, N. C., 306; *Merony* v. *McIntyre*, 82 N. C., 103, cited, commented on and approved.)

PETITION to rehear filed by the plaintiff and heard at January Term, 1881, of THE SUPREME COURT.

Messrs. Day & Zollicoffer, J. B. Batchelor and *Mullen & Moore*, for petitioner.

Messrs. Gilliam & Gatling, contra.

SMITH, C. J. Upon the former hearing, this case was carefully examined and considered, and after being retained under an *advisari*, decided, and our conclusion announced at the succeeding term (82 N. C., 504). To the full and elaborate argument now addressed to us on behalf of the plaintiff for a revision of the opinion then formed, we have given the attention due to the importance of the case and the principle involved, and now proceed to announce the result.

Two errors are assigned in the application for a re hearing

1. No exception having been taken to the charge in the particular declared to be erroneous or in any other, the point of law, upon which the new trial is granted according to the settled practice was not open to the defendant upon the appeal.

2. The erroneous instruction only affects the *quantum* of damages, and the new trial should be restricted to that issue, leaving undisturbed the findings upon the others.

I. The first alleged error rests upon a misconception of the decision and the reasoning by which it is supported in the opinion, arising, perhaps, from the prominence given to the instructions of the court. This will appear from a brief recapitulation of what transpired at the trial and bears upon the question involved.

During the trial the plaintiff was allowed to prove, against the defendant's objection, that his intestate was administrator of the estate of one Jno. M. Long, which was largely in debt, and to pay which it would be necessary to sell his real estate of the value of $22,000, as had been done by the succeeding administrator *de bonis non*, the usual allowance of commission on which was from 2½ to 5 per cent. on the amount of sales, upon the issue of damages sustained by the intestate's premature death. The reception of the evidence is distinctly assigned in the record as error. This court held, and such is still our opinion, that the evidence was admissible and proper to be heard by the jury, in passing upon the value of the intestate's life, if prolonged, to those beneficially interested in its preservation, and to whom the fruits of his skill and labor would belong. It tended to show his business qualifications and the compensation which one of his capacity and repute might be expected to obtain. In other words, as expressed in the opinion, it assisted the jury in determining "what reasonable expectation there was of pecuniary benefits from the continuance of the life of the deceased." For this restricted purpose the testimony was competent, and the use to be made of it ought to have been explained, then, or afterwards in the charge to the jury. But it seems to have been admitted generally and without qualification, notwithstanding the objection, and left to the jury to draw their own inferences and pass upon

its weight for any purpose. If proper explanations as to the legal force and effect of the evidence had been made in the instructions, the objection would have been met and all cause for complaint removed. But no such explanations were given, and the jury were directed in general terms to "carefully weigh all the testimony bearing on each of the issues submitted to them, and to find each issue as the testimony should satisfy them." They were thus left at liberty to consider the anticipated allowance for services to be rendered, as money lost by his death, and to enter into the measure of damages found in the verdict, thus forming a basis for the estimate of profits for one year, and multiplying the resulting sum by the number of years during which he would probably live. Such is the import of the charge, and this may have been the understanding of the jury in awarding the large sum contained in the verdict, afterwards reduced by the court, with plaintiff's assent, to two-thirds of the amount. The error then consists in admitting the evidence and giving it a direction, and allowing it to be used for an improper purpose to which its competency does not extend, thereby giving point and force to the objection of its being received.

It is error to admit evidence, competent for one purpose only, to be considered and acted on for another and improper purpose. The error lies not only in the omission to make the necessary explanation, but in giving a direction calculated to mislead and which may have misled the jury in rendering their verdict. This is so connected with the facts allowed to be proved as to extend the exception to the reception of the testimony to the disposition afterwards made of it. We have in our own reports a case very similar—*State* v. *Ballard*, 79 N. C., 627. There, upon an indictment for fornication and adultery, the admission of one of the accused parties was received without objection from either, and no instructions were asked as to its effect. The

court say: "While, therefore, it (the admission) could not properly be rejected, it was *the duty of the judge*, either at its introduction or in his charge, to explain to the jury its force and effect, and to tell them it was not to be considered as any evidence against the woman. *In failing to do this and submitting all the evidence to the jury, without such explanation, there is error, invalidating the verdict.*"

But we are not prepared to concede the proposition, so broadly and strenuously asserted in the argument, and in some degree countenanced by what is said in *Williamson* v. *Canal Co.*, 78 N. C., 156, and perhaps in other preceding cases, that no errors, however palpable and hurtful, committed in the administration of the law by the action of the judge, are capable of correction unless specially pointed out in an exception on the record. The case prepared on an appeal under our practice is said to be in the nature of a bill of exceptions, and the functions of the appellate court analogous to those exercised by a court of errors, and for most purposes the comparison is admissible.

But the exercise of the revising power of this court is not restricted, as is that of a court of errors. The latter can only reverse and annul for errors assigned, while this court may grant a new trial and restore the case to the condition it occupied before the error was committed, and it may then, avoiding the error, proceed to a final determination. Still, for general purposes, the analogy may be recognized, and we unhesitatingly reaffirm the general rule governing appeals declared in the numerous adjudications cited for the plaintiff. But the rule itself is not without qualification, and enforced, would in some cases lead to disastrous consequences. For the purpose of illustration, let us suppose a case on trial the indisputed facts of which make the prisoner's offence to be manslaughter, and yet under the erroneous charge of the judge the jury find a verdict of murder, and all this fully appears on the record. Because of the

inadvertence of counsel, the misapprehension of the judge as to the law and the consequent misdirection given to the jury are not specially pointed out in an exception, and yet the fatal error is apparent to the court. Is the court, in the observance of a strict rule of practice, compelled to shut its eyes to the injustice done the prisoner and affirm a judgment which wrongfully takes his life? In such a case, would not the court interfere and correct a manifest error, although overlooked at the trial, and, therefore, not the subject of a distinct exception? In *State* v. *Johnson*, 1 Ired., 354, where the judge corrected the misunderstanding common to the counsel on both sides as to what was the law, and expounded it himself to the jury, GASTON, J., speaking for the court, thus defines the duties of the judge presiding at jury trials: "It has not been questioned, and it cannot be questioned, but that it is the duty of a judge who presides at the trial of a cause, whether *civil* or *criminal*, to correct every misrepresentation of law made to a jury, although admitted to be law by the parties or their counsel. He does not preside merely as a moderator, to enforce order and decorum in a discussion, addressed to a body with whose deliberations he has no concern, and over whose judgment he is to exercise no influence; but he is an integral part of that mixed tribunal which is to pass upon the issue; and while he is forbidden to give to the jury an opinion whether any fact is sufficiently proved, he is bound to declare and expound to them the law arising upon the facts."

The exception to the general rule, if indeed it be fairly within its purview, is expressed with clearness by the eminent judge who for so many years presided over this court and has enriched its records with the fruits of his profound learning and labors, in *Bynum* v. *Bynum*, 11 Ired., 632, and we again adopt his exposition of the law: "Although it be not error to refrain from giving instructions, unless they

are asked, yet care must be taken, when the judge thinks it proper, of his own motion, or at the party's, to give them, that they *be not in themselves* erroneous, or so framed as to mislead the jury."

It was suggested in the argument that the original case on file shows that there was an exception in the court below, which brought the point on which the decision turned before this court for review, and therefore it does not sustain the ruling. If this were so, it would not detract from the force of the proposition enunciated without reference to that fact, in language intended to guide and instruct in the future practice of the courts. But on examination it will be found that the distinction in the formalities required in the execution of wills of real and personal estate, and in force when this disputed instrument was made, was not adverted to in argument or in any manner called to the notice of the judge at any time during the trial before the jury. The failure of the judge to instruct them that the attestation of subscribing witnesses in the presence of the testator was not essential to the validity of a will conveying personal estate, is first mentioned and assigned, after the rendition of the verdict, as one of the grounds on which a new trial is demanded. This does not impair the authority of the case as a precedent sustaining the ruling made.

"It is the right and duty of counsel," remarks BYNUM, J., commenting on a similar omission in *State* v. *Caveness*, 78 N. C., 484, "before or during the charge and before the jury shall be sent out to consider of their verdict, to ask for such instruction to the jury, both as to evidence improperly admitted and that which has been stated correctly, and to declare and explain the law arising thereon."

The same principle decided in *Bynum* v. *Bynum*, has the recognition and sanction of the recent case of *State* v. *Austin*, 79 N. C., 624, where the court, in describing the offence with which the defendant was charged, omitted to mention one

of its essential elements. The court, in reference to the misdescription, say: "Had the judge simply omitted to give an instruction to which the defendant would have been entitled, had he asked it, he would not have any just ground of complaint." * * * "But when the judge undertakes to state the law, he must state it correctly." Here no exception was taken to this part of the charge and yet the error was noticed and remedied, by sending the case to another jury.

In *Grist* v. *Backhouse*, 4 D. & B., 302, DANIEL, J., thus expresses the opinion of the court: "The counsel for the plaintiffs insists that the defendant cannot now object to this error, because there was no specific exception taken at the trial. The defendant had placed on record his plea; it was for the plaintiffs to support the affirmative of the issue on that plea. The court misdirected the jury as to the law on the trial of the issue, and told them that the evidence offered was sufficient for the plaintiff. This error appears on the record, and for that the judgment must be reversed and a new trial awarded."

So GASTON, J., in *Ring* v. *King*, *Ibid.*, 164, on the same point, uses this language: "It must not be understood, from our noticing this objection, that we allow questions of law to be raised here, except such as appear on the record, strictly so called, which were not before the court from which the appeal was taken. Our rule is to regard as nearly as we can the case made by the judge in the light of a bill of exceptions for specified errors. The presumption is, that whatever is not complained of was rightfully done. But we cannot presume against what appears. If by any reasonable intendment, we could suppose facts shown which, notwithstanding those admitted, constituted the defendant's act a trespass—inasmuch as the opinion of the judge on that point was not directly called for—we might hold it our duty to make the amendment. But if we cannot, and we

do not see how we can, then the jury was misdirected upon a question of law, presented by the pleadings and the evidence upon a matter material to the issues which they had to try. The consequences of the mistake * * * have been a verdict and judgment against law. *This is an error which when shown to us we are bound to correct.*"

To like effect are the words of NASH, J., in *Bailey* v. *Pool*, 13 Ired., 404: "Nor is it error in a judge, or any officiousness, to bring to the notice of the jury, principles of law, or facts bearing upon the case, which counsel may have omitted in argument. If important to the decision of the case, *it is his duty to do so.*"

These references to the practice which has heretofore prevailed are sufficient to show that the rule which forbids the hearing of an objection, not taken, and which ought to have been taken, at the trial, does not embrace the case where the judge in response to a request for an instruction or of his own accord misdirects the jury upon a material question of law, injuriously to the appellant by which they have been or may have been misled in rendering the verdict, and the error is patent upon the record, such error is open to correction, and the complaining party is not required to interrupt the delivery of the charge, by then stating the objection. As to such error, the appeal itself may be treated as an exception, authorizing a revision and a remedy. We have re-examined and carefully considered the question, because of its practical importance, and that the rule may be fully understood. But its decision is not necessary in the present case for reasons which have been already stated.

II. The second assignment of error involves a question of more difficult solution. Our attention was not called in the former argument to the point whether the new trial should be partial, confined to the issue as to the damages,

or be general, and re-open the whole controversy. It is consequently not adverted to in the opinion.

Ordinarily, for an error committed during the progress of the trial, in the improper admission or rejection of evidence, or in the charge to the jury, material upon any issue, the verdict is set aside entirely, for the obvious reason that it cannot be seen to what extent it may have influenced the jury upon the other findings. It will be set aside in part only when it plainly appears the erroneous ruling would not and did not enter into their consideration in passing upon the remaining issues. The character of the new trial is therefore rather a matter of sound discretion, than of strict right. The cases cited for the plaintiff (with the exception of that of *Hutchison* v. *Pepper*, 4 Saun., 555, where it is held that a partial new trial may be had, when the right to move for it is reserved with leave of the court, or where justice has not been done, and yet greater injustice would result from setting the matter at large) are decisions in the court of Massachusetts. *Kent* v. *Whitney*, 9 Pick., 62; *Wems* v. *Col. Ins. Co.*, 12 Pick., 279; *Boyd* v. *Brown*,, 17 Pick., 453; *Robbins* v. *Townsend*, 20 Pick., 345.

Without examining these adjudications in detail, or inquiring into the constitution and functions of the court which made them, and its relation to *nisi prius* trials, we will only say they do not accord with the rules and the practice of this court, as a tribunal created for the correction of errors in the inferior courts. But there are precedents to be found in our own reports. Thus in *Key* v. *Allen*, 3 Murph., 523, where in an action of detinue the jury assessed damages for detaining the slaves but failed to find their value, it was decided that a *distringas* should issue, and if the slaves were not delivered, a writ of enquiry issue to ascertain their value.

In *Holmes* v. *Godwin*, 71 N. C., 306, BYNUM, J., declares: "The power to award a partial new trial, or an inquiry of

damages, when they have been erroneously assessed without disturbing the findings which dispose of the merits of the case, is both convenient and useful, however delicate and difficult may be its application in particular cases. It certainly should not be exercised except in a clear case." See also *Merony* v. *McIntyre*, 82 N. C., 103.

The erroneous ruling in the present case is entirely distinct and separable, and seems to fall within the class which admits of a restricted new trial, confined to the damages only, and this is all to which the defendant is fairly entitled. The judgment will be reformed so as to re-open that issue only, and in other respects it is affirmed.

PER CURIAM. Judgment modified.

F. M. KEATHLY v. A. B. BRANCH.

Parties—Practice.

1. In an action to recover land, where it appeared that the defendant in possession had mortgaged the land, and the same had been sold under a power in the deed on default of payment of the secured debt, the purchaser at such sale has the right upon affidavit to be let in as party defendant.

2. In such case it is error to proceed with the trial until the question as to the right of the applicant to be made a party has been heard and finally determined.

(*Rollins* v. *Rollins*, 76 N. C., 264; *Lytle* v. *Burgin*, 82 N. C., 301; *Jones* v. *Hill*, 64 N. C., 198; *Gwyn* v. *Welborn*, 1 Dev. & Bat., 313; *Parker* v. *Banks*, 79 N. C., 480, cited and approved.)

CIVIL ACTION to recover land tried at August Special Term, 1880, of DUPLIN Superior Court, before *Schenck, J.*

Verdict and judgment for plaintiff, appeal from the ruling of the court below, as set out in the opinion.

Mr. H. R. Kornegay, for plaintiff.
Messrs. Allen & Isler, for appellant.

SMITH, C. J. At the term to which the summons in the action is returnable, the appellant, John D. Stanford, on his application and affidavit of ownership of the land, of which the plaintiff seeks to recover possession, is made a party defendant and files a separate answer, denying the allegations of the complaint, and averring title in himself. The defendant, Branch, also denies the plaintiff's allegations. No objection was then made to the order of the court, nor for nearly two years thereafter, until a special term held in August, 1880, when the presiding judge vacated the order as having been made without previous notice to the plaintiff, and thereupon the motion is renewed, and supported by a second affidavit, in which it is stated that the defendant, Branch, conveyed the land in dispute by a deed of mortgage in April, 1877, to one Matthew Moore, to secure a debt of $300 due the mortgagee, with power of sale, by virtue of which, after the maturity of the debt, the land was sold and purchased by the applicant (Stanford), and a deed therefor executed to him, conveying the title. His Honor denied the motion, for that, the appellant had never had possession of any part of the lands described in plaintiff's complaint, and did not connect himself with the possession of the same in any way, as was admitted by his counsel, and, notwithstanding the appeal from this ruling, proceeded with the trial of the cause between the original parties. The jury found the issues in favor of the plaintiff, and he had judgment accordingly.

It is very clear that a claimant for land in dispute between other parties to a suit, and not connected with, or

interested in that controversy, nor injuriously affected by its result, cannot be allowed to intervene and assert his own independent title. This would be in effect to make a double action, and introduce new issues foreign to the original subject of controversy, and not within the scope of either section 61 or 65 of the code. But this is not the condition of the applicant in the present case. He has a direct relation to, and interest in the retention of the possession by the mortgagor for himself, and in preventing the plaintiff's recovery, and this is "*adverse to the plaintiff*," and in harmony with the defence. As the defendant holds permissively under the applicant, the latter is but protecting his own, while he protects the possession of the occupant. The practice which prevails in such cases is declared in *Rollins* v. *Rollins*, 76 N. C., 264, and is reaffirmed in *Lytle* v. *Burgin*, 82 N. C., 301. It is there held, that at common law every landlord has the right to be admitted to defend with or without the tenant, and that under the term "landlord" all persons have the right to come in as parties, "whose title was connected or consistent with the occupier, and is divested or disturbed by any claim adverse to such possession, and that it is not necessary they should have exercised previously any acts of ownership in the land," and it was declared that the same right exists under the Revised Code, and under C. C. P., § 61, and that "on the interest of the party being manifested by affidavit, the application *was to be passed on as a question of right in law, and not to be granted or refused, as a matter resting in the discretion of the judge.*"

What then are the relations subsisting between the defendant and the applicant? On the execution of the mortgage, and after default in payment of the secured debt, the mortgagor, for most purposes, becomes a tenant to the mortgagee, and upon a sale of the land he sustains, when allowed to remain in possession, the same relation to the purchaser. "If a mortgagor remains in possession after forfeiture of

the property," says RODMAN, J., in *Jones* v. *Hill*, 64 N. C., 198, "he remains only by permission of the mortgagee. In such cases the mortgagor has been sometimes called a tenant at will or sufferance, and sometimes a trespasser, but he is properly neither. His position cannot be more accurately defined than by calling him a mortgagor in possession, but he may be ejected at any time by the mortgagee, without notice."

"The possession of the mortgagor, or of those who claim under the mortgagor," remarks GASTON, J., "is the possession of the mortgagee." *Gwyn* v. *Wellborn*, 1 Dev. & Bat., 313.

"It is well settled," observes BYNUM, J., "that the mortgagor is the tenant of the mortgagee, and therefore his possession is not hostile or adverse to the mortgagee." *Parker* v. *Banks*, 79 N. C., 480.

A mortgagor may be considered a tenant for the purpose of enabling the mortgagee to maintain an action against a trespasser, and if the mortgage be transferred, the mortgagor becomes tenant to the assignee. Coote on Mort. 320, 324. It is manifest, therefore, that the appellant was wrongfully denied the opportunity to come in and defend the possession of the defendant, and in this there is error.

While under the ruling, the trial proceeded to its conclusion, adverse to the defendant, the result cannot impair the right of the appellant still to become a party to the cause, and to make up and retry the issue his answer may raise in controverting the claim of the plaintiff. The action should have been stayed, pending the appeal, to await its determination, and thus a double jury trial avoided, but as this was not done, the writ of possession should be withheld until the plaintiff's controversy with the intervening appellant and the issues between them are also settled.

No question is made as to the ruling of the court, in

striking out the first order making the appellant a party, and we express no opinion upon it.

There is error, and this will be certified to the end that further proceedings be had in the court below in conformity with this opinion.

Error. Reversed.

THE DAWSON BANK v. GEORGE HARRIS and others.

Pleading—Practice—Parties.

1. A complaint in which are two causes of action, the one upon a debt and the other to declare void certain conveyances alleged to have been made by the debtor in fraud of the complaining creditor, is not demurrable on the ground of a misjoinder of causes of action.
2. Nor is the same demurrable for want of an allegation that the defendant debtor has not other property sufficient to satisfy the claim.
3. Nor is it necessary in such case to reduce the debt to judgment and have a return of *nulla bona* to the execution in order to maintain the action, the courts under our present system having the jurisdiction of courts of law and courts of equity, and therefore competent to give full relief in one action.
4. And where the alleged fraudulent conveyances are made to several grantees, they all have an interest in the subject matter, and are necessary and proper parties in order to a final determination of the controversy.

(*Clark* v. *Banner*, 1 Dev. & Bat. Eq., 608; *Bethell* v. *Wilson*, *Ib*, 619; *Brown* v. *Long*, 1 Ired. Eq., 190; *Wheeler* v. *Taylor*, 6 Ired. Eq., 225; *Kilpatrick* v. *Means*, 5 Ired. Eq., 220; *Moore* v. *Ragland*, 74 N. C., 343; *McLendon* v. *Com'rs*, 71 N. C., 38; *Glenn* v. *Bank*, 72 N. C., 626; *Hamlin* v. *Tucker*, 72 N. C., 502; *Young* v. *Young*, 81 N. C., 91, cited and approved.)

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

The case was heard on complaint and demurrer. The demurrer was sustained, judgment, appeal by plaintiff.

Mr. E. S. Martin, for plaintiff.
Messrs. McRae & Strange, for defendants.

SMITH, C. J. The plaintiff alleges that the defendant is indebted to him in the sum of seven thousand dollars, evidenced by two promissory notes under a contract for the loan of money entered into prior to February 3d, 1874, on which the interest has been paid up to April 28th, 1878; that on February 3d, 1874, May 4th, 1874, and July 27th, 1875, he made several deeds to the respective defendants, Marsden Bellamy, Henry P. West and John D. Bellamy, of separate lots of land owned by him in the city of Wilmington, with false recitals of money considerations, with an understanding and agreement with each, that they should reconvey to his wife, the defendant Julia, which has been carried into effect, and with an express intent thereby to defraud his creditors, and places his property beyond the reach of legal process.

That in furtherance of this purpose, after paying off several judgments recovered against him in New Hanover superior court, in the aggregate sum of twenty-six hundred dollars, he has caused the same to be assigned to his wife, more effectually to protect the several covinous conveyances and secure the property to her. That he owes debts exceeding fifty thousand dollars in amount, which all his estate of every kind, including that mentioned in the fraudulent deeds, is wholly insufficient to pay, and that he has become and is utterly insolvent.

The object of the action and the prayer of the complaint are that the plaintiff have judgment for his debt, that the several deeds be declared void, and the property therein

mentioned, or so much as may be necessary, be sold for the satisfaction of the debt.

The defendants demur to the complaint, and assign as grounds thereof:

1. For that it is not averred that the defendant has not other property liable to execution and sufficient to pay the plaintiff's demand.

2. For that it appears upon the face of the complaint that the debt has not been reduced to judgment, so that execution could issue therefor.

3. For that there is a misjoinder of distinct and independent causes of action.

4. For that there is a misjoinder of parties and there is no community of interest among them, in the several impeached assignments.

These objections to the granting of the relief sought, under the present structure of the complaint, we proceed to consider:

I. The absence of an averment that the plaintiff cannot obtain satisfaction of his demand, from other property of the debtor:

The allegations of the complaint on this behalf are not very specific and pointed. But it charges the fraudulent alienations of the debtor, to screen his property from the claims of his creditors, and the plan by which it is intended and attempted to divest the title to a large number of town lots out of the defendant, and put it in his wife, under instruments in proper form to effect the object; the transfer to her of discharged judgments, apparently in force, for the accomplishment of the same dishonest purpose; the hopeless insolvency of the debtor, and the insufficiency of all his estate to meet his liabilities. These allegations, in substance, must be understood to mean that satisfaction of the plaintiff's debt can only be procured by pursuing the alienated land, and appropriating it thereto, and especially in

the absence of any intimation that he has any other property accessible to legal process.

II. The failure to prosecute the claim to judgment, and sue out execution thereon:

When, under our former system, the law was administered by two separate and distinct tribunals, of which each had its own rules of practice, the court of equity would lend its aid to a creditor in enforcing a legal demand, when he had none or an inadequate remedy at law. Hence it became an established doctrine in that court, to refuse its assistance, unless the creditor had ascertained the amount of his debt by reducing it to judgment, and sued out execution, when the property of the debtor pursued, could be seized and sold thereunder, as in case of a fraudulent and ineffective assignment, in order that a lien might attach, although this was not required, when the estate and interest to be appropriated was purely equitable, or such as was not accessible to legal process, and in both cases it must be shown (and commonly this was done by the return of *nulla bona* to the execution) that the debtor had no property from which the debt could be satisfied by such legal process. *Clark* v. *Banner*, 1 Dev. & Bat. Eq., 608; *Bethel* v. *Wilson*, *Ibid.*, 610. "A court of equity never interferes," says RUFFIN, C. J., in *Brown* v. *Long*, 1 Ired. Eq., 190, "on behalf of a mere legal demand, unless the creditor has tried the legal remedies, and found them ineffectual." In like manner, NASH, J., speaking for the court in *Wheeler* v. *Taylor*, 6 Ired. Eq., 225, repeats the remark and adds: "The creditor must reduce his debt to judgment, and in general take out execution, that it may appear by demanding property of the defendant and the return of *nulla bona*, that satisfaction cannot be had at law." See also *Kilpatrick* v. *Means*, 5 Ired. Eq., 220, and numerous other cases. It is obvious, that as this rule grew out of the relations of the two courts under the former system, one acting in aid of the other, and was

essential to the harmony of their action in the exercise of their separate functions in the administration of the law, so it must of necessity cease to have any force, when the powers of both, and the functions of each, are committed to a single tribunal, substituted in place of both. Why should a plaintiff be compelled to sue for and recover his debt, and then to bring a new action to enforce payment out of his debtor's property in the very court that ordered the judgment? Why should not full relief be had in one action, when the same court is to be called on to afford it in the second? The policy of the new practice, and one of its best features, is to furnish a complete and final remedy for an aggrieved party in a single court, and without needless delay or expense. The demurrer admits the debt, the insolvency of the debtor, his fraudulent contrivances, with the help of others, to place his property beyond the reach of creditors, and secure it for the enjoyment of himself and wife, his large indebtedness still subsisting, and by a fair implication, the want of other property which a creditor can reach; these facts would seem to remove all obstacles in the way of the relief demanded.

In *Moore* v. *Ragland*, 74 N. C., 343, RODMAN, J., uses this language: "A creditor can only assert his rights, as such, by obtaining a judgment which will be a lien on the property which the debtor has, and also on all which he has before that time fraudulently conveyed." The remark was not intended to convey the idea that the judgment must be first obtained in an independent suit, but that a creditor, merely as such, and without a judgment, could not pursue and get satisfaction out of the debtor's property. This is undoubtedly correct, for without a judgment for the debt, though it may be rendered preliminarily in the same action, the creditor has no claim upon his debtor's property.

There is a strong analogy to the present to be found in the case of *McLendon* v. *The Commissioners of Anson*, 71 N.

C., 38. There, the plaintiff in the same complaint demanded judgment for the amount due on his coupons and a *mandamus* to coerce payment; and the answer to the objection that two distinct and independent causes of action were improperly joined, READE, J., uses this pertinent language: "*Cui bono*, another action? It is true that a *mandamus* issues only when the amount is ascertained, but here it is ascertained when the judgment is rendered and the complainant demands both the judgment and the writ of *mandamus*. This, therefore, is a civil action for a *mandamus*, as much as it is a civil action for a money demand." We see no reason why, if an admitted subsequent remedy by *mandamus*, which proceeds upon the refusal of the county authorities to levy the necessary tax, can be demanded in the action for the recovery of the money due, as a means of rendering the judgment effectual by satisfying it, the remedy against the obstructing frauds, alleged to have been practiced by the defendants, may not in like manner be afforded the plaintiff in the same action and looking to the same end, the payment of his debt.

III. The blending in one action of two separate and distinct actions, the one posterior to and dependent on the result of the other:

What has already been said is a sufficient answer to this assigned cause of demurrer, and it is only necessary to add that the point is expressly decided and the objection declared to be without force by this court in *Glenn* v. *Bank*, 72 N. C., 626. It was there held to be competent to proceed against the insolvent debtor bank, and against the stockholders upon their individual liabilities under the charter, in the same action.

IV. The last objection is to the joining of the several defendants, who are connected with different transactions, and are without any community of interest, and no combination among them is charged:

The essential unity of the proceeding consists in the fact that the debtor's own property is alone sought to be appropriated to his own debt. If the conveyances are fraudulent, as for this purpose the demurrer admits, the title remains in Harris, and never was divested out of him. The aid of the court is asked to remove a cloud upon the title, by declaring the deeds void, so that the property may be sold under the direction of the court, and bidders be induced to give the value for it. The defendants, other than Harris, are made parties because they by their deeds profess to have had an interest in the subject matter, and section 61 of the Code requires they should, in order that they may be concluded by the result and the adjudication be final.

These general views we think are in accord with the current of decisions in respect to the construction of the provisions of the Code, whose predominant purpose is to make one proceeding adjust and settle all controversies about its subject matter. *Hamlin* v. *Tucker*, 72 N. C., 502; *Young* v. *Young*, 81 N. C., 91, and the authorities therein cited and reviewed.

There is error, and this will be certified for further proceedings in the court below.

Error. Reversed.

J. G. L. ENGLAND and others v. EDMUND GARNER and others.

Practice—Remedy to test validity of final decree.

Where a final decree has been rendered in a proceeding, and carried into effect, the only mode of testing its validity is by a new action commenced by summons.

(*Pearson* v. *Nesbit*, 1 Dev., 315; *Keaton* v. *Banks*, 10 Ired., 381; *Single-*

tary v. *Whitaker*, Phil. Eq., 77; *Rogers* v. *Holt*, *Ib.*, 108; *Covington* v. *Ingram*, 64 N. C., 123; *Thaxton* v. *Williamson*, 72 N. C, 125; *Peterson* v. *Vann*, 83 N. C., 118: *Doyle* v. *Brown*, 72 N. C., 393; *Latta* v. *Vickers*, 82 N. C., 501, cited and approved.)

MOTION to set aside an order of sale, &c., heard at Fall Term, 1880, of MOORE Superior Court, before *Avery, J.*

At spring term, 1860, of the court of equity of Moore county, a petition was filed in the name and on the behalf of the parties now complaining for the partition by sale of three several tracts of land held by them as tenants in common. The lands were sold under a decree, and bought by the several defendants, who have paid therefor, and received their title deeds. The cause was retained on the docket, and afterwards transferred to that of the superior court, under rules against the purchasers, and at fall term of 1871, the rules were discharged and the proceedings terminated.

The petitioners, alleging their non-residence and the want of authority in the solicitor who undertook to represent them to institute or carry on the suit, upon notice to the purchasers issued on November 23d, 1878, moved the court to set aside the entire proceedings, on that ground, and offered evidence to sustain the allegation. The court, being of opinion that relief could only be sought in a new action and was not obtainable in this summary method, refused the motion and the evidence offered in its support, from which ruling the plaintiffs appealed.

Mr. John Manning, for plaintiffs.
Messrs. Hinsdale & Devereux, for defendants.

SMITH, C. J. The cases cited by the counsel for the appellants show that relief from a judgment at law, rendered against the course of the court, may be had by motion in the cause. To this class of cases belong:

Pearson v. *Nesbit*, 1 Dev., 315, where the judgment was vacated seven years after its rendition, because the same person was plaintiff, an executor and a defendant.

Keaton v. *Banks*, 10 Ired., 381, where an unauthorized acceptance of service of process was made for an infant defendant, and the judgment on which an execution had issued and property sold was set aside eight years thereafter.

It is equally well settled, that errors or wrongs committed during the progress of a suit in equity, and before its determination, must be corrected by a petition filed in the cause, as is held in *Singletary* v. *Whitaker*, Phil. Eq., 77; and *Rogers* v. *Holt*, Ib., 108.

If, however, the suit is ended by a final decree, carried into effect, the redress must be sought by a new action, as is decided in *Covington* v. *Ingram*, 64 N. C., 123; *Thaxton* v. *Williamson*, 72 N. C., 125; and *Peterson* v. *Vann*, 83 N. C., 118; and is recognized and acted on in *Doyle* v. *Brown*, 72 N. C., 393, and *Latta* v. *Vickers*, 82 N. C., 501.

The case of *Doyle* v. *Brown*, in its essential features, is very similar to the present. There, the petitioners alleged that they resided in the state of Arkansas, when the bill for sale of the lands was filed and decree made; that they had no notice of the proceedings, nor have in any way assented to them since they came to their knowledge in 1867; In delivering the opinion, READE, J., uses this language: "It is an action in the nature of a bill in equity to vacate the said decree, but not alone for that. It sets forth the proceedings and the decree in the former action, and that the plaintiff was not in fact a party thereto, and had no knowledge of it, being at the time, as she now is, a non-resident. And it demands to have the proceedings and decree vacated and declared void."

So again in *Peterson* v. *Vann*, where the motion was to invalidate certain proceedings instituted by the plaintiff, as administrator, for license to sell land for assets, DILLARD,

J., adverting to the fact that a final decree had been entered, the purchase money paid, and title made to the purchaser, proceeds to say: "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.*"

We think, therefore, the remedy in this case has been misconceived, and should have been sought in a new action. We do not enter upon a consideration of the merits, and will only say that if confidence in the integrity of the action of the court is to be retained, it will be slow to annul what it has done, after the lapse of many years, and will only do so upon the clearest proof. The judgment is affirmed.

No error. Affirmed.

A. J. WILSON v. J. C. SYKES and James Austin.

Pleading—Practice—Fraud.

Complaint states that sheriff sold plaintiff's land under execution; the sale being by the acre, a survey was made to ascertain the number of acres; the purchaser and surveyor conspired to defraud and did defraud the plaintiff by reporting to the sheriff that the tract contained 550 acres, whereas by the actual survey there were 700 acres; the sale was made, purchase money paid, and deed executed to purchaser upon that false basis; *Held*, to be a good cause of action against the purchaser and surveyor, and that plaintiff was entitled to relief in an independent suit and not by motion in the cause. *Held also*, that to dismiss plaintiff's action after answer filed by the defendant, on the ground that the complaint did not state facts sufficient to constitute a cause of action is contrary to the course of the courts. Such objection should be taken by demurrer.

(*Smith* v. *Moore*, 79 N. C., 82; *Walton* v. *Walton*, 80 N. C., 26, cited and approved.)

WILSON *v.* SYKES.

CIVIL ACTION for damages tried at Fall Term, 1880, of MECKLENBURG Superior Court, before *Seymour, J.*

In his complaint the plaintiff states his case to be as follows: That the sheriff of his county having an execution against him sold his land, and the defendant, Sykes, became the purchaser; and the sale being by the acre, it became necessary to have a survey in order to ascertain the exact number of acres, which survey the sheriff and purchaser employed the defendant, Austin, to make; that the defendants, the one being the purchaser, and the other the surveyor, conspired to defraud the plaintiff, and in pursuance thereof, after surveying the land and ascertaining that it contained seven hundred acres, they reported to the sheriff that it contained only five hundred and fifty acres, and procured a deed from him, by paying for the land at that rate, whereby the plaintiff was damaged to the amount of six hundred dollars, for which sum he demands judgment.

The defendant, Sykes, answered, admitting the sale by the sheriff, and the purchase by himself, and denying all the other allegations in the plaintiff's complaint. The defendant, Austin, filed no answer.

When the cause was called for trial and before a jury were impanelled, the defendant moved the court to dismiss the plaintiff's action, upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and His Honor, being of that opinion, allowed the motion, and the plaintiff appealed.

Mr. W. H. Bailey, for plaintiff.
Messrs. Wilson & Son, for defendants.

RUFFIN, J. This court has in several instances spoken of this summary way of disposing of cases as being irregular, and have intimated the opinion that good pleading required that such objections should be taken by demurrer, and that

the defect in the complaint, if merely formal, was waived by an answer to the merits. Still, if His Honor were of the opinion that the defect was not in the manner of stating his case but in the plaintiff's cause of action itself, so that however it might be developed by the proofs, or aided by amendment, it could not be maintained, he did well to economize the time of his court by dismissing it.

If such was His Honor's view of the plaintiff's cause of action, we cannot concur therein. To us it seems clear that he has been damaged, provided the allegations of his complaint are true, and for the purpose of this motion, we must assume them to be true.

If the amount paid the sheriff, estimating the land at five hundred and fifty acres, was sufficient to satisfy the execution under which he sold, then the plaintiff would have been entitled to have the proceeds of the other hundred and fifty acres. Or supposing that the execution was sufficient to absorb the whole purchase money, estimating the land truly at seven hundred acres, then, he was entitled to have his indebtedness reduced to the full amount. In one way or the other he has been injured, and that by the conduct of the defendants, and it cannot be, that he can get no relief in a court, clothed, as was the court below, with the double power of a court of law and a court of equity.

The defendant's counsel took the position here, that it was proper to have dismissed the plaintiff's action, because he might have had relief by a motion in the cause in which the execution against him had issued, and therefore, should not have brought an independent action. Suppose we concede that the plaintiff was at fault in this particular, still the question recurs, was not this also waived by an answer to the merits? We understand the rule to be, that whenever the court has a general jurisdiction of the subject matter of an action, but lacks it in some particular case, because of some exceptional matter, such, for instance, as the pen-

dency of a former suit, then such matter should be pleaded specially, or else it is deemed to be waived. *Smith* v. *Moore*, 79 N. C., 82; *Walton* v. *Walton*, 80 N. C., 26.

But apart from mere matter of pleading, it does not appear to us that the plaintiff could have had, by a motion in the original cause, the relief he seeks in his present action. Here, he seeks compensation for an injury arising out of the fraud and covin of the defendants, and the most that he could obtain by a motion in the cause, would have been to have the sheriff's return corrected.

Holding that there was no inherent defect in the plaintiff's cause of action, and that any formal defect in the statement of it in his complaint was waived by the answer of the defendant, and that it was too late on the trial to raise the question of the pendency of another action, the court is of the opinion that it was error in the court below to dismiss the plaintiff's action.

Error. Reversed.

ANDERSON JONES v. JOHN SHAW and others.

Practice—New Trial.

Where the facts of a case are so meagre and uncertain as that this court cannot in justice to the parties pass upon the question raised in the pleadings, a new trial will be granted.

CIVIL ACTION tried at Fall Term, 1880, of MOORE Superior Court, before *Avery, J.*

The plaintiff submitted to a nonsuit and appealed.

Messrs. Hinsdale & Devereux, for plaintiff.

Messrs. John D. Shaw and *J. C. Black*, for defendants.

ASHE, J. The action was brought upon two written instruments not under seal, dated respectively August 24th, 1860, and April 24th, 1861. Both of said papers are signed by Shaw & Turner, it being admitted that the two defendants at the date of said papers were trading under that name and style. The following language is used in both, to-wit: "We have sold the above notes to Anderson Jones, which he is to use all diligence in collecting, and if he fails we are to take them up from him,"—each of these instruments is preceded by a list of notes assigned to the plaintiff. The plaintiff alleges in his complaint that up to a short time before the commencement of this action, he has been using all diligence in the collection of the notes, and has failed to collect certain notes mentioned in his complaint and a few days before suit brought requested said defendants to take up the notes and to pay him the amount due upon the same, but they refused so to do, and that he tendered them to the defendants upon the payment of the amount due. The defendants in their answer stated:

1. That the plaintiff had never notified them or either of them before the commencement of the action of his inability to collect those claims or any of them mentioned in the complaint.

2. That the plaintiff did not use reasonable diligence in endeavoring to collect the claims sued on.

3. That the plaintiff's claim is barred by the statute of limitations.

The summons was issued on the 22d of July, 1879.

On the trial the plaintiff's counsel offered to prove by the plaintiff himself: 1st. That he has been making diligent efforts to collect the claims mentioned in paragraph four of the complaint, until a short time before the suit was brought and that after the decision of the supreme court of the United States on the homestead law in 1878, he again put the claims in the hands of a constable, but has failed to

collect them. 2d. That within the last three years he has had several conversations with each of the defendants in regard to their liability on the guaranties; that defendant Turner asked him to do all he could to collect these notes and that he would do what was right on his guaranty; that Shaw, the other defendant, said he would do what was right in the matter. 3rd. That a demand was made upon both of the defendants a short time, to-wit, within six months before suit brought. The plaintiff's counsel stated that he could offer no testimony except this to repel the plea of the statute of limitations. And upon an intimation from the court that the action was barred by the statute, the plaintiff submitted to a nonsuit and appealed.

The only question in the case for our consideration is, whether the plaintiff's action was barred by the statute of limitations. But the facts of the case are so meagre and uncertain that it is impossible to say whether the statute applies to the action, and if it does, at what time it began to run. The plaintiff proposed to prove that he had been making diligent efforts to collect the claims mentioned in the complaint, for the failure to collect which, he sought to hold the defendants liable, to within a short time before the institution of the action. It was important to a correct understanding of the question whether the action was barred by the statute that the plaintiff's evidence in regard to the degree of diligence used by him in the collection of the claims should have been heard. But His Honor, by intimating his opinion, *in limine*, in regard to the bar of the statute, drove the plaintiff to a nonsuit and thereby prevented a full development of his evidence, which might have presented such a state of facts as to exclude the application of the statute. We think the action of the court was premature and unwarranted by the facts as set forth in the record. If the plaintiff had been allowed to proceed with his testimony, there are several interesting questions in-

volved in the case which would most probably have arisen, the solution of which might have become necessary to a just determination of the case. Some of these are: Whether the statute of limitations applies to the case? and if it applies, when did it begin to run? Were the defendants discharged by the laches of the plaintiff by reason of the lack of due diligence as of not notifying the defendants in a reasonable time of his inability to collect and that he would hold them responsible for their guaranty? Whether the defendants have sustained any loss by the want of due diligence on the part of the plaintiff, as affecting their discharge, and whether the promises, if made by the defendants within three years before the commencement of the action, to do what was right in regard to the guaranty were sufficient to remove the bar of the statute or revive the guaranty? We are of the opinion the nonsuit should be set aside and a new trial awarded, and we have come to this conclusion not so much because the opinion intimated by His Honor appears to be wrong as because we cannot see that it is right.

There is error. Let this be certified to the superior court of Moore county to the end that a new trial may be had.

Error. *Venire de novo.*

F. D. KOONCE v. D. M. BUTLER and others.

Practice—Motion to vacate Judgment—Erroneous—Irregular.

1. Upon a motion to vacate a judgment, it appeared that defendant was not served with process, but that opposite the names of the defendants in the action (this defendant being one of them) the name of an attorney was written on the docket, and judgment was taken by default in 1863, of which the complaining defendant had no notice until 1879:

Held, that he is entitled to relief, and the fact that the clerk prior to this motion gave plaintiff leave to issue execution upon his dormant judgment, after notice, does not conclude him from impeaching its validity for irregularity or other cause, in a proper proceeding before the judge of the court.

2. Remarks of SMITH, C. J., upon erroneous and irregular judgments, and the authority of an attorney to appear for a party.

(*Wolfe* v. *Davis*, 74 N. C., 597; *Doyle* v. *Brown*, 72 N. C., 393; *University* v. *Lassiter*, 83 N. C., 38; *Sanderson* v. *Daily*, *Ib.*, 67; *Weaver* v. *Jones*, 82 N. C., 449, cited and approved.)

MOTION to vacate a judgment heard, in a case pending in JONES Superior Court, at Chambers in Wilson on the 9th of March, 1880, before *Avery, J.*

The court allowed the motion and the plaintiff appealed.

Messrs. Allen & Isler, and *J. B. Batchelor*, for plaintiff.
Mr. W. W. Clark, for defendant.

SMITH, C. J. Upon the evidence the court finds that the defendant, John A. Guion, who moves to set aside the judgment recovered by the plaintiff against himself and others at fall term, 1863, of the superior court of law of Jones, as to himself, was not served with process, nor had he any notice of the institution of the suit or of the rendition of the judgment until the month of November, 1879. The motion is opposed by the plaintiff upon the two-fold ground that the defendant war represented by counsel in the original action, and that, upon notice and after hearing evidence, the clerk, prior to the present application, gave the plaintiff leave to sue out execution upon his dormant judgment, thereby concluding him from impeaching its validity for irregularity or other cause. The legal sufficiency of these objections, which were overruled in the court below, is presented in the appeal.

The distinction between erroneous and irregular judgments, and between such as are voidable, is thus clearly

traced by READE, J: "An erroneous judgment is one rendered according to the course and practice of the courts, but contrary to law; as where it is for one party, when it ought to be for another, or for too little or too much. An irregular judgment is one contrary to the course and practice of the court, as a judgment without service of process." *Wolfe* v. *Davis*, 74 N. C., 597. Again, "a judgment rendered against a defendant who has never been served with process, nor appeared in person or by attorney, is not voidable, but void; and it may be so treated, whenever or wherever offered without any direct proceeding to vacate it. The reason is that the *want of service of process and want of appearance are shown by the record itself whenever it is offered.* It would be otherwise if the record showed service of process or appearance, when in fact there had been none. In such case the judgment would be apparently regular, and would be conclusive until by a direct proceeding for the purpose it is vacated." *Doyle* v. *Brown*, 72 N. C., 393.

The concluding words of the first citation are qualified and explained in the more explicit statement of the doctrine in the latter. The rule governs when applied to the record of a judicial proceeding in the same state, but it is held that when offered in evidence in an action pending in a tribunal of a different state, it may be shown by parol that the attorney named in the record, and appearing for a party, never had authority to do so, and that notwithstanding the recital he is not bound thereby. This Mr. WEEKS says may be considered settled, and as not contravening that portion of the federal constitution which declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." Constitution, Art. 4, § 1; Weeks on Attorneys, 358.

The supreme court of the United States have extended the doctrine to the record of a circuit court, produced as evidence in an action in a circuit court in another state, and

permitted the want of authority of an attorney professing to act for a party to be proved in order to defeat its otherwise conclusive effect. *Hill* v. *Mendenhall*, 21 Wallace, 163.

The judge does not himself ascertain the facts in reference to the alleged representation of the defendant by attorney, but annexes a transcript of the docket in which the cause is entered, leaving to us to interpret its meaning and effect. From this it appears that on the appearance docket where the cause is stated, the initials "J. F. W." are written against the defendant's name. And this memorandum is found in the space intended for the abstract of the pleas or defence: "Butler pleads specially the late stay act of the general assembly. The defendant D. M. Butler craves until the next term of this court to plead."

At fall term, 1863, the name G. C. Woodley, substituted in place of the initials, appears against the names of the defendants, and the further entry: "Judgment final by default according to specialty filed for principal due 1st September, 1860, $1,506, interest to November 2d, 1863, $286.14 and costs." No actual defence seems to have been made on behalf of the complaining defendant, although, as His Honor finds, the draft, the subject matter of the suit had been paid by the payee to the defendant, his endorsee, and the payee had afterwards fraudulently transferred it to the plaintiff, without cancelling the names of the succeeding endorsees.

We cannot regard this loose and imperfect record as concluding the defendant against any claim for relief, even upon the strictest rules which have been recognized as governing in cases of unauthorized appearances of counsel, when no process has been served, and no subsequent assent has been given, or can reasonably be implied, as collected in *University* v. *Lassiter*, 83 N. C., 38. In that case, service had been made and the defence faithfully conducted by the attorney of record for all. The practice of vacating a judgment ren-

dered against one never properly made a party to the action, although represented on the record by attorney, where application is made in apt time, and under circumstances warranting the exercise of the power, is recognized in *Weaver* v. *Jones*, 8 N. C., 440, although the motion was denied, and the court say: "When the facts are ascertained, the vacating or refusing to vacate a judgment, is not a matter of uncontrolled discretion, but of legal right, and herein the judge correctly held, upon the case made in the application, the record was not successfully impeached." The citations in *University* v. *Lassiter* were intended to call attention to the ruling elsewhere, and to show to what extent the appearance of an attorney, professing to have, but in fact possessing no authority and who had conducted the cause, had been carried in giving authority to the record, and placing the validity of the action of the court in the cause beyond the reach of contradiction and impeachment for such reason. We cannot attach such consequences to the mere entry of a name, when the appearance may have been for the principal defendant only, as seems to have been intended by initials marked at the appearance term, and nothing further in the premises for the protection of the defendant, Guion, was done or attempted, and judgment then rendered by default. We think, therefore, the court did not err in regarding this objection insufficient.

It is further contended for the appellant that the action of the clerk in awarding execution was an adjudication sustaining the judgment and estopping the defendant from now assailing its regularity and legal force. This position would be entirely correct if it was now proposed to set up any defences relied on, or which could have been and ought to have been set up in opposition to the motion for leave to issue execution. This is fully settled by the case cited by the counsel (*Sanderson* v. *Daily*, 83 N. C., 67,) and rests upon round reason. The order that authorizes execution to issue

and awakes the sleeping judgment to new life and activity, is an adjudication of the insufficiency of the grounds upon which it is resisted, and as to them and whatever other grounds could have been urged in opposition, the order becomes *res adjudicata*, but its effect is only to restore and relieve the former judgment upon which the execution issues, and obviously any defect which could not then be made available is not thereby cured, but the judgment is revived with the force and effect it originally possessed and relieved from an infirmity resulting from lapse of time. The judgment upon its face is not void, but regular and proper, and consequently was not open to the extrinsic proof of its irregularity in the proceedings before the clerk. The judge of the superior court alone, in the exercise of primary and exclusive jurisdiction, could vacate and set it aside; and this, the proper legal method of impeachment, is pursued in the proceeding under review.

It must therefore be declared, that there is no error and the judgment is affirmed.

No error. Affirmed.

A. MILLER & BRO. v. M. HAHN & CO.

Evidence—Proof of Handwriting—Subscribing Witnesses—Claim and Delivery—Contract.

1. Where the maker of an instrument is out of the state and the subscribing witness thereto is dead, proof by one who saw them sign the same is competent to establish the fact of its execution.

2. In claim and delivery it was in evidence that the property could not be delivered in specie and the plaintiff was permitted to show its value to aid the jury in assessing his damages; *Held* no error.

3. In such action the defendant claimed a gray mare under a bill of sale executed in February, conveying "one gray horse, also one black horse and one gray mare," and the plaintiff claimed the same mare under a bill of sale executed in May following, conveying "two horses one a bay and the other a gray mare," and the said mare was thereupon delivered to plaintiff; *Held*, that the plaintiff is entitled to recover.

(*Selby* v. *Clarke*, 4 Hawks. 265; *Edwards* v. *Sullivan*, 8 Ired., 302; *Carrier* v. *Hampton*, 11 Ired., 307; *Holmes* v. *Godwin*, 69 N. C., 467; *Isley* v. *Stewart*, 4 Dev. & Bat., 160; *Massey* v. *Belisle*, 2 Ired., 170; *Sizemore* v. *Morrow*, 6 Ired., 54; *Rhodes* v. *Chesson*, Busb., 336, cited and approved.)

CIVIL ACTION of claim and delivery tried at Spring Term, 1880, of CRAVEN Superior Court, before *Gudger, J.*

Messrs. Manly, Simmons & Manly, for plaintiffs.
Messrs. Green & Stevenson, for defendants.

SMITH, C. J. The mare, the ownership of which is the subject of controversy, belonged to Calvin Herring, under whom both parties claim.

1. The plaintiffs produced in evidence a bill of sale bearing the signatures of Calvin Herring and of a subscribing witness, already proved and registered; and in proof of execution, was permitted, on objection, to show that the subscribing witness was dead and the maker out of the state, and that the names of each affixed to the instrument were in their own proper hand-writing respectively. The witness also testified that he was present and saw each of them sign his name to the paper. The exception to the evidence is wholly untenable. In this mode deeds for land may be proved for registration under the statute which is itself in pursuance of the common law. Bat. Rev., ch. 35, § 2; *Selby* v. *Clarke*, 4 Hawks, 265; *Edwards* v. *Sullivan*, 8 Ired., 302; *Carrier* v. *Hampton*, 11 Ired., 307; 1 Greenl. Ev., § 572.

2. It was in proof that the defendants, soon after the

plaintiffs' demand and the institution of the suit, sold the mare to a resident of another county, who had carried her out of Craven, and the witness did not know where she then was. Thereupon the plaintiffs were allowed to show the value of the mare at the time of the demand, as assisting the jury in arriving at an estimate of her value at the trial, the rule prescribed in actions of replevin and for claim and delivery, substituted for them. To this ruling the defendants also except. The present action, though commenced in form for a claim and delivery, has not been followed by any delivery, and hence is prosecuted for the recovery of the value of the property in damages. "Probably if it appeared on the trial," remarks RODMAN, J., in *Holmes* v. *Godwin*, 69 N. C., 467, when the very point was presented, "that the property had been destroyed so that it would not be returned *in specie*, the jury would be justified in so finding, and giving the value of the property at the time of the taking and interest thereon as the damages for the taking and detention." The same rule would seem to apply where the defendant cannot restore the property because of its disposition by sale and removal, and can only make compensation in damages. The testimony was admissible, if not generally, certainly for the purposes for which it was received.

3. A witness introduced for the plaintiffs, after objection from defendants, testified to his having made an examination of the registry and finding no registered conveyance of a *bay mare* from Calvin Herring to the defendants antedating the plaintiffs' claim of title, and the plaintiffs exhibited a chattel mortgage from him to them of "*one bay mare*," dated July 22nd, 1876. The inability of the witness, after search, to find such an instrument, alike negative and harmless, is but the assertion of a legal presumption expressed in the Latin maxim, "*De non apparentibus et non existentibus eadem est ratio.*" But the main controversy is as to the

proper construction and operation of the two instruments executed, one on May 31st to the plaintiffs, the other February 23rd preceding, to the defendants. If the former, later in time, fails sufficiently to describe and pass the property, or if the latter, and earlier, does embrace it, the plaintiffs cannot recover. The bill of sale to the plaintiffs undertakes to convey "two horses (one a bay and the other a gray mare);" and the testimony is that the animal in suit was, at its execution, delivered to the plaintiffs as embraced in the contract. The fair interpretation of the language used is, in our view, consistent with this practical understanding of its import by the parties to the transaction. The intention evidently was (and such we think to be the legal effect of the descriptive words employed) to sell the horses, one of which is a bay mare and the other a gray mare, the added description of color and sex limiting and defining the more general preceding term, "horses." We are equally clear that the description in the defendant's bill of sale, "one gray horse, also one black horse and one gray mare," does not include a black or bay mare, nor can it be aided by the testimony of the defendant, that the word *horse* is used to embrace both sexes. Obviously this instrument discriminates in respect to sex, and when the female is meant, she is called by the appropriate name of her sex. The horses, described by their color as gray and black, are of the male sex, while the other is designated in contradistinction from the two others as a gray mare.

The court ought to have instructed the jury as to the legal construction and operation of these contracts, as of all others when the terms are ascertained. What is the contract, when verbal and dependent on memory, is a question of fact for the jury; what its effect, when ascertained, a question of law to be decided by the court? *Isley* v. *Stewart*, 4 Dev. & Bat., 160; *Massey* v. *Belisle*, 2 Ired., 170; *Sizemore* v. *Morrow*, 6 Ired., 54; *Rhodes* v. *Chesson*, Busb., 336.

The error, however, not adverse to the appellants and of which they cannot complain, is corrected by the verdict of the jury, whose finding is in uniformity with the instructions which ought to have been given as to the legal effect of both instruments.

There is no error and the judgment must be affirmed.

No error. Affirmed.

W. F. PERRY v. E. G. JACKSON.

Section 343—*Transaction with person deceased.*

Where a witness is incompetent under section 343 of the code, to testify as to a transaction between himself and a person deceased, it is error to receive the witness' testimony of his subsequent unsworn declarations, made to others, in regard to the same transaction.

(*Gidney* v. *Logan*, 79 N. C., 214; *Roberts* v. *Roberts*, 82 N. C., 27; *Isler* v. *Dewey*, 67 N. C., 93; *McCandless* v. *Edwards*, 74 N. C., 301; *Peppes* v. *Broughton*, 80 N. C., 251, cited and approved.)

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

Verdict and judgment for plaintiff, appeal by defendant.

Mr. D. G. Fowle, for plaintiff.

Messrs. Battle & Mordecai and *T. M. Argo*, for defendant.

SMITH, C. J. On April 5th, 1869, in the superior court of Wake, John Pierce, administrator of R. H. Perry, recovered judgment for $158.14 against Willis H. Ray, who then owned the land in dispute, and shortly thereafter caused execution to issue to the sheriff of said county, which was returned with his endorsement, "no property to be found subject to execution, homestead having been laid off."

The cause was entered as of fall term, 1869, on the execution docket, kept in the clerk's office and used as a record of executions issued under the former system of procedure. On March 11th, 1874, the judgment was transferred and entered on the judgment docket No. 2. This docket contains a record of causes determined between the years 1871 and 1875, and a similar preceding docket, No. 1, contains such as were determined after the change in the courts, up to 1871.

A second execution issued on the judgment in August, 1875, with a like result, no action being had under it. On the 3d day of October, 1870, another judgment was recovered against the said Willis H. Ray, for the sum of $315, by W. F. Freeman. On May 1st, 1878, a third execution issued on the first mentioned judgment, and on the 22d day of the same month, one issued also on the latter, both of which were levied ten days thereafter on certain lands of the debtor, particularly describing them, one containing 108 acres, the other 210 acres.

Both tracts were sold under these writs, the larger to the plaintiff for $265, the smaller to one L. Woodliff for $250, and the deeds made by the sheriff to the respective purchasers, that to the plaintiff bearing date July 8th, 1878, the proceeds of which were applied to the satisfaction of the first judgment, while the proceeds of the other sale were paid into the office for the said W. F. Freeman.

In support of the defendant's title, he introduced a deed executed September 15th, 1869, by the said W. H. Ray and his wife to Tyrrell Ray, their son, reciting the consideration of $120, and conveying 109 acres, part of the larger tract, and a deed for the same made May 8th, 1872, by Tyrrell Ray and his wife to the defendant for the sum of $260. The defendant also exhibited a deed for 123 acres, the residue of the tract, executed the 15th of September, 1869, by W. H. Ray and wife to H. R. Chappell, their son-in-law, for the

alleged consideration of $250, and the deed of H. R. Chappell and wife, dated January 5th, 1878, for the same to the defendant for the sum of $1000.

The following issues involving the validity of the deeds under which the defendant derives title, were submitted to the jury:

1. Were the purchases of Tyrrell Ray and of H. R. Chappell made in fraud of the creditors of Willis H. Ray?

2. Did the defendant pay a full and fair price for the land?

3. Did the defendant have notice of the fraud, if any, between the said Tyrrell Ray and H. R. Chappell, and the said Willis H. Ray?

4. What damages, if any, have accrued to the plaintiff since July, 8th, 1878?

The jury responded affirmatively to the first three questions, and, in answer to the last, assessed the damages at $94.75.

The exceptions contained in the record, are to the ruling of the court in the admission of testimony after objection, only one of which, decisive of the appeal, is it necessary to consider.

The plaintiff introduced the said Tyrrell Ray, and proposed to show by him certain transactions between the witness and the said Willis H. Ray, then deceased, in regard to the sale and conveyance of the parcel of land mentioned in the deed of September 15th, 1869, to the former, which evidence the court disallowed, as being excluded by the proviso in section 343 of C. C. P. The plaintiff's counsel then put to the witness the following question: What declaration did you make while in possession of the land conveyed to you, and before making your deed to the defendant, in regard to your title or possession? The question was, after objection from the defendant, held to be admissible, and in answer, the witness stated that he had talked to many per-

sons about the amount he had paid for the land, telling them he had paid only $50, and had told the defendant the same thing, but that he did not mention the Norman debt, due by his father, in the sum of $200, and the fact that the deeds to Chapell and himself were made in consideration of their paying the debt, and that this had been done. The witness added that the defendant paid for the land conveyed to him by the witness in money $260, as stated in the deed, and $65 in articles of personal property, in addition.

The reception of the testimony in the form, is a manifest evasion of the rule which had just been announced and enforced. The witness is not allowed to speak of the facts of a transaction which took place between himself and the deceased in the lifetime of the latter, and of which he had personal knowledge, but his repetition of the facts in conversation with others than the defendant the jury are allowed to hear and act upon as evidence. In other words, the witness is incompetent to testify to the transaction or communication itself, when on oath, while he may testify to his own subsequent unsworn declarations of what transpired or was said and done in the transaction itself. This would be to exclude primary, and admit secondary evidence of a fact. The error is apparent in the very statement of the proposition.

But the declarations of the witness seem to have been received as accompanying his possession, and qualifying and explaining it and the title derived under his father's deed. The declaration of the owner of land made at the time or just before and in contemplation of the execution of his deed therefor, are received as attaching to and disparaging the estate conveyed when known to the grantee, *Gidney* v. *Logan*, 79 N. C., 214, and perhaps in other cases; but they are no more competent to prove an antecedent fact or occurrence than the unsworn declarations of other persons. The declarations admitted here are not of that kind,

nor offered for that purpose. They are offered to prove what sum was in fact paid for the land, that is, the witness' representations to others of what he paid before he parted with his own title. The correct rule, we think, is laid down in the recent case of *Roberts* v. *Roberts*, 82 N. C., 29, and we see no reason for departing from or modifying it. We were somewhat disposed to consider the original transaction as provable by the witness under the ruling in *Isler* v. *Dewey*, 67 N. C., 93, the facts of which are not unlike those of the present case. There, the grantor in a deed of trust to a deceased grantee was called by the plaintiff, whose title had been acquired by a subsequent sale under execution, to prove fraud in the making of the deed, and was allowed to testify, on the ground that no deed from the trustee was needed, and hence no claim set up under him to defeat the action, as the plaintiff could only recover by proving title in himself.

The defendant here does claim under deeds to himself, which if obtained *bona fide* for value, and without notice of an infirmity in the title, protect him against the plantiff's claim, even though fraud was conceived, and enters into the preceding conveyance of the debtor, Willis H. Ray. The present case then falls within, and is governed by the principles decided in *McCanles* v. *Edwards*, 74 N. C., 301, and reaffirmed in *Pepper* v. *Broughton*, 80 N. C., 251.

The case is not complicated with any homestead claim, and in its consideration such claim is left entirely out of view.

The evidence was inadmissible as a declaration of what occurred in the conversation, even though the witness be not personally disabled to testify to facts within his knowledge, and there must be a new trial. It is so adjudged, and this will be certified.

Error. *Venire de novo.*

ELIZABETH McLEARY v. R. M. NORMENT and others.

Evidence—Mental capacity to make a deed—Section 343.

Where a witness testifies to the want of mental capacity in a grantor to make a deed, and that his opinion was formed from conversations and communications between the witness and grantor; *it was held* competent to prove the facts upon which such opinion was founded. Section 343 of the Code does not apply to the facts of this case.

(*Clary* v. *Clary*, 2 Ired., 78; *State* v. *Ketchey*, 70 N. C., 621; *Mason* v. *McCormick*, 75 N. C., 263; *McCanless* v. *Reynolds*, 74 N. C., 301; *Gregg* v. *Hill*, 80 N. C., 255, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of MECKLENBURG Superior Court, before *McKoy, J.*

Judgment for defendants, appeal by plaintiff.

Messrs. Dowd & Walker, Wilson & Son, A. Burwell and *Shipp & Bailey*, for plaintiff.

Messrs. Bynum & Grier and *Jones & Johnston*, for defendants.

SMITH, C. J. The purpose of this suit is to have a deed of conveyance of land, made February 2d, 1867, by the plaintiff to George M. Norment, of whom the defendants are his heirs at law, declared void and ineffectual to pass her estate, by reason of her unsoundness of mind, and the exercise of an undue and fraudulent influence, practiced by the intestate grantee.

Upon issues submitted, the jury find that the plaintiff was competent to execute the deed at the time of its date, and that its execution was not obtained by fraud or improper influence. The plaintiff's appeal presents several exceptions, in relation to evidence refused and received, to the comments of counsel, not arrested by the interposition

of the court, and to the instructions refused and given to the jury, only one of which, decisive of the case, is it necessary to notice and dispose of.

One Harriet Alexander, a niece of the plaintiff, and introduced as a witness in her behalf, testified to her aunt's want of mental capacity to make the deed, and that her opinion was formed from conversations and communications between them. The plaintiff's counsel then proposed to prove those conversations and communications, in order that the jury might see whether the opinion was well founded, and the weight due to it as evidence. The court, on objection, ruled out the offered testimony, and the plaintiff excepted.

It is settled in this state that witnesses, whether experts or not, who have had opportunities, from personal intercourse with another, to form an opinion of his legal competency of mind, may express their opinion, and state the facts upon which it is based. It is so held in *Clary* v. *Clary*, 2 Ired., 78; and *State* v. *Ketchey*, 70 N. C., 621.

The evidence was rejected, as we understand from the course of the argument, upon the ground that it is within the inhibition of the proviso of section 343 of the Code which forbids a witness "who has a legal or equitable interest, which may be affected by the event of the action" to be "examined in regard to any transaction or communication between such witness and a person at the time of such examination, deceased, insane or lunatic," "against a party then prosecuting or defending the action, as executor * * * or as assignee, or committee of such insane person or lunatic," when the interest of the witness may be affected by the result.

The witness who had given to the plaintiff an indemnity against the costs of the suit, if unsuccessfully prosecuted, has an interest similar to that which was held to render the witness incompetent in *Mason* v. *McCormick*, 75 N C., 263, re-affirmed in the same case on the second appeal in 80 N.

C., 244, if the testimony itself was of the kind intended to be excluded by the statute. The evidence proposed, it will be observed, is not *against the lunatic*, nor *adverse to her interests*, so as to be inadmissible upon the principle deduced from the construction of the act, and thus summarily expressed by PEARSON, C. J., in *McCanless* v. *Reynolds*, 74 N. C., 301: "The principle is, that unless both parties to a transaction can be heard on oath, a party to an action is not a competent witness in regard to the transaction." *Gregg* v. *Hill*, 80 N. C., 255. The proposition presupposes an admission or statement, from which an admission may be inferred injurious to the deceased or lunatic, and it is disallowed because the other party is unable to give his version of the matter. In this sense, the evidence would not be received from any source since the declarations are of a party herself, offered on her own behalf and to neutralize the effect of her own act. The proviso proceeds upon the idea that unless both can be heard, it is best to hear neither. But the conversations offered are not to prove any fact stated or implied, but the mental condition of the plaintiff, as declarations are received to show the presence of disease in the physical system. How, except through observation of the acts and utterances of a person, can you arrive at a knowledge of his health of body or mind? As sanity is ascertained from sensible and sane acts and expressions, so may and must any conclusion of unsoundness be reached by the same means and the same evidence. The declarations are not received to show the truth of the things declared, but as evidence of a disordered intellect, of which they are the outward manifestations. Would it not be competent to show an attempt at self-destruction? And do not foolish and irrational utterances equally tend to show the loss of reason when proceeding from the same person? In either case, the conduct and the language may be feigned and insincere, but this will only require a more care-

ful scrutiny of the evidence, and does not require its total rejection. The admissibility of the witness' opinion, resting as it necessarily must, upon past opportunities of observing one's conduct, requires in order to a correct estimate of the value of the opinion, an enquiry into the facts and circumstances from which it has been formed. There seems to be no sufficient reason for receiving the opinion and excluding proof of the facts upon which it is founded.

As an irrational mind manifests itself in irrational and foolish acts and expressions, (and in this view the words are of equivalent import,) so proof of the latter point to the insane source of which they are the offspring and appropriate fruit.

The conversations and transactions mentioned in the code of which a living witness is not permitted to testify, when the other party to it is dead, insane, or lunatic, and unable to give his version of them, do not, in our construction of the language and purposes of the law, embrace such evidence as was here offered and rejected, and is outside the mischief intended to be remedied. There was, therefore, error in arresting the enquiry into the grounds of the witness' belief, although it entered into the antecedent conduct and declarations of the alleged lunatic.

While it is not necessary to pass upon the other exceptions, they may have to be met in another trial, and we will only remark, that the instructions given to the jury, considered in this connection, seem to be as favorable to the plaintiff as she could reasonably ask. The whole controversy turned upon the validity of the deed, as a rational and competent act of the plaintiff, and the presumption arising out of the relations of the parties, and the general presumption in favor of sanity appear to have been fairly and fully explained to the jury. But for the error in reject-

ing the evidence there must be a *venire de novo*, and it is so adjudged. Let this be certified.

Error. *Venire de novo.*

REBECCA BLUE v. JAMES GILCHRIST.

Statute of Limitations—Witness.

1. The provisions of section 41 of the code of civil procedure do not apply to causes of action existing before the adoption of the code in 1868.
2. Where a cause of action upon an account accrued before 1868, and more than three years elapsed after the statute began to run (in January, 1870,) and before suit brought, the action is barred; and where the party owing the account was living in the state at the time the cause of action accrued (1866) and afterwards removed therefrom (1869) and has been continuously absent since, *it was held*, that the case does not fall within the exception contained in section 10, chapter 65, of the Revised Code. The absence of the party in such case does not operate to prevent the running of the statute.
3. A party to a note under seal executed before 1868, sued thereon, is not a competent witness under chapter 183 of the acts of 1879, to prove payment thereof.

CIVIL ACTION, tried on appeal from a justice's judgment, at Fall Term, 1880, of MOORE Superior Court, before *Avery, J.*

The action was commenced on the 19th of February, 1875, and the plaintiff declared on a note under seal for sixty-three dollars and eleven cents executed by the defendant to McNeill & McLeod, who were partners in business, on the 24th day of April, 1862, and assigned to plaintiff in 1866.

The defendant set up in his answer by way of counter-claim an open account in favor of defendant against McKoy

McNeill, a member of said firm of McNeill & McLeod, the first item of which bore date January 28th, 1863, and the last, February, 1866. The defendant also relied in his answer upon the plea of payment.

The plaintiff replied and pleaded the statute of limitation to the account. It was agreed that McKoy McNeill left the state of North Carolina in the year 1869, and has since resided in the state of South Carolina.

The defendant Gilchrist was then introduced in his own behalf, to prove the justness of his account, and while he was under examination, his counsel proposed to ask him the question: "Have you paid the note sued on; if so, when and how?" The plaintiff's counsel objected on the ground that the defendant was under the provisions of chapter 183, act of 1879, incompetent as a witness to prove that the said note was paid. The objection was sustained and the defendant's counsel excepted. Defendant's counsel then proposed to show by witness that Mrs. Jane McNeill offered to pay the account in 1864, but the witness told her not to do so; that it could be credited on the note sued on. The plaintiff's counsel objected; the objection was sustained, and defendant's counsel excepted.

Mrs. Gilchrist, the wife of the defendant, was then introduced on the part of her husband to prove, in contradiction of the testimony of Mrs. McNeill who had sworn that the account had been paid, that only a part of it had been liquidated, and the defendant's counsel proposed to show by her that in conversation with said Jane McNeill, witness said "I cannot pay for the barrel," (meaning a barrel which she had got from Mrs. McNeill), and Mrs. McNeill replied, "there is an account between Mr. Gilchrist and Mr. McNeill, and he owes Mr. McNeill a note, and it can be settled by them." The testimony was objected to by the plaintiff's counsel, the objection was sustained, and the defendent excepted.

The court held that the account was barred by the statute of limitations and the jury returned a verdict in favor of the plaintiff, upon which judgment was rendered against the defendant for the amount of the note and the interest subject to the scale, as provided by law, and the defendant appealed.

Messrs. Hinsdale & Devereux, for plaintiff.
No counsel for defendant.

ASHE, J. Exception was taken by the defendant's counsel to the ruling of His Honor in regard to the statute of limitations, but in that, we hold there was no error.

The last item of the account was charged in 1866, and more than three years having elapsed after the first day of January, 1870, before the commencement of this action and pleading the counterclaim, the statute was a bar, unless the running of the statute was stopped by the removal of the defendant from the state in 1869. Section 41, C. C. P., chapter 4, title 1, provides: "If when the cause of action accrue against any person, he shall be out of the state, such action may be commenced within the times herein respectively limited, after the return of such person into the state; and if, after such cause of action shall have accrued, such person shall depart from and reside out of the state, or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action." But section 10, chapter 1, of the same title provides: "That this title shall not extend to actions already commenced, or to cases when the right of action has already accrued, but the statutes in force previous to the ratification of this act shall be applicable to such cases."

This action had accrued on the defendant's account, before the adoption of the code in 1868, and therefore his case

does not come within its provisions; nor is he helped by the "statutes in force previous to the ratification of the code," for the exception to the barring of actions by the statute on open accounts previous to the adoption of the code is to be found in section 10, chapter 65, of the Revised Code, which provides: "That when any person against whom there is cause of action, shall be beyond sea, or a non-resident of the state, *at the time such cause of action accrued,* the plaintiff may bring his action against such person after his return within the time as heretofore limited for bringing such actions." But the defendant's cause of action had accrued in 1866, and he then had not removed from the state; so his case does not fall within this exception, and the statute is a complete bar to his action, and it is therefore needless to consider his exceptions taken to the refusal of the court to admit the evidence offered by the defendant, tending to establish the justness of his account, for it is immaterial whether the account is correct or not, if it is barred by the statute.

The only other exception presented for our consideration is to the exclusion of the testimony of the defendant, that the bond sued on had been paid.

The ruling of the court upon this point is also sustained, for the defendant was clearly an incompetent witness for that purpose, under the provisions of the act of 1879, ch. 183. This act provides that no person who is a party to a suit now existing, or which may hereafter be commenced in any court in this state that is founded on any bond under seal for the payment of money, executed previous to the first day of August, 1868, shall be a competent witness. The witness offered is a party to the suit, the action is founded upon a bond under seal, and it was executed before the first day of August, 1868. It is just such a case as it was intended the act should apply to. There is no error. The judgment of the superior court must be affirmed.

No error. Affirmed.

M. B. BELDEN v. D. B. SNEAD.

Witness, pay for attendance—Practice—Agreement of Parties.

1. A witness is not at liberty after final judgment to withdraw his "witness ticket" and sue upon it. His fees for attendance should be taxed and collected with the other costs against the party adjudged to pay the same, if he be solvent; and if not, then the prevailing party who summoned and required his testimony is responsible therefor.
2. An agreement that other pending causes shall abide the determination in this, is a matter between the parties, and does not authorize this court to assume jurisdiction in cases not before it, or warrant the expression of an opinion purely speculative.

(*Standly* v. *Hodges*, Conf. Rep., 350; *Carter* v. *Wood*, 11 Ired., 22; *Thompson* v. *Hodges*, 3 Hawks 318, cited and approved.)

MOTION by plaintiff to retax costs heard on appeal from the decision of the clerk, at Fall Term, 1879, of RICHMOND Superior Court, before *Seymour, J.*

The plaintiff appealed from the ruling of the court below.

Messrs. Hinsdale & Devereux, for plaintiff.
Mr. John D. Shaw, for defendant.

SMITH, C. J. Upon the hearing before the clerk of the plaintiff's motion for leave to issue execution upon the judgment which had been dormant, the application was refused at his costs.

One McLaurin had been summoned on the day and at the place of trial and testified for the plaintiff, and his fee, as a witness for one day's attendance, and mileage in returning home, was included in the costs, with an allowance of one dollar to the clerk for the judgment, and twenty-five cents for docketing the same, for the correction of which by a re-taxation, a motion was made before the clerk, an ap-

peal taken from his ruling to the superior court, and again from the judgment in that to this court. The witness proved his attendance and filed the certificate thereof, but has withdrawn it and commenced an action against the plaintiff, which is still pending, for the recovery of what is due him. The court held that the clerk was entitled to the fee charged, but disallowed the amount due the witness, because he had withdrawn his ticket and sought redress in an independent action instituted in another tribunal.

In the act of March 21st, 1871, revising and fixing the fees of county officers, the clerk of the superior court is allowed fifty cents for "entering judgment and verdict," and one dollar for "a judgment on any question authorized to be decided by him, if there be an appeal, including the statement of the case on appeal," &c. Acts 1870-'71, chap. 139, § 11, par. 5 and 6. He is also entitled to receive twenty-five cents for docketing a judgment on the execution docket. *Ibid.*, par. 12. The charge for entering the judgment must therefore be reduced to one half the sum taxed; the fees allowed the witness are correct in amount, and the only question is whether they can be taxed as costs in the judgment.

In *Standly* v. *Hodges*, Conf. Rep., 350, it is held that an action to recover the value of the services rendered by the witness would not lie at common law against the party by whom he was summoned, and that the matter was regulated by statute. The statute gives this direct remedy, when the party at whose instance the witness is summoned, fails to pay what is ascertained to be due at each term before the departure of the witness from court. Revised Code, ch. 31, § 73. In order to be recovered in the judgment the witness tickets must be filed in the clerk's office when the cause has been finally determined. *Ibid.*, § 74. After judgment, the claim is not against the party summoning, but against the person adjudged to pay the costs, unless from his insolvency

they cannot be collected. *Carter* v. *Wood*, 11 Ired., 22; *Thompson* v. *Hodges*, 3 Hawks, 318. It would seem from these adjudications that the witness is not at liberty after final judgment, to withdraw and sue upon his certificate, but must seek satisfaction in the cause against the party cast, and if the money cannot be made out of him or his surety, then out of the prevailing party, who summoned and required his testimony.

The case is defectively stated, but we infer the tickets were filed at the rendition of the judgment refusing leave to issue execution and have since been taken out, and the action brought on them. Their withdrawal was improper and they ought to be returned to sustain the judgment in that behalf. It was not only irregular, but wholly useless to bring a new suit, the end of which would only be a judgment against the plaintiff for *part of the costs, all of which are embraced in the judgment already rendered by the clerk.* If the tickets could become the subject of a new suit, we should be disposed to agree with the court that the right to have them taxed in the original action would be suspended, if not lost, upon the principle that two proceedings for one and the same object and between the same parties will not be permitted to be carried on at the same time. The one must operate as an abatement of the other. We are therefore of opinion that the fees due the witness should be taxed and collected with the other costs, upon the return of his certificate to the proper office, or upon satisfactory evidence accounting for its loss or absence.

It seems to have been the purpose of the appeal to obtain the opinion of the court upon the point whether the witness was entitled to compensation for attendance and mileage also in each of the numerous similar cases, in which he was also summoned and examined. But it would be going outside of this record to decide questions in other cases, and where there is and can be no consolidation because there

are different defendants. The argreement that other pending causes shall abide the determination in this, is a matter between parties and counsel, but does not authorize this court to assume jurisdiction in cases not before it, nor warrent the expression of an opinion purely speculative.

There is error, and as for the reasons stated final judgment cannot be rendered here, this will be certified to the end that the proper judgment may be entered in the court below in accordance with this opinion.

Error. Reversed.

NEWTON CRAWBORD v. JASON ORR.

Arbitration and Award.

1. Delivery of a copy of an award to the parties is not neeessary where the submission contains no such stipulation, and where the parties were present when it was signed, and understood its provisions.
2. Where the agreement was to refer the matter in dispute "to two disinterested men together with A as surveyor, with privilege to call in a third party," &c.; *Held* that the reference is to two arbitrators only, with liberty to call in another, and the surveyor is designated to aid and not to *act* as one of them.
3. An award which fixes with accuracy the terminal points of a disputed line between adjacent land owners, and its course and distance, is not obnoxious to the allegation of uncertainty. A simple response to the inquiry submitted, in analogy to a jury verdict, is sufficient.
4. Submission and award constitute an executory agreement, and certainty to a common intent is all that is required in the award to admit of its specific enforcement.
5. Only such evidence as will enable this court to pass upon the ruling to which exception is taken below, should be set out in the case.

(*Baird* v. *Baird*, 7 Ired. Eq., 265; *Osborne* v. *Calvert*, 83 N. C., 365; *State* v. *Secrest*, 80 N. C., 450; *Murray* v. *Blackledge*, 71 N. C., 492; *Thompson* v. *Deans*, 6 Jones Eq., 22, cited and approved.)

CRAWFORD *v.* ORR.

CIVIL ACTION to recover possession of land tried at Fall Term, 1880, of HENDERSON Superior, before *Gilmer J.*

Verdict and judgment for defendant, appeal by plaintiff.

Messrs. J. H. Merrimon and *J. J. Osborne*, for plaintiff.
Messrs. Jones & Martin, for defendant.

SMITH, C. J. The defendant sets up as a defence to the plaintiff's action, an award made establishing the boundary line between their respective tracts of land, over which he has not trespassed, and the appeal brings before us certain assigned errors in the rulings of the court in respect to the award. The agreement of submission is in these words: "We, the undersigned, having a matter in dispute with reference to the location of the proper line between our lands, have this day agreed between ourselves to refer the matter to two disinterested men, together with A. L. Patterson, as surveyor, with the privilege of calling in a third party in case they fail to agree. Each of us obligate ourselves to furnish the referees with all our land papers bearing on the disputed piece of land. We further bind ourselves to furnish the necessary evidence in the case and bear the expenses of the referees and surveyor, equally and forever abide the decision of the said referees chosen.' (Signed by the plaintiff and defendant on the 17th of March 1879, in presence of a witness.)

The referees (as to whose appointment and action in executing the submission no objection is taken) made their award in the following terms: "We the arbitrators selected by Newton Crawford and Jason Orr to settle the disputed boundaries of their adjoining lands, after having examined the papers of each and viewed the boundaries of said land with a competent engineer, said engineer running the line as called for by the papers of said Crawford and Orr, find the following facts apparent to our minds in the case, a

follows: That the line from east to west begins nine rods north, eleven degrees east from a spanish oak, a corner in J. M. Davis' line, running two hundred and fourteen poles west to a black gum, a corner in C. M. Green's and Crawford's line." (Signed by Wm. J. Johnson and A. Cannon on the 24th of March, 1879.)

On the trial the arbitrators and other witnesses were examined touching the proceedings before the former in executing the reference. The plaintiff asked the following instructions to the jury:

1. It was necessary in order to render the award binding upon the plaintiff, to show that it was made known and delivered to him.

2. The award is defective and does not pursue the submission, in that, two only of those upon whom the duty devolved have signed the same.

3. The award is upon its face uncertain and void.

The court declined to give the two last instructions, and in reference to the first charged the jury that in order to make the award binding on the plaintiff, it must be shown that it was made known to him, but that if they believed he was present, saw it signed, and fully understood its purport, and that such was the decision of the arbitrators and he assented thereto, it was not necessary to its validity that a copy should be delivered to the plaintiff.

The errors assigned and appearing in the record are in the refusal to give the proposed directions, and in the charge given, and these only are reviewable upon the appeal.

I. The submission in terms contains no stipulation for the delivery of the award when made to either party, and therefore such delivery is not essential to its efficacy. It is sufficient if the parties were present when it was agreed on and signed by the referees, and they then fully understood its provisions. If either desired a copy, it should have been demanded, and we are not to assume it would not have

been furnished. The omission is the fault of the party, and cannot impair its force and obligation. Indeed, remarks an eminent writer, "it is not necessary that the party should have a copy to be bound to perform it, for it lies as much in the knowledge of one party as the other," unless it is provided in the submission "that the award shall be notified to the parties." Watson on Arb. & Aw., 133. It is not necessary, says a recent author, that a copy of the award should be furnished to each party if neither the submission nor the statute under which the submission is made, requires such delivery. Morse on Arb. & Aw., 280. If the defect relied on is the failure to deliver a copy within the time prescribed in the agreement, to be availing under the old rules of pleading, the fact must be specifically averred, and a general denial is inadmissible. *Ibid.*, 284. The charge of the court, that if the award was fully understood by the plaintiff, present at the making of it and assenting thereto, it would be valid without the additional fact of a delivery of a copy, is quite as favorable to the appellant as he can require, and is not obnoxious to objection from him.

II. The reference is to two arbitrators only, with liberty in case of disagreement to all in another. This is the manifest meaning of the parties, and the proper interpretation of their contract. They agree "to refer to *two disinterested men* together with A. L. Patterson, *as surveyor*." The association of the surveyor designated is obviously that the arbitrators may have his particular professional services and advice in prosecuting the investigation of the disputed boundary, and in making the necessary surveys to enable them to settle the controversy and to run and mark the lines when determined. It is in this capacity only that he is designated to aid the referees, not to act as one of them, in the performance of their prescribed work. If they fail to agree, it is a "*third party*" who is to be called in to make the decision, and the expenses of the "referees and surveyor"

are to be paid by the parties, equally, and each binds himself "to abide the decision of the said referees chosen," thus plainly separating and distinguishing the referees from the surveyor who aids them. The award therefore properly comes from the hands of those who alone under the agreement were authorized and required to act in making it.

III. The alleged defects in the award: The law does not require that the award shall in direct terms declare a compliance with the conditions essential to its validity. This will be assumed when the contrary does not appear, and any material departure from the terms of submission must be shown by him who alleges it and seeks to be relieved from its operation. Morse on Arb. & Aw., 446. Indeed the award should, as far as practicable and without needless recitals, be a simple and succinct respose to the enquiry involved in the reference, in analogy to a jury verdict, and this is all that is needful to its validity. *Baird* v. *Baird*, 7 Ired. Eq., 265; *Osborne* v. *Calvert*, 83 N. C., 365. The imputation of uncertainty finds as little support in the instrument. It appears upon its face to fix the terminal points of the line and its course and distance between the two with entire accuracy. It begins at a point north eleven degrees east nine rods distant from "a spanish oak, a corner of J. M. Davis' line," runs thence west two hundred and fourteen poles, and ends at "a black gum, a corner of C. M. Green's and Crawford's line." If those objects can be found, it is difficult to conceive how the description could be rendered more definite; and if they cannot be located, the difficulty is not in the insufficiency of the descriptive words, but it fitting them to the objects described.

It was earnestly pressed in the argument that as no evidence is set out to warrant the instruction given as to the plaintiff's presence and personal knowledge of the award at the time of its rendition, the omission entitles the plaintiff to a taken new trial. This exception does not appear to have been

in the court below, and cannot be entertained on the appeal. We must assume there was such evidence, as no complaint was then made of the charge in this respect, and no evidence should be set out except such as tends to elucidate and enable us to determine the correctness of some ruling to which exception is taken. *State* v. *Secrest*, 80 N. C., 450.

If then the award is valid and sufficient to establish the boundary line between the tracts, its effect is, as to so much of the land as is not covered by the defendant's previous title, to vest in him the equitable estate sufficient to defeat the present action, as is decided in *Murray* v. *Blackledge*, 71 N. C., 492, and entitling him to a conveyance of the legal estate in a suit for specific performance. *Thompson* v. *Deans*, 6 Jones Eq., 22.

It was insisted in the argument for the appellant that an award operated only as an estoppel, and the utmost certainty in its terms is required. This is not the view taken in the case cited last, and the submission and the award together are held to constitute an agreement executory in its nature, and the court say, "that "certainty to a common intent is all that is required in an award," to admit of its specific enforcement.

There is no error and the judgment must be affirmed.

No error. Affirmed.

LEWIS HESTER v. NATHANIEL BROACH.

Mill-Dam Act—Damages—Issue to Jury.

1. In an action for damages resulting from ponding water upon plaintiff's land, caused by the erection of defendant's mill-dam, an issue involving the amount of *annual* damage done thereby, is the proper one to be submitted to the jury.

2 The present law regulating the proceedings against owners of mill-dams for injuries resulting from their erection, is contained in chapter 197 of the acts of 1877, and sections 17 and 18 of chapter 72 of Battle's Revisal.

CIVIL ACTION, tried at Fall Term, 1880, of PERSON Superior Court, before *Eure, J.*

The action was brought by the plaintiff to recover damages of the defendant for ponding water over his land, the ponding being caused by the erection of a mill-dam on a stream running through plaintiff's and defendant's lands, which adjoin. The plaintiff laid his damages at four hundred dollars, and upon the trial, the plaintiff asked the court to submit this issue to the jury: "What is the amount of the annual damages done the plaintiff by reason of the erection of the defendants dam," to which the defendant objected, and insisted the only proper issue to be submitted to the jury was: "What is the amount of damages sustained by plaintiff to his lands, on account of the erection of defendant's dam." His Honor submitted the issue asked by the plaintiff and the defendant excepted. Verdict and judgment for plaintiff, appeal by defendant.

Messrs. Graham & Ruffin, for plaintiff.
Messrs. Edwards & Batchelor, for defendant.

ASHE, J. The question is, which issue should have been submitted to the jury, that proposed by the plaintiff or defendant?

Before the year 1809, when water was ponded upon the land of any one, by the erection of a mill by another, the owner of the overflowed land could bring his action, at common law, for the damages sustained by him each day, so long as the ponding on his land continued. Such actions were generally trivial and vexatious, and sometimes ruinous. It was to remedy this mischief the act of 1809 was

passed, which debarred the person whose land was overflowed from his common law action, unless he had, in the first instance, resort to the remedy prescribed by this statute; and not then, unless he recovered annual damages as high as twenty dollars.

The act of 1809 was brought forward into the Revised Statutes and Revised Code with but slight alterations, but was amended by the act of 1868–'69 (Bat. Rev., ch. 72), section 13 of which provides that the proceeding for recovering damages in such cases shall be commenced by summons returnable to the clerk of the superior court. By section 14 three commissioners were directed to be appointed to assess the damages, instead of a jury. Section 15 was substantially the same as section 12 of the Revised Code, ch. 71, declaring how the damages should be assessed and the verdict returned, and that the judgment should be binding between the parties for five years. Sections 17 and 18 are the same as sections 13 and 14 of the Revised Code. The act of 1868–'69 did not make any substantial alteration of the law as it existed before. It only changed the mode of proceeding. But then came the act of 1876–'77, ch. 197, which repealed section 13 of chapter 72 of Battle's Revisal, by directing it to be stricken out and the following section substituted: "Any person conceiving himself injured by the erection of any grist mill, or mill for any useful purpose, may issue his summons returnable before the judge of the superior court of the county where the endamaged land or any part thereof lies, against the persons required to be made parties defendant by the Code of Civil Procedure. In his complaint he shall set forth *in what respect and to what extent he has been injured*, together with such other matters as may be necessary to entitle him to the relief demanded." Sections 11, 12 and 13 of the act of 1868–'69, corresponding with sections 14, 15 and 16 of Battle's Revisal, were also directed to be stricken out, leaving unrepealed sections 17

and 18 of Battle's Revisal, chapter 72, which are the same as sections 13 and 14 of the Revised Code, chapter 71.

The defendant's counsel insists that the proper construction of the act of 1876–'77, is, that the jury shall assess the entire damages which the plaintiff has sustained by reason of the overflowing of his land, and not the annual damage as heretofore. To give it that construction, would be falling back to the common law remedy and disregarding the purpose of the legislation in retaining sections 17 and 18. We could not adopt such a construction without disregarding these sections which the legislature has seen proper to retain.

The section substituted by the act of 1876–'77, and section 17 and 18, now constitute the entire statute in regard to the recovery of damages for the overflowing of land by the erection of a mill. It is still in its amended form, as it was originally, a remedial statute, enacted for the purpose of remedying a mischief for which the common law did not provide; and it is our duty as judges so to construe the act as to suppress the mischief and advance the remedy. Dwarris Stat., 58. And in the construction of a statute, every part of it must be viewed with the whole, so as to make all its parts harmonize if practicable, and give a sensible and intelligent effect to each. It is not to be presumed that the legislature intended any part of a statute to be without meaning. *Ibid.*, 144, 145. Following this rule, we must, in interpreting that act as it now stands on the statute book, consider the act of 1876–'77 in connection with sections 17 and 18 of chapter 72 of Battle's Revisal.

The act of 1876–'77, if it stood alone, would undoubtedly bear the construction given to it by the defendant's counsel; but the sections 17 and 18 clearly contemplate the assessment of yearly damages. The section 17 so declares in so many words, for it provides, "when the final judgment shall assess the *yearly damage* of the plaintiff as high

as twenty dollars, the said judgment shall be binding for the year's damage preceding the issuing of the summons." So in section 18 it is provided, "if the final judgment shall be in favor of the plaintiff, he shall have execution against the defendant for *one year's damage* preceding the issuing of the summons, and all costs."

We hold that the proper issue was submitted by His Honor to the jury, and that there is no error. The judgment must be affirmed.

No error. Affirmed.

T. N. GODFREY v. GEORGE MABERRY and wife.

Witness—Evidence—Damages for ponding water.

1. Where a witness has expressed an admissible opinion, he may state in corroboration that he previously gave the same opinion to another, and especially where it is elicited on cross-examination.
2. In an action to recover damages for ponding water on plaintiff's land by increasing the height of a dam, it is competent to show that by direction of defendant the dam was built so as not to pond the water above the old water-marks. And to sustain the action it was also held that plaintiff must show affirmatively that the alleged increased volume of water was occasioned by the increased size of the dam.

CIVIL ACTION for damages tried at Fall Term, 1880, of YADKIN Superior Court, before *McKoy, J.*

Judgment for defendants, appeal by plaintiff.

No counsel for plaintiff.

Mr. J. M. Clement for defendant.

SMITH, C. J. The plaintiff and defendants own adjoining tracts of land on the same stream, both of which formerly belonged to James Wells, and on the lower tract is a mill that has been in use more than fifty years. In 1850, he raised the dam some two feet above its former level, and in 1867 it was washed away. The next year one E. C. Roughton, the former husband of the feme defendant, (since intermarried with the defendant Maberry) then owning the lower tract, caused the dam to be rebuilt in the same place and of the same dimensions as the old dam, as they allege, but higher and more compact as the plaintiff, the owner of the upper tract, charges in his complaint, and the same has been since kept up and maintained.

The action is to recover damages for the increased volume of water thereby ponded upon the plaintiff's land and obstructing its outflow, and the controversy is as to the alleged enlargement and greater compactness of the dam as rebuilt in 1868. Upon the trial of this issue, the finding on which against the plaintiff, dispensing with the necessity of the others in regard to the damages, much conflicting testimony was heard. And two objections made to the admission of certain evidence, and one to the charge of the court, constitute the exceptions apparent on the record submitted for revision.

1. One Joseph Sparks, introduced by the defendants, expressed an opinion that the plaintiff's land could be drained by ditching, with the dam at its present height, and on his cross-examination, being pressed by the plaintiff's counsel for his reasons for this statement, said, that he had expressed the same opinion to E. C. Roughton, under whom the defendant claimed, and to James Wells, under whom the plaintiff claimed title, both of whom were then dead. The court was requested and refused to rule out this answer of the witness.

Aside from the fact that the evidence was in response to

a question propounded by the plaintiff's counsel, and the witness was not stopped as soon as its impertinency was discovered, we think the objection is untenable, and that the evidence was relevant and proper as showing the opinion to have been deliberately formed and forcibly impressed upon the mind of the witness, and further as corroborative of his present testimony.

2. One J. H. Potts, a millwright by profession, and who in 1868, reconstructed the dam for Roughton, testified that he was shown the old water marks upon the rocks, and directed to replace the dam so as not to permit the ponding of the water above them, that he endeavored to do the work as directed, and believed he had done so. This evidence was competent to prove the former height of the pond—the water lines which were to guide and did guide the witness in putting up the new embankment, and in repelling the evidence that the dimensions of the old dam had been exceeded by the new, and that any additional water had thereby flooded and injured the plaintiff's land.

3. The court instructed the jury that as the gravamen of the complaint was the larger accumulation of water upon the plaintiff's land and the consequent damaging effect thereon, caused by the erection of a new dam of greater height and more compact than the former, it devolved upon the plaintiff to prove the alleged fact. It seems to have been conceded that no actionable injury resulted from the restoration and maintenance of the defendant's dam as constructed in 1868, unless the flooding of the plaintiff's land was increased thereby beyond the former overflow, and hence to sustain the action, it became necessary to show affimatively the increased size of the rebuilt dam, which produced this effect as a part of the plaintiff's case. The court properly ruled that this burden rested upon him.

It must therefore be declared there is no error and the judgment is affirmed.

No error. Affirmed.

J. F. HARRISON v. CHAPPELL & STORER.

Trial—Exception to Charge—Damages.

An exception by counsel to the charge of a judge not taken at its close, is not in apt time, and cannot be made after judgment upon a motion for a new trial. (The rule as to measure of damages laid down by the court below, sustained.)

(*Morgan* v. *Smith*, 77 N. C., 37, cited and approved.)

CIVIL ACTION of claim and delivery tried at Spring Term, 1880, of BEAUFORT Superior Court, before *Graves, J.*

The action was brought by the plaintiff to recover the possession of two seines, the one known as the 700 yard seine, and the other as the 1200 yard seine, which the plaintiff alleged had been unlawfully taken from him and the possession thereof unlawfully withheld by the defendant firm. The defendant claimed title and the right of possession to the same by virtue of a mortgage executed by plaintiff to defendant firm on the 27th of March, 1879, to secure a debt of eight hundred dollars due by plaintiff, and payable on the first of April, 1880. The plaintiff demanded of the agent of defendant firm the two seines on the 10th of November, 1879, and after issuing the summons on that day, the order of seizure was issued to the sheriff, by the authority of which he took the seines from the possession of defendant who failed to replevy them within the time prescribed by law, and delivered them to the plaintiff.

When the case was called for trial, the defendant's counsel submitted the following issues (to which the responses are added) which were accepted by plaintiff and approved by the court:

1. Was the plaintiff entitled to the possession of the property demanded by him, at the time of commencing this action, viz: November 10th, 1879, or any part thereof, and if any, to what part? Ans. To the 700 yard seine.

2. Is plaintiff entitled to damages by reason of defendant's taking the property, to the possession of which the plaintiff was entitled as aforesaid, and if so, how much? Ans. Five cents.

3. Did defendant sustain any damage by reason of the return of the property demanded to plaintiff under order of the court, and by the possession and use thereof by plaintiff from that time till April 10th, 1880, when it was redelivered to defendant, and if so, how much? Ans. None.

4. What was the value of the 1200 yard seine on its delivery to plaintiff in November, 1879? Ans. One thousand dollars.

5. What was its value when returned by plaintiff to defendant on the 10th of April, 1880? Ans. One thousand dollars?

The plaintiff testified in his own behalf that he was the owner of the seines in November, 1879; they were in his possession and he had brought them from Neuse river where he had fished with them during the previous spring; that he brought them in a boat to Washington, Beaufort county, and during his absence from the boat one Cohen, an agent of the defendant firm, went to the boat, seized the seines and removed and locked them up in a warehouse in Washington; that they were immediately demanded of said agent as soon as the removal of the seines was discovered, but he refused to deliver them up. The witness admitted the execution of the chattel mortgage of the 27th

of March, 1879, but stated that the 700 yard seine was not included in it, and that the only seine in use on Neuse river when he made the mortgage was the 1,200 yard seine; that in the character and make up of the two seines, they were entirely distinguishable; that the other property conveyed in the mortgage was destroyed by the storm of August, 1879, except the fishing sheds which were of small value; that sometime during the summer of 1879, the defendant firm wrote to witness that they were glad he was going to Washington to fish during the season of 1880, and hoped he would have better luck than he had at Newbern. He further testified that when the sheriff put him in possession of the seines, the 1,200 yard seine was heavily covered with tar and was wet and partly rotten; that he put men at once to work on it and repaired it, and that he put three coils of rope in it and returned it to Jesse G. Bryan, the defendant's agent, on the 10th of April, 1880, when the mortgage became due; that when he returned it, the seine was worth more than when the sheriff delivered it to him in November, 1879, and he had used only a small part of it for five or six weeks and the balance for eight or ten days; that he was experienced in such things and swears that 1,200 yard seine was worth more when he delivered it to defendant than when he received it; it was worth one thousand dollars when he got it, and was worth as much or more in April, 1880, when returned; that if the seines had remained in the warehouse as they were in November, 1879, wet and covered with tar, they would have been nearly destroyed; the seine was not cut or split by him; it was a sectional seine and could be divided in sections without damage, and was so made.

Defendant introduced the mortgage and admitted that the plaintiff was entitled to the 700 yard seine and to damages for taking it. Jesse G. Bryan was then introduced as a witness who testified that he was the agent of defendant

firm, and saw a part of the seines on a boat in Pamlico river in November, 1879, about the time they were taken into possession by said Cohen for the defendant, but did not examine them and cannot testify as to their condition at that time; when the 1,200 yard seine was delivered to him in April, 1880, about 400 yards of it looked as if it had been used as a dutch-net, and was partially rotten; but he could not say how much the seine had been damaged by its use in 1879; seines are sometimes more damaged when used as a dutch-net; he had been a fisherman for many years; the 1,200 yard seine when returned to him was worth from one hundred and fifty to two hundred dollars, but it must have cost more than two thousand dollars; that he did not see it to examine it until April, 1880, and did not know what repairs the plaintiff had put on it; the repairs might have raised the value more than the damage from its use; it was unfit for use in Pamlico river; if the seines had been wet and full of tar in 1879 and had not been attended to, they would have been ruined. He further testified that the plaintiff was a man of excellent character.

On the question of damages, the court charged the jury that the plaintiff was only entitled to nominal damages for the taking of the 700 yard seine, as he claimed no more; and as to defendant's damages, the question involved in the third issue, he told the jury they had heard the testimony of the plaintiff, Harrison, on the one side, and the witness Bryan, on the other, and after recapitulating their testimony charged the jury that they should give the defendant damages for any deterioration in value of the 1,200 yard seine from November, 1879, when taken, to April, 1880, when returned by plaintiff, and whatever the deterioration was, if any, they should so find; that this property it is admitted has been returned in specie and the question is, its depreciation, and they might add, if they saw fit, to the damage by way of interest; as to damages for detention, it

is admitted the defendant firm have no other right in the 1,200 seine than as mortgagee or trustee, and that although the defendant had the right to take possession of it in November, 1879, to secure it, he had no right to destroy it by use or otherwise, and that mortgage debt was not due until the first of April, 1880, and if the property when returned to defendant when this debt became due was worth as much as could be realized out of it in November, 1879, then defendant would not be entitled to damages for detention and being deprived of its use, other than for the deterioration thereof, as before stated. The jury responded to the issues as above set forth, and upon this finding the court adjudged that the plaintiff was the owner and entitled to the possession of the 700 yard seine, and that plaintiff recover five cents damages and costs of action; and it was further adjudged that defendant recover no damages for the detention of the 1,200 yard seine from November, 1879, to April 10th, 1880.

The defendant's counsel moved for a new trial on the ground that the findings of the jury were, first, contrary to the clear weight of testimony and, secondly, unsupported by any evidence; thirdly, that the findings denied the operation of a law of nature, and, fourthly, the court failed to properly instruct the jury as to the rule of damages. The motion was overruled, judgment, appeal by defendant.

Mr. G. H. Brown, Jr., for plaintiff.
Mr. W. B. Rodman, for defendant.

ASHE, J. We find nothing in the several grounds relied upon to sustain the motion for a new trial, which would warrant this court in reversing the judgment and granting a *venire de novo*.

As to the first ground: It has been so repeatedly decided that the superior court only can grant a new trial on the

ground that the verdict of the jury is against the weight of evidence that it is unnecessary to cite any authority.

The second ground is equally untenable, and in answer to it, it is only necessary to refer to the statement of the case and the evidence therein set forth.

As to the third ground that the jury denied the operation of the law of nature: We do not understand what is meant, unless it is that the seine was necessarily damaged by the ravages of use and time. If that is what is meant, there is nothing in the case to show that the jury did not give due consideration to the law, in connection with the proof adduced as to the condition and value of the seine, for their finding is to the effect that the operation of this law of nature was so counteracted by needful repairs of the seine, as to leave it in as good condition and as valuable when returned to defendant in April, 1880, as when received by plaintiff in November, 1879.

And lastly, as to the failure of the court to give proper instructions as to the measure of damages: His Honor at the conclusion of his charge to the jury expressly called upon counsel on both sides to say if they had any instructions to request, and they both declared that they had none. If any objection was to be taken to the charge of the court, then was the proper time to do so; and the failure to do it then, was an assent to the charge and could not be taken after judgment upon a motion for a new trial. In the case of *Morgan* v. *Smith*, 77 N. C., 37, it is held: "It was the duty of the plaintiff, if he desired fuller or more specific instructions, to have asked for them. If a contrary rule should prevail and a party could get a new trial whenever upon a critical subsequent examination of a judge's charge he could detect some point omitted or not fully treated, charges must be unnecessarily long, and even then few verdicts would stand." But even if the exception to the charge in this case had been made in proper time, we are unable

to discover wherein it was erroneous. The instructions given by the judge to the jury in regard to the measure of damages is substantially sustained in Sedgwick, 499.

There is no error. The judgment of the superior court must be affirmed.

No error. Affirmed.

GEORGE ACHENBACH v. THOMAS P. JOHNSTON.

Field—Burning Woods—Penalty.

A field grown up in broom-sedge and wire-grass, surrounded by an old fence and used as a pasture, is not "woods" within the meaning of the statute, Bat. Rev. ch. 13, § 1; and the owner burning off the same is not liable to the penalty imposed by the act for an alleged injury to an adjoining proprietor.

(*Hall* v. *Crawford*, 5 Jones, 3, cited, distinguished and approved.)

CIVIL ACTION tried at August Special Term, 1880, of ROWAN Superior Court, before *McKoy, J.*

The action was brought to recover damages for an injury alleged to have been caused by the defendant in burning off the broom sedge on his land when there was a strong wind blowing towards the land of plaintiff, which by the alleged negligence of defendant caused the fire to be communicated to plaintiff's fence, destroying a part of the same. The defendant denied the allegation of negligence, and among other things averred that he and five other persons used every effort to prevent the fire from spreading so as to injure the plaintiff.

The evidence tended to show that the defendant's land (burned off) consisted of a field grown up in broom sedge and wire grass, surronnded by an old fence and used as

pasture land. There was no evidence that defendant notified plaintiff of his intention to burn off the field, but there was evidence showing that after the fire reached plaintiff's land, the defendant used great diligence in trying to prevent its spreading and injuring plaintiff's fences.

The plaintiff's counsel asked the court to charge the jury that the policy of the law (Bat. Rev. ch. 13) forbids any one from setting fire to his woods unless two day's written notice is first given to all persons owning adjoining land, which the court gave, but added that there was no evidence that the defendant had set fire to his woods, to which the plaintiff excepted. The jury found the issues in favor of defendant, judgment, appeal by plaintiff.

Mr. J. M. McCorkle, for plaintiff.
No counsel for defendant.

RUFFIN, J. The question presented in this case is, whether "a field grown up in broom sedge and wire grass, surrounded by an old fence and used as a pasture," can be construed to be "woods" within the meaning of the statute. Bat. Rev. ch. 13, § 1. His Honor below held that it could not, and we concur in his opinion.

The case of *Hall* v. *Crawford*, 5 Jones, 3, in which it was held that "an old field which had been turned out *without any fence around it and which had grown up in broom sedge and pine bushes, some of which were waist-high and others head-high,*" did come within its meaning, stretched the doctrine of being liberal in construing statutes in order to reach the mischief intended to be remedied, as far as it is safe to follow. We therefore hold that in the ruling of the superior court there was no error.

No error. Affirmed.

JOHN LONDON, Guardian, &c., v. SOL. BEAR.

Trespasser, what constitutes—Constructive Possession sufficient to maintain action against.

1. Where one supposing himself an executor entered upon the lands of the ancestor claiming to hold for the benefit of the estate, and rented them out receiving the rents therefor; *Held*, that such holding is not adverse to the legal title, nor is it equivalent to an abatement or disseizin, and therefore the heirs or devisees have a constructive possession sufficient to maintain an action in the nature of trespass *q. c. f.*

2. *Held also*, That the action may be maintained not only against the lessee of the acting executor, but also against the lessees of such lessee who are equally trespassers with him.

3. *Held further*, That the mere acceptance of rent by the defendant from his lessees for the premises without an actual entry on his part upon the same, or his putting them in possession thereof, is sufficient to make him a trespasser.

(*Tyson* v. *Harrington*, 6 Ired. Eq., 329; *Kennedy* v. *Wheatley*, 2 Hay., 402; *Dobbs* v. *Gullige*, 4 Dev. & Bat., 68; *McCormick* v. *Monroe*, 1 Jones, 13; *Smith* v. *Ingram*, 7 Ired., 175; *Patterson* v. *Bodenhammer*, 11 Ired, 4; *Horton* v. *Hensley*, 1 Ired., 163; *Brittain* v. *McKay*, *Ib.*, 265; *Lawson* v. *Smith*, 4 Dev., 232, cited and approved.)

CIVIL ACTION brought by the plaintiffs against the defendant to recover damages for an alleged unlawful entry upon and occupation of certain real estate in the city of Wilmington, tried at Fall Term, 1880, of NEW HANOVER Superior Court, before *Gudger, J.*

Eli W. Hall, the owner of the lots on which the alleged trespasses were committed, died in 1865, leaving a will, and in an insufficiently executed codicil attached thereto appointed Edward D. Hall, executor, who was permitted to qualify as such. Assuming to act as executor, he took possession of the lots and rented them out for several years preceding October 1st, 1872, and this action is prosecuted to recover damages for trespasses committed on them from

that date until the entry of plaintiffs two years thereafter. It is not shown whether any authority is conferred by the testator upon his executor in the premises, nor whether the plaintiffs derive their title as devisees under the will of their father, Eli W. Hall, or as his heirs at law, but as their title is not disputed, it is not material to enquire how it becomes vested.

It was in evidence that one Finlayson occupied part of the premises under a contract with Hall who by an instrument in writing on May 27th, 1872, assigned the rent to be paid by Finlayson to the defendant partly in payment for goods bought from him, and with a reservation of the excess of rent to Hall.

A witness, Godfrey Hart, testified that he rented part of the premises from the defendant for the year following October 1st, 1872, and paid him therefor, but was not put in possession by the defendant, and that he sub-let the store thereon for the same period to one Charles Wessell who entered and occupied during the term, and for which, according to Wessell's testimony, he paid $450 to Hart.

It was also in evidence that the witness leased the same store from defendant for the succeeding year, ending October 1st, 1874, and continued in the use and occupation for that term, paying a monthly rent of about twenty-nine dollars, and an additional sum of one hundred dollars to the defendant.

It was further shown that defendant leased another store for one year beginning October 1st, 1873, to one Hines who was already in possession and continued his occupation through the term and paid the rent to the defendant.

The written assignment made by Hall on the 27th of May, 1872, transfers to defendant "the entire rent of the store on North Water street now occupied by M. U. Finlayson (being No. 42 Hall Row) from October 1st, 1872, to

October 1st, 1873." Two other instruments in writing and under seal were exhibited in evidence; the one, executed by defendant on the 7th of August, 1873, in which he assigns to Hines "all the right and interest which he has in the store known as No. 44 * * * under and by virtue of a certain paper writing executed to him by E. D. Hall, executor of Eli W. Hall, on the 13th of January, 1873," with a clause releasing the assignor from liability for loss or damage for injury or destruction by fire on and after January 1st, 1874; the other, executed by defendant and Wessell on the 15th of August, 1873, in which for the consideration of $350 the former assigns to the latter all the right and interest which he has in the storehouse known as No. 41, under and by virtue of a certain paper writing under seal which was made by E. D. Hall, executor of Eli W. Hall, to the defendant on the 27th of January, 1873.

Upon this evidence the defendant's counsel contended that plaintiff could not recover in this action:

1. For that the plaintiff was not at the time of the alleged trespasses in actual or constructive possession of the land, such possession being then in Hall and those claiming under him; and

2. For that the defendant did not participate in the trespasses nor authorize or sanction them so as to become legally liable therefor.

The court was asked to give these instructions to the jury, which the court refused, and charged that an adverse possession is a claim of right against the world, and that Hall in renting out the lots as executor did not undertake to set up a possession adverse to the right of the plaintiffs, and his possession was theirs; and that if the defendant himself or others under his authority or by his conduct occupied the premises and he received the rents and profits thereof, he would be liable to the plaintiffs. To the charge thus given, the defendant excepts, and, (the exception to

the instruction as to damages being abandoned) its correctness is the only subject of consideration by this court, upon the defendant's appeal from the judgment below.

Mr. E. S. Martin, for plaintiffs: Plaintiffs have shown legal title, and no adverse possession being shown, this gives them a constructive possession sufficient to maintain action. C. C. P., § 25; *Dobbs* v. *Gullige*, 4 D. & B., 68; *Smith* v. *Ingram*, 7 Ired., 175. What is disseizin in this state? *Tyson* v. *Harrington*, 6, Ired., 333. Adverse possession. *Parker* v. *Banks*, 79 N. C., 485. After re-entry, disseizee may maintain action against disseizor and all who entered under him. *Green* v. *Biddle*, 8 Wheat., 75; 1 Waterman Trespass, § 931; *Smith* v. *Ingram*, *supra*; *Graham* v. *Houston*, 4 Dev., 232. And the reception of rent alone without an actual entry is sufficient to constitute a trespass. 11 Wheat, 280; *Horton* v. *Hensley*, 1 Ired., 165.

Messrs. McRae & Strange, for defendant: Complaint being for independent action of trespass on first of October, 1872, and unconnected with original dispossession by Hall in 1866, action of trespass *q. c. f.* would not lie under the old system, nor will this action, as the principles of law are not changed, but only the forms of action are abolished. 65 N. C., 209; 80 N. C., 191. The act of Hall if adverse was an abatement which is recognized here as distinguished from disseizin. *Freeman* v. *Perry*, 3 Dev. Eq., 247; 1 Dev. Eq., 158. Heir or devisee cannot after entry maintain action *q. c. f.* against abator or one who enters under him. 7 Com. Dig; 2 Roll. Abr., 553. And constructive possession does not change this rule (though it might enable plaintiffs to sue for the act of dispossession) and their action is for a trespass alleged when they had neither actual nor constructive possession. The *post liminium* relates only to actual possession and disseizin. *Tobey* v. *Webster*, 3 John., 468. The law will not put a

fiction on a fiction to make a possession. Act of Hall a dispossession under rule in *Tyson* v. *Harrington;* whether a disseizin, abatement or dispossession, plaintiffs cannot sue for distinct trespass occurring in 1872, but only for a continuing one from original act of dispossession. *Smith* v. *Ingram* and *Patterson* v. *Bodenhammer*, discussed. Doctrine of relation is never applied to affect an innocent party injuriously, even where he comes in by right or title under disseizor. *Leford's case*, 11 Coke Rep., 51. See also 14 E. C. L. Rep., 61.

SMITH, C. J., after stating the case. The defendant's counsel has discussed the nature and effect of a disseizin under the ancient law upon the title of the owner, and wherein it differs from an abatement in which the descent or devise from an ancestor is intercepted by a hostile entry upon the heir or devisee, to which this case is assimilated. And he maintains that as there was no actual or constructive possession in the plaintiffs at the time of the alleged invasion by the defendant, their entry in October, 1874, could not by relation to a period antecedent to the original trespass render the defendant liable for an intermediate occupancy. We concur with him that this action is for an injury to the possession, and that the principles which govern it are unchanged by the new system which condenses into one the different forms which were before in use. But the argument proceeds upon a misconception in ascribing to a dispossession of the owner the same legal effects that flow from an act of disseizin or abatement. Even in the latter case, the re-entry of the disseizee remits him to his first possession as if he had never been out of possession, and then *all who occupied in the meantime by what title soever they come in*, shall answer unto him, * * * for otherwise it would be mischievous unto him, for after his re-entry he shall have no remedy for the mesne profits. *Holcomb* v. *Rawlins*, Cro. Eliz., 540. But disseizin, in the sense of taking the seizin or estate

from one man and placing it in another (Pres. Abs., 284,) is not the necessary result of dispossession, and the estate of the owner is divested when that possession is adverse and is continued for a series of years unbroken under the requirements of the statute or until it raises a presumption of a conveyance. The distinction between them is so clearly traced and pointed out by the late Chief Justice in an able review of the subject in *Tyson* v. *Harrington*, 6 Ired. Eq., 329, that we prefer to reproduce what is said in the opinion in that case: "Disseizin is an ouster of the freehold, and is where one enters and turns out the tenant and usurps his place and feodal relation, which can only be done by the concurrence and consent of the feodal lord. The latter circumstance distinguishes a disseizin from a dispossession." Then after quoting the words of LORD MANSFIELD to the effect that a tenant could not against his will be disseized by the mere act of a wrong-doer as long as he had the right of entry, but if he saw proper, he might elect to consider himself disseized for the sake of the remedy against disseizors, the Chief Justice announces this conclusion: "A freeholder cannot now be disseized of his seizin but by a dispossession aided by the act of the law which takes away his right of entry, * * *. Hence a descent cast can now have no effect. If the descent before the right of entry is lost, the entry is not tolled; if after, then it has no effect; for the right of entry must have been already taken away to constitute a disseizin. In this state, after a possession of seven years under color of title, the law recognizes and concurs in the right of the wrong-doer, and the right of entry on the part of the former owner is taken away. *There is then a disseizin and not before.* If a descent is cast before the seven years expire, the entry is not tolled, for there is no disseizin; if after, it can have no effect, for the estate was gone before." This is said of course when the persons from whom the land is adversely withheld are not

under legal disabilities, and as to such as are, a longer period is required.

The doctrine is well established in this state, that in the absence of possession in another, he who has the legal estate is in construction of law in possession and may maintain an action of trespass for an unauthorized entry upon the land. *Kennedy* v. *Wheatley*, 2 Hay., 402; *Dobbs* v. *Gullige*, 4 Dev. & Bat., 68.

"In ejectment," remarks NASH, C. J., "the lessor of the plaintiff must show a legal title to the premises in dispute. In trespass, the plaintiff not in actual possession must do the same. * * * If he has shown a legal title to the land in dispute, that title draws to it the possession, there being no adverse possession." *McCormick* v. *Monroe*, 1 Jones, 13.

"In England," says RUFFIN, C. J., "an actual re-entry upon the *locus in quo* is necessary, because possession by an actual occupation of the very part is requisite to maintain trespass. But here even a constructive possession suffices." *Lawson* v. *Smith*, 4 Dev., 232.

While the action of the ousted owner only lies for the original unlawful entry until he regains his possession, "then the law," says DANIEL, J., "by relation would adjudge him to be in possession from the first ouster, and enable him to recover damages for all the time the defendant had wrongfully withheld the land and kept him out of possession. *Smith* v. *Ingram* 7 Ired., 175.

It would seem to follow unavoidably that the plaintiffs' entry in October, 1874, restored and made continuous that possession which accompanied the transmission of the title from their father, whether by descent or devise, and remained until broken, if it were broken, by the action of the executor and his assumption of control over the property in his capacity as such, and redress could be obtained for any and every injury by whomsoever committed during the

intermediate period. If this were not so, depredations without number and without stint would be without remedy to the owners. In the plain but forcible language of the court in the case cited from Croke's Reports: "It is not to be doubted but that the disseizee after his *re-entry shall punish the second disseizor and the servant of the first disseizor who occupied under the master.*"

The argument that there must have been a possession in the plaintiffs when the first invasion was made by the defendant and the first trespass done, in order to the operation of the rule that extends the entry back to connect with it, rests somewhat upon an expression used by NASH, J., delivering the opinion in *Patterson* v. *Bodenhammer*, 11 Ired., 4, and quoted in the brief. A reference to the facts of the case and the general course of reasoning however show that it is no authority for his proposition. The plaintiff showed no title and undertook to maintain his action upon the possession alone and only proved that he put "some empty barrels and boxes in a house on the land and nailed plank over the spaces left in the walls for a window and a fireplace. A year after Bodenhammer pulled off these boards, threw out the plaintiff's goods and leased to another defendant for one year, and he put some wagon timber in the house." In this condition the premises remained for nearly two years when the defendant removed the house, and this removal constituted the trespass for which suit was brought. The court used this language: "If they (the plaintiff's acts) were sufficient to give Patterson *the actual possession*, similar acts on the part of the defendant were sufficient to divest him of it and place the actual possession in the defendant. The acts were of the same character and must carry with them the same effects. Two years after Bodenhammer had dispossessed the plaintiff, and while his possession, so acquired, continued, the house was removed. *To enable the plaintiff to maintain an action for the removing of the*

house he ought to have re-entered before the house was removed and thereby revert the possession in himself."

It is manifest that no reference is made to the operation of the *post-liminium* rule, in extending back to a former, a possession restored by the owner's re-entry, and covering all the intermediate interval, so that redress may be had for all the damages meanwhile done to the land.

The plaintiff's right of recovery then existed outside of the question whether the occupation and control of the premises by the acting executor was hostile or permissive or in subservience to the rights and interests of the infant owners, since their possession reaches back to a period antedating such assumed authority, and whether the ruling of His Honor in regard to the character of the possession by Hall be erroneous or not, it does not affect the plaintiff's action. And while we do not propose to pass upon the ruling, we are not prepared to dissent from it.

We think it equally plain that the transfer of the defendant's interest in the case and his acceptance of full rent therefore, are an assent and sanction to the trespass committed under its authority, for which he is equally liable with his assignee. As is observed by GASTON, J., in *Horton* v. *Hensley*, 1 Ired., 163, "in trespass, all persons, aiders and abettors, nay those who are not even privy to the commission of a trespass for their use and benefit, but who afterwards assent to it, in the judgment of the law, are principals." One is liable who procures the act to be done by inciting others. 2 Greenl. Ev. § 621. See *Britian* v. *McKay*, 1 Ired., 265.

The defendant's conduct is a legal participation in the illegal occupancy by the others acting under him.

There is no error and the judgment must be affirmed.

No error. Affirmed.

ELIZA BOYCE v. ROBERT WILLIAMS.

Trover and Trespass—Evidence of title in.

Where the plaintiff brings an action for the conversion of personal property to defendant's own use, it is a full defence to show that the same belongs to a third party, although no privity be shown to exist between the owner and the defendant. Distinction between trover and trespass discussed by SMITH, C. J.

(*Laspeyre* v. *McFarland*, N. C. Term Rep., 187; *Barwick* v. *Barwick*, 11 Ired., 80, cited and approved.)

CIVIL ACTION tried at August Special Term, 1880, of DUPLIN Superior Court, before *Schenck, J.*

This action begun before a justice of the peace and removed by appeal to the superior court is to recover the value of certain cattle, *taken by the defendant from the plaintiff's possession* and converted to his own use. The defendant claimed a right to take the cattle under a mortgage of them by one Haywood Pearsall to Harper Williams, the defendant's father, and he testified that the mortgage deed was made at his house and witnessed by himself, his father not being present, and he caused it to be registered; that the deed was never delivered to or seen by Harper Williams, and was taken by the witness under a general authority of said Harper to him to take such mortgages in his name, and that he took possession of the cattle claiming them as his own.

The court charged the jury:

1. That the deed was inoperative to pass the title to the property for want of delivery to Harper Williams; and

2. That if the deed was effectual, the defendant having no authority from the mortgagee to take the cattle and showing no right in himself, was liable to the plaintiff.

Defendant excepted. Verdict and judgment for plaintiff, appeal by defendant.

Mr. H. R. Kornegay, for plaintiff.
No counsel for defendant.

SMITH, C. J., after stating the case. Such we understand to be the instruction under which a verdict was rendered in favor of the plaintiff for the value of the cattle and to which exception is taken.

The action is for property taken and converted to the defendant's use, and not for damages for an invasion of the plaintiff's possessory right, and under the former practice would in form be trover instead of trespass.

The action of trespass is for an injury to the possession, and compensation in damages is recovered against a wrongdoer, commensurate with the injury sustained. In either form of action, possession of personal goods being presumptive evidence of title, when not rebutted, entitles the plaintiff to recover in damages their full value. But when the action is for the conversion, or appropriation of the goods to the defendant's own use, it is a full defence to show that the goods belong to another person, and the plaintiff has no interest in them, although no privity be shown to exist between such owner and the defendant. This doctrine is settled by two adjudications in this state, to which alone we deem it necessary to refer.

In *Laspeyre* v. *McFarland,* N. C. Term Rep., 187, the action was in trover for a slave in possession of the plaintiff. The defendant showed no title in himself, but offered in evidence a marriage settlement entered into between the plaintiff and his wife and one Davis whereby the slave was conveyed to the latter, as trustee to permit the wife to have the labor and profits of the slave and to allow the slave to be under the plaintiff's control. In the superior court upon

these facts appearing the plaintiff was nonsuited. In this court, on the hearing of the appeal, RUFFIN, J., thus declares the law, in sustaining the judgment below: "It is one of the characteristic distinctions between this action and trespass that the latter may be maintained on possession; the former only on property and the right of possession. Trover is to personals what ejectment is to the realty. In both, title is indispensable. It is true that as possession is the strongest evidence of the ownership, property may be presumed from possession. And therefore the plaintiff may not in all cases be bound to show a good title by conveyances against all the world, but may recover in trover upon such presumption against a wrong-doer. Yet it is but a presumption and cannot stand when the contrary is shown. Here it is completely rebutted by the deed which shows the title to be in another and not in the plaintiff."

The same point came up in *Barwick* v. *Barwick*, 11 Ired., 80, and was similarly decided. PEARSON, J., after presenting the same views as to the law, proceeds: "But if it appears on the trial that the plaintiff, although in possession, is not in fact the owner, the presumption of title inferred from the possession is rebutted, and it would be manifestly wrong to allow the plaintiff to recover the value of the property. For the real owner may forthwith bring trover against the defendant and force him to pay the value a second time, and the fact that he had paid it in a former suit would be no defence." He adds, "that trover can never be maintained unless a satisfaction of the judgment will have the effect of vesting a good title in the defendant, except when the property is restored and the conversion was temporary. Accordingly *it is well settled as the law of this state that to maintain trover the plaintiff must show title and a possession, or a present right of possession.*"

As the erroneous rulings on this point must result in awarding a new trial, we pretermit the expression of any

opinion upon the correctness of the instruction that there was no delivery of the deed, and do not wish to be understood as giving it our approval.

The judgment must be reversed and a new trial granted.

Let this be certified.

Error. *Venire de novo.*

N. C. McCORMAC and others v. C. W. WIGGINS and others.

Husband and Wife—Pleading—Parties.

A husband defendant demurred to a complaint on the ground that his wife, who had a common interest with plaintiffs as one of the next of kin of an intestate, was made a defendant without an allegation in the complaint that she had refused to join as plaintiff; *Held*, that the overruling of the demurrer in this case was not erroneous. Sections 56 and 62 of the code, commented on by ASHE, J.

(*Shuler* v. *Millsaps*, 71 N. C., 297, cited and approved.)

SPECIAL PROCEEDING commenced in the probate court and heard on appeal at December Special Term, 1880, of ROBESON Superior Court, before *Avery, J.*

This was a petition by the next of kin of Neill C. McCormac against the defendant C. W. Wiggins, as administrator of said Neill C. McCormac, deceased, for an account and settlement, and heard upon demurrer.

All the distributees of the estate of said deceased were made parties plaintiff, except E. C. Wiggins, (who was one of them and the wife of C. W. Wiggins,) who was made a party defendant.

The defendant C. W. Wiggins demurred to the complaint on the ground that his wife, E. C. Wiggins, who was one of the next of kin of his intestate, and therefore had an inter-

est in common with the plaintiffs, was made a defendant, without its being stated in the complaint that she had refused to join as a plaintiff. The court below held, that as it appeared from the pleadings, that the defendant E. C. Wiggins was the wife of the defendant C. W. Wiggins, that was a statement of a sufficient reason for making her a party defendant, and that it was not necessary under the provisions of section 62 of the code to set forth in the complaint that the said E. C. Wiggins would not consent to be made a party plaintiff. The demurrer was overruled, and the plaintiffs appealed.

Messrs. Rowland & McLean, for plaintiffs.
Messrs. W. F. French and *Walter Clark*, for defendants.

ASHE, J. While we do not entirely agree with the reasoning of His Honor, we concur with him in his conclusion, and hold that the demurrer was properly overruled.

The distributive share of E. C. Wiggins in the hands of her husband, C. W. Wiggins, as administrator of her father, Neill C. McCormac, by virtue of article ten, section six, of the constitution of 1868, is her sole and separate estate, and under section 56 of the Code of Civil Procedure, where the action concerns her separate property, she may sue alone; so she may sue and be sued, alone, when the action is between herself and her husband; and she may sue her husband, or be sued by him, alone. *Shuler* v. *Millsap*, 71 N. C., 297. As this, then, is an action which concerns her separate estate, and by section 62 of the code, all persons should be joined as plaintiffs who are united in interests, unless the consent of any one who should be joined as plaintiff, cannot be obtained, such person may be made defendant, the reason thereof being stated in the complaint. According then to this rule of practice, E. C. Wiggins ought to have been made a party plaintiff, and should not have been

made a defendant without her refusal to be made a plaintiff, and that fact stated in the complaint.

In the complaint, as originally filed, she was omitted to be made a party, and the defendant C. W. Wiggins, in his answer objected to the complaint, for the want of parties. The plaintiffs then obtained leave of the court to amend the complaint and make her a party defendant to the suit. A summons was regularly issued and served upon her as a defendant, and when she was thus brought into court, if she had been willing to take sides with the plaintiffs against her husband she could have applied to the court to be permitted to become a plaintiff in the proceeding, and the court no doubt would have promptly ordered a change in her position on the record, for the court has the power and will always exercise it so to adjust the relation of parties as to meet the ends of justice.

From the fact that no such application was made, and from the known general disinclination of married women to be placed in antagonism to their husbands, it is to be presumed that she was unwilling to become a plaintiff against her husband, and under the circumstances of the case, we do not think the fact needed to have been stated in the complaint.

There is no error; the demurrer must be overruled. Let this be certified to the superior court of Robeson county, that further proceedings may be had in conformity to this opinion and the law.

No error. Affirmed.

J. F. O'KELLY v. REUBEN WILLIAMS.

Dower—Laws, when a part of Contract.

1. Where a marriage took place in 1866 (prior to the act of 1866-'67, restoring to married women their common right of dower,) and the husband acquired land in November, 1867, subsequently to the date of said act, (and prior to the act of 1869) and conveyed the same by deed to which the wife was not a party; *Held*, that notwithstanding the deed, the wife of the grantor is entitled to such dower in the land as was secured to married women by the act of 1867, the right to the same having vested by the operation of that act, and not affected by the subsequent repealing act of 1869.

2. The rule that laws existing at the time and place of making a contract, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms, is equally applicable to the acquisition of real property whether it comes by descent or purchase.

(*Sutton* v. *Askew*, 66 N. C., 172; *Felton* v. *Elliott*, *Ib.*, 195; *Hughes* v. *Merritt*, 67 N. C., 386; *Williams* v. *Monroe*, *Ib.*, 164; *Bruce* v. *Strickland*, 81 N. C., 267, cited and approved.)

CIVIL ACTION to recover land tried at Fall Term, 1880, of CHATHAM Superior Court, before *Eure, J.*

A jury trial was waived, and the cause was submitted upon a case agreed, which is as follows, to-wit:

1. The defendant acquired the fee simple title to the lands described in the plaintiff's complaint, on the first day of November, 1867, and that on the 6th of October, 1876, defendant, by deed, mortgaged said land to Duncan F. Parish, to secure a debt of one hundred and thirty dollars, contracted on the 30th day of October, 1875, and that defendant's entire real estate does not exceed one thousand dollars.

2. That defendant failed to pay the debt at or before the day stipulated in the mortgage deed, to-wit, the 1st day of January, 1877, and that said Parish, in pursuance of the power contained in the mortgage, sold said land to plaintiff.

3. That at the time of the execution of the deed, defendant had living a wife and several children, and that defendant's wife and children are still living.

4. That said defendant's wife did not execute said mortgage deed.

5. That defendant is in possession of said land.

6. That defendant was married to his wife in 1866.

7. That the annual value of said land is ten dollars.

And if, upon the foregoing case agreed, the court should be of opinion with plaintiff, judgment shall be entered in his favor for title to said land, subject to the defendant's wife's right of dower, if she shall be entitled to dower, and for $—— damages, and for his costs of action; otherwise, judgment shall be entered for defendant, and for his costs of action.

His Honor rendered judgment as follows: "That the said plaintiff is the owner of the lands described in the complaint, in fee simple, without encumbrance, and is entitled to the immediate possession of the same. And that the plaintiff recover of the defendant and C. L. Williams, the surety upon his bond, the sum of fifty dollars for damages for the detention of said land and for the costs of the action, to be taxed by the clerk.

From this judgment the defendant appealed.

Mr. John M. Moring, for plaintiff.
Mr. George H. Snow, for defendant.

ASHE, J. The only question raised by the appeal from the judgment upon the case agreed, is whether the wife of the defendant is entitled to dower.

The wife is not a party to this action, but the defendant husband sets up a claim for her dower under the act of 1867, the first section of which gave to her the one-third of all the lands, &c., of which he was seized or possessed at any

time during the coverture, and the second section prohibited the husband from alienating more than two-thirds of the same, unless she joined with him in the conveyance, and was privately examined touching her free and voluntary consent to the same; but this act was expressly repealed by the act of 27th of March, 1869, which, to be sure, left the widow's right of dower the same as secured by the act of 1867, only postponing the time of enjoyment until after the husband's death, but was amended by the act of 28th March, 1870, which gave the wife, upon the *death of the husband*, one-third of all the lands, &c., of which her husband was seized or possessed at any time during the coverture.

It has been repeatedly decided by this court, that when the husband was married, and acquired the land in dispute, before the 27th day of March, 1869, the day of the ratification of the act of 1868–'69, the husband had the absolute right of alienation, and a claim for dower, by his wife, could not be sustained. *Sutton* v. *Askew*, 66 N. C., 172; *Felton* v. *Elliott*, *Ib.*, 195; *Hughes* v. *Merritt*, 67 N. C. 386; *Williams* v. *Munroe*, *Ib.*, 164; *Bruce* v. *Strickland*, 81 N. C., 267. The facts in most of the cases are very imperfectly stated. In *Sutton* v. *Askew*, it is stated that the marriage took place in the year 1867, and it is left to inference that the husband then owned the land. In *Felton* v. *Elliott*, the date of the marriage and acquisition of the land are not given. There is no statement of the dates of these events in the case of *Hughes* v. *Merritt*. In *Williams* v. *Munroe*, the title to the land, and the marriage, are stated to have occurred in 1859. And in *Bruce* v. *Strickland*, it is stated that the marriage took place in 1847, and the land was acquired before March, 1867. All of these cases were decided upon the ground that the marriage and the acquisition of the land were had prior to the act of 1868–'69, and these facts were either proved or assumed. But in neither of the cases does it appear that either the marriage or the acquisition of the land occurred

after the act of 1867, and prior to the act of 1868–'69. But in our case, the marriage was contracted in the year 1866, and the land obtained in November, 1867, so that it differs in its facts from all the cases cited, and in applying the principles enunciated in them to the facts of this case, we are led to a different result from that reached in any of the said cases.

In the absence of any information to be derived from the records in these cases, we must take it for granted that the marriage and acquisition of the land did not occur between the ratification of the act of 1867 and that of 1869, for all of the decisions are made upon the ground that the act of 1867 was repealed by the act of 1869, and the husband had a vested right in his land, and an absolute right of alienation unaffected by the latter act. *Sutton* v. *Askew*, and the other cases cited, *supra*.

By the marriage in 1866, the wife of the defendant acquired only a right of dower in such lands as her husband might die seized and possessed of, depending upon the contingency of her surviving him. But when the act of 1867, restoring to married women their common law right of dower was passed, she acquired a vested right in all the land her husband might be seized and possessed of during coverture. The first section of the act provided "that every married woman shall be entitled to one-third of the lands, tenements and hereditaments of which her husband is or may be seized and possessed at any time during coverture, &c." The second restricted the husband's alienation to two-thirds of the land, unless, with the consent and privy examination of the wife. The third section provided that no creditor should levy upon the land without first having set apart to the wife the one-third thereof, by metes and bounds, under the proceeding prescribed in said act. And it was further provided in said act, that "when the proceedings shall have been reported to the court by the said jury, and

the court shall have confirmed the same, the title to the land so allotted and set apart to the wife, shall be deemed to have *vested* in her by virtue of her marriage."

As to the land acquired by the defendant in November, 1867, the wife's right of dower, though inchoate till then, attached to the land as soon as acquired, and then at once, by the operation of the act, became "vested," and was not affected by the repealing act of 1869, for a "vested right" cannot be destroyed by a subsequent repealing statute. Sedgwick on Stat., &c., 177; Cooley's Const. Lim., 443, and *Sutton* v. *Askew, supra.* In the latter case Mr. Justice READE says: "We by no means subscribe to the doctrine that a right vested by operation of law is less inviolable than when it arises from contract; where it once exists, no matter how, it is inviolable."

When the defendant acquired the land in 1867, he took it subject to the laws existing at the time, for laws which subsist at the time and place of making a contract enter into and form part of it, as if they were expressly referred to or incorporated in its terms. *Van Huffman* v. *Quincy*, 4 Wallace, 552. The same principle applies to the acquisition of real property, whether it comes by purchase or inheritance. If a deed for land, for instance, was made to a man and the heirs of his body in fee-tail, he would take an estate in fee simple; so if the land should be conveyed to two men and their heirs to hold as joint tenants, they would take as tenants in common. The defendant then when he acquired the land in dispute, had full legal notice that he was taking it with the encumbrance of the wife's right of dower, and there was no hardship upon him.

We hold that the wife of the defendant is entitled to such dower in the land in controversy as was secured to married women by the act of 1867, and judgment must be rendered in conformity to this opinion, according to the "case agreed."

Error. Reversed.

WILLIAM M. TANKARD v. SALLIE A. TANKARD and others.

Purchase—Trust—Equitable Right—Notice presumed, when.

1. A purchaser at the sale of a debtor's land under a deed of trust, at the instance and for the benefit of the debtor and under an agreement to let him have the land back on re-paying the price, is liable to be declared a trustee for the debtor.
2. The equity of the debtor to have title on re-payment of the money extends not only to the purchaser and his heirs at law, but also to his vendee taking with notice, actual or constructive. And the possession of the debtor at the time of the sale by the purchaser to his vendee is by construction of the law, a notice to the vendee of the equitable right of the party in possession; and the notice is of such legal effect, as not to be controverted or rebutted by evidence on issue to the jury, and concludes the vendee.
3. Where such notice is apparent on the pleadings, the finding of the jury that the vendee bought *without* notice is of no legal significance, and is not in the way of rendering such decree as the other facts found and admitted, authorized.

(*Mulholland* v. *York*, 82 N. C., 510; *Edwards* v. *Thompson*, 71 N. C., 177, cited and approved.)

PETITION to rehear filed on the 5th of August, 1879, and heard at January Term, 1881, of THE SUPREME COURT.

This is a petition to rehear the decision of this court at June term, 1879, reported in 79 N. C., 54, in an action to recover the possession of land. The claim of title by the parties respectively, the issues submitted to the jury and findings thereon, and the judgment of the court from which the appeal was taken, are substantially as follows:

Both sides claim under Ransom Tankard. The plaintiff claims under Oliver H. P. Tankard, and he by deed from one Cutler as trustee to whom Ransom conveyed as security for a debt.

The defendants set up in their answer an equity to have plaintiff affected with a trust by decree of court in their

favor, upon the allegation that at the sale under the deed of trust in 1849, Oliver Tankard bought the tract of land, worth $800, at $176 on the representation of purchasing for Ransom and his family, and under an agreement with him to let him have the land back on payment of the price and interest thereon. They further allege that Ransom paid to Oliver the sum at which he bought at trustee's sale, and lived on the land from the sale in 1849 to his death in 1872, and that his widow and heirs at law have ever since lived and now live on the same land; that when the deed was made by Oliver to plaintiff in 1869, Ransom was living on the land, and the deed was executed on voluntary consideration, or, if on valuable consideration, then with notice of Ransom's equity.

The plaintiff in his reply denies the purchase by Oliver on the alleged agreement to let Ransom redeem the same, and also, the alleged return of the money by Ransom in his lifetime; but he admits that Ransom lived on the premises at the time of the trustee's sale and thereafter to his death, and the possession of defendants since then to the present time. The plaintiff further admits the possession by Ransom in 1869 when he bought, and avers that he bought for value and without notice of any equity existing in favor of Ransom.

Upon the matters of fact controverted in the pleadings, issues were submitted to the jury and responded to as follows:

1. Did O. P. H. Tankard purchase the land in dispute at the sale in June, 1849, by virtue of an agreement with Ransom Tankard, that said Oliver should purchase it for Ransom? Ans. Yes.

2. Has Oliver been heretofore paid the purchase money and charges against the land as alleged in the answer, or any part thereof, and if so, how much? Ans. No.

3. Is plaintiff a *bona fide* purchaser for value without no-

tice of any of the alleged equities set forth in the answer? Ans. Yes.

4. Did Oliver at the trustee's sale make known to probable bidders that he was going to buy for the benefit of his brother, Ransom, and his wife and children, and thereby suppress competition, and purchase the land at less than its value? Ans. Yes.

5. Has Ransom Tankard been in actual possession of the land from 1849, claiming it as his own? Ans. No, though held by virtue of an alleged trust in O. H. P. Tankard up to his death in 1872.

6. Have defendants been in possession since Ransom's death, claiming title in same way with the knowledge of O. H. P. Tankard? Ans. Yes.

7. Did O. H. P. Tankard purchase for the benefit of Ransom and his family under an agreement with Ransom to that effect, and did Ransom remain in possession so long as he lived, or was the possession of Ransom and his family as a gratuity on the part of said Oliver? Ans. Yes.

On the issues as found by the jury and the admissions in the pleadings, the plaintiff moved for judgment, but the court held the issues to be so confused and the findings contradictory, that no judgment could be pronounced, and ordered a reformation of the issues and a new trial to be had, and from this judgment the appeal was taken.

Messrs. Jos. E. Shepherd and *Geo. H. Brown, Jr.* for plaintiff.
No counsel for defendants.

DILLARD, J. The affirmance in this court of the judgment in the court below was based, as will be seen on reference to the opinion in 79 N. C., 54, on two grounds; first, that some of the issues were badly constructed, and especialy the 7th one, wherein alternative inquiries were put to the jury, so that a single response thereto was without

meaning; and secondly, and chiefly, for that the finding of a purchase by the plaintiff for value and without notice of the equity of Ransom Tankard, in answer to the 3rd issue, was a contradiction to the reply of plaintiff, wherein he admitted a possession by Ransom, from the trustee's sale in 1849 to his death in 1872, and a possession by the defendants, his heirs at law since that time, which in law was notice to him of that equity.

On a careful examination of the case of appeal, it seems to us that apart from the grounds on which the judgment of affirmance was pronounced in this court, there are other issues and responses thereto free from all objection on which the court below might have proceeded to judgment on plaintiff's motion, and which in law authorized a reversal of the ruling below and the entry of a judgment in this court.

The jury find in answer to the 1st and 4th issues in substance, that Oliver Tankard, under whom the plaintiff derives his title, purchased the land in controversy at the sale in 1849, under an agreement with Ransom that he would buy for his benefit, and that at the sale he made known to bidders that he was buying for his brother and his family, and that thereby he purchased the land at less than its value. Upon this finding alone it is undeniable that the relation of trustee and *cestui que trust* was created. And thereupon an equity arose to Ransom to have Oliver declared a trustee of the legal title, and on re-payment of the purchase money to have a conveyance thereof to him; and this his equity on his death descended to defendants who are his heirs at law; and they may assert and enforce the same equity now against the plaintiff, the vendee of Oliver, if he took with notice, actual or constructive, of the equity in favor of their ancestor. *Mulholland* v. *York*, 82 N. C., 510, and cases therein cited.

But the jury find in answer to the 2nd issue, that no part of the money paid by Oliver in purchase of the land has

been repaid, and this being so, the defendants' right to have the title is not affected thereby, otherwise than by being obliged to do equity of repaying the purchase money before they could have the relief they ask.

The right of the defendants to redeem the land on the above facts is indisputable against Oliver Tankard, and if the plaintiff purchased from him with notice of that equity, actual or constructive, then the same right extends to him also. So the only question of fact to be found, in order to determine the liability of the plaintiff to be adjudged a trustee for defendant, and his right in that event to have repaid the money at which his vendor purchased the land, was the fact, whether he had purchased with or without notice of the equitable right of Ransom Tankard.

As to this fact of notice by plaintiff, the defendants allege that he had notice of the equity at the time of his purchase, if not actual, at least constructive notice, from the fact of Ransom's possession from the trustee's sale in 1849, up to and at the time of plaintiff's purchase, and thereafter to his death in 1872. And the plaintiff in his reply, although denying notice, distinctly admits the possession of Ransom at and before and after his purchase as alleged by defendants. Yet at the trial an issue was put to the jury as to notice, and in response thereto the jury found that plaintiff purchased without notice of the equity of defendants' ancestor. This finding of the jury in the decision of this court was the difficulty in the way of any judgment on plaintiff's motion on the other facts found and admitted in the pleadings. In our opinion the 3rd issue, in view of the admitted possession of Ransom at the time of plaintiff's purchase, claiming as the jury find under a trust in O. H. P. Tankard, was an unnecessary issue, and the response thereto was of no legal significance whatever in determining the sentence of the law on the other facts found and admitted.

We take it to be a well settled doctrine in equity and a recognized doctrine in our law, that a purchaser with notice of a trust or equity existing against his vendor is bound by such equities, and that besides actual notice there is a constructive notice raised by presumption of the law from the actual possession of the equitable claimant. The latter kind of notice is based not on the idea that actual occupation is evidence of notice, to be weighed and given such weight as a jury may think it entitled to, but upon the idea that in ordinary prudence a purchaser before he buys ought to ascertain who is in possession, and if any one, then by what right or claim he possesses. Under this rule an actual possession is a fact that the purchaser ought to know; and the right by which the possessor holds is also a fact he might know by inquiry, and therefore the law presumes that he does know it. The legal presumption thus made of notice is a conclusive one, not open to averment to the contrary or rebuttal on issue to the jury. This effect of notice presumed from the actual possession of another is settled to be the law of this state in *Edwards* v. *Thompson*, 71 N. C., 177, and cases therein cited. In that case, RODMAN, J., says, "that on policy an open, notorious, and exclusive possession in a person other than one's vendor is a fact of which a purchaser must inform himself, and he is conclusively presumed to have done so." And so likewise it is held that he is taken to know because he might know by inquiry of the equitable title of the party in possession. Adams Eq., 158; 5 Johns. Chan. Rep., 39; and cases in note to 2 White & Tudor's Leading Cases, 116.

Such being the effect of notice presumed from possession, it is clear from the admissions by plaintiff in his reply of a continuous possession by Ransom Tankard at the time of his purchase, and before and after, and up to his death, that plaintiff is conclusively to be taken as notified of his equity, now descended to defendants, and no finding of the jury to

the contrary on an issue unnecessarily put to them can avail to supersede an established rule of law.

Now putting this finding of the jury of a *purchaser without notice* out of the case, as being entitled to no import or consideration, then we have a purchase by Oliver, the vendor of plaintiff, of Ransom's land for less than its value, under a promise to let him have it back on repayment of the purchase money, which has never been repaid; and we have the further fact of a purchase by the plaintiff with a notice of Ransom's equity presumed from his possession. On these facts found on issues and admitted in the pleadings, to which there is no objection on the score of obscurity, inconsistency or otherwise, we think it was competent to the court below on plaintiff's motion, which was an assent to be held as trustee of the title for defendants, to have adjudged such trust and ordered a conveyance on repayment of the purchase money, or in default of such payment, then to have decreed a sale and a payment out of the proceeds, and the excess if any to defendants.

We must declare it to be our opinion that there was error in the refusal of the court below to proceed to judgment as above indicated, and also in this court in the affirmance of that judgment. The judgment pronounced in this court is reversed, and a judgment may be entered now in conformity to this opinion.

Error. Reversed.

*JOHN B. MORRIS v. WM. H. WILLARD and another.

Injunction—Trust Fund—Conflicting Testimony.

An injunction will be continued until the hearing to retain control of a trust fund in dispute, where the plaintiff in the action seeks to have a judgment reformed and the validity of an assignment determined, alleging that the same was procured by fraud which is denied in the answer, and where the testimony bearing upon the question is conflicting.

(*Winslow* v. *Wood*, 70 N. C., 430; *Lee* v. *Pearce*, 63 N. C., 76; *Harris* v. *Carstarphen*, 69 N. C., 416; *Craycroft* v. *Morehead*, 67 N. C., 422; *Ponton* v. *McAdoo*, 71 N. C., 101; *McCorkle* v. *Brem*, 76 N. C., 407; *Peebles* v. *Com'rs*, 82 N. C., 385, cited and approved.)

MOTION for injunction heard at Chambers in Greensboro in an action pending in ORANGE Superior Court, on the 22d of December, 1879, before *Gilmer, J.*

The motion was allowed and defendants appealed.

Messrs. John Manning and *J. M. Moring*, for plaintiff.
Messrs. Merrimon & Fuller, for defendants.

SMITH, C. J. The defendant William H. Willard, who had purchased several tracts of land belonging to R. F. Morris at a sale under execution, in consideration of the release of her claim of dower therein, on April 9th, 1872, entered into a covenant with Caroline, his wife, on being discharged from liability incurred for either, to reconvey the lands to her in fee, except the "Guest lot" which was to be transferred to the R. F. Morris & Son Manufacturing Company and the proceeds of sale applied in payment of stock taken by her in the company. Robert F. Morris died on Septem-

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

ber 3d, 1872, and the said Caroline in October, 1875, both intestate, leaving six children and among them John B. Morris (the plaintiff) without having had any settlement with the said Willard of the trust fund held by him. On January 14th, 1876, he assigned for the sum of $550 to the defendant S. F. Tomlinson all his right and claim, as one of the heirs and distributees of the estate under the said covenant and his share and interest in the property therein mentioned, alleged by the assignor to be worth about $40,000. On March 27th, 1879, suit was brought in the name of C. B. Green, administrator of said Caroline, and her children and heirs at law and the husbands of each of the daughters as were married, against the said Willard, Tomlinson and the said manufacturing company, for an account and settlement of the trust, the plaintiffs stating in their complaint that the trustee had been fully released from his surety obligations, and that the share of John B. Morris had been assigned to the said Tomlinson, who with the others entitled claimed their respective shares in the property. The defendants, Willard and Tomlinson, answered, admitting the general averments of the complainant, and at spring term following, judgment was rendered declaring the exoneration of the trustee and his liability, and directing, after payment to the administrator whatever sum, if any, was required in completing the administration, the residue of the funds in his hands to be delivered, and the undisposed of lands to be conveyed to the plaintiffs and the defendant assignee of the share and estate of said John B. Morris, pursuant to the terms of the said covenant.

The said John B. Morris now makes application, verified November 6th, 1879, on oath, for a reformation of so much of the judgment as substitutes the defendant Tomlinson to his rights and interests and recognizes the efficacy of the assignment; and he alleges that the assignment was pro-

cured by the fraud of the trustee and the concealment of the true condition of the fund, through the agency of Tomlinson acting surety for him; that the suit was brought without his knowledge or consent, nor did he know until long after the judgment that the said Tomlinson was a party to the proceedings, and he asks that the money now in, and about to be paid into, the clerk's office, claimed by him, be retained and he restrained from receiving or disposing of it, until the validity of the assignment shall be determined.

The defendants, Willard and Tomlinson, explicitly deny every imputation of fraud, imposition or concealment, giving a minute and detailed explanation of the transactions resulting in the sale and assignment, and attributing the great advancement in value of the property since to the growth and prosperity of Durham, but not up to the estimate put upon it by said Morris. These statements accepted as truthful, repel every allegation of fraud and unfairness and show that the sale was the voluntary and deliberate choice and act of Morris himself without influence from either of them. A court of equity never interferes with an owner's disposition of his property when not procured by fraud or false representations or other improper artifice, however insufficient the consideration may be, if it be his voluntary act. Inadequacy of price is only regarded as evidence of imposition and undue advantage taken, and often raises a presumption almost insurmountable, with other circumstances of the fraud. *Winslow* v. *Wood*, 70 N. C., 430. Every person has the legal right to give or sell at any price his property and he cannot be relieved from the consequences of his own imprudence and want of judgment.

But the testimony is essentially conflicting and the complaint presents the case of a trustee dealing with a *cestui que trust*, through an intermediate agency, and for an insig-

nificant price obtaining a transfer of part of the trust estate, and if this be correct, relief would without hesitation be afforded. *Lee* v. *Pearce*, 68 N. C., 76; *Harris* v. *Carstarphen*, 69 N. C., 416, and other cases. In case of such repugnancy in the testimony and when the fund is in possession of the court and there is a reasonable probability that a party is entitled to relief, the settled practice is to retain control over it until the rightful owner is ascertained. Nor will the court upon an interlocutory application pass upon the merits of the controversy, but leave them to be determined upon the final hearing. *Craycroff* v. *Morehead*, 67 N. C., 422; *Ponton* v. *McAdoo*, 71 N. C., 101; *McCorkle* v. *Brem*, 76 N. C., 407; *Peebles* v. *Commissioners of Davie*, 82 N. C., 385.

The allegation that the action was instituted without the knowledge or authority of said Morris, and his ignorance of the fact that the assignee was a party, meets with no response from either defendant in their respective answers, and if so, the judgment ought not to be conclusive against his right to have it reopened as far as it affects himself. The defendant, Tomlinson, in his answer seems to have been under the impression that the said Morris was not a party and explains the supposed absence of his name upon the ground that his entire interest had been transferred; and he refers to and adopts as his own the answer of his co-defendant, Willard, which relies upon that fact as an estoppel resting upon him.

Upon the consideration of the controversy at this preliminary stage, we concur in the ruling of the court in retaining the fund and issuing the restraining order, and affirm the judgment. Let this be certified.

No error. Affirmed.

SARAH HORTON v. W. W. WHITE and others.

Injunction and Receiver on motion of defendant in Ejectment.

The right to take under the control of the court a disputed fund liable to waste when suffered to remain in the hands of a defendant, extends also to a plaintiff who takes it from the defendant and whose possession threatens a similar injury to the latter; *Therefore*, where the plaintiff sues *in forma pauperis* to recover land, and during the pendency of the action takes possession of a part thereof and resists the re-occupation by defendant, an order for an injunction and receiver to take control of the usurped premises and secure the rents and profits upon defendant's application was properly granted.

(*Johnson* v. *Swain*, Busb., 335; *Thompson* v. *Red*, 2 Jones, 412, cited and approved.)

APPEAL from an order made in an action to recover land at Spring Term, 1880, of CALDWELL Superior Court, before *Gilmer, J.*

The plaintiff appealed from the interlocutory order of the court below.

Mr. G. N. Folk, for plaintiff.
Mr. W. H. Malone, for defendants.

SMITH, C. J. The plaintiff, suing *in forma pauperis*, commenced her action in September, 1876, for the recovery of the land described in her complaint of which she claims to be owner, and her allegations of title are denied in the answer which asserts it to be vested in some of the defendants, the others being tenants under them. In March, 1880, the plaintiff through her agent, James M. Isbell, entered into and took possession of a small unoccupied house on the disputed land, and resists the re-occupation thereof by the defendants. The defendants on application to the judge at spring term of the court obtained a temporary restraining

order, and upon notice applied for an injunction and the appointment of a receiver to take control of the usurped premises, and secure the rents and profits, until upon the final determination of the cause it could be ascertained to whom the property belongs. Numerous affidavits, conflicting in their statements of the circumstances attending the entry of the agent and in support and denial of the alleged interruption of the tenants in the cultivation of a field of twelve acres, outside of the said entry, and upon the question of ownership, were submitted on the motion for an injuction against further interference and receiver until the hearing of the cause upon its merits, which was allowed, and one James Horton was appointed receiver. From this interlocutory judgment the plaintiff appeals.

In a proceeding at law to recover possession of land in an action of ejectment, the subsequently acquired possession of the disputed land before trial, on a plea in abatement since the last continuance, had the effect of defeating the recovery. If the entry was upon a part only of the premises, the action would proceed for the recovery of the residue, but the fact to be noticed must be brought to the attention of the court by a proper plea. *Johnson* v. *Swain*, Busb., 335; *Thompson* v. *Reed*, 2 Jones, 412. The defendant would thus be driven to a similar action to regain possession lost during the pendency of the preceding suit. The present system, combining in a single action all the essential attributes and all the ancillary powers belonging to a suit in a court of law and in a court of equity, admits of remedies and orders found necessary during its progress for the relief of both parties, and the preservation of the property in litigation. The court may also enforce obedience to its lawful commands by acting upon the person of the suitor. While then the novelty of the present application on the part of the defendants, for which neither have the counsel nor the court been able to find a precedent, should induce us to proceed

with proper caution and care, our examination and reflection lead us to the conclusion adopted by His Honor that it was competent to make the order for the security of the property, pending the controversy as to ownership, and that the power was properly exercised. We should be reluctant to disturb his conclusions of fact deduced from the evidence (and would do so only in case of palpable error) in an order merely interlocutory and temporary and intended only to secure the fruits of a final determination to the successful litigant. The right to take under the control of the court a disputed fund liable to waste and irremediable loss when suffered to remain in the hands of the defendant, must extend in our opinion to the plaintiff who may have taken it from the defendant, and whose possession threatens a similar injury to the latter. We therefore sustain the ruling of the court. This will be certified.

No error. Affirmed.

E. F. PRITCHARD and wife v. FANNIE SANDERSON, Ex'rx, and others.

Injunction—Court directs sale under trust deed, when.

An injunction to restrain the sale of land conveyed in a deed to secure a debt will be granted under the equitable jurisdiction of the court, where the parties dealing together have settled their accounts and a note secured by the deed given for the estimated balance, and where fraud is alleged to have been practiced upon the mortgagor or trustor in such settlement. A sale by the trustee of the property conveyed will not be permitted until the amount due is ascertained under the direction of the court.

(*Kornegay* v. *Spicer*, 76 N. C., 95; *Mosby* v. *Hodge*, *Ib.*, 387; *Capehart* v. *Biggs*, 77 N. C., 261; *Purnell* v. *Vaughan*, *Ib.*, 268; *Brinegar* v.

Chaffin, 3 Dev., 108; *Hays* v. *Askew*, 5 Jones, 63; *Wesson* v. *Stephens*, 2 Ired. Eq., 557, cited and approved.)

MOTION by defendant to vacate an injunction heard at Chambers on the 17th day of September, 1880, before *Schenck, J.*

The motion was made in an action pending in Pasquotank superior court in which an injunction had been granted on the first day of May, 1880. The facts are as follows: At a sale made by George W. Charles, administrator of Daniel Richardson, under a license of the proper court therefor on the 6th of July, 1867, the feme plaintiff purchased a tract of land belonging to the intestate and known as the "Richardson farm" for $3,627, and the title was retained as a security for the payment of said sum.

On the 20th of May, 1872, upon a settlement between the parties, three notes were executed by the plaintiffs for the estimated residue of the purchase money, two in the sum of $1,209, each bearing interest from the day of sale, and one in the sum of $251.03, bearing interest from May 10th, 1869; and the land was then conveyed by the said Charles to the said feme plaintiff. At the same time the land was reconveyed by the plaintiffs to William F. Martin in trust to secure the said notes.

On the 6th of May, 1876, portions of the land having been sold to different persons with consent of all interested therein, and the proceeds applied in reduction of the indebtedness, another settlement was made and a new note given for $2,054, the estimated balance of purchase money remaining unpaid, and the residue of the land reconveyed to the same trustee for its security.

On the 1st of January, 1877, the feme plaintiff bought also of the testator, Charles, (who died in the latter part of the year 1877, leaving a will in which the defendant Fannie was appointed executrix) a lot in the town of Elizabeth

City, for the sum of $1,050, for which the plaintiffs gave their note, and on obtaining title reconveyed the lot and their equitable estate in the other land to the said Martin to secure the payment thereof.

The defendant, C. W. Grandy (substituted as trustee in place of the former who had died) in pursuance of directions from the defendant Fannie, executrix of said Charles, her former husband, and the defendant Thos. L. Sanderson whom she had since married, had advertised and was about to sell the said lands conveyed in the last mentioned deeds in trust, when the plaintiffs commenced their action to arrest further proceedings for a sale until an account could be taken and the amount due ascertained, and obtained a temporary restraining order before *Graves, J.*, to this effect. In their complaint used as an affidavit they allege that the prior settlements were made and the notes executed upon estimates and calculations made by the testator alone, which they accepted and acted on as correct, in full assurance that all proper credits were allowed them, and with entire confidence in his integrity and accuracy in the transactions; that they were misled, deceived, and defrauded by him in said matters, and instead of being indebted in May, 1876, for any of the original purchase money for the farm, they had overpaid it, and a considerable excess was due to them and should have been applied to the indebtedness incurred in the purchase of the town lot; and they annex as an exhibit a detailed statement of their own indebtedness and the successive payments made, in date and amount, from which there appears to be due the executrix on the first of January, 1880, the sum of $440.58, which they offer to pay in discharge of the incumbrance upon the lands.

The executrix in her answer, used as a counter-affidavit upon the motion to vacate the restraining order, without professing to have personal knowledge of the facts alleged outside of what is contained in the deeds and notes them-

selves, declares her belief in the correctness of the testator's computations, and that all proper credits were allowed the plaintiffs in arriving at the result, and that upon a statement of the account in an accompanying exhibit, there is due to the testator the sum of $3,306.73. She also denies, upon information and knowledge of her husband's business habits and competency and her confidence in his strict integrity, the imputations made of fraud and deceit.

Thereupon the judge continued the injunction to the hearing upon the payment into court in thirty days by plaintiffs of the sum admitted to be due the defendants, and from this order the defendants appealed.

No counsel for plaintiffs.

Mr. C. W. Grandy, for defendants.

SMITH, C. J. It is unnecessary to consider in detail the allegations and denials reciprocally made in determining the point arising on the appeal. Nor can we receive as evidence the unsworn answers put in by the other defendants. On hearing the motion, His Honor ruled that if the plaintiffs within a limited period paid into the office the sum admitted to be due with interest from January 1st, 1880, the injunction should be continued to the final hearing, and if they failed, it should stand dissolved, and the trustee should proceed to sell the lands. From this order the defendants appeal.

It is conceded in the argument for the appellants that the ruling below is fully sustained by the adjudications in *Kornegay* v. *Spicer*, 76 N. C., 95; *Mosby* v. *Hodge*, *Ib.*, 387, and *Capehart* v. *Biggs*, 77 N. C., 261; unless this case is distinguishable in some essential feature from those. The practice where there is a controversy as to the sum due under the mortgage or deed in trust is thus declared by PEARSON, C. J., in *Mosby* v. *Hodge*: "The exercise of the power (of sale)

is only allowed in plain cases when there is no complication and no controversy as to the amount due upon the mortgage debt, and the power is given merely to avoid the expense of foreclosing the mortgage by action; but where there is such complication and controversy, the court will interfere and require the foreclosure to be made under the direction of the court after the controverted matters have been adjusted and the balance due is fixed; so that the property may be brought to sale when purchasers will be assured of a title, and not be deterred by any idea that they are buying a law suit." To same effect is *Purnell* v. *Vaughan*, 77 N. C., 268.

The distinction attempted to be drawn is, that the full settlement had between the parties in May, 1872, and the execution of a new note for the amount then admitted to be due, with the recitals in the deed made to secure it, concludes all inquiry into antecedent matters, and operates as an estoppel upon the plaintiffs and determines finally what was then due; and as the alleged subsequent payments are not disputed, the indebtedness is but a matter of arithmetical calculation, requiring no reference and no delay. Undoubtedly at law such estoppel will rise, and so the cases cited decide. *Brinegar* v. *Chaffin*, 3 Dev., 108; *Hays* v. *Askew*, 5 Jones, 63. But in equity the rule is otherwise, and deceit and fraud superinducing the execution of a deed may be inquired into to defeat its operation and relieve the deluded and injured party from its obligation. This is one of the most valuable functions of a court of equity, and perhaps more often called into exercise than any other. The principle is illustrated in *Wesson* v. *Stephens*, 2 Ired. Eq., 557, and we deem further references needless.

Besides the reason given by the late chief justice for the rule, it may be added that the mortgagor ought to know definitely what sum he is required to pay and have an opportunity to redeem without a sale. There is in the present

case a wide discrepancy in the estimates made by the parties as to the amount of the secured debt, and this controversy ought to be decided before a sale is permitted. We do not undertake to pass upon its merits, or say that the plaintiffs can successfully impeach the settlements relied on by the executrix, but merely, that they ought to have an opportunity to do so, and meanwhile the sale should be suspended. The ruling of the judge below is quite as favorable to the defendants as they have a right to ask, and in our opinion is obnoxious to no just complaint from them.

We therefore declare there is no error in the interlocutory judgment rendered, and this will be certified that the cause may proceed in the court below.

No error. Affirmed.

ALEXANDER OLDHAM v. FIRST NATIONAL BANK OF WILMINGTON.

Injunction—Receiver of mortgaged premises to secure Rents.

Where plaintiff mortgagor obtained an injunction to restrain the sale of the mortgaged premises until certain counterclaims could be passed upon and the sum really due ascertained, the defendant mortgagee is entitled to have a receiver appointed to take charge of the property and secure the rents and profits where the same are in danger of being lost. C. C. P., § 215.

(*Fuller* v. *Wadsworth*, 2 Ired., 263; *Ellis* v. *Hussey*, 66 N. C., 501; *Reade* v. *Hamlin*, Phil. Eq., 128, cited and approved.)

MOTION by defendants, (the bank and E. E. Burris, its president), for the appointment of a receiver heard at Fall Term, 1880, of NEW HANOVER Superior Court, before *Gudger, J.*

The motion was denied and the defendants appealed.

Messrs. McRae & Strange and *Stedman & Latimer*, for plaintiff.

Mr. E. S. Martin, for defendants.

SMITH, C. J. The defendants were about to sell certain lands of the plaintiff conveyed to them by deed of mortgage with power of sale in case of default in paying the secured debts, and the present action is for an injunction until the sum really due upon an adjustment of counter-claims and deductions set up in the complaint can be ascertained and determined. A restraining order has been obtained and continued until the hearing upon terms which have been complied with, and thereupon the defendants ask for the appointment of a receiver to take possession of the property and accruing rents to meet the requirements of the mortgage debts. From the refusal to grant the motion the appeal is taken to this court. Upon the hearing of the application, the affidavits of the parties to the action and of others were read in its support and against it, which we are required to examine and weigh.

The defendant, Burriss, states that the plaintiff is in possession of the mill property as well as his house, appropriating both to his own use, that the debt secured in the mortgage due the bank amounts with interest to $12,392.87, while that due himself is $4,371.46; that the plaintiff has failed to pay the taxes for several years and in consequence the property had been sold to pay them, and that $299.32 were required to redeem; that by reason of the plaintiff's neglect the defendants have been compelled to pay state and county taxes for 1879 and 1880, $301.64, city taxes for the years 1875, 1876, 1877, 1878 and 1879, $949.06, and the city taxes for the year 1880 due and unpaid are $224, which defendants expect themselves to meet; that for the plaintiff's

further default, the defendants have had to pay the premiums for insurance amounting to $275.52; that the property is assessed for taxation at $12,800, and plaintiff has no other visible property in the county except personal property assessed at $795; that the most valuable part is a large steam flour and grist mill, with the attached machinery, exposed to damage from fire, not of ready sale and but a precarious security for the debts; that in his opinion the lands will not, if sold, bring a sufficient sum to satisfy the mortgage and the plaintiff is himself utterly insolvent.

Several other affidavits were also introduced in reference to the value of the mortgaged property from M. Cronly, a real estate broker and auctioneer for twenty-five years, and John K. Brown, a civil engineer and also a real estate broker of thirteen year's experience; from Oscar G. Parsley, several times acting as assessor of city property for taxation, and Preston Cumming whose occupation is the running of a steam grist mill; from A. H. Van Bokkelen and A. J. De Rosset, long residents of the city. These all declare their familiar knowledge of the value of real estate in Wilmington, and of the mortgaged lands particularly. And their estimates of the value of the lands, sold for cash, range from $12,500 to $17,500, with an additional sum of about $3,000, if sold on a credit of one, two, three and four years.

The plaintiff in his affidavit controverts the defendant's statements as to the amount of the encumbering debt, alleges his redeeming the land and his arrangements for discharging the taxes due the city for 1875, 1876 and 1877, and was in the act of giving them effect when he learned of the unauthorized payment by defendant, Burriss, without previous notice to him. In relation to the value of the property the plaintiff offered the joint affidavit of Samuel Butt, E. T. Love, J. G. Bagley, John McEachern, R. B. Wood, J. H. Hamby and J. H. Huff, in which they state that they had that day examined the property, found it in

good condition, and "think its true value on the market to be from $33,000 to $36,000.

The record shows that an injunction bond of $4,000 had been required and that three bonds in that aggregate penal sum, with justified sureties, had been given before the issue of the injunction for the indemnity of the defendants against damages resulting therefrom.

The conveyance of land or personal property by mortgage or deed in trust is an appropriation of it as a security for the mortgage debt, and while the mortgagor permitted to remain in possession may take and use the rents and profits, the mortgagee at least after default may enter into or recover possession by action in order that these may be applied in reduction of his demand, and this he may do without notice. *Fuller* v. *Wadsworth*, 2 Ired., 263; *Ellis* v. *Hussey*, 66 N. C., 501. This clear legal remedy debars him from recourse to a court of equity for its aid unless incidental to a jurisdiction already assumed in obtaining the profits, since it will not interfere when the remedy at law is full and adequate. But if the mortgage is due and the proceeds of the property are not likely to prove sufficient to discharge the incumbrance, and the debtor is insolvent, the mortgagee may have a receiver appointed to secure the uncollected rents to meet the apprehended deficiency. High on Receivers, §§ 640 and 643, and cases referred to. *Reade* v. *Hamlin*, Phil. Eq., 128. The matter is, however, regulated by statute in this state and a receiver may be appointed "before judgment on the application of either party when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property or its *rents and profits* are in danger of being lost or materially injured or impaired." C. C. P., § 215. For the purpose of the declared trusts, the use and profit of the lands, quite as much as the lands, belong to the defendants and they have an equal right to have both

applied in reduction or extinguishment of the mortgage debt.

While there is great diversity of opinion among the witnesses as to the value of the property, and we may not understand the basis on which the larger estimates of the plaintiff's witnesses are placed when they speak of its "true value on the market," the evidence clearly discloses these facts—the insolvency of the plaintiff and his want of other resources to meet any possible deficieney—the large indebtedness accumulated as shown upon the face of the deeds, although liable to be greatly reduced by the counter-claims and other defences set up—the constant increase from unpaid interest, insurance premiums and taxes, which the profits from the occupation and use of the premises have not hitherto been applied to meet, and the uncertainty of a sufficient sum being raised by a forced sale to pay the incumbering demands. And these, in our opinion, entitle the defendant who is restrained from pursuing his legal rights, to the interposition of the court in taking such action as will secure the entire fund until the controversy is determined and the results of a sale made known. The court ought therefore to have granted the defendants' motion.

If upon a reference to ascertain the value of the annual rental of the conveyed premises and the attending expenses of insurance and taxation and the interest accruing on the secured debt, the plaintiffs will give bond with adequate security to discharge these expenses and pay the residue of the rental into the office of the clerk subject to the order of the court, His Honor may in his discretion adopt this method of securing the rents and profits, and dispense with the appointment of a receiver. Unless this is done a receiver must be appointed.

There is error in the ruling of the court and the judg-

ment must be reversed. This will be certified for further proceeding in the court below in accordance with this opinion.

Error. Reversed.

HENRY COWLES v. RICHMOND & DANVILLE RAILROAD COMPANY.

Negligence—Damages—Master and Servant.

1. An action for damages for an injury received by the plaintiff employee of a railroad company, will not lie against the company if it resulted from the negligence of a fellow-servant occupying the same level with the plaintiff, where the company used due care in the selection of such fellow-servant. But such action will lie, if the injury resulted from the negligence of a servant whose commands the plaintiff was bound to obey.

2. A master is bound to furnish his servant with such appliances for his work as are suitable and may be used with safety; and this, by implication of the law, is a stipulation in every contract for service; and if the servant is injured by reason of defective appliances placed in his hands by the master or his agent, the master is liable in damages, unless he can clearly show, (1) that he has used due care in the selection and preservation of the same, or (2) that the servant had knowledge of the defect and failed to notify the master, or (3) that the injury resulted from contributory negligence.

(*Honeycutt* v. *Angel*, 4 Dev. & Bat., 306; *Crutchfield's* case, 78 N. C., 300; *Johnson* v. *R. R. Co.*, 81 N. C., 453, cited and approved.)

CIVIL ACTION for damages tried at August Special Term, 1880, of ROWAN Superior Court, before *McKoy, J.*

Judgment for plaintiff, appeal by defendant.

Mr. J. S. Henderson, for plaintiff.

Mr. J. M. McCorkle, for defendant.

RUFFIN, J. The plaintiff alleges that he was a brakesman on the defendant's road, and that he was injured by having his foot and ankle crushed while in its service and by reason of its negligence. On the trial he testified that he was under the immediate direction and order of one Garrison, who was the engineer and conductor of the defendant's freight train, and on the occasion of the injuries received was ordered by him to go upon a certain car and apply the brake, so as to prevent a clash between that car and another; that he went upon the car, and while executing the order given him was injured in the manner complained of, by a collision of the two cars, which collision resulted from the fact that the cars were so constructed that their "bumpers" did not correspond or fit to one another as they should have done in order to prevent the cars coming in too close contact, which defect was unknown to the plaintiff, and but for which he would not have been injured.

The defendant's counsel asked the judge to instruct the jury that if they believed that plaintiff was injured in consequence of the negligence and unskillfulness of the engineer, Garrison, then, he could not recover, which the court declined to do; but told them that the plaintiff did not complain that his injuries resulted from the negligence and unskillfulness of the engineer; that the point for them to consider was whether the plaintiff was injured by reason of the defendant's negligence and without default on his part; that it was defendant's duty to furnish safe cars, supplied with the necessary machinery and appliances to render them secure, and if the jury believed that it had failed in this and thereby the plaintiff had been injured, without any neglect or want of skill on his part, then, they should find the issues submitted in favor of the plaintiff without regard to the conduct of the engineer; but if they should believe that the defendant had furnished safely constructed and appointed cars, or that the plaintiff had contributed by his

negligence to his own injury, then they should find for the defendant, to which the defendant excepted.

The only issue submitted to the jury was, "Did the plaintiff, while in defendant's employment, receive the injuries complained of, by reason of defendant company having carelessly and negligently provided and used unsafe and defective cars or 'bumpers,' and without the fault of the plaintiff"? to which the jury responded in the affirmative.

The defendant's exception as argued before us, does not go to any portion of His Honor's charge as given, but only to his refusal to give that specially asked for; and the purpose of counsel in making the request is admitted to have been to bring the case within the rule, so much discussed of late by elementary writers, and so often, and in some instances so variously announced by the courts, which declares that a servant who has sustained injuries by reason of the negligence of a fellow-servant in the same employment cannot maintain an action against the master, provided the latter has used due care in the selection of such fellow-servant. He should have been careful then to see that more evidence was put into the case than is to be found there, going to show the respective duties, powers and conduct of the two servants, and especially their relations to each other—whether they were strictly fellow-servants occupying the same level, or whether the engineer was a superior whose commands the plaintiff was bound to obey; for in making an application of the rule, a knowledge of all these matters is absolutely necessary.

In entering the service of the defendant, the plaintiff might be and is presumed to understand and take upon himself every risk naturally pertaining to such service; and amongst others, that which may proceed from the possible carelessness of such fellow-servants as he must know, from the very nature of the employment, he may be required to associate with in the performance of his duties. But no

such presumption is or should be raised, of his willingness to assume the risk growing out of the possible negligence of one, who while a servant to their common master, stands to himself in the light of a superior whose commands and directions he is bound to obey; for so to hold, in the case of a corporation, like this defendant, which can only operate through its agents and employees, would be to absolve it from all responsibility to those in its employment.

If we may infer from the meagre statement of the evidence given in the case, that the defendant's engineer stood to the plaintiff as one in authority, his case would be withdrawn from the operation of the rule; and on the other hand if it should be said that the evidence as stated is not sufficient to establish the superior authority of the engineer, we cannot see that the defendant's condition is at all improved. The verdict of the jury acquits the plaintiff of all blame and convicts the defendant of negligence; and the burden of showing an error rests upon the defendant who takes the appeal. Every presumption must be made in favor of a verdict, and as said in the case of *Honeycutt* v. *Angel*, 4 Dev. & Bat., 306, it is deemed to be right unless the record sets out so much of the proceedings at the trial below as will show affirmatively that there was an error committed. If, therefore, any other facts than those set out in the record are needed to support the plaintiff's claim against the defendant, we are bound to assume that they were proved on the trial. And the same principle applies with all its force to the judge's charge; we must suppose it to be correct, until so much is developed in the case as to show that it was certainly erroneous.

But we do not care to place our decision upon any such restricted ground as this; for we do not hesitate to say that upon the facts as stated in the record and supposing them to constitute the whole case, we are of the opinion that His

Honor's charge was correct and the verdict of the jury a rightful one.

Every person who admits another into his employment, whereby he constitutes him his servant, is bound to furnish and maintain such instruments as are suitable to his work and may be used with safety to the person employed. The law, by an implication of its own, makes such a stipulation a part of every contract for service, and in proportion as the employment is hazardous, so is the rigid enforcement of the master's duty. Nor is there any injustice to the master in this. He can if diligent and prudent procure such implements as are fit for the servant's use and by a reasonable oversight he can keep them so, while the servant is, most generally, without the ability or opportunity to detect or remedy their defects. It follows that whenever a servant, whose own conduct has been blameless, sustains an injury by reason of defects in an implement put into his hands by the master or his agents to be used in the prosecution of his work, a responsibility must attach to the master. It is true he may free himself of this responsibility to his servant by showing that he has been at all times diligent and circumspect as well in the choice of his associates as in the selection and preservation of the implements to be used by him. Or as in *Crutchfield's* case, 78 N. C., 300, he may show that his servant after having a knowledge of the defects in the machinery given him to work with, continued its use without giving notice so that they might be remedied. Or again, as said by the present chief justice in *Johnson* v. *R. R. Co.*, 81 N. C., 453, he may show that notwithstanding the existence of the defects in the machinery, no injury would have happened but for the negligence of the servant himself. But it is not sufficient for him to show, as this defendant has undertaken to do, that his servant's hurt *may* have proceeded from some one of these various excusing causes. He must show that it *did* do so.

The duty of a master to his servant and the responsibility growing out of it have very recently been discussed by the supreme court of the United States in the case of *Hough* v. *The Railway Company*, 100 U. S. Rep., 213, and again by the supreme court of the State of Missouri in the case of *Gibson* v. *The Pacific Railway Co.*, 46 Mo. Rep., 163, and this last case has been treated by Thompson in his work on Negligence as a leading one on those subjects, and we think that our conclusions in this case are in accord with the principles enunciated in those cases.

We therefore hold that there is no error in the judgment of the court below and that the same must be affirmed.

No error. Affirmed.

E. MAUNEY v. T. J. CROWELL.

Evidence—Contract to convey land—Registration.

Where proof is made of the loss of a contract to convey land, a copy thereof if shown to be correct is admissible as secondary evidence to prove the contents of the original, though no search was made to ascertain whether the original was registered. Such a contract is valid without registration.

(*Edwards* v. *Thompson*, 71 N. C., 177, cited and approved.)

CIVIL ACTION tried at August Special Term, 1880, of ROWAN Superior Court, before *McKoy, J.*

The plaintiff sues to recover the value of a portion of a stamp mill, used for reducing gold ore, which is withheld and appropriated by the defendant. The defence set up is a denial of the plaintiff's right and an assertion of property in the defendant. During the trial before the jury several

exceptions were taken by the defendant, one only of which is it necessary to consider. The defendant proposed to show that he, owning certain mining lands whereon the mill was afterwards placed, entered into a written contract with the firm of Kent & Miller to convey the same to them, if the stipulated purchase money was paid within a limited time; and if not, the land should revert to him and the title to all the fixtures and improvements put thereon by the vendees also vest in him; that the contract had been lost, and he offered as secondary evidence a copy bearing the genuine signatures of himself and of Miller, one of the partners to whom the sale was made. The court held that "the contract being between Crowell and parties unconnected with the suit, and its loss not being sufficiently accounted for in not showing that it was not registered in Stanly county, where the mine is situated, and it being intended to prove what the defendant was here in person to prove, the contents were not allowed to be proved by parol." To this ruling the defendant excepts. The verdict was in favor of plaintiff, judgment, appeal by defendant.

Messrs. J. M. McCorkle and *J. W. Mauney*, for plaintiff.
Mr. W. H. Bailey, for defendant.

SMITH, C. J., after stating the case. If the finding was general that no sufficient search had been made for the absent original and for this reason the offered copy was refused, the fact thus found would be conclusive and the rejection would follow as a necessary legal consequence and both be beyond the reach of correction. While the record is somewhat confused and we may fail to put upon it the meaning intended, we understand the copy to have been excluded solely upon the ground that as the law directs the registration of "all contracts to sell or convey lands, tenements or hereditaments, or any interest in or concerning them,"

(Bat. Rev., ch. 35, § 24,) this is presumed to have been registered, and if so registered, a copy duly certified from that office (§ 9) would be legal evidence of a higher grade, and hence in the absence of any examination of the register's book, the inferior evidence offered was inadmissible. We must then assume there was plenary proof of the loss of the original writing and the copy was ruled out because there had been no examination and search to ascertain whether it had been admitted to registration. This ruling raises a question of law, of which this court has appellate jurisdiction and in our opinion it is erroneous. Contracts of this kind are valid without registration as is decided in *Edwards* v. *Thompson*, 71 N. C., 177. The copy from the registry is but a copy, differing from another only in the effect given to the certificate of the register, while in other cases the correctness of the copy must be shown by sworn testimony and then only when the original is lost or destroyed. When its absence is satisfactorily accounted for, we see no sufficient reason why either method of proof may not be resorted to, and why one should be allowed to exclude the other. The evidence may be considered in another aspect, not presented in the form of the exception. The paper writing was also itself an original and may have the effect of vesting a moiety of the mill in the vendor, and, if so, his right of possession would defeat the action. But it was offered only as a secondary evidence, and we cannot consider it in any other light. There must be a new trial.

Error. *Venire de novo.*

R. S. GILMER v. EDWARD HANKS.

Evidence—Fraud—Material Matter.

1. Though the general rule in an action upon a note forbids the introduction of evidence of another and distinct transaction, yet where the two contracts are entered into about the same time to effect a common object, the terms and conditions of the one may be admitted as evidence to be considered by the jury in passing upon those of the other.
2. Proof of fraud must come from the party alleging it, and to avoid a contract the fraudulent representation must be of material matter resulting in damage. And if the fraud be such that had it not been practiced the contract would not have been made, then it is material; but if it be shown that the contract would have been made without fraud practiced, then it is not material.

(*Brink* v. *Black*, 77 N. C., 59; *Homesly* v. *Hogue*, 2 Jones, 391; *McLane* v. *Manning*, Winst. Eq., 60, cited and approved.)

CIVIL ACTION commenced before a justice of the peace and tried on appeal at Fall Term, 1880, of ALLEGHANY Superior Court, before *McKoy, J.*

The defence to the note sued on, the making of which is admitted, is, that its execution was obtained by false and fraudulent representations of the plaintiff's agent in regard to the consideration on which it is founded. The defendant says that at the sale of the estate of G. W. Hanks, (adjudged a bankrupt in the district court of the United States in Virginia,) by his assignee, one Jerry Gilmer, the plaintiff's said agent, represented to him that the plaintiff had recovered a judgment against the bankrupt in the superior court of Surry for upwards of two hundred dollars which was a lien upon his land and had also proved the debt in the bankrupt court, and upon this representation contracted to sell and assign said judgment to the defendant for one hundred and seventy-five dollars, and induced him to execute the note, the subject of the action. That before the

note became due he went to the county seat of Surry and there ascertained there was no such judgment against the bankrupt to be assigned, but a note only against him.

The following issues were submitted to the jury, to both of which they respond in the negative:

1. Was the execution of the paper writing declared on obtained by fraud or fraudulent representations on the part of the plaintiff or of his agent?

2. Was there an entire failure of consideration?

Judgment for plaintiff, appeal by defendant.

Messrs. Merrimon & Fuller, for plaintiff.

No counsel for defendant.

SMITH, C. J. Two exceptions only of the appellant are noted on the record, and require consideration; and these are, (1) to the admission of evidence, and (2) to the charge of the court.

The testimony of the defendant and of the said G. W. Hanks who was present when the contract was made, concurred in supporting the allegations in the answer, which were controverted by the plaintiff and in direct conflict with the testimony of his agent and witness. On the cross-examination of the last named witness for the defendant, he was asked if the defendant did not on the same day purchase another note of his from one Felts, which was wholly unsecured? The question after objection was allowed and the witness answered that the defendant did. The evidence is offered to disprove the allegation that the defendant desired or sought any security in purchasing claims against the bankrupt at the time, and that any such false representations as are alleged in superinducing the contract were necessary or in fact made, and to corroborate the plaintiff's denial.

The only objection which can be made to the testimony

is its irrelevancy and tendency to mislead. We think it is not obnoxious to this objection and was proper to be considered by the jury in ascertaining the truth of the transaction and the credit to be given to the conflicting testimony. To prove fraud in the execution of a mortgage it was held competent to show that the mortgagor made a mortgage the previous year of property of the same kind, and thereafter remained in possession dealing with it and treating it as his own. "These facts and circumstances in connection with the kiln of brick, in 1872," remarks the late Chief Justice, "constituted not only some evidence, but very strong evidence of an intention that the kiln of 1873, was to go in the same way as the kiln of 1872." *Brink* v. *Black*, 77 N. C., 59. See also 3 Wait. Act. & Def., 447.

The defendant is engaged in buying up claims against the bankrupt and at the sale purchases for one hundred and fifty dollars his land worth twelve hundred dollars, and the two contracts to effect a common object are entered into about the same time. Such an association seems to furnish some presumption that the same terms and conditions would enter into each, and thus except the case from the operation of the general rule which forbids evidence of another and distinct transaction to be introduced. *Homesly* v. *Hogue*, 2 Jones, 391; 1 Greenl. Ev., § 50.

2. The court charged the jury, that a docketed judgment in Surry could create no lien on land in Virginia; that a fraudulent representation to avoid a contract must be of material matter resulting in damage, and that the proof of fraud must come from the party alleging it, and none had been offered to show the debt had not been proved in bankruptcy.

The exception is not pointed to any particular part of the instruction, as according to the practice it should, and is general in its reference. But we see no error in the charge and it is fully supported by the authorities.

The execution of the note being admitted, the evidence to impeach the validity must be produced by the defendant. *McLane* v. *Manning*, Winst. Eq., 60. "All the authorities are uniform," says a late author, "in holding that in order to sustain an allegation of fraud by false representation, the representation must be of some matter or thing material to the contract or transaction sought to be avoided because of it." 3 Wait's Act. and Def., 439. The rule deducible from the adjudicated cases, he thus announces: "If the fraud be such that had it not been practiced, the contract would not have been made, or the transaction completed, then it is material; but if it be shown or made probable that the same thing would have been done in the same way, if the fraud had not been practiced, it cannot be deemed material." Ib., 440.

The exceptions are untenable and the judgment must be affirmed, and it is so ordered.

No error. Affirmed.

JESSE JONES v. R. M. HENRY and another.

Evidence— Witness.

1. In a suit on a bond it is competent to show by a memorandum on the docket of the court that the defendant admitted its execution, even though there be a subscribing witness.

2. And where there is no proof to sustain an allegation in defendant's answer that a certain lunatic owned the bond, evidence of the declarations of such lunatic in regard thereto was properly excluded.

3. Under the act of 1879, ch. 183, a party to an action on a bond executed prior to the first of August, 1868, is an incompetent witness to maintain or defend the suit.

(*Austin* v. *Rodman*, 1 Hawks, 71; *Smith* v. *Haynes*, 82 N. C., 448; *Jabor* v. *Ward*, 83 N. C., 291, cited and approved.)

JONES *v.* HENRY.

CIVIL ACTION tried at Fall Term, 1880, of JACKSON Superior Court, before *Gilmer, J.*

The action was brought to recover from the defendants, R. M. Henry and Marcus Erwin, as obligors, the amount of a single bill alleged to be executed by them to the plaintiff for the sum of four hundred and forty dollars, due twelve months after date, with interest from date, and dated March 18th, 1857. Its execution was witnessed by Z. B. Vance. There are two credits endorsed on the bond of one hundred dollars each, on the 18th day of March, 1867.

The defendants denied the execution of the bond, insisted that it had been paid to one Thomas, who owned the same, at the time the payments were made, and set up as a further defence a counterclaim for more than the amount of the bond due them for professional services rendered the said Thomas, while the bond was his property. There was a replication to the several answers of the defendants.

The issues raised by the pleadings were submitted to a jury, and on the trial the plaintiff offered in evidence the following memorandum made by the clerk at spring term, 1878: "Jesse Jones *v.* R. M. Henry and Marcus Erwin, continued; and the defendants admit the execution of the bond sued upon. Leave granted the defendants to amend their answer as of the present term." This evidence was excepted to by the defendants on the ground that they had no knowledge of such a memorandum as they denied the execution of the note, and on the further ground that it was a memorandum not signed by the defendants or their attorneys, nor by the judge presiding, and not legal proof of the note, and therefore incompetent evidence. His Honor overruled the objection, and after reading the memorandum and note the plaintiff closed his case.

The defendants then offered to prove by the testimony of R. M. Henry, one of the defendants, that the note was at one time the property of Wm. H. Thomas, and while his

property or in his possession, he actually paid it, and offered further to prove by said Henry that the plaintiff was not the owner of the note when this action was brought. The defendants further offered to prove by J. W. Terrell, a disinterested witness, the declarations of W. H. Thomas that the note was paid, Thomas being in the Insane Asylum. The plaintiff objected. The objection was sustained and the defendants excepted.

The jury found all the issues in favor of the plaintiff and there was judgment for the plaintiff, and the defendants appealed.

No counsel for plaintiff.

Messrs. C. A. Moore, T. F. Davidson, Battle & Mordecai and *F. A. Sandley*, for defendants.

ASHE, J. The exception of defendants to the admission of the memorandum as evidence of the execution of the bond was not well taken. As no objection was made in the court below that the memorandum was not upon the docket, we must presume that it was there entered, and being entered, it must be regarded as having been entered with the consent of the parties or their counsel, under the sanction of the court. This presumption is supported by the fact that the memorandum of the admission of the execution of the bond is entered in connection with, and inserted between two orders of the court, which must certainly have constituted a part of the record of the case, namely, the order of continuance and the leave to defendants to amend their answer. These were entries such as are commonly made in a cause and are according to the practice of the court; and it is not necessary that they should be signed by the presiding judge. Entries like this memorandum upon the records of a court are not unusual where defendants sued for a large debt, to get time, are desirous for a continuance and willing to take one upon terms; or, when apprehensive

of an adverse decision to avoid the expense of the attendance of a witness residing at a distance, admit upon the record the execution of the instrument sued on. It was a private memorandum of the clerk; he had the power and it was his duty to strike it from the docket, or if it was a part of the record unauthorized or entered irregularly upon the docket, it was incumbent upon the defendants to move to have it expunged therefrom; but so long as it remains upon the docket it must be deemed as having the force and effect of a record, and conclusive. If it was a mere private memorandum or an unauthorized entry, that fact on a motion to strike it out could have been proved by the affidavits of the clerk and the parties. *Austin* v. *Rodman*, 1 Hawks, 71. The very fact that no such motion was made is strongly corroborative of the presumption that the entry was regularly made with the consent of the parties or their attorneys.

But the defendants insist that even if the memorandum is all right, it is incompetent for the purpose for which it was offered; for the execution of a bond can only be proved by the subscribing witness when there is one, and that the admission or confession of the obligor is not sufficient. As a general rule this proposition is no doubt correct, but there are exceptions. The first relaxation of the rule we have found in this country is in the case of *Hall* v. *Phelps*, 2 Johnson Rep. 451, which was an action on a promissory note. And Justice SPENCER in that case says, "the confession of a party that he gave a note or any instrument precisely identified is as high proof as that derived from a subscribing witness. The notion that those who attest an instrument are agreed upon to be the only witnesses to prove it, is not conformable to the truth of transactions of this kind, and to speak with all possible delicacy is an absurdity;" and in the case of *Henry* v. *Bishop*, 2 Wendell, 375, Chief Justice SAVAGE, while adhering to the general rule said, it always appeared to him as an absurdity; and in *Fox* v. *Reel*, 3 Johns.

476, which was an action upon a bond, Chief Justice KENT, speaking for the court said he concurred in the decision of *Hall* v. *Phelps*, from a sense of the great inconvenience of the English rule when applied to commercial paper, but that the court was concluded by the ancient and uniform rule, where the defendant has not acknowledged his deed before a competent public officer, *or has not expressly agreed to admit it in evidence* upon the trial. This is a distinct recognition of the exception when the execution is admitted for the purpose of the trial. In *Abbott* v. *Plumbe*, Doug. 216, where it was proved that the obligor acknowledged that he owed the debt and it was objected that the subscribing witness ought to have been called, LORD MANSFIELD considered the objection as captious, and that it was a mere technical rule which required the subscribing witness to be produced. And in the case of *Smaitle* v. *Williams*, 1 Salk. 280, the court of King's Bench held, that the acknowledgment of a deed by the party in a court of record was good evidence of the execution of the deed, and such an acknowledgment estopped the party from relying upon the plea of *non est factum*. Upon these authorities we are of the opinion the admission of the memorandum as evidence was not erroneous.

The exception to the ruling of His Honor in excluding the testimony of the witness, Terrell, as to the declarations of W. H. Thomas cannot be sustained. For while it is admitted to be law, that the declarations of a deceased person or a lunatic, not a party to the action, are admissible, where they have been made against his interest, as between third parties, the principle is not applicable to the facts of this case. Here, there was no proof that Thomas had ever been the owner of the note and his declarations as to the payment of it, therefore, when made, could not have been against his interest. It is true it was alleged in the answers that Thomas had once owned the note, or had possession of

it for the purpose of collection, but there was no proof to sustain that averment. An offer was made to prove that fact as well as the payment of the bond and the counter-claim set up in the answer by the defendant, R. M. Henry, but upon objection his testimony was ruled out by the court, and this ruling forms the ground for another exception taken by the defendants. The bond sued on having been executed prior to the first of August, 1868, the defendant, R. M. Henry, was an incompetent witness to prove those facts. The act of 1879, chapter 183, declares that no person who is a party to a suit now existing, or which may hereafter be commenced in any court in North Carolina, that is founded on any bond under seal for the payment of money, executed previous to the first day of August, 1868, shall be a competent witness. He is made incompetent for any purpose on the trial of the action upon such a bond. The case of *Smith* v. *Haynes*, 82 N. C., 448, relied upon by the defendants, in support of the exception, does not sustain the position. That was not an action brought upon a bond, but a suit by a surety to recover money paid by him to the use of the principal obligor of the bond. Such a case does not come within the purview of the statute. As was said in that case, we have no doubt the leading purpose of the legislature in passing the act of 1879 was to prevent the presumption of payment arising after the lapse of ten years upon such bonds and judgments from being rebutted by the testimony of the parties to the action, but the act is broad and explicit in its terms, and must be construed to make a party to an action on such a bond incompetent as a a witness on a trial to maintain or defend the action. *Tabor* v. *Ward*, 83 N. C., 291.

There is no error. The judgment of the court below must be affirmed.

No error. Affirmed.

L. H. YEARGIN v. R. A. WOOD, Coroner.

Sheriff, amercement of—Notice of Rule.

1. In a proceeding to enforce the statutory penalty against a sheriff for failure to make due return of process, it is not error to set aside a judgment absolute where it appeared that he had no notice of the rule upon him to show cause.
2. Where in such case the summons sent by mail did not reach such officer until six days before the sitting of the court to which it was returnable, and he served it in two days thereafter; *Held* he is not liable to amercement.

(*Frost* v. *Rowland*, 5 Ired., 385; *State* v. *Latham*, 6 Jones, 233; *Waugh* v. *Brittain*, 4 Jones, 470; *Cockerham* v. *Baker*, 7 Jones 288, cited and approved.)

MOTION to vacate a judgment heard at Fall Term, 1880, of WAKE Superior Court, before *Graves, J.*

The motion was allowed and the plaintiff appealed.

Mr. Walter Clark, for plaintiff.

Messrs. Gilliam & Gatling, for defendant.

SMITH, C. J. The plaintiff sued out of the office of the clerk of the superior court of Wake, in an action instituted by himself against Susan Siler and others, one of whom was the sheriff of Macon, a summons returnable to fall term, 1879, and directed to the coroner of said county, and caused the same on July 8th, 1879, to be deposited in the post office at Raleigh, in an envelope addressed to said coroner at the county seat thereof. The process was returned with an endorsement of service made on August 7th, four days before the beginning of the term of Wake superior court, and on proof of the deposit in the post-office, judgment *nisi* for the penalty was then on plaintiff's motion entered up against the defendant and notice thereof ordered

to issue to him. At spring term following on like proof of the issuing and forwarding of a copy of the rule by mail in time to have reached its destination, and the defendant failing to appear, the said judgment was made final. At August term, 1880, upon notice, motion was made on behalf of the defendant to vacate the judgment, supported by his affidavit, and the court finds the following facts: The defendant, a mill wright, was absent at work in South Carolina, during the months of July and August, and the summons for neglect to serve which he was amerced was forwarded and received by him on the 5th day of the latter month, and under his deputation was executed two days thereafter. Owing to his prolonged absence at his work, he received no copy of the rule, and no notice or information thereof from any source until the execution against him was in the sheriff's hands. The court thereupon set aside the final judgment and refused to make the rule absolute, and the plaintiff appealed.

The record does not disclose any final disposition of the cause by an order of dismissal, and strictly the only point presented is the action of the court in vacating the absolute judgment, and this raises two questions:

1. Was the transmission of the copy of the rule by mail a sufficient service?

2. Upon the facts is the defendant liable to amercement?

While we do not undertake to say that any thing short of an actual personal service or service by publication will authorize a final judgment upon the presumption that the copy was received, it was clearly competent for the court, and its duty to relieve the defendant upon satisfactory evidence that the notice never did reach him, nor did he have information from any source of the pending proceeding to enforce the statutory penalty. It was not error therefore to set aside the judgment when no opportunity had been afforded for making a defence.

2. Has the defendant rendered himself liable to the amercement?

The act of 1777 declares that "every sheriff by himself or his lawful deputies" (and it equally applies to coroners under subsequent legislation) "shall execute all writs and other process to him legally issued and directed," &c., and make due return thereof under the penalty of forfeiting one hundred dollars (originally fifty pounds) for each neglect, when such process *shall be delivered to him* twenty days before the sitting of the court to which the same is returnable, to be paid to the party aggrieved, by order of the court upon motion and *proof* of such delivery, unless such sheriff can show sufficient cause to the court at the next succeeding term after the order. Bat. Rev., ch. 106, § 15. The statute became more highly penal by an amendment in 1821, since repealed, which subjected the offending officer to indictment also. "It was known," says Chief Justice RUFFIN, in reference to the purposes of this legislation, "that debtors often prevailed on sheriffs to omit doing execution by paying down to them the trifling fine. To prevent such scandal to the law and such injury to the suitor, the legislature enlarged the amercement to the party aggrieved to $100. But as even that might in some cases be advanced by the debtor, and it was intended to enforce effectually the execution of process in all cases, it was added in that act that said sheriff shall for every such neglect be further subject to indictment." *Frost* v. *Rowland*, 5 Ired., 385. To bring a delinquent officer within the provisions of the statute and subject him to its pains, the process must have been delivered to him twenty days before it is to be returned and there must be "*proof of such delivery.*" The proof is sufficient for an amercement *nisi*, under former rulings where it is shown that the process in an envelope properly directed and with postage pre-paid has been deposited in the post office in time to enable it to reach its destination in the due

course of the mail twenty days before the session of the court to which it is returnable. *State* v. *Latham*, 6 Jones, 233. And the officer is allowed to rebut the presumption of its having been received and to discharge himself, as upon a motion for a rule against him, in the language of the late chief justice, "by making an affidavit that the writ did not come to his hands." In like manner the officer may use the mail for the transmission and return of the precept in his hands to the office whence it issued without incurring the penalty, a proposition intimated in *Waugh* v. *Brittain*, 4 Jones, 770, and declared in *Cockerham* v. *Baker*, 7 Jones, 288.

To what extent these rulings are modified by the code of civil procedure, sections 350, 351 and 352, which prescribe the mode of serving notice, it is not necessary for us now to determine. They do not make the case more favorable to the appellant.

The delivery of the process to the officer and his failure to execute its commands and make due return, are essential ingredients in the criminal dereliction of duty followed by the penal consequences thus summarily enforced.

Whatever liabilities the defendant may have incurred (and we do not say he has incurred any to the plaintiff) by his protracted absence from his county and consequent inability to discharge the duties of his office when called on, to the public, he has not incurred that now sought to be enforced. The fact being established that the summons never came into the defendant's hands until six days before the session of the court to which it was returnable, and that in two days thereafter it was served, we are of opinion that he cannot be amerced; and the ruling of His Honor must be sustained and the proceeding dismissed.

No error. Affirmed.

ANN GIFFORD v. M. E. ALEXANDER, Sheriff.

Sheriff—Sale under several executions—Purchaser.

Where a sheriff has five executions in his hands against the same defendant and sells his lands under four of them but was restrained by injunction from selling under the other also, *it was held* that the latter could not be called in to aid the title of the purchaser, nor the sheriff be required to recite it in his deed.

(*Seawell* v. *Bank*, 3 Dev., 279; *Huggins* v. *Ketchum*, 4 Dev. & Bat., 414, cited and approved.)

RULE upon a sheriff to show cause, &c., heard at Fall Term, 1880, of MECKLENBURG Superior Court, before *Seymour, J.*

In this case the plaintiff moved for and obtained a rule upon the defendant, who, as sheriff of Mecklenburg county, had sold certain lands under execution against one Stenhouse, to show cause why he should not execute her a deed with correct recitals as to the executions in his hands at the time of the sale, and under which, it is alleged, he actually sold. In support of her motion, the plaintiff set forth in an affidavit that the defendant, having in his hands several executions against the said Stenhouse, returnable to spring term, 1877, to wit, one under a judgment recovered by M. L. Davis, at fall term, 1871, and then docketed, two under justices' judgments in favor of Alfred Harshaw, docketed on the 29th day of February, 1876, and two under justices' judgments in favor of H. G. Springs, docketed on the 29th day of March, 1876, endorsed on those in favor of Harshaw and Springs as follows: "Levied this execution on the property of J. E. Stenhouse, adjoining the property of R. G. Spraggins, April 2nd, 1877, (signed) M. E. Alexander, sheriff," but made no endorsement on the Davis execution. That on the 5th of March, 1877, the said sheriff advertised

the said land for sale in the following words: "I will sell for cash, at the court house door in the city of Charlotte, on Monday, the 2nd day of April, 1877, to satisfy executions in my hands for debt, and state and county taxes, the following described city property and land," (giving a description of the Stenhouse land amongst others.) That the Stenhouse land was sold under the said executions and in pursuance of said advertisement, when the plaintiff became purchaser at the price of five hundred dollars. She was ready and willing to comply with her bid by paying the purchase money and has offered to do so. That the defendant has refused to make her a deed for the land as having been sold under the Davis execution, but offered to give a deed under the Harshaw and Springs executions, which she is unwilling to take. That subsequent to the docketing of the Davis judgment, but prior to the Harshaw and Springs judgments, said Stenhouse executed a mortgage on said land, on which there is a balance due going to one Davidson. That after all the judgments were docketed, said Stenhouse gave another mortgage to said Davidson to secure a debt of some five thousand dollars. Thereupon she prays that the defendant in the motion may be required, as such sheriff, to execute to her a deed, reciting a sale under all the executions in his hands at the time of the sale, including the Davis one. In his answer to the rule, the defendant admits that the Harshaw and Springs executions were in his hands as set forth in the plaintiff's affidavit; and that he levied them upon the land of said Stenhouse, which, after advertisement, he sold, when the plaintiff became the purchaser; but he denies that he either levied, advertised under, or sold under the Davis execution. On the contrary he avers that after such execution came to his hands, and before any levy, advertisement or sale was made under any, he w s restrained by injunction from proceeding under the Davis execution, and therefore he did not consider it as in

his hands, or act under it. There were many other allegations (*pro* and *con*) made by the parties as to the estate which the said Stenhouse had in the land, and questions raised as to its liability to sale under execution and his right to homestead therein, and His Honor below made several findings in regard to these matters. But as they are not material to the only point considered by the court, they are omitted from this statement. As to the sale by the sheriff, His Honor found as a fact in the case that he did not advertise and sell the land described under the Davis execution, but that he returned said execution to court with the endorsement of his action under it as follows: "No sale by reason of injunction," and that he sold only under the Harshaw and Springs executions. And thereupon His Honor refused the plaintiff's motion to compel the defendant as sheriff to execute a deed, as asked for, to which the plaintiff excepted and appealed.

Messrs. P. D. Walker and *Shipp & Bailey*, for plaintiff.

Messrs. Bynum & Grier, Jones & Johnston, Walter Clark, and *Hinsdale & Devereux*, for defendant.

RUFFIN, J. The plaintiff in the motion is precluded, by His Honor's finding of fact, from asserting further, that the defendant sheriff sold the Stenhouse land under the Davis execution. This being so, she can derive no support for her claim to the land, from that execution, as was decided in *Seawell* v. *Bank*, 3 Dev., 279. There, it was held that if a sheriff has several writs against the same defendant and fails to sell under one of them, that one cannot be called in to aid the title of a purchaser, who buys at a sale under the others. The circumstances of that case were very much stronger in favor of such a right in the purchaser, than those existing in the plaintiff's case, for there some portion of the money, raised by the sale, was applied to the omitted

execution. The principle which says that a sheriff, who sells under several writs, one of which is rightful and the others indifferent, can confer upon the purchaser a valid title, has no application to the plaintiff's claim; for that presupposes what does not exist in her case, a sale under *all*. Until the contrary is shown, a sheriff, who sells, is presumed to act under every power conferred upon him and existing at the time, as was said in *Huggins* v. *Ketchum*, 4 Dev. & Bat., 414; and in such case a mis-recital or a non-recital of his powers will not be permitted to prejudice the title of the purchaser. But this presumption of a sale under all *may be* shown to be untrue, and unfortunately for the plaintiff, His Honor finds it to be untrue in her case. If the defendant sheriff did not, in fact, act under the power given him by the Davis execution, he should not be permitted, and much less required, to recite that in his deed as one under which he proceeded; for apart from the question of untruthfulness involved, it might seriously complicate the rights of the plaintiff in that judgment.

We hold therefore that His Honor did right in denying the plaintiff's motion, and the order of the court below is affirmed.

No error. Affirmed.

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*JOHN C. GAY v. ROBERT S. NASH.

Agricultural Lien, proceeding to enforce.

In a proceeding to enforce an agricultural lien under Bat. Rev., ch. 65, § 20, the crop was sold by the sheriff and on trial before a jury the de-

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

fendant admitted the execution of the lien but denied that anything was due for advances thereunder; there was a general verdict for the plaintiff and the court refused judgment because the jury failed to assess the damages; *Held* error; the verdict established the "lien debt" in excess of the proceeds of sale, entitling the plaintiff to judgment.

(*Jenkins* v. *Ore Co.*, 65 N. C., 563; *Bryan* v. *Heck*, 67 N. C., 322; *Moore* v. *Edmiston*, 70 N. C., 471, cited and approved.)

PROCEEDING to enforce an agricultural lien, removed from Richmond county and tried at Fall Term, 1880, of STANLY Superior Court, before *Seymour, J.*

There was a verdict for plaintiff, and from the refusal of the judge to give judgment thereon for the reason set out in the opinion of this court, the plaintiff appealed.

Messrs. A. Burwell and *Platt D. Walker*, for plaintiff.
Mr. Jas. A. Lockhart, for defendant.

SMITH, C. J. The plaintiff made affidavit in proper form as required by Battle's Revisal, ch. 65, § 20, and sued out of the clerk's office a warrant directed to the sheriff, by virtue of which he seized and sold certain crops of the defendant raised in the year 1876 for $389.79 to satisfy a debt in the sum of $546.95, alleged to be due the plaintiff, and a lien thereon for advances made in their cultivation. The defendant in his answer admits his giving the lien but denies that there is anything due the plaintiff for the advances authorized therein, or that he had any intent to remove and place the property beyond the plaintiff's reach. The case was before us on a former appeal on the question of the validity of the contract for want of registration within the time prescribed in the act. (See 78 N. C., 100.) It has been tried before a jury whose verdict, though not in the form of a response to distinct issues, was rendered generally for the plaintiff, that is, as the record must be understood, the findings upon the controverted facts are in favor of the plaintiff.

The court refused to give judgment for the plaintiff on the ground that "the jury had failed to assess the plaintiff's damages," set aside the verdict and ordered a new trial, from which ruling the plaintiff appeals.

We think the plaintiff was entitled to the judgment demanded for the proceeds of the sale of the crops in the hands of the sheriff to be applied to the costs incurred in the proceeding and to his debt. The entire dispute was as to the amount and lien of the plaintiff's debt and its sufficiency to absorb the value of the crop by which it was secured. This is the entire scope and object of the summary proceeding, and it ends with the disposal of the crop. It is unlike an ordinary action where the plaintiff recovers his whole demand and has partial satisfaction only out of the encumbered property, but is a direct method provided by law for the enforcement of a lien upon specific property which the advances constituting the debt have contributed to make. The verdict establishes a lien debt in excess of the sales, and the plaintiff was entitled to an order of appropriation thereof. If the new trial were awarded in the exercise of a discretion reposed in His Honor, it would not be disturbed by an appeal. But the refusal to give judgment is put upon ground within the provisions of C. C. P., § 299, (*Jenkins* v. *N. C. Ore Dressing Company*, 65 N. C., 563; *Bryan* v. *Heck*, 67 N. C., 322; *Moore* v. *Edmiston*, 70 N. C., 471), as "involving a matter of law or legal inference."

There is error and the plaintiff must have judgment for the appropriation of the money to his debt.

Error. Reversed.

THOMAS J. MERONEY v. JOHN L. WRIGHT.

Summary Ejectment—Writ of Restitution.

On trial of summary ejectment before a justice of the peace, judgment was rendered for plaintiff who was put into possession; on appeal, the superior court decided against the plaintiff upon the ground that the lease had not terminated; and on appeal to this court the judgment was affirmed; *Held* that the defendant is entitled to a writ of restitution as a part of the judgment in his favor and damages for use and occupation of the premises by plaintiff, and that the court below erred in permitting an inquiry into the question as to the termination of the lease before the former trial.

(*Meroney* v. *Wright*, 81 N. C., 390; *Perry* v. *Tupper*, 70 N. C., 538, and 71 N. C., 385, cited and approved.)

MOTION in a proceeding under the landlord and tenant act for an inquiry to ascertain damages sustained by defendant for his eviction, heard at August Special Term, 1880, of ROWAN Superior Court, before *McKoy, J.*

Motion refused, judgment in favor of plaintiff for costs, appeal by defendant.

Messrs. J. M. McCorkle and *J. W. Mauney*, for plaintiff.

No counsel for defendant.

SMITH, C. J. The plaintiff commenced his action on January 14th, 1878, before a justice of the peace, against the defendant, his lessee, as he alleges in his accompanying affidavit, who is holding over after the expiration of the term and refuses to surrender, for the possession of a lot in the town of Salisbury, under the provisions of the act of 1869 in relation to landlord and tenant. Bat. Rev., ch. 64.

The defendant denied the tenancy, and on the trial the justice gave judgment for the plaintiff, awarding the writ under which, on the 28th day of the next month, he was

put in possession. On the rehearing of the cause, on the defendant's appeal in the superior court of Rowan, at spring term, 1879, upon an intimation from the court that the plaintiff, upon his own showing, was not entitled to recover, he submitted to a non-suit; and the court adjudged that the defendant recover his costs, and directed a writ to issue restoring the premises to him. Thereupon the plaintiff appealed to this court and entered into an undertaking with sureties "that during the possession of said property by the plaintiff, he will not commit nor suffer to be committed any waste therein, and that, if the judgment be affirmed, *the plaintiff will pay to the defendant, John L. Wright, the value of the use and occupation of the property from the spring term*, 1879, *of said court until the delivery of possession thereof to the defendant*," under the requirements of section 307 of the Code.

In this court the judgment was affirmed for the reason assigned in the court below, that the lease did not terminate by default in the monthly payment of rent, in the absence of any stipulation to that effect. *Meroney* v. *Wright*, 81 N. C., 390. At a special term of the court, held in August, 1880, an issue as to "the value of the use and occupation" of the premises during the period specified in the undertaking, was prepared and submitted to the jury, who assess the monthly value at six dollars. At the same time, the court, against the defendant's objection, entertained the enquiry and heard evidence to show that the lease had terminated before the former trial, and thereupon, the defendant declining to produce any himself, adjudged that the defendant was not entitled to the writ of restitution, nor to compensation for the plaintiff's occupation of the lot after the appeal, and refused the defendant's motion for either, with costs. From this ruling the defendant's appeal again brings the case up for review.

We think there is manifest error in refusing the relief demanded, and disregarding alike the former judgment of this

court affirming that rendered below, and the express stipulations of the plaintiff's undertaking, whereby he was enabled to retain the possession for the period during which he and his sureties were to be accountable for rent. The contract is positive and explicit, that failing in the appeal, the plaintiff will pay the rent thereafter accruing, until the land is restored to the defendant, without qualification or condition of any kind. The cause was at an end by the decision on the appeal and remained only for the purpose of restitution to the party from whom the land had been wrongfully taken, and awarding him compensation therefor at least during the period in which it was withheld in consequence of the appeal. The title cannot again be drawn in controversy in an action already determined adversely to the plaintiff and in those final necessary proceedings to give effect to the judgment. If the possession of the lot had not been originally taken under the justice's process and delivered to the plaintiff at his own instance, no responsibility for its use would have been incurred; and if the deprivation of the defendant had not been prolonged by a fruitless appeal, and thus a prompt restitution prevented, there would have been no undertaking required, imposing the obligation now to be enforced. The compensation is but a substitute for the occupation and the measure of its value, of which the appellee is deprived by reason of the appeal. To allow the results of a suit to be lost to the prevailing litigant, as is done by the ruling of the court, is in substance to convert an unsuccessful into a successful action by proceedings subsequent to its determination without a reversal of the final judgment, and thus enable the plaintiff to retain property, the possession of which he has acquired by the action of the court during the pendency of his suit, and which by the decision of the court he has no right to recover. If he had been content to prosecute his action and leave the defendant undisturbed in his occupation until the rights of the

parties were determined, his failure would have left the matter as it was before, and the redress provided, because of the dispossession, accomplishes the same practical result.

But if the question of title could arise as affecting the claim for damages, it should have been, as a material fact, also submitted to the jury in presence of the defendant's objection and refusal to introduce evidence, and the court should not have undertaken itself to pass upon the point; and this would be to re-open a closed controversy which puts the plaintiff out of court.

We do not mean to say that the awarding damages to the defendant for the use of the premises will bar the plaintiff's right, in another action for the recovery of possession, to demand damages from defendant for the wrongful withholding by the defendant even during the period for which he must make compensation to the defendant in this, since the latter is thus placed in the exact relation to the plaintiff as if his possession had never been interrupted.

The judgment rendered at spring term when the nonsuit was entered, after (as His Honor now finds) the expiration of the lease, was that restitution be made and this was affirmed on the appeal. The denial of the motion for restitution is in direct opposition to that judgment.

"Whenever a party is put out of possession by process of law and the proceedings are adjudged void," says the late chief justice, "an order for a writ of restitution is a *part of the judgment.*" *Perry* v. *Tupper*, 70 N. C., 538. And again when the same matter subsequently came before the court, READE, J., thus expresses the opinion: "The defendant having been put out of possession by an abuse of the process of the law, the law must be just to itself as well as to the defendant by restoring him to that of which he was wrongfully deprived. *When the defendant is restored to the possession, then, and not till then* will the court be in condition

in which it can, honorably to itself, pass upon the further rights of the parties." *Perry* v. *Tupper*, 71 N. C., 385.

These observations seem entirely appropriate to the facts of the present case.

We therefore declare there is error and the ruling in the court below must be reversed, and the cause will then proceed in accordance with this opinion, and to this end let it be certified.

Error. Reversed.

MARTHA WHITE v. WILLIAM WHITE.

Divorce—Sufficiency of Complaint.

In a divorce suit where the wife alleges ill-treatment by her husband, but fails to state the circumstances connected with the assaults charged and the causes which brought them on, it is error to render judgment in her favor upon the finding of a single issue that she was ill-treated, thereby rendering her condition intolerable and life burdensome (which is but a conclusion of law). In such case the court cannot determine the sufficiency of the grounds upon which her application is based.

(*McQueen* v. *McQueen*, 82 N. C., 471; *Joyner* v. *Joyner*, 6 Jones Eq., 322; *Harrison* v. *Harrison*, 7 Ired., 484; *Coble* v. *Coble*, 2 Jones Eq., 392; *Taylor* v. *Taylor*, 76 N. C., 433, cited and approved.)

CIVIL ACTION for divorce *a mensa et thoro* tried at December Special Term, 1880, of LENOIR Superior Court, before *Seymour, J.*

The defendant appeals from the judgment below.

Messrs. Grainger & Bryan, for plaintiff.

Messrs. Geo. V. Strong and *W. T. Dortch*, for defendant.

SMITH, C. J. The plaintiff, who married the defendant in 1867, she being then about thirty, and her husband sixty-three years of age, commenced her action on April 29th, 1875, for divorce from bed and board, and, besides general charges of brutal treatment, assigns as the special grounds of her application three separate acts of violence suffered at his hands. She alleges:

1. That on the 1st day of January, 1872, he struck her at their residence on the head with a piece of iron about one and a half feet long, causing bruises and swelling which lasted for a week.

2. That in August of the next year at their residence he gave her several blows with a stick two feet in length and one and a half inches in diameter on her head and hip, accompanying the beating with abusive language, from which wounds blood flowed and she suffered severe pain for more than a week.

3. That on April 16th, 1874, he abused her and with a pestle one and a half feet long gave her several blows, cutting and bruising her badly, the effects of which remained for a week.

All this violence she declares was committed on her person without any provocation, and she is entirely silent as to the antecedent and attending circumstances, and the causes which prompted the defendant thus to act. She makes no statement of her own conduct, nor of any facts in explanation of the three violent assaults described in the complaint, separated at long intervals from each other, so that the court can see whether there was any and what excuse or extenuation for such outbursts of temper in an old man crippled and verging upon seventy years of age, contenting herself with the brief averment that there was no provocation given. The plaintiff's statements obviously present a partial view of the several transactions mentioned, and not a full and fair narrative of what occurred on those

occasions, so that the court can determine the sufficiency of the grounds upon which the application is based. It is difficult to conceive how such an innate impulse of rage and passion can exist in the human heart and break out in acts of brutal violence to an unoffending wife, without an exciting though it may be a wholly inexcusable cause. And it is due to the court whose interposing and protecting power is asked, that all the essential facts should be truthfully and fairly stated. The policy of the law does not favor the separation of married persons, because of domestic strife and dissensions, and does so when one "shall by cruel or barbarous treatment endanger the life of the other," or "shall offer such indignities to the person of the other as to render his or her condition intolerable and life burdensome." Bat. Rev., ch. 37, § 4. So the allegations in the complaint, without an answer, are denied in law, and the material facts must be found by the jury. § 7. And therefore the complaint should contain a fair representation of any transaction relied on as the ground of the decree, since its defects are not aided by the verdict. *McQueen* v. *McQueen*, 82 N. C., 471.

"We are of opinion," remarks PEARSON, C. J., speaking for the court in a case where the petition was obnoxious to the same objection, "that it was necessary to state the circumstances under which the blow with the horsewhip and the blow with the switch were given; for instance, what was the conduct of the petitioner; what had she done or said to induce such violence on the part of the husband." *Joyner* v. *Joyner*, 6 Jones Eq., 322.

It is true the instruments charged to have been used in the present case were calculated to inflict much greater injury than the whips, but the same necessity exists in both for a correct account of the matter in order that it may be understood and fairly estimated. It may have been a transcient ebullition of temper, or it may have been the fruit of

a cool deliberate purpose to injure and oppress seeking occasion for indulgence. The defendant's answer, denying the first two assaults charged, says, in explanation of the blow alleged to have been given with the pestle, that the plaintiff struck him with the pestle, and caught and pulled out a handful of his hair, when he returned the blow with his fist; that on the second occasion, she struck him with the iron stick, and he simply pressed a small stick against her head and quieted her; that the plaintiff has an uncontrollable temper, was always the aggressor in using abusive language, and never trusting him as becomes a wife; and that he is seventy years of age, feeble and infirm, and inferior in physical strength to his wife.

The affirmative response of the jury to the third issue, "Did the defendant beat, abuse, and ill-treat the plaintiff as stated in the complaint and thereby render her condition intolerable and life burdensome and thus compel her to separate from him," leaves out of view, as does the complaint, the circumstances connected with the assaults and the causes which brought them on, and is equally obnoxious to objection. The matters of excuse and extenuation should also have been submitted to the jury in appropriate issues, and thus the court put in possession of all the facts material in the determination of the cause. If we were at liberty to look into the evidence transmitted, as we are not, the necessity of additional issues as to the plaintiff's conduct and the existence of a provocation offered by her, would be more apparent. When parties are equally blamable for domestic disturbances—are each *in pari delicto*—the court will not interfere, unless perhaps when necessary to protect from danger to life or great bodily harm. "To entitle a wife to a sentence in a suit for divorce by reason of cruelty, it must not appear that she has herself been the cause of the sufferings she complains of." Poyner Mar. & Div., 214. "A wife is not entitled to a divorce by reason of the cruelty

of her husband, if she is a woman of bad temper and provokes his ill-usage. Her remedy in such cases is by her changing her own manners." Shel. Mar. & Div., 431. The ordinary rule applicable to civil suits, which forbids a party in this court to assign as error the omission to submit issues of controverted facts, which he did not demand at the trial, are not appropriate to proceedings for divorce. Here, the facts material to the plaintiff's relief, with or without a denial from the defendant, must be ascertained and declared by the verdict; and no relief can be granted without such finding. The verdict is in our opinion insufficient, and other issues ought to have been submitted and passed on for a fuller development and understanding of the controversy, nor is this objection removed by the finding that the plaintiff's condition has been rendered intolerable, and her life burdensome, which are but conclusions of law. *Harrison* v. *Harrison*, 7 Ired., 484. The charges of brutal treatment, unexplained and without sufficient provocation (and it will require very great provocation to excuse the defendant) clearly entitle the plaintiff to a separation. *Coble* v. *Coble*, 2 Jones Eq., 392; *Taylor* v. *Taylor*, 76 N. C., 433.

We think the judge erred in rendering his judgment upon the case made in the complaint and affirmed by the jury, without the additional explanatory information, if there be such to which we have adverted. The judgment must therefore be reversed and a new jury ordered.

Error. *Venire de novo.*

*S. W. ISLER, Ex'r, v. H. M. DEWEY and others.

Statute of Limitations, purchaser protected by.

A purchaser of land, who has been in the continuous adverse possession under a deed for the same for more than seven years before suit brought (and after cause of action accrued) to have such purchaser declared a trustee for plaintiff's benefit, is protected by the statute of limitations, and the fact that ejectment was brought within the time is no defence to the plea of the statute. The two actions are not for the same cause. *Whitfield* v. *Hill*, 5 Jones Eq., 316, approved.

(*Hall* v. *Davis*, 3 Jones Eq., 413; *Taylor* v. *Dawson*, *Ib.*, 86; *Whitfield* v. *Hill*, 5 Jones Eq., 316, cited and approved.)

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

This is an action brought by plaintiff's testatrix to have the defendants declared to be trustees of the lands described in the complaint. The case upon the pleadings and the issues found by the jury is as follows:

On the 6th of February, 1867, one Samuel Smith executed and delivered to Richard Washington a deed for the lands set forth in the complaint in trust to sell the same for the payment of the debts therein described, which deed was duly registered. That thereafter, to-wit, at February term, 1867, of Wayne county court, the plaintiff's testatrix recovered a judgment against said Smith for a large amount, and on the 19th day of August ensuing caused the interest of said Smith in said lands to be exposed to sale under an execution issued upon said judgment and at said sale became the purchaser at the price of $.. ..., paid the money to, and took a deed in fee from the sheriff, for the interest of said Smith in the land. That after this on the ..... day of ....., the said Richard Washington died, and upon

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

proper proceedings had for that purpose, in the court of equity for said county, one William G. Morisey, clerk and master of said court, was appointed trustee in place of said Washington, and in pursuance of a decree in the cause, Morisey as trustee sold the land at public outcry in Goldsboro, when the defendants became the purchasers at the price of three thousand and two dollars, paid the purchase money, and the sale was reported and confirmed by said court, and under an order thereof a title in fee to the land was made by Morisey as trustee, by deed bearing date March 30th, 1867. That plaintiff's testatrix was not a party to said proceedings.

After this last sale and confirmation, to-wit, on the 29th day of December, 1867, Smith was ejected from the land by the defendants, who have held the continuous adverse possession of the same ever since.

On the 23rd day of January, 1871, plaintiff's testatrix commenced an action in nature of ejectment in the superior court of said county against the defendants for the recovery of the land, on the ground that the deed of trust from Smith to Washington was fraudulent and void, which action was finally decided against the plaintiff at June term, 1876, of this court. The present action was commenced on the 19th day of March, 1877.

To the issues submitted, the jury returned the following finding:

1. What is the amount of indebtedness in said deed of trust? Ans. $18,761.23, of which $8,943.08 is principal, and $9,818.35 is interest.

2. What is the value of the land in controversy? Ans. Three thousand seven hundred dollars.

3. What is its annual value? Ans. Two hundred and seventy dollars.

4. What was the value of the personal property embraced

in said deed of trust at the time it was closed on the 29th day of December, 1867? Ans. Three hundred dollars.

The testatrix died after the commencement of the action, and by her will which was duly admitted to probate appointed the plaintiff her executor and devised to him the lands in controversy.

The defendants for defence say that the plaintiff acquired no title to her interest in the lands in dispute by her purchase at the sheriff's sale, under the execution in her favor against Smith and others, for Smith had no interest at the time liable to execution, and that the plaintiff's action is barred by the statute of limitations. His Honor gave judgment for the defendants and the plaintiff appealed.

Mr. W. T. Faircloth, for plaintiff.
Messrs Dortch, Strong and *Smedes*, for defendants.

ASHE, J. The defendants relied for their defence partly upon the statute of limitations, and we think the case turns upon that question. It is therefore unnecessary to consider it in any other aspect.

The defendants obtained title under the sale by the trustee on the 30th of March, 1867, ejected Smith on the 27th of December following, and have had the continuous adverse possession of the land ever since, and the present action was commenced on the 19th of March, 1877, more than seven years after the plaintiff's cause of action had accrued.

But the plaintiff insists that the operation of the statute was arrested by the institution of the action of ejectment commenced in 1871, for the land in controversy, which was not finally decided until the June term, 1876, of this court, and then that this action was brought within twelve months after the determination of said suit. If this action were for the same cause as that brought by the plaintiff's testatrix and determined in 1876, the position would be sustainable

and this case would come within the principle enunciated in *Hall* v. *Davis*, 3 Jones Eq., 413. But that case was an action of ejectment brought by the plaintiff's testatrix to recover the land in dispute, on the ground that the deed in trust made by Smith to Washington was fraudulent and void as against creditors, and this is an action founded upon the assumption that that deed was *bona fide* and valid, and seeks to convert the defendants into trustees, and have the land conveyed to plaintiff or sold, and after making certain deductions to apply the remainder of the proceeds to the plaintiff's debt. This is a cause of action different from the former action and altogether inconsistent with it.

The case of *Whitfield* v. *Hill*, 5 Jones Eq., 316, is directly in point and we think settles this question. There, the lands of one Hugh Whitfield had been sold under execution against him, and soon thereafter he brought an action of ejectment against the purchaser at the sheriff's sale, upon the ground that the sale was fraudulent and void, the bidding at the sale as alleged having been "stifled" by the purchaser. And while this action was still pending, but more than seven years after the sale, the defendant having been in continuous adverse possession thereof during all that time, the plaintiff filed a bill in equity alleging the fraud at the sale, and praying that the alienee of the purchaser might be converted into a trustee and the land reconveyed to him. But this court held that the suit was barred by the statute of limitations, for the reason, "the right which the plaintiff insisted on at law was to set aside the sheriff's deed *in toto*, and treat it as a nullity. The right which he now insists on in equity is to convert the defendant into a trustee, assuming the validity of the sale to pass the legal title, and admitting the right of the defendant to hold the land as security for the amount of the judgment and costs, which two rights are inconsistent." And again in *Taylor* v. *Dawson*, 3 Jones Eq., 86, it is held, where a deed in

trust was made to secure *bona fide* debts, one who took the trustee's title, is protected by the statute of limitations, however fraudulent he may have acted in suppressing competition, and although he bought in the property for the trustor."

It will be noted, the plaintiff does not seek by his action as the purchaser of the interest of Smith at the sheriff's sale to be subrogated to any rights he might be supposed to have, to redeem the land as mortgagor, for that would subject him to the duty of paying the debts secured in the mortgage or deed in trust before he could perfect his legal title; but he seeks to deprive the defendants of the legal rights they have acquired by their *bona fide* purchase at the trustee's sale, and have them declared trustees to his use, and to answer for the rents and profits during the time they have been in possession. We are not aware that any such equity has ever been recognized by the courts.

We are of the opinion the plaintiff's action was barred by the statute of limitations and that there is no error. The judgment of the court below is therefore affirmed.

No error. Affirmed.

B. F. HOUSTON, Ex'r. v. WILLIAM H. HOWIE, and others.

Construction of Will—Practice—Jurisdiction.

1. A testator, in the second clause of his will, bequeathed to certain relations of his deceased wife "all that part of my property that I now have that I got with or by my wife, to be equally divided between them, *to be separated from my other property*," by A and B. In the third item he bequeathed to his own relations by blood "all the *balance* of my household furniture and bedding," and in still another clause (Item 7) he directed his plantation to be sold by his executor, and the

proceeds of said sale "together with any moneys on hand or debts due me, (which debts I desire my executor to collect) and after taking out the aforesaid bequests, be divided into two shares,"—and paid to certain legatees therein named; *Held*, that a legacy bequeathed to the testator's wife by her grandfather, but which was never reduced into possession by the husband in his lifetime, and remained unpaid until collected by the husband's executor, did not pass to the deceased wife's relations as property which the testator had "got" from her, but went to those entitled under item 7 of the will.

2. Where proceedings to obtain the construction of a will are commenced by the executor before the superior court clerk or judge of probate, and then transferred to the superior court in term for the adjudication of the judge, the decision of the latter, rendered without objection, will not be reversed on appeal by reason of a defect of jurisdiction, first urged in this court.

(*Davis* v. *Davis*, 83 N. C., 71; *Heilig* v. *Foard*, 64 N. C., 710; *Rowland* v. *Thompson*, 65 N. C., 110; *Haywood* v. *Haywood*, 79 N. C., 42; *Bratton* v. *Davidson*, *Ib.*, 423; *Staley* v. *Sellars*, 65 N. C., 467; *Cheatham* v. *Crews*, 81 N. C., 343; *Taylor* v. *Bond*, Busb. Eq., 5, cited and approved.)

CONSTRUCTION of a will heard at Fall Term, 1879, of UNION Superior Court, before *Buxton, J.*

Josiah Craige died in 1863 leaving a will in which are contained the following bequests:

Item 2. "I give and bequeath unto my sister-in-law, Sarah E. Howie, and my brother-in-law, George R. Winchester, all that part of my property that I now have, that I got with or by my wife, to be equally divided between them, to be separated from my other property by Eliza Winchester and Sarah E. Howie."

Item. 3. "I give and bequeath to my sister, Rachel Helms, and Leander Craige, all the balance of my household furniture and bedding, to be equally divided among them, the aforesaid bequest to include my saddle and bridle and trunk, to be divided between them by my father and executor."

Item 7. "My will and desire is that my plantation be sold to the highest bidder, on such terms as my executor

may deem most beneficial to my estate, and that the proceeds of said sale, together with any moneys on hand or debts due me (which debts I desire my executor to collect) and after taking out the aforesaid bequests, be divided into two shares, one share to be paid to Rachel Helms, the other share paid to H. B. Craige," with certain trusts imposed on the estate given to Leander Craige, not material to be stated in detail.

The wife of the testator, Josiah Craige, under the will of her grandfather, John Walker, became entitled to a legacy which was not reduced into possession by her husband during her lifetime, nor after her death during his own, he having survived her; but it has since been collected by the plaintiff, his executor.

This suit is instituted against the defendants, who assert their conflicting claims to the fund under the recited clauses in the will, to obtain the advice and direction of the court as to their proper construction and the rights to the parties to the legacy in the plaintiff's hands. The plaintiff who is the personal representative of the father of his testator, also sets up a claim thereto in that capacity, if there is an intestacy as to the fund. The answers admit the facts set out in the complaint and prefer their several demands as they are stated by the plaintiff.

Thereupon, the judge below held that Sarah E. Howie and George R. Winchester are only entitled to such articles of personalty as came into possession of the testator with or by his wife, and are not entitled to the fund claimed by them; but that Rachel Helms and Leander Craige under the 7th clause of the will, take the fund, and that there is no intestacy. From this ruling Howie and Winchester appealed.

Messrs. Wilson & Son, for plaintiff.

Messrs. Payne & Vann, D. A. Covington, G. V. Strong and *W. H. Pace,* for the several defendants.

SMITH, C. J. The argument on behalf of the claimants under the second item exhibited much research and careful study, and was pressed with great earnestness, but entirely fails to satisfy us that the terms of that bequest are sufficiently comprehensive to embrace this portion of the wife's estate, or that such was the intention of the testator to be ascertained from the words in which it is expressed.

This fund belonged to the estate of the wife, and could only be recovered by her administrator, and was first applicable to her debts if she had any. It did not specifically and in a legal sense belong to her surviving husband, whose right thereto as her distributee could only be asserted through the course of administration by which it has reached his executor. It was not therefore in the testator's own language, "my property that I now have that I got with or by my wife," as it had not then been reduced to possession and thereby become his own. Nor was it property which required the agency of any one to separate this from his other property, as he directs to be done by the two persons named in the concluding words of the clause. That kind of property was manifestly in the testator's mind, which, derived through his wife, had become mixed with other similar property of his own and required judgment and perhaps personal knowledge to make the division and separate that intended for the legatee relatives of his wife. Certainly a definite pecuniary legacy unrecovered could not fairly come within the purview of his words, nor of his expressed intent.

The interpretation is strengthened by what is said in the succeeding and third item, wherein is bequeathed to the other defendants, his sister Rachel and Leander Craige, "all the balance of his (my) household furniture and bedding to be equally divided between them;" thus indicating, after the division has been made and the two kinds of property separated, a purpose to dispose of the residue to

other persons of his own blood. These clauses construed in connection in our opinion point to property which by no reasonable intendment can be extended to take in the fund in dispute.

In the last item of the will, the testator directs the sale of his plantation and the proceeds thereof, "together with any moneys on hand or debts due me," after deducting previous bequests to be "divided into two shares, one share to be paid to Rachel Helms, the other share paid to H. B. Craige" who is appointed by the will trustee for Leander Craige. The latter seems not to have been made a party to the suit. While in a strict interpretation, the legacy to the wife is neither money on hand nor a debt due the testator, yet in a more liberal sense, and especially aided by the words "which debts I desire my executor to collect," must be understood to have been used to comprehend whatever moneys might thereafter accrue in enlargement of his estate, as well that derived from his wife's estate, as that paid by a debtor to his own. It is plain the testator undertook to dispose of all his estate and to die intestate as to none, and this general intent will be effective when it can be by putting any reasonable interpretation upon his words which will avoid an intestacy.

In the argument it was insisted that the action originated in the court of probate which is without jurisdiction, and must be dismissed. Whatever force there may be in the objection, if applicable to the case, it is not supported by the facts as we interpret the record. No summons seems to have been issued, and the only evidence that the cause was ever in the probate court is found in the caption to the complaint and answers drawn by counsel. The first judicial recognition of it is the order of transfer for trial made in the superior court, as shown in the marginal entry and signed by the clerk in his official capacity as such. It is heard by the judge without objection to the mode in which

the case reached the superior court, with acquiescence in his exercise of jurisdiction in the premises, and from his judgment the appeal is taken. The case would seem thus to be properly constituted in the superior court, and not within the principle applicable to an appellate jurisdiction. *Davis* v. *Davis*, 83 N. C., 71. The action seems to have been a special proceeding instituted in accordance with the act of 1868–'69, and transferred because questions of law are involved. Bat. Rev., ch. 45, § 147; *Heilig* v. *Foard*, 64 N. C., 710; *Rowland* v. *Thompson*, 65 N. C., 110; *Haywood* v. *Haywood*, 79 N. C., 42; *Bratton* v. *Davidson*, *Ib.*, 423. These cases point out the proper practice.

But if the construction of the will, and directions as to the discharge of its trusts when asked by the executor for his guidance, was heretofore the function of a court of equity which is now vested exclusively in the judge of the superior court, the jurisdiction exercised is fully sustained by the ruling in *Staley* v. *Sellars*, 65 N. C., 467, and *Cheatham* v. *Crews*, 81 N. C., 343, and references in the latter.

In *Staley* v. *Sellars*, the process was made returnable before the clerk and was entered on the summons docket of the superior court where it remained under an order of reference to the clerk for two terms, and was then remanded to the jurisdiction of the probate judge. A motion to dismiss was made before the clerk, and on his refusal an appeal taken and the motion renewed before the judge. On his refusal and on appeal to this court, the judgment below was affirmed.

In *Cheatham* v. *Crews*, the summons was made returnable before the clerk and the complaint and answers filed in his office. The cause was then transferred to the superior court in term time, and a motion before the judge made to dismiss the proceeding for want of jurisdiction as relied on in the answer. The court allowed the process to be amended so as to make it in form returnable to the term and refused

to dismiss, and the ruling was sustained in this court. This differs from the present case only in the fact that no amendment is now necessary, as was then required.

The court then had full cognizance of the cause, and for the first time, the objection is here taken, after acquiescence in the exercise of jurisdiction by the judge. When the advice and direction of the judge are sought by an executor or other trustee, for his own protection, they will only be given to remove present practical difficulties encountered in administering the trust, and the opinion can be enforced. The practice with its limitations is explained by the chief justice in *Tayloe* v. *Bond*, Busb. Eq., 5.

No error. Affirmed.

T. M. ARGALL and others v. OLD NORTH STATE INSURANCE COMPANY.

Insurance—Notice of Loss—Waiver.

1. Notice to the local agent of a fire insurance company by whom the insurance was effected, in a few days after such loss, and by him communicated immediately to the company, satisfies the requirement of the policy that persons sustaining loss should "forthwith" give notice thereof to the company.

2. Where, shortly after the fire, the adjuster of the company visits the scene of the casualty, inspects the premises and makes a (declined) offer of compromise, and afterwards the company furnishes to the assured blank proofs of loss, which are filled up in the presence of its officers, it is not error to leave it to the jury to infer, in the exercise of their best judgment, a waiver of strict proof of loss.

(*Collins* v. *Ins. Co.*, and *Willis* v. *Ins. Co.*, 79 N. C., 279 and 285, cited and approved.)

CIVIL ACTION tried at Fall Term, 1880, of JOHNSTON Superior Court, before *Avery, J.*

This action was brought to recover the amount of a policy of insurance issued by defendant company, and the jury rendered a verdict in favor of plaintiff and the defendant appealed.

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

Messrs. Merrimon, Fuller & Fuller, for defendant.

SMITH, C. J. The findings of the jury upon the series of issues submitted to them leave but two exceptions to be passed on in this appeal from the ruling of the court:

1. The sufficiency of the notice of loss, and

2. The sufficiency in form and time of the proof of loss.

The clauses in the policy out of which the points in dispute arise are as follows: "Persons sustaining loss or damage by fire shall forthwith give notice of such loss to the company, and, as soon after as possible, render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon, also the actual cash value of the property, and their interest therein; for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the time of the loss; where and how the fire originated; and shall also produce a certificate, under the hand and seal of a magistrate or notary public (nearest to the place of the fire, not concerned in the loss, as creditor or otherwise, nor related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate or notary public shall certify."

"The use of general terms, or anything less than a distinct specific agreement, clearly expressed and endorsed on this policy shall not be construed as a waiver of any printed or written condition or restriction thereon. And it is mutually understood and agreed by and between this company and the assured, that this policy is made and accepted in reference to the foregoing terms and conditions, which are hereby declared to be a part of this contract, and are to be used and referred to, in order to determine the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for in writing."

The facts testified to and upon which the alleged erroneous rulings were predicated are summarily these:

The fire occurred on the night of the 18th of March, 1879, and the next day a messenger was sent by Flowers, the plaintiff, to one Kirkman, the agent of the company by whom the insurance had been effected and residing nearest to the place of the fire, to give him information of the fact and to request him to communicate to his principal. A few days later, Flowers met with Kirkman at Smithfield, his residence, and twelve miles distant, and informed him of the nature and extent of the loss, and Kirkman told him he had received the message and had communicated it to the defendant and requested that the general agent and adjuster of the company should be sent out to adjust the loss.

Early in April the general agent and adjuster came out, inspected the premises, made inquiry as to the nature and extent of the damage, such as he deemed proper, was handed such invoices of goods as the insured had preserved, took a detailed statement and estimate of the articles destroyed, and offered to pay $400 in satisfaction of the damages. No additional statement or proof of loss was asked, and on leaving, the adjuster requested Flowers to write and procure duplicate bills of goods in place of those which could not be found. Subsequently the defendant company,

or some one in its behalf, wrote to Flowers to send or bring such duplicates as had been received and he thereupon went to the company's place of business at Warrenton, on July 15th, and was furnished with printed forms of proofs of loss which the company used, to be filled up. The forms were accordingly filled with the required information, signed and sworn to, and handed to and accepted by the proper officers of the company without objection or complaint. The defendant afterwards refusing to pay, this action is brought by the assured and the co-plaintiffs his assignees to recover for the loss sustained.

The defendant's counsel insisted that the question of notice under the terms of the policy, and its legal sufficiency, were questions for the court to determine. The court ruled that if the testimony as to the facts was accepted as true, a question of law would arise which the court must determine; if not, the evidence would be submitted to the jury, and the law declared according to their findings. The counsel refused to admit the testimony of the witness to be true, and declared his purpose to impeach his credit. The course of His Honor in this was correct.

The defendant's counsel contended that upon the evidence, neither the notice of the fire, nor the proof of loss, had been given in conformity with the requirements of the policy, and these being essential conditions to fix the liability of the defendant, the plaintiffs could not maintain their action and asked the court so to instruct the jury. The refusal of the court to give the instruction was in our opinion entirely proper.

The notice of the fire given by a verbal messenger the next day to the insuring agent, and by him communicated to the defendant, was both in time and form sufficient. The policy does not require it to be in writing or the information conveyed in any special or formal manner. It is only essential that the fact be made known to the company forth-

with, that is, in a reasonable time under the circumstances after the fire occurred.

"The notice need not be in writing," says an eminent author on the law of insurance, "unless expressly so stipulated; nor need the insured go to the office nor to the agent of the insurers for the purpose of giving the notice." May on Ins., § 461. "A notice from the local agent of the company, upon information communicated to him by the assured, is sufficient." *Ibid.*, § 463. "If the notice be required to be *forthwith* or as *soon as possible* or immediately, it will meet the requirement if given with due diligence under the circumstances of the case and without unnecessary or unreasonable delay. Thus, notice within eight days after the fire and within five days after it came to the knowledge of the insured has been held to be reasonable." *Ibid.*, § 462.

We think His Honor also properly left it to the jury upon the evidence to infer a waiver of a strict compliance with the requirements of the policy.

"It is in their (the company's) option to waive any delinquency on the part of the insured" in giving proof of loss, and such a waiver will be inferred from any conduct on the part of the insurers, clearly inconsistent with an intention to insist upon a failure to give due notice." *Ibid.*, § 464.

We do not deem it necessary to pursue an investigation of the numerous cases decided in other states to which our attention was directed in the argument bearing upon the question as to what acts will amount to a waiver and dispense with a strict observance of this special provision in this policy, and we believe common in others, since the recent cases, *Collins* v. *Insurance Company* and *Willis* v. *Germ. & Han. Company*, reported in volume 79 of the Reports, settle the law in this state and fully support the rulings of His Honor.

In the former case a double insurance had been effected upon the same stock of goods, one of which was withdrawn and another substituted in its place by the common agent of both. The consent of the first insuring company to the second insurance was not endorsed on its policy as required and as essential to its continuing liability, and it was urged that this avoided the contract of insurance. The court held otherwise, and READE, J., delivering the opinion says: "There was evidence tending to show that the defendant knew of the substitution of one company for the other by its agent, and there was no complaint against it; and when the defendant was endeavoring to adjust the loss with the plaintiff, the *substitution was well known and no objection made;* and the only objection now made is the technical one that the change was not actually endorsed upon the policy," and he adds, "we are of opinion that the facts that the substitution was made *by the defendant's agent with the defendant's knowledge and no objection made upon the attempted adjustment or before action brought, are a waiver of the objection that it was not entered on the policy.* In the latter case, the same objections were made to a recovery which are relied on here, and we content ourselves with extracts from the opinion upon the two points. "That the plaintiff did not give immediate notice of the fire to the general agent of the defendant in New York. The facts in detail upon that point are that the plaintiff in a few days gave notice to the local agent of the defendant in Wilmington, N. C., and the local agent gave the notice to the general agent in New York, and thereupon the defendant sent an agent to the plaintiff to examine the matter. His Honor left these facts to the jury from which they might infer an acceptance of the notice sufficient. We think His Honor might have gone further and *charged the jury that these facts being true, there was notice.*"

Upon the second question, the sufficiency of the proof of loss, the court say: "The plaintiff's bills and invoices of

goods were burned so that he could not furnish the agent that evidence. But by mutual consent, the settlement was postponed until the plaintiff could get duplicates of his purchases. At the time agreed on, they met again, when being unable to agree they separated, and the agent returned to New York." No other evidence of loss was demanded, and a compliance with the precise terms of the policy not insisted on. "And it would seem," say the court, "that while they were treating about the loss and the plaintiff offered such evidence as was in his power, and it was unsatisfactory to the agent, he ought to have said in what it was unsatisfactory. Indeed we are to take it that the objections which he made then are the same as made now, and that they are frivolous."

We are unable to draw a distinction from the facts of the present case favorable to the defendant, and think those cases decisive. Nor can the rights of the plaintiff be forfeited by the provision that nothing less than a distinct specific agreement, clearly expressed and endorsed on the policy, "shall be construed as a waiver;" for the endorsement of consent to the second insurance was as specifically required as was and is the precise mode of proving and authenticating the loss of which the defendant's conduct was a waiver, in those cases, and the general principle of law must in all such cases govern. It is the duty of the court to adhere to the doctrines enunciated in carefully and fully considered cases heretofore adjudged, unless the error is palpable, and acting upon this view, and approving those decisions we must declare the law to have been correctly administered, and affirm the judgment.

No error. Affirmed.

*WILLIAM HORNE v. THE STATE OF NORTH CAROLINA.

Claim against the State—Jurisdiction.

The jurisdiction of the supreme court to hear a claim against the state based upon the non-payment of interest alleged to be due on a bond issued under an act of 1869, has been taken away by an amendment of the constitution in pursuance of chapter 268 of the acts of 1879. And such deprivation of jurisdiction after suit brought is not inhibited by the federal constitution as impairing the obligation of contracts.

CLAIM against the State heard at January Term, 1881, of THE SUPREME COURT.

Mr. W. P. Batchelor, for the plaintiff.
Attorney General, for the state.

ASHE, J. This is an action brought by the plaintiff against the state, under article four, section nine, of the constitution, which provides that "the supreme court shall have original jurisdiction to hear claims against the state, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the general assembly for its action."

The action is to obtain the recommendatory decision of this court upon his claims, which have accrued by way of interest on a certain bond for one thousand dollars issued under and by virtue of an act of the legislature ratified on the 3rd day of February, 1869, and entitled "an act to amend the charter of the Western Railroad Company," which bond has coupons for interest attached at the rate of six per cent. per annum, payable on the first of April and

*Ruffin, J., was associate counsel for the state and did not sit on the hearing of this case.

the first of October in each year. And it is for the non-payment of the coupons falling due from the first of April, 1870, to the first of October, 1879, inclusive, that the plaintiff complains.

At the June term, 1880, of this court the attorney general filed a demurrer to the complaint for a defect in not stating facts sufficient to constitute a cause of action, the grounds of which are set forth in the plea. The cause was continued by consent from June term, 1880, to January term, 1881. In the meantime in pursuance of an act of the legislature, ratified the 14th day of March, 1879, entitled an act to alter the constitution of North Carolina concerning the debt of the state," an amendment of the constitution was submitted to the qualified voters of the state at the general election held in the state on the second day of November, 1880, and was adopted by a large majority of the voters, to wit, one hundred and eleven thousand nine hundred and thirty votes, so that said amendment is now a part of the constitution of the state. The amendment is to section six, article one, of the constitution by adding at the end thereof the following: "nor shall the general assembly assume or pay or authorize the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond incurred or issued, by authority of the convention of the year 1868, nor shall any debt or bond incurred or issued by the legislature of the year 1868, either at the special session of the year 1868, or at its regular sessions of the years 1868–'69, and 1869–'70, except the bonds issued to fund the interest on the old debts of the state, unless the proposing to pay the same shall have first been submitted to the people, and by them ratified by the vote of a majority of all the qualified voters of the state at a regular election held for that purpose."

The claim set forth in the plaintiff's complaint upon which recommendatory judgment of this court is demanded

is, for coupons attached to one of the bonds especially proscribed in this amendment of the constitution. The attorney general in behalf of the state, in view of this prohibition of the payment of this bond contained in the said amendment, moves at this term of the court to dismiss the action on the ground that the jurisdiction of the court has been taken away, over the subject of the action, and this is the question for our consideration.

There has been a prevalent opinion in this state and one entertained by gentlemen of the highest eminence in the legal profession, that the legislature of 1868-'9 transcended its limited powers, under the constitution, in creating the class of bonds to which the one in question belongs, and that they are therefore illegal. Whether this opinion is well founded or not it is not for us to say, as we believe this court is precluded by the said amendment of the constitution from going into that inquiry. When the framers of the constitution invested the supreme court with the original jurisdiction of hearing claims against the state, we are of the opinion that that provision in the constitution had reference exclusively to those claims against the state which the legislature in the exercise of its functions under the constitution were authorized to pay by appropriate legislation, but was never intended to embrace a case involving the necessity of submitting the question to the people, whether the claim should be paid. We take the distinction to be this, that when the legislature may by act or resolution direct the treasurer of the state to pay a claim against the state, there, the supreme court has jurisdiction; but when the legislature is prohibited by the constitution from the exercise of such power, and can only order the payment, after obtaining the assent of the people by a popular vote, then it does not have jurisdiction, for it was never intended that the supreme court should have the power or authority of advising the legislature as to the subjects of its legislation

or of recommending to them the duty of passing a law asking the people to clothe them with a power which is denied them by the constitution. It would be an act of supererogation, an act obnoxious to the charge of presumption, for this court in the face of the unmistakable will of the people, declared in the organic law of the land, to recommend to the legislature the payment of this claim. Can we advise the legislature to pay it, when the constitution declares they shall not pay it?

So far as concerns the objection that the amendment cannot apply to this case, for the reason it was adopted after the commencement of the action, the question is settled by the supreme court of the United States in the cases of *R. R. Co.* v. *Tennessee*, 11 Otto, and *R. R. Co.* v. *Alabama*, *Ibid.*, 832. The latter case was on "all fours" with this. There the legislature of the state had passed a statute giving jurisdiction to certain courts of the state to hear and determine claims against the state under the same rules as in suits against individuals, and provided that if judgment be rendered against the state, it should be the duty of the comptroller, on the certificate of the clerk of the court together with that of the judge who tried the cause that the recovery was just, to issue his warrant for the amount, &c. Subsequently this act was repealed, but before its repeal and while the first act was in force, an action was brought by a railroad company against the state. The action was dismissed by the supreme court of Alabama, and its judgment approved by the supreme court of the United States, upon the ground that the repealing act was not in violation of the provision of the constitution of the United States forbidding the passage of laws impairing the obligation of contracts.

We are of the opinion the jurisdiction of this court over the subject of this action has been taken away by the adoption of the amendment to the constitution, and that any

recommendation we might make would be extra judicial. The action must therefore be dismissed.

PER CURIAM. Dismissed.

JAS. C. McLEAN, Adm'r, v. A. A. McLEAN, Adm'r.

Motion to set aside judgment under section 133.

1. On motion to set aside a judgment upon the ground of excusable neglect, if it appear that a summons was personally served on the defendant, he is affected with notice of the judgment and must make his motion within a year after its rendition; but if not, he may make it at any time within one year after *actual* notice of the judgment.
2. Where in such case the summons was regularly served upon defendant and the counsel employed by him failed to enter his pleas, and the defendant made no inquiry as to the disposition of the case until nearly five years after rendition of judgment; *Held* that his laches were inexcusable.

(*Griel* v. *Vernon*, 65 N. C., 76; *Burke* v. *Stokely*, *Ib.*, 569; *Mabry* v. *Erwin*, 78 N. C., 45; *Askew* v. *Capehart*, 79 N. C., 17; *McDaniel* v. *Watkins*, 76 N. C., 399; *Hall* v. *Craige*, 68 N. C., 305; *Smith* v. *Hahn*, 80 N. C., 240; *Jarman* v. *Saunders*, 64 N. C., 367; *Tooley* v. *Jasper*, 2 2 Hay, 383; *Molyneux* v. *Huey*, 81 N. C., 106, cited and approved.)

MOTION under section 133 of the Code to set aside a judgment, rendered in the above entitled action, heard at Spring Term, 1880, of ROBESON Superior Court, before *Eure, J.*

The following are the facts found by His Honor: At fall term, 1875, of the superior court of said county the plaintiff obtained a judgment against the defendant in manner and form following: "It appearing by complaint of plaintiff in the above entitled cause that the defendant is justly due and indebted to the plaintiff in the sum of four hundred and fifty-five dollars and sixty-one cents and the defendant

having failed to answer, it is considered and adjudged by the court that the plaintiff do recover of the defendant, A. A. McLean, administrator of G. W. McLean, deceased, the sum of four hundred and fifty-five dollars and sixty-one cents and interest on two hundred and ninety-nine dollars and eighty four cents, till paid, and costs of this action." That the judgment was rendered on a negotiable promissory note, under seal, given by defendant, A. A. McLean, as administrator of G. W. McLean, deceased, to D. H. McLean in consideration of an open account due by the said G. W. McLean to the said D. H. McLean, and was docketed on the judgment docket of the superior court of said county on October 15th, 1875. That about three weeks before the fall term, 1875, of the superior court of said county, the defendant requested an attorney to enter for him in said case, the pleas of fully administered, no assets, and all the other protecting pleas of an administrator, and that said attorney promised him he would do so, and that before that time he had employed the said attorney to appear in said case and had paid him his fee, and that the said attorney did not mark his name to the said case, but for some cause, unknown to the said A. A. McLean, administrator, did not file any answer, nor enter any pleas therein, and that that fact was not known to defendant until the 25th day of March, 1880. That the action was commenced in March, 1875, it being spring term of said court, and judgment was rendered at fall term, 1875, for want of an answer. That at fall term, 1878, J. C. McLean, administrator of D. H. McLean, deceased, brought an action against the said A. A. McLean and against McKoy Sellers and N. A. Sellers who were sureties on his administration bond, to enforce payment of the aforesaid judgment, and that the complaint in said action was not filed until fall term, 1879, of said court, and the said suit is now pending. That the defendant had no assets at the time the aforesaid judgment was rendered against him

and has no assets now. That defendant allowed judgment absolute in favor of Mary Ann McLean to be taken against him, on open account for the amount of five hundred dollars in January, 1875, after demand had been made on him by the plaintiff for the payment of the negotiable promissory note above described. The motion to set aside the judgment was allowed, and judgment against the plaintiff for costs of motion, and from these rulings the plaintiff appealed.

Messrs. McNeill & McNeill and *A. Rowland*, for plaintiff.
Messrs. W. F. French and *Walter Clark*, for defendant.

ASHE, J. This was a motion to set aside a judgment by default under section 133 of the Code, upon the ground of surprise or excusable neglect. The decisions of this court are not uniform and altogether reconcilable on the construction of this section of the code. In *Griel* v. *Vernon*, 65 N. C., 76, where the motion was made after the year from the rendition of the judgment, but within twelve months before the motion to set aside the judgment, the court held that a judgment by default against a party who had employed an attorney to enter his pleas, and such attorney had neglected to do so, is a surprise within the meaning of the section, and the neglect of the party to examine the docket and see that the pleas were in, is an excusable neglect. And at the same term in the case of *Burke* v. *Stokely*, 65 N. C., 569, which was a motion to set aside a judgment by default and inquiry and a final judgment, on the ground that the defendant had written to an attorney residing in the town where the action was pending and employed him to plead to the action, stating that he had a meritorious defence, but no appearance was entered by the attorney and the defendant did not know whether his letter had been received, and he was not aware that the attorney had not made an ap-

pearance in the case until a few days before his motion to set aside the judgment was made, more than a year from its rendition. The motion was disallowed by the court below, and PEARSON, C. J., said: "We concur with the court below in the conclusion that the defendants do not make out a case of mistake, inadvertence, surprise or excusable negligence under the code, section 133, as to the judgment by default," but the final judgment was set aside on the ground that one of the defendants had died pending the action. In *Mabry* v. *Erwin*, 78 N. C., 45, 46, two cases: The motion was refused by this court, READE, J., saying, "more than a year had expired before the motion was made and therefore it cannot be allowed." In *Askew* v. *Capehart*, 79 N. C., 17, the motion was not made within a year after the rendition of the judgment and the plaintiff alleged that he did not discover the mistake until within a few months before the institution of this action. Judge BYNUM, speaking for the court, said: "But he was a party defendant to the action wherein the alleged mistake occurred. The law presumes that he took notice of all that occurred in the progress of the action and of the judgment rendered. He has neither shown nor alleged any excuse in rebuttal of this presumption. It was his duty to take notice." And in the case of *McDaniel* v. *Watkins*, 76 N. C., 399, where His Honor in the superior court, as in this case, found the facts "that the defendant had no notice of the existence of said judgment, except such as appeared upon the records of the court, and the motion was made by the defendant more than a year after the rendition of the judgment, and upon that state of facts ordered the judgment to be set aside, but this court, PEARSON, C. J., delivering the opinion, says: "We think His Honor erred in respect to what 'amounts to notice of judgment,' which is a matter of law. Suppose judgment by default be taken at the appearance term in an action commenced in the superior court, the defendant has

notice of this judgment at the term to which the summons is returnable, and cannot be heard to say, when he asks for relief under section 133, that he did not have notice of the judgment." This decision, we think, is decisive of the case before us. It is true in that case, there was no excuse given, as in this case of the neglect of counsel; but it announces the principle that what amounts to notice of a judgment is "matter of law," and when a party is personally served with a summons, he is bound to take notice. The law fixes him with notice, and he cannot be heard to say, he did not have it. And that, we think, is the true distinction to be made in construing section 133. When a summons is personally served upon a party or he is a party plaintiff to an action by his own act, or with his knowledge or consent, he is affected with notice of all that occurs in the progress of the cause and must make his motion within a *year after the rendition of the judgment;* but when he has not been personally served with notice, or has been made a party to the action without his knowledge, then he may make his motion *at any time within one year after actual notice of the judgment.*

Applying the principle of this distinction, which we think is fully recognized in the cases above cited, the defendant has not brought himself within the provisions of section 133. He was a party to the action, regularly served with the summons, and, after employing counsel, he never enquired what had become of his case until nearly five years after the rendition of the judgment, and while we do not undertake to decide the question, which will probably be raised on the trial of the action on the administration bond now pending in the superior court of Robeson, with the lights now before us, we are unable to see, if his attorney had entered, as he directed, all the protecting pleas of an administrator, how it would have availed him, in tha

action, which was founded upon his note under seal. See Parsons on Contracts, 128; *Hall* v. *Craige*, 68 N. C., 305.

But the defendant insists that even if the defendant has failed to make out a case of surprise or excusable negligence under section 133, the facts found by His Honor in the court below make out such a case, as the old courts of equity would have set aside or enjoined the judgment and the superior courts now having all the jurisdiction of the old courts of equity should set it aside, and to sustain the point, the defendant's counsel relied upon the cases of *Smith* v. *Hahn*, 80 N. C., 240; *Jarman* v. *Saunders*, 64 N. C., 367; *Tooley's Executors* v. *Jasper*, 2 Hay., 383; *Molyneux* v. *Huey*, 81 N. C., 106. But these cases are not applicable and do not sustain the defendant's position. In *Smith* v. *Hahn*, the judgment was set aside on the ground of fraud; in *Tooley's Ex'rs* v. *Jasper*, the injunction was refused to be dissolved by Judge HALL because the contract was unconscionable, and the bond sued on was alleged to have been founded in champerty and maintenance, and Judge TAYLOR had rendered a judgment upon the bond. In *Jarman* v. *Saunders* the judgment set aside was rendered in violation of an express agreement between the parties, and the plaintiff had taken an unconscientious advantage of the defendant, and *Molyneux* v. *Huey* was disposed of upon the same ground. "A court of equity will not grant an injunction against a judgment, when there has been negligence on the part of the complainant in availing himself of a defence at law, or other neglect." To authorize a court of equity to interfere by injunction, there must be some fact, which clearly proved it to be against conscience to execute a judgment at law, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his *agents*. Adams Eq., 197, note 1, and cases there cited.

In the view we have taken of the case, we do not think we have anything to do with the question, whether the complainant had assets when he gave the bond, or how that fact, be it as it may, can affect the question presented by the record for our determination.

We think the ruling of His Honor in the court below was erroneous and his judgment on the motion is reversed, and judgment must be entered in this court for the plaintiff.

Error. Reversed.

DAVID PENDER and others v. N. J. PITTMAN and others.

Injunction—Purchaser.

1. An injunction against carrying out a contract of sale, made under a power contained in a mortgage, will not be granted where the relief to which the plaintiff conceives himself entitled is not sought until the sale has been made and the rights of a purchaser have intervened.
2. In order to be in a situation to avail himself of his supposed equities, the plaintiff should have attended the mortgage sale (he having full notice when and where it would take place) and apprised the bidders of his claims in the premises.

(*Capehart* v. *Biggs*, 77 N. C., 261; *Purnell* v. *Vaughan*, *Ib.*, 268, cited, distinguished and approved.)

APPLICATION for an injunction in an action pending in EDGECOMBE Superior Court, heard at Chambers on the 21st of April, 1880, before *Gudger, J.*

Injunction refused and restraining order dissolved, and the plaintiffs appealed.

Messrs. W. B. Rodman, Geo. Howard and *Fred. Philips*, for plaintiffs.

Messrs. Murray & Woodard and *Connor & Woodard*, for defendants.

SMITH, C. J. The plaintiff, David Pender, owning a lot in the town of Tarboro occupied and used as a store, the location and dimensions of which are particularly described in the complaint, on January 1st, 1874, his wife uniting with him, conveyed the same by deed of mortgage, to the defendant N. J. Pittman to secure a debt due him of $3,000; contracted for money loaned payable on the first day of the next year and the interest semi-annually with a power of sale in case of default in payment at maturity on twenty days notice. The accruing interest he continued to pay up to January 1st, 1880, but was not required to pay the principal. On February 1st, 1877, he alone made a second mortgage of his interest and estate in the lot to John Norfleet to secure several notes executed in the name of the firm of Pender & Jenkins, of which he was a member, of the aggregate principal of $2266.33, and a further sum of $750 to be thereafter advanced and which was advanced by the mortgagee, with a similar provision for a sale at any time after February 13th, 1878, at the election of the mortgagee on his demand in case of failure to make payment. On January 1st, 1879, Pender made a third mortgage, his wife being a party, to Joseph B. Best of his residuary estate in the premises to secure a note of that date due the latter and payable one day after date and with a like clause conferring authority to sell after a notice of twenty days. On November 10th, 1879, Pender conveyed the lot subject to these mortgages to the plaintiff, Andrew J. Cotten, in trust to hold the same as a security for three several bonds executed the same day to said Pender by his wife, one of $2000, papable at ninety days; a second of the same amount at four months; the third of $2400 at six months, with a provision that if the bonds were paid as they respectively fell due, the estate should be conveyed by the trustee to her, the plaintiff, Mary C., for her separate use or to such other persons as she should designate in writing, and that if she

should fail to make the payments, the estate should be reconveyed to Pender. On November 19th, 1879, Pender made a general assignment of his personal property, including his wife's bonds to the said Cotten and John L. Bridgers, trustees, for the security and payment of his debts, giving priority to those in the mortgages, the fund thus created being sufficient, as he alleges, to pay in full the preferred debts and a ratable part of the others. On the day of the assignment but after its execution, a judgment was recovered against Pender by one of his creditors before a justice of the peace for about $70 which was at once docketed in the superior court and execution sued out thereon, levied upon the equity of redemption in the lot, and a sale advertised; but this was prevented by Pender's satisfying the debt. On January 1st, 1880, after due public notice in the name of all the mortgagees, Norfleet (acting for himself and the others), sold the premises to Thomas H. Gatlin, he being the highest bidder, at the price of $7526, the terms being that $2000 should be paid in cash and the residue in equal instalments at one and two years with interest, and possession delivered on April 1st following. Accordingly $2000 was paid on the day after the sale and three thousand dollars more were on the 14th day of the month paid to Norfleet who died soon after, and the defendants, W. H. Johnston and Benjamin Norfleet are his executors.

The complaint charges that the sale was premature and not authorized under any of the mortgages: not under the first, because the interest on the debt had been regularly paid and the forbearance of the morgagee to assert his strict legal right for the default as to the principal, for so long a period, entitled the mortgagor to a reasonable previous notice of the intent to terminate the indulgence in order that the latter might have an opportunity to raise the means to meet the obligation and obviate the necessity of a sale; not under the second, for want of a prior demand as provided

in the mortgage deed; nor under the last because no default had then been incurred.

The plaintiff, Pender, alleges that the mortgagee, Pittman, did not authorize or assent to a sale under his mortgage, and that upon conversations with him and with Norfleet, he had inferred that inasmuch as he had paid the execution, there would be no sale under the mortgage deeds.

The object of the suit, instituted on February 26th, 1880, is to have the contract of sale annulled—a resale of the premises under the direction of the court—an assignment of a homestead to Pender and wife and meanwhile an injunction against further steps to consummate the sale.

The defendants, the executors of Norfleet, answering on information and belief, say the sale was advertised in the name of the mortgagees by their testator after a conference with Pittman, and, as he understood, with Pittman's concurrence, at the court house and ten other public places in the town for the full space of time specified in the deeds; and that the said John L. Bridgers, the attorney and adviser of Pender and one of the trustees in his general assignment, also agreed "that it would be for the interest of Pender that the property should be sold under the mortgage deeds; and on the day of the sale he was consulted by the testator as to the time of delivering possession, and assented to the announcement that it would be on the 1st of April; that Pender himself stated a few days before the sale that the property would be sold if it brought the amount of the mortgage debts; that their testator as appears by entries in his books on January 12th, 1880, in his accounts with certain persons for whose benefit the notes of Pender & Jenkins were taken in his name and to whom he had transferred them, charges himself with their amount and on the next day paid them in full the balance due including the notes.

The defendant, Pittman, who with the executors puts in

a joint answer, says that his last interest was paid through an account which Pender had against his wife whose separate estate he was managing, in order that he might make up his administration account of the trust fund to the first of the year.

The defendant, Gatlin, answers that, without personal knowledge of the fact but on information and belief, the testator, Norfleet, did make demand of payment of the debts mentioned in his deed, before proceeding to sell That the remark imputed to Norfleet when informed of the settlement of the execution by Pender, was preceded by the expression, "I have got nothing to do with that," and did not warrant the influence that he would suspend proceedings for the sale; that he paid a fair price for the land and bought in good faith, supposing all the requirements of the deeds to have been observed; that his co defendant, Pittman, told him in February that he had given authority to Norfleet to act for him in making the mortgage sale, and that the plaintiff, Pender, on the day after the sale, admitted to him that he had through his attorney consented to the sale.

The complaint and answer, put in on oath, constitute the evidence heard by His Honor on the motion for an injunction against carrying out the contract of sale, of the time and place for hearing which, previous notice had been given the defendants as required in the temporary restraining order before made. His Honor refused the injunction and dissolved the restraining order, from which the plaintiffs appeal.

We are not disposed to controvert the correctness of the general proposition, maintained in the argument for the plaintiffs, that a mortgagee who does not avail himself of the right to sell upon the default of the mortgagor, and who, by long indulgence and accepting regular payments of interest, has encouraged this expectation of the continuance of those relations by his own voluntary conduct, ought not

to be allowed suddenly to enforce his suspended right and break up those relations, without a reasonable previous notice to the mortgagor to enable him to make an effort to meet his obligation. But this equity ought to be promptly asserted and not deferred until by the sale other interests may intervene, rendering it inequitable, if practicable, to reverse what has been done and restore matters to their former condition. Difficulties of the kind present themselves in the way of the present application. More than half the purchase money has been paid in and a portion of it paid out to holders of the secured notes who are not parties to the action, and the mortgagee is not alive himself to look after the necessary re-adjustment. But aside from this, it is not alleged that any payments have been made by the debtor upon the notes secured in the second mortgage, nor any forbearance to be implied from the conduct or omission of the testator; and the sale by him under his own mortgage as effectually puts the title in the purchaser as if made under all rendered perfect by the discharge of the prior mortgage debt to Pittman. The only exception to this sale is the alleged want of a previous demand. This objection rests upon the testimony of a living witness to a transaction between himself and a deceased person who cannot give his own version, and if admissible the evidence should be carefully scanned and weighed in the light of reasonable probabilities. Why, it may be asked, should the mortgagee wish to sell unless to enforce payment? And why does not the mortgagor in the misinterpreted conversations held with Norfleet in regard to the contemplated sale suggest his ability to pay, if longer indulgence were given? Was not this itself an effectual demand to give activity to the power of sale? But during the month preceding, the mortgagor had attempted an absolute sale to his wife and substituted her notes in place of his own equity in the land; and of these he then made a general assignment with other personal property, which his own estimates show to be insufficient to meet his liabilities

and avert insolvency. The defendants' affidavits also state that the attorney of Pender was consulted and in behalf of his principal consented to the sale, was present when it took place, advised as to the time when possession would be given, and that on the succeeding day Pender himself admitted to Gatlin that he had through his attorney given his consent. It was with this information the second and larger payment of the purchase money in advance was made. It is in proof and without contradiction that Pender expressed his willingness to let the property be thus disposed of under the mortgages at a sum less than that bid, and there is no suggestion of any unfairness in the manner of selling—that the lot did not bring its full value or of any reasonable grounds for expecting a more favorable result from a re-sale. The homestead claim cannot prevail against the first and third mortgages so as to defeat the sale, and if valid it can be asserted against the fund in the distribution to be made. The decretal order retains the full value of the homestead to abide the future decision of the court upon the question of its validity. In the aspect of the case thus presented, and re-examining the evidence produced before His Honor, we entirely concur in his conclusion that the sale ought not to be disturbed and in refusing to restrain the parties from carrying out the contract. The cases of *Capehart* v. *Biggs* and *Purnell* v. *Vaughn*, 77 N. C., 261 and 268, are not in conflict with this opinion. In both, no sale had taken place and the proceedings therefor were stayed until (there having been dealings between the parties) the correct amount of the mortgage debt could be ascertained, so that the mortgagor might know what he had to pay and have reasonable time to raise the money and redeem his property.

We decide only upon the ruling of the court denying the interlocutory order for an injunction in this appeal and that the exception of the plaintiffs thereto are untenable. Let this be certified.

No error. Affirmed.

MORDECAI LAMB v. MILES CHAMNESS.

Homestead—Bankruptcy.

The homestead of a defendant bankrupt is protected from sale under execution by operation of the amendment to the bankrupt act of 1873, without regard to the date of the judgment lien. U. S. Rev. Stat., § 5045.

MOTION of plaintiff made before the clerk for execution to issue upon a judgment against the defendant, heard on appeal at Spring Term, 1880, of RANDOLPH Superior Court, before *Seymour, J.*

The clerk allowed the motion and from his order the defendant appealed, and the same was reversed by the judge, and the plaintiff appealed.

Messrs. J. N. Staples and *W. W. Fuller*, for plaintiff: Cited *Blum* v. *Ellis*, 73 N. C., 295; Bump on Bankruptcy, 142, 198 *et seq; Dawson* v. *Hartsfield*, 79 N. C., 334; *Dixon* v. *Dixon*, 81 N. C., 323.

Messrs. Scott & Caldwell, for defendant discussed the authorities referred to by the plaintiff, and insisted that the matter had been adjudicated against the plaintiff in the district court of the United States.

SMITH, C. J. The plaintiff recovered judgment against the defendant on March 1st, 1873, before a justice of the peace upon a debt contracted previous to the year 1868, and caused the same to be docketed in the superior court of Randolph county. The defendant, on May 27th, 1878, filed his petition in bankruptcy, and in November of the same year, obtained his discharge. The land, which the present proceeding is instituted to subject to the satisfaction of the judgment, was set apart by the assignee and exempted,

as the defendant's homestead, "subject to various liens against it."

On June 17th, 1878, the plaintiff filed in the bankrupt court proof of his debt, in which no reference is made to any security or lien, nor to any land or other property bound therefor, but describing his debt as a note "on which a judgment was taken in the superior court of Randolph county and docketed in said court," and annexing to his affidavit a transcript thereof. It is not stated that there is any land to which the lien attaches, nor any claim asserted by reason of such judgment thereto, and the form of proof is that of an unsecured debt.

The plaintiff applied by petition to the district judge, pending the proceeding in bankruptcy, and at a date not given, therein setting out his lien, for an order to enforce the same by a sale of the bankrupt's land. The defendant resisted the application, and as a defence alleged that the land had been assigned to him as his homestead by the sheriff, under the requirement of the laws of the state, and subsequently by the assignee, and that it was exempt under the express provisions of the amendment to the bankrupt act made in 1873. Upon the hearing, the application was denied and the petition dismissed with costs, with leave to the plaintiff to pursue in the courts of the state any remedy he may have against the exempted land.

Upon these facts and proof that the judgment remains unpaid, the plaintiff moves for leave to issue execution to sell said land and to enforce his judgment lien thereon, which motion was allowed by the clerk, and on appeal denied in the superior court; and from this refusal the plaintiff appeals to this court.

The only question presented in the record is whether the plaintiff is entitled to proceed and sell the defendant's homestead, set apart as exempt under the law of the United States, for the satisfaction of his debt, since for all other

purposes than the enforcement of the alleged lien, and to the extent of the value of the land charged, the indebtedness is discharged by the decree in the bankrupt court.

If the form of proof is of an unsecured debt, and we are inclined so to consider it, as it fails to designate any property subject to the lien or to show "whether any and what securities are held therefor," as required by the act and the rules adopted to carry it into effect, (Rev. Stat. U. S, § 5077) and the existence of the incumbrance is inferable only from the fact of the docketed judgment, it is by numerous decisions held to be a waiver and release of the lien, and the debt itself thus separated is extinguished, as are other debts of the bankrupt, by the discharge.

But waiving this point, the case is clearly within the contemplation of the amendments made to the bankrupt act in 1872 and 1873. The law, as thus amended, among other exemptions specifically mentioned, adds: "Such other property as now is or hereafter shall be exempted from attachment, or seizure, or levy or execution by the laws of the United States, and such other property, not included in the foregoing exceptions, as is exempted from levy and sale under execution or other process, or order of any court, by the laws of the state in which the bankrupt has his domicile at the time of the commencement of proceedings in bankruptcy, to an amount allowed by the constitution and laws of each state as existing in the year 1871; and *such exemptions* shall be valid *against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court*, any decision of any such court, rendered since the adoption and passage of such constitution and laws, to the contrary notwithstanding. (§ 5045.)

It is plain that congress intended by this amendatory clause to prevent any discrimination among classes of debts in consequence of the different dates when they were in-

curred, and the inability of the states, under the restraints of the federal constitution, to put them upon the same footing, and such is the construction put upon the language in all the cases in the federal courts which we have examined. The defendant's homestead is clearly protected from the plantiff's debt, and his lien obliterated by force of the words used, if congress has the constitutional power thus to enact, and this is the only point about which there seems to be any controversy.

In re Deckert, a case decided in the circuit court of the United States for the district of Virginia, 10 Nat. Bank, Reg. 1, the distinguished chief justice of the supreme court expresses the opinion that this feature in the amendment, which extends the exemption to such property as a state may attempt to relieve, but is disabled from relieving, from the obligation of antecedent contracts, under the constitution, destroys the uniformity necessary to the validity of a bankrupt law, and is consequently inoperative and void; while the recognition of such exemptions as are legally in force in the several states and leave for distribution under the administration of the bankrupt law all such property as could then be reached by the creditor and appropriated to his debt, is within the competency and discretion of congress. This view is sustained by the circuit judge of this district, *in re Shipman*, 14 N. B. Reg. 570. The validity of the act, however, has been maintained in several other cases to which we will briefly refer, notwithstanding the high authority of Chief Justice WAITE.

In re Smith, 8 N. B. Reg. 401, ERSKINE, J., in the district court of the northern district of Georgia, in a learned and elaborate examination of the question, arrives at the conclusion "that the exemptions claimed by the bankrupt supplant the liens of state judgments and decrees." This opinion is re-affirmed by the same judge in another and subsequent case. *In re Jordan*, 10 N. B., Reg. 427. Again

the same view is taken by *Woods*, circuit judge, and now an associate justice of the supreme court, *in re Smith*, 14 N. B., Reg. 295, in the circuit court of the same district, who declares that, in his opinion, "congress may adopt the state laws on the statute books of the state, at a particular date, in reference to exemptions, and that the legislation is *uniform, although the laws in some of the states may afterwards be repealed by the legislature, or declared null by the courts.*" Referring to the opposite opinion of the chief justice, he adds: "While therefore disposed to yield great weight to this high authority, I cannot forget that, in the opinion of the congress of the United States, this law is constitutional, and that the highest judicial authority has said that the courts ought not to pronounce a law unconstitutional, unless its incompatibility be clear, decided and inevitable."

So *Rives*, district judge, *in re Kean*, 8 N. B, Reg., 367, determined in the district court of the western district of Virginia, says: "We have even seen that the power to exempt and discharge is plenary and has no limitation, but in the discretion of congress. It cannot alter the state exemption for state purposes: this would be indeed, as urged, to alter state laws, but I do not see why congress may not, in its discretion, to effect certain objects in its bankrupt system, relieve these state exemptions of restrictions deemed hostile to the spirit, principles and aims of that system. * * * This act, therefore, in unfettering the state exemptions of certain restrictions and enlarging their operation, is, in its nature, mixed, and partakes of a state exemption in one aspect, and in another, of a congressional enlargement thereof."

So, in like manner, *in re Jordan*, 8 N. B., Reg. 180, *Dick*, district judge, says: "I have a very decided opinion that congress did not exceed t he limits of its constitutional powers in enacting the act of March 3d, 1873. I also think that congress, under its general powers over the subject of

bankruptcy, *could avoid all liens, whether existing by statute*, by usage, by express contract or at common law."

The power of congress in passing a bankrupt law may unquestionably be exerted in destroying a lien, as in discharging a debt to which it adheres, and no objection founded upon these effects can lie against the present act. "Nor can it be truly aid," remarks Mr. Justice STRONG in the *Legal Tender Cases*, that congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless or partially fruitless. Directly it may, confessedly, by passing a bankrupt act, embracing past as well as future transactions. This is obliterating contracts entirely." 12 Wall., 457. *Hepburn* v. *Griswold*, 8 Wall., 603.

The states possess no such power, and it was the evident intent of the act to give the sanction of a competent authority to the exemptions allowed under state laws, and make them uniform in their operation upon all debts alike. It does not undertake to incorporate those laws in the bankrupt system which were in force by virtue of state legislation, but to enlarge the scope of exemptions and make them effective when the state could not. This would seem to tend in the direction of securing uniformity, because it gives full instead of partial force to legislation, and supplies a defect irremediable by the act of the state. We feel constrained, therefore, until the question shall be authoritatively decided by the supreme court, and in this conflict of opinion, to say, in the concluding words of Judge WOODS, "resolving doubts in favor of the law, we must decline to declare it unconstitutional."

No error. Affirmed.

J. N. GREER v. J. H. CAGLE.

Equitable Jurisdiction—Consent of Parties.

1. Where a court has jurisdiction of the subject matter, the consent of parties can give it jurisdiction over the particular action.
2. The superior court has exclusive jurisdiction of the subject matter of an action brought by a creditor of an intestate's estate against the administrator, where it is alleged that the intestate in his life time bought certain land and being insolvent and intending to defraud creditors procured the deed to be made to his son who became his administrator, and judgment demanded that he be declared a trustee and the said land be sold to pay intestate's debts. The right of creditors to subject this land is independent of the statute defining what lands may be sold for assets under a license from the probate court, and can only be enforced by a court of original equitable jurisdiction, such as does not attach to a court of probate.
3. Suggestion of the court to the parties as to the further conduct of the cause.

(*Rhem* v. *Tull*, 13 Ired., 57; *Smitherman* v. *Allen*, 6 Jones Eq., 17; *Wal* v. *Fairley*, 77 N. C., 105, cited and approved.)

APPEAL from an order made at Fall Term, 1880, of TRANSYLVANIA Superior Court, by *Gilmer, J.*

The plaintiff being a creditor of Leonard Cagle, deceased, brought this action against the defendant as administrator of said Leonard, and in his own right, returnable to fall term, 1873, of said court. In his complaint filed at that term he alleges that the defendant's intestate had contracted with certain parties for the purchase of a tract of land, paying part of the purchase money in cash and the balance at some time afterwards, but being insolvent and intending to defraud his creditors, he did not take the title to himself, but procured it to be made to the defendant, his son, who became his administrator upon his death. And the judgment asked was, first, that the defendant might be declared

a trustee for the benefit of his intestate's creditors, and secondly, that the land might be sold and the proceeds applied to the payment of the intestate's debts. At the same term, the defendant demurred to the jurisdiction of the court, taking the ground that the probate court had exclusive jurisdiction of the subject matter.

The cause was continued from term to term until spring term, 1875, when the demurrer was withdrawn, and by consent of the parties, it was ordered that the cause be sent to the probate court and the defendant be allowed to answer, and the issues raised by the pleadings be sent up for trial at the next term of the superior court.

At fall term, 1875, an order was made giving the defendant leave to file an answer at the next term, and that the next term should be the trial term.

At spring term, 1876, the defendant filed his answer and took an order allowing him to take certain depositions, and the cause was continued from term to term until fall term, 1878, when the plaintiff had leave to take depositions.

At spring term, 1879, the record shows the following entry to have been made: "This cause is continued without prejudice, and leave is given defendant to file answer by the second day of next term as of this; all irregularities waived."

At fall term, 1879, the presiding judge made the following order: "This proceeding coming on to be heard, upon inspection of the record, pleadings, &c., it is considered by the court that no issues have been transferred to this court for trial, and that the cause is not properly on the docket of this court."

Immediately upon the making of the foregoing order, the plaintiff gave defendant notice that he would move the probate court to have the cause there docketed, and accordingly on the 19th of September, 1879, did make such motion, which was resisted by the defendant but allowed by the

clerk, and from the order docketing the same the defendant appealed to the judge of the superior court at term time.

At spring term, 1880, the defendant made an affidavit to the judge presiding, and thereon obtained an order to the effect that plaintiff should produce the prosecution bond theretofore filed and justify the same or file a new bond by Wednesday of the next term, *or this case shall stand dismissed.*

At fall term, 1880, the following order was made: "This cause coming on to be heard, by consent of parties it is treated as upon an appeal of defendant from the order of the probate court docketing the cause in that court. After hearing argument of counsel, it is adjudged by the court here that there was no error in the order of the probate court docketing the cause in that court, and said order is affirmed. It is further ordered that a writ of *procedendo* issue to said probate court to the end that the cause may be further proceeded in according to law and the practice of the court." And from this order the defendant appeals.

Mr. Jas. H. Merrimon, for plaintiff.
Mr. J. J. Osborne, for defendant.

RUFFIN, J., after stating the case. It is difficult to conceive how any cause could be conducted with so much irregularity, and so little regard to that precision which should attend the proceedings of our courts, as to make it doubtful what forum had cognizance of it; and yet so inconsistent has been the action of the parties to this cause, and so contradictory many of the orders taken during its progress, that it is brought here for us to determine, not the rights of the parties involved, but the point whether it is pending in the court of probate or in the superior court proper. Indeed the counsel for the defendant devoted his entire agument to the proposition that it had ceased to have a foot-hold in any court; that by force of the consent order of spring term, 1875, and the order of fall term, 1879, "it had been cast out

of the superior court," and that the probate court acquired no jurisdiction because of the laches of the plaintiff in having it placed upon the docket of that court.

If the subject matter of the action were such that the two courts had concurrent jurisdiction, it would not be difficult to determine the matter, for such has been the conduct of the parties in assenting either expressly or by a clear implication to the jurisdiction of both tribunals, that either one of them might very properly have assumed control of the action and considered it to its determination. The rule is, that when a court has jurisdiction of the subject matter, then the consent of the parties can give it jurisdiction over the particular action, and that this consent may be implied as a legal inference from their conduct. But of the subject matter of the action now under consideration, the jurisdiction of the two courts is not concurrent; on the contrary, the probate court has none, while that of the superior court is exclusive.

We presume it will hardly be contended that an administrator can be required at the suit of a creditor of his intestate to sell lands for assets, when upon his own petition for a like purpose he could not procure a license to sell them. And it has been decided by this court in several cases that no such license would be given under circumstances like those alleged in this complaint. The statute in defining what lands may be sold by an administrator for assets, includes not only the lands whereof his intestate died seized, but all that he may have conveyed with intent to defraud his creditors, and all rights of entry and of action, and all other rights and interest in lands which he may devise, or by law would descend to his heirs. As was decided in *Rhem* v. *Tull*, 13 Ired., 57, very soon after the adoption of the statute, no part of this description fits the lands sought to be reached by this action. The intestate did not die seized of them, nor did he ever convey them with intent to

defraud his creditors. There is no right or interest in them of any kind or character which he could devise, or which upon his death could descend upon his heirs. The right of the creditors to reach these lands is entirely independent of the statute, and existed as well before as after its enactment. It is a right to follow their debtor's money which by a fraudulent contrivance has been put into them, and it is one that can only be enforced in a court possessing an original equitable jurisdiction, such as does not attach to a court of probate under our system. *Smitherman* v. *Allen*, 6 Jones Eq., 17; *Wall* v. *Fairley*, 77 N. C., 105.

Our conclusion then on this part of the case, is, that the probate court had no jurisdiction of the subject matter of the action, and that the consent of the parties nor the order of the judge of the superior court could confer it upon that court; and therefore the order of the probate judge docketing the cause, if done with a view of his taking cognizance thereof, was void, and the judgment of the superior court affirming the same, was erroneous, and especially that part of it which directed a writ of *procedendo* to issue to the probate court.

This disposes of the only point raised by the appeal, and it is therefore not incumbent on us to consider the further one, of what is to become of the action. But as we have a decided opinion in regard to it, which may save the parties from loss of time and useless litigation, we venture to express it, and leave it to their election to be governed by it or not.

Since the order made with the consent of the parties at spring term, 1875, sending the cause to the probate court, they have never ceased to treat the cause as one pending in the superior court. At fall term, 1875, the defendant obtained leave to file his answer at the following term, which was declared to be the trial term. At spring term, 1876, he filed his answer in the court during the term, and applied for leave to take depositions. At fall term, 1878, the

plaintiff had leave of the court to take depositions. At spring term, 1879, the defendant obtained leave to file another answer, and it was expressly stated on the court docket that the cause was continued without prejudice to either party, *and that all irregularities were waived.* If the jurisdiction of a court could ever be made, by the consent of the parties clearly and unequivocally expressed, to attach any cause, surely that of the superior court of Transylvania county must have attached to this one.

It is true that after all this, the judge who presided in that court at the fall term, 1879, did sign an order declaring he considered the case as not properly upon the docket of the court, but he made no order dismissing it, nor indeed any order affecting any substantial right of either party, which could afford sufficient ground for an appeal. But suppose he had done so. The defendant even after this recognized the cause as pending in the superior court, for at spring term, 1880, he filed an affidavit in the cause, in that court, as the basis for a rule on the plaintiff to file a new prosecution bond, or justify the old, on or before a given day, *or his cause should stand dismissed.* Dismissed from where? from the superior court, that court which at his instance was making the order? Under all these circumstances, it does not occur to this court that there can be any room for doubting that the cause was properly on the docket of the superior court in 1879, and that it should be so considered now, to be proceeded in according to the course of the court.

It is therefore considered that the order of the superior court affirming the action of the probate court in the premises and directing a writ of *procedendo* to issue to that court, is erroneous, and that it be so certified, that the parties may proceed in the cause as they may be advised.

Error. Reversed.

JOHN G. CHASTEEN v. WILLIAM P. MARTIN.

Practice—Equity, no Consideration necessary in Transfer of.

1. Where a case does not disclose the grounds of appellant's exceptions, this court will affirm the judgment below not because it is thought to be right, but because it cannot be seen to be wrong.
2. No consideration is necessary in the transfer of an equity, but only necessary to raise an equity; and when once raised, it can be transferred like all other rights, upon legal evidence of the will of the owner to make the transfer.

(*Williams* v. *Council*, 65 N. C., 10; *Stewart* v. *Garland*, 1 Ired., 470; *Fleming* v. *Halcomb*, 4 Ired., 268; *Harry* v. *Graham*, 1 Dev. & Bat., 76; *Thomas* v. *Alexander*, 2 Dev. & Bat., 385; *State* v. *Orrell*, Bush., 217; *Turner* v. *Foard*, 83 N. C., 683; *Patton* v. *Clendenin*, 3 Murp 68; *Honeycut* v. *Angel*, 4 Dev. & Bat., 306, cited and approved.)

CIVIL ACTION, tried at Spring Term, 1880, of CHEROKEE Superior Court, before *Schenck, J.*

The plaintiff alleges that he is the purchaser of the equitable interest of one J. B. Standridge in the lands described in the pleadings; that Standridge had purchased the same from John M. Martin, who had paid the purchase money to the state, and had assigned to the said Standridge the certificate of purchase and valuation, which he had obtained for said land; that the defendant, William P. Martin, well knowing these facts, purchased the said land from John M. Martin, and obtained a grant from the state. The plaintiff prayed:

1. That William P. Martin, might be declared a trustee for him, and that a decree be made requiring him to convey to the plaintiff such estate or title, as he, the defendant, has in the premises above described.

2. For the possession of the land.

3. For damages for withholding the possession.

The defendant admits in his answer that the purchase

money had been paid by J. M. Martin to the state, and that the certificate of purchase and valuation had been assigned by J. M. Martin to J. B. Standridge, but contended that said assignment had been made conditionally; that about the time of the assignment and transfer by Martin to Standridge, the said Standridge became security of the said J. M. Martin, on a certain note or bond, payable to one Rogers, and it was to secure him, the said Standridge, from any probable loss or damage, by reason of his becoming surety as aforesaid; that the said certificate was transferred, and he alleges that the transfer of said certificate was not absolute, but made as security aforesaid; that sometime thereafter, suit was brought on the Roger's note, and Martin being unable to pay, Standridge was compelled to pay the same; that soon after this, Standridge entered into and took possession of one of the tracts of land transferred as aforesaid to J. B. Standridge, and for the purpose aforesaid, but not the tract in controversy, and has held the possession ever since; and that the tract now sued for was permitted to remain in the possession of J. M. Martin, up to the time he sold to the defendant; that he consulted the defendant about the purchase of this lot designated in the certificate of valuation as lot no. 101, and he told him he set up no claim to this tract, and if he wanted to purchase it to do so, and upon this he did purchase from his father, and upon his stating to the proper authorities that he was the person entitled thereto, obtained a grant from the state. He alleged in his answer, that the pretended purchase by defendant from Standridge was with full knowledge of all these facts, and that the purchase was not made in good faith, but for the purpose of annoying and harassing him, and that the plaintiff has never purchased the certificate from Standridge, but has only agreed to pay him a very small amount, wholly disproportionate to the real value, in the event, and upon the condition that he should recover against the defendant in

this action. He further alleged, that he had fully perfected his title to the land, by the means aforesaid, before the plaintiff made his pretended purchase, and that he was then in the open, notorious, and adverse possession of the land, of which the plaintiff had full notice. The plaintiff filed a replication, in which he denied all the allegations of the answer, and it does not appear from the record that there was any proof offered to sustain them. The following issues were submitted to the jury:

1. Was the sale from John M. Martin to J. B. Standridge an absolute sale, or was it in trust to secure the Roger's debt? Ans. Absolute sale.

2. If it was on trust, did John G. Chasteen purchase the land from J. B. Standridge for a valuable consideration, and without notice of the trust?

3. Did the defendant, W. P. Martin, at the time he took his grant, have notice that John M. Martin had assigned his interest to Standridge? Ans. Yes, by consent.

4. Did John G. Chasteen, the plaintiff, have notice that the defendant had a grant for the land, at the time he purchased from J. B. Standridge? Ans. Yes, by consent.

Upon this finding of the jury, the following judgment was rendered, to-wit: "This cause coming on to be heard, upon the pleadings and issues submitted to and found by the jury, and it appearing to the court now here, that John M. Martin sold to J. B. Standridge a tract of land known and described in the pleadings as tract No. 101, in 3d district of Cherokee lands, and transferred to J. B. Standridge the certificate of purchase therefor, and at the time of the said sale, the said J. M. Martin had paid the purchase money to the state of North Carolina; and it further appearing that the said J. B. Standridge sold the said tract of land to the plaintiff John G. Chasteen, and transferred to him the said certificate of purchase, and it further appearing that after the sale and transfer by the said J. M. Martin

to the said J. B. Standridge, that the defendant W. P. Martin purchased, with full knowledge of the sale and transfer to the said J. B. Standridge, and afterwards procured a grant to be issued from the state of North Carolina; and it also appearing to the court, that the plaintiff John G. Chasteen, purchased of the said J. B. Standridge, after the said W. P. Martin had procured the grant from the state of North Carolina:

Now, after full argument by counsel, it is considered by the court, that the said W. P. Martin be declared trustee for the plaintiff John G. Chasteen and to him the plaintiff convey the legal title which he holds, and that the said defendant, W. P. Martin, shall surrender and deliver up to the plaintiff the possession thereof.

And it is further ordered, adjudged and decreed, that the defendant convey to the plaintiff by deed of conveyance, all the right, title and interest in said tract of land, No. 101, in 3d district of Cherokee lands described in the pleadings, and containing two hundred and forty acres; beginning on a small hickory on a steep hill side, south-east corner of lot No. 101, and runs east one hundred and sixty poles, to a post oak, then north two hundred and forty-five poles, to a black jack on a small mountain, then west one hundred and seventy poles, to a small black oak, on the east side of a small creek, north-east corner of No. 100, thence south to the beginning; and that the defendant shall deliver the possession thereof to the plaintiff; and it is further adjudged and decreed by the court, that the plaintiff have, and recover of the defendant his costs of suit, to be taxed by the clerk."

The defendant excepted, and appealed to this court.

Messrs. W. W. and *A. Jones*, for plaintiff.

Messrs. T. F. Davidson and *Reade, Busbee & Busbee*, for defendant.

ASHE, J. There is a statement of the case sent up with the transcript, signed by the opposing counsel, but it does not disclose the grounds of exception taken by the defendant. The statement of the case, signed by counsel, or the presiding judge, in our practice, is a substitute for "a bill of exceptions, wherein should be set forth the errors complained of. "It is the privilege of an appellant to make up his case, and it is his duty to do it, so as to intelligibly exhibit the error in the judgment of which he complains; and the rules of practice give him all the necessary power to do so. Ordinarily, if he fail to do so, the only course left open to the supreme court is to confirm the judgment below, not because it is thought to be right, but because it cannot be seen to be wrong." *Williams* v. *Council*, 65 N. C., 10; *Stewart* v. *Garland*, 1 Ired., 470; *Fleming* v. *Halcomb*, 4 Ired, 268; *Harry* v. *Graham*, 1 Dev. & Bat., 76; *Honeycutt* v. *Angel*, 4 Dev. & Bat., 306; *Thomas* v. *Alexander*, 2 Dev. & Bat., 385; *State* v. *Orrell*, Busb., 217; *Turner* v. *Foard*, 83 N. C., 683.

In the absence of a bill of exceptions, we have looked through the record, and are unable to discover the grounds upon which the defendant's exception was taken, unless it was because the second issue had not been responded to by the jury. That issue was immaterial. How could it be a material matter of inquiry whether he knew of the trust, when it was the trust itself he was buying, which he had the right to do, and which, by the transfer of the equity, gave him the same right to call for the conveyance of the legal estate that Standridge had, and it made no difference whether he paid a valuable consideration for it or not. "For no consideration is necessary in the transfer of an equity, but only necessary to raise an equity, and when once raised, to be transferred like all other rights, upon legal evidence of the will of the owner to make the transfer." *Patton* v. *Clendenin*, 3 Murphy, 68.

There is no error; the judgment of the court below must be affirmed.

No error. Affirmed.

JOHN C. DAVIS and others v. WILLIAM INSCOE.

Unregistered Deed—Statute of Frauds—Executor, renunciation of—Equitable Estate—Purchaser—Title.

1. A deed for land executed and delivered but not registered, does not pass the legal but only the equitable estate; and before registration the parties may rescind the contract by returning the consideration and re-delivering the deed.
2. Where the agreement to rescind in such case is by parol, a third party is not permitted to set up the statute of frauds to invalidate the same for his benefit; this can be done only by the party to the contract who is to be charged thereby.
3. A sole executor, or a surviving executor, who has renounced, may retract his renunciation at any time and administer, before administration granted. Any intermeddling with the estate before qualifying is evidence of such retraction, and his subsequent qualification and the grant of letters testamentary validate, by relation, contracts made by him in behalf of the estate.
4. The equitable estate in land which an unregistered deed conveys is subject to sale under execution, and the purchaser at such sale is entitled to a decree for the conveyance of the legal estate.
5. Where such deed is surrendered and the contract rescinded in pursuance of an agreement made before judgment recovered against the grantee, the purchaser at a sale under execution on said judgment acquires no title to the land, the effect of the agreement being to extinguish the equity of the grantee.
6. But where the judgment was obtained prior to such agreement and a sale is had thereunder, he acquires the equitable title, which when set up is sufficient to defeat an action to recover the land.

DAVIS *v.* INSCOE.

(*Love* v. *Belk*, 1 Ired. Eq., 163; *Green* v. *R. R. Co.*, 77 N. C., 95; *Mizell* v. *Burnett*, 4 Jones, 249; *Wood* v. *Sparks*, 1 Dev. & Bat., 389; *Hare* v. *Jernigan*, 76 N. C., 471; *Triplett* v. *Witherspoon*, 74 N. C., 475; *Ivey* v. *Granberry*, 66 N. C., 223; *Hoke* v. *Henderson*, 3 Dev. 12, cited and approved.)

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

A jury trial being waived, the judge found the facts as follows: Dr. Thomas Davis of Franklin county died in 1862, leaving a last will and testament by which he directed his land to be sold by his executors, N. B. Massenburg and John C. Davis, who were appointed by him executors of his will. Massenburg alone qualified, and Davis renounced on the 22d day of January, 1863. Massenburg, as executor, sold the land in controversy and A. H. A. Stallings became the purchaser at five dollars and fifty cents per acre, and on the same day executed a bond for the purchase money with two sureties who were at the time solvent, and a deed for the land consisting of two hundred and sixty-six acres was executed by said executor to him. On the same day, Stallings sold and conveyed by a deed in fee simple to A. W. Pearce, Sen., one hundred and fifty-six acres of the land, upon the same terms and for the same price as those between the executor and Stallings, and Pearce had notice that no money had been paid for the land.

At September term, 1867, of the court of pleas and quarter sessions for Franklin county, Simon Kittrell obtained a judgment for one hundred and fifty dollars with interest against said Pearce and others, and at the same term Brown & Thomas obtained judgment against Pearce and others for two hundred and fifty dollars and interest.

Executions were issued on these judgments from September term returnable to December term of said court, and *alias* executions from December term, 1867, to March term, 1868, of said court, and duly levied on said land. On the

11th of March, 1868, the sheriff by virtue of said executions sold and conveyed the one hundred and fifty six acre tract (conveyed by Stallings to Pearce) to Thomas & Thomas, who in the year 1873 conveyed the same to the defendant.

At June term, 1868, a judgment was obtained by Samuel Perry against said Stallings for one hundred and twenty-five dollars and interest, and execution issued upon the same from said term returnable to September term, 1868. The case and execution were transferred to the superior court on the 19th of June, 1868, and an *alias* execution issued from September term, 1868, to spring term, 1869, and levied by the sheriff on the one hundred and ten acre tract of the land conveyed to him by Massenburg as executor, and a *vend. ex.* issued from spring term, in pursuance of which the sheriff sold and conveyed said land to one Minitree, who in 1872 conveyed the same to the defendant.

The deed from Massenburg to Stallings was never registered and the purchase money was never paid.

Massenburg died in February, 1867; and on the 11th of March, 1869, John C. Davis qualified as executor of Thomas Davis, deceased.

About a year before the 5th of June, 1869, the date of the sheriff's sale of the Stallings' part of the *locus in quo* and before any judgment had been obtained against him, an oral agreement was made between Stallings and John C. Davis, by which, in consideration of the fact that no money had been paid for the land and that the sureties on the bond for the purchase money were insolvent, the said Stallings agreed to surrender his unregistered deed for the land, and shortly after the 11th of March and after the levy of the execution aforesaid and before the 5th of June, 1869 (the date of the sale), the said Stallings surrendered the deed to Davis.

Stallings went into possession of the one hundred and ten acre tract in 1863, and remained therein until he surren-

dered the deed, and there was no actual possession of the land from the time of such surrender until after the execution sale, when Minitree took possession; and from the time of the sale until the bringing of this action, the land has been continuously in possession, first of Minitree, and then of the defendant.

A. W. Pearce, the Thomases, and the defendant have had continuous possession of the one hundred and fifty-six acre tract since the 23d of January, 1863.

The defendant had no notice in fact of the claim of plaintiff, or of the fact that the purchase money had not been paid or of the agreement to surrender or of the surrender of the deep, until several years after he had bought and paid for the land.

The court found as conclusions of law, that plaintiff is entitled to recover the one hundred and ten acre tract, on the ground that the parol agreement for a conveyance of said tract was made before the teste of the execution, and that no person but the parties thereto can avail himself of the statute of frauds; and further, that plaintiff is not entitled to recover the one hundred and fifty-six acre tract. There was judgment accordingly, from which both parties appealed.

Messrs. J. B. Batchelor and *Reade, Busbee & Busbee*, for plaintiffs.

Mr. Charles M. Cooke, for defendant.

ASHE, J. The land sold by the executor, Massenburg, was divided into two tracts by the purchaser, Stallings, by his selling one hundred and fifty-six acres thereof to A. W. Pearce on the day of sale, and reserving the residue of one hundred and ten acres. And though both tracts ultimately came into the possession of the defendant, they were acquired by him through different chains of title. The title to each

was derived through a sheriff's deed, but by sales under different executions and at different times, and the principles of law which govern the one case have no application to the other.

The plaintiffs claim title to the whole of the land sold by the executor. They insist that upon the death of the father, the legal title descended to them and was never divested by the sale to Stallings, because the deed made by Massenburg, the executor, to him was never registered, and a deed though executed and delivered but not registered does not pass the legal estate. This according to recent decisions of this court we must hold to be law, whatever may be our individual opinions in regard to its correctness. The unregistered deed however conveyed an equitable estate to Stallings. But before any lien was acquired upon the one hundred and ten acre tract by virtue of the execution issued upon the judgment obtained by Perry against Stallings, and in fact before the rendition of the judgment, without any allegation of fraud, there was a parol agreement between Stallings and John C. Davis, the surviving executor, to surrender the unregistered deed in consideration that the notes given by him for the purchase money should be delivered up. If this was a valid *contract*, it had the effect to extinguish the equity of Stallings in the tract of one hundred and ten acres. When a deed has been delivered, but before probate and registration, the vendor and vendee may rescind the contract by returning the consideration and redelivering the deed. *Love* v. *Belk*, 1 Ired. Eq., 163. But the validity of this contract is denied by the defendant on two grounds; first, that it is a parol contract for the conveyance of an interest in land and is within the statute of frauds and therefore void; and secondly, that Davis having renounced the executorship had no right to make the contract.

The answer to the first ground is that the defendant was not a party to the agreement and had no right to set up the

statute of frauds for the purpose of invalidating the contract. No person can avail himself of the statute for his own benefit, unless he is a party to the contract and is to be charged thereby. *Green* v. *R. R. Co.*, 77 N. C., 95; *Mizell* v. *Burnett*, 4 Jones, 249. Stallings was the only person to be charged by the contract, and he had the right if he chose to exercise it to waive the protection of the statute; for when such a contract comes in question *inter alios*, it is generally regarded as a valid contract, and a third party cannot invoke its application for his own benefit. Though Stallings was not legally bound to fulfill his parol contract by surrendering the deed, yet as he was unable to pay the purchase money, there was a moral duty resting upon him to do so; and if he chose to waive his legal right from a sense of moral obligation, the defendant being a stranger to the contract had no right to complain or preclude him from the exercise of his discretion. Browne on Stat. of Frauds, § 130–135.

The other ground is not so easily answered, but reasoning by analogy we are led to the conclusion that Davis had the right to make the contract in behalf of the estate of his testator. It is true he had renounced the executorship, and his renunciation had been put on record; but he had the right after the death of his co-executor and before general letters of administration with the will annexed were granted on the estate of his testator, to retract his renunciation and administer. The renunciation was not peremptory. Williams on Executors, 250. And in *Wood* v. *Sparks*, 1 Dev. & Bat., 389, Judge GASTON says, if an executor actually renounces, "it is not to be questioned he may come forward the next day and take the oath of office and enter upon the execution of its functions." But this principle, we take it, was meant to apply to those cases where the executor was the sole executor and retracts his renunciation before letters of administration granted.

An executor may do many things before receiving his letters, or even before probate. He may receive or release debts, give away or dispose of the goods and effects of his testator, assent to legacies and bring actions, though he cannot declare. Williams on Executors, 256-260; Toller, 45. If an executor may do these acts before receiving his letters or before probate, we do not see why a surviving executor who had renounced, but may retract his renunciation at any time and administer before letters of administration granted, may not do the same acts. His taking possession of the estate or intermeddling with it in any way before qualifying, would be evidence of the retraction of his renunciation, and would subject him to all the responsibilities of the office. And as Judge GASTON says in *Wood* v. *Sparks*, *supra*, "it might perhaps notwithstanding the impropriety of such conduct constitute him a full executor." An executor who intermeddles with an estate may be compelled to prove the will and administer. And with respect to what acts will amount to administering so as to render him compellable to act, it is held that whatever an executor does with respect to the goods and effects of the testator which shows an intention in him to take upon him the executorship, will regularly amount to administration. Williams *supra*, 244.

We therefore hold that John C. Davis in entering into the contract with Stallings for the surrender of the notes of the latter and receiving from him the unregistered deed, was such an act as manifested the intention of assuming the burthen of administration, and was evidence of the retraction of his refusal to administer, and when afterwards he qualified as executor and took out letters, it made valid by relation the act of agreement, if it was not so before.

The case of the one hundred and fifty-six acre tract of land stands upon a different footing. The execution against Pearce who purchased the tract from Stallings, was issued

from the September term, 1867, of the county court of Franklin to its December term ensuing, and at the time it was issued, Stallings had the deed from Massenburg in his hands, but unregistered. The deed not being registered, he had only an equitable interest in the land, and the sale to Pearce passed only the same interest which he had, the legal title in the meantime remaining in the heirs of Thomas Davis, which could be divested only by the registration of the deed to Stallings, for an unregistered deed does not pass the legal estate. *Hare* v. *Jernigan*, 76 N. C., 471; *Triplett* v. *Witherspoon*, 74 N. C., 475; *Ivey* v. *Granberry*, 66 N. C., 223. The interest of Pearce then being equitable, the question is, was it such an equity as might be sold under execution?

In the case of *Hoke* v. *Henderson*, 3 Dev., 12, Chief Justice RUFFIN said: "We think it clear that the interest of a purchaser at a sheriff's sale who has paid his money but not taken a deed, is a trust estate within the act of 1812. The whole equitable interest is in him, and he has a right to call for a conveyance to himself at any moment." And the same learned judge in that case said, "the estate of a *cestui que trust* may be sold under execution though it may be necessary that the purchaser should come into a court of equity for the discovery, declaration and establishment of the trust and of permanent evidence of it, on which his legal title depends." Ours is a purer and more simple equity than that. There, the money it is true had been paid, and that raised the equity which could only be enforced by invoking the aid of the court of equity. But here, though the money has not been paid, the deed had been delivered, and all that was necessary to draw to it the legal title was its registration. It required no interposition of the equitable jurisdiction of the court to perfect the legal title. Such was the interest of Stallings when he sold to Pearce, and the interest of the latter, which was sold by the sheriff, under the execution against him. It is the equita-

ble title derived by the defendant through mesne conveyances from the sheriff that is set up as a defence in the answer against the recovery of the plaintiff of the hundred and fifty-six acre tract, and it has been held that where the legal and equitable remedies are blended together, as in our present system of pleading, the defendant can defeat the action to recover land upon equitable principles, and if upon the application of these principles the plaintiff *ought not to be put in possession of the premises, he cannot recover in the action.* *Chase* v. *Peck*, 21 N. Y., 581.

We have considered all the points raised in the argument of this case and hold, for the reasons herein given, that the plaintiff is not entitled to recover the tract of one hundred and fifty-six acres, but that he is entitled to recover the one hundred and ten acre tract, and his costs. There is no error. The judgment of the superior court is affirmed.

No error. Affirmed.

In same case upon plaintiffs' appeal:

ASHE, J. The questions presented in this case are decided in the case between the same parties at this term of the court, on the appeal of the defendant. It is unnecessary to repeat the reasons there stated; but, as it was decided the plaintiff could not recover the tract of land sued for, consisting of one hundred and fifty-six acres, by reason of the equitable counter-claim set up by the defence, we hold the defendant is entitled to the possession of that tract of land; and the legal title being in the plaintiffs, he has the right to a decree for the conveyance of the legal title from the plaintiffs and that it be declared in the decree that the effect thereof shall be to transfer to the defendant the legal title of the said land in fee simple.

McARTHUR & WALKER v. JAMES B. MORRIS.

Description in Deed—Covenant of Seizin.

An exception in a deed conveying land, of "eighty acres, *more or less*, heretofore conveyed to L, joining said L's land," is merely descriptive, and not of the essence of the contract, so as to involve the breach of a covenant of seizin by the grantor, where the portion heretofore conveyed is found upon a survey to be one hundred and seventy acres.

CIVIL ACTION for breach of covenant in a deed tried at August Special Term, 1879, of RUTHERFORD Superior Court, before *Buxton, J.*

The defendant by deed executed on the 4th of April, 1871, and to which his wife was a party, for the consideration of three thousand and five hundred dollars, conveyed to the plaintiffs two tracts of land with a minute and exact description of the boundaries of each, the former as "containing four hundred and eighteen acres more or less," and the latter as "containing two hundred and forty-five acres more or less, saving and excepting out of the boundary of the last mentioned, that is, the Rucker tract, eighty acres more or less, heretofore conveyed by said J. B. Morris to J. K. Lynch, joining said Lynch's land." The defendant covenants in his deed, "that he is seized in fee simple of said lands and has lawful power to make this conveyance," and further, "to warrant and defend the same to the parties of the second part (plaintiffs) and their heirs forever, free from the lawful claims of all persons whomsoever."

The defendant had on March 20th, 1861, sold and conveyed to said J. K. Lynch for the sum of one thousand and fifty dollars, a tract with well defined boundary lines, represented "as containing one hundred and fifty acres more or less," the deed for which had not been registered and could not be found when the conveyance was made to the

plaintiffs. Upon a survey it was ascertained that the land described in the deed to Lynch consisted of two hundred acres, of which thirty covered the "Dickey tract" and one hundred and seventy the "Rucker tract."

The action is brought on the covenant of seizin to recover the value of the land embraced in the Lynch deed in excess of the eighty acres it is represented to contain, and the jury upon issues submitted and under instructions of the court ascertain the value, (1) of all the land purchased by the plaintiffs to be three thousand five hundred dollars; (2) of the ninety acres lappage upon the Rucker tract, above the eighty acres mentioned, to be two hundred dollars; and (3) of the thirty acres lappage upon the Dickey tract to be fifty dollars.

Upon this finding the court gave judgment for the plaintiffs for the assessed value of both lappages with interest, and the defendant appealed from so much thereof as charged him with the lappage upon the Rucker tract.

Messrs. Hoke & Hoke, for plaintiffs.
Mr. W. J. Montgomery, for defendant.

SMITH, C. J., after stating the case. If the terms of the covenant were that there were but eighty acres taken from the area of the Rucker tract, with its defined boundary lines, by the pryor deed to Lynch, it would be broken and the defendant would be liable in damages commensurate with the value of the ninety acres lost beyond the number specified, and the ruling of the court would be correct. But if its meaning be, and such we think is a fair construction of the words, to exempt from the operation of the plaintiffs' deed all the land embraced in the deed to Lynch, and the supposed area is mentioned as descriptive only, then the reserved land without regard to quantity would be included in the plaintiffs', and consequently the covenant would at-

tach to no part of it. The defendant covenants as to the title to the land described and which his deed purports to convey, but not to that which is reserved out of the general description of the boundary lines. A superior outstanding title to the reserved part cannot be a breach of the obligation entered into in regard to that which the grantor designates, and undertakes to convey. "Whenever it appears," remarks Chancellor KENT, "by the definite boundaries, or by words of qualification, as 'more or less,' or as 'containing by estimation,' or the like, that the statement of the quantity of acres in the deed is mere matter of description and not of the essence of the contract, the buyer takes the risk of quantity, if there be no intermixture of fraud in the case." 4 Kent Com., 466. See also *Noble* v. *Goggins*, 99 Mass., 235, where the authorities are reviewed and a similar conclusion reached. Rawls Cov. Title, 358.

The statement as to the supposed quantity passing under the Lynch deed, followed by the words, "more or less," shows that it was but a conjectural estimate resting on memory only, and the purpose was to exclude all which that deed embraced, so that if the area was less, the plaintiffs would get the benefit of the enlargement, and if more, they must sustain the loss arising from the reduction. If there was fraud practiced, the plaintiffs are not without remedy in a different action, but in our opinion they cannot recover for the deficiency in the Rucker tract upon the defendant's covenant.

There is error, and judgment will be entered for the plaintiffs for fifty dollars, the damages as to the Dickey tract, and interest.

Error. Judgment accordingly.

*STEPHEN DAY and others v. JAMES R. DAY and others.

Reforming Deed—Purchasers—Statute of Limitations.

1. Where a deaf and aged father makes a deed to his son, in whom he reposes confidence, conveying a tract of land in fee, but omitting either by the mistake or contrivance of the son, under whose direction the deed was drawn, to reserve a life estate to the grantor, an equity arises in favor of the father to have such instrument reformed in accordance with the original intention of the parties.
2. A third person to whom the son conveys such land in trust to pay his debts is a purchaser for value, but takes the land subject to the equity which had attached to it in the hands of his grantor.
3. The relief asked by the father in this case, being entirely of an equitable nature, is not barred by the statute of limitations (C. C. P., § 33, 9) until after the lapse of three years from the discovery by the plaintiff of the fraud upon his rights.

(*Newsom* v. *Bufferlow*, 1 Dev. Eq., 379; *Pugh* v. *Brittain*, 2 Dev. Eq., 34; *Brady* v. *Parker*, 4 Ired., 430; *McKay* v. *Simpson*, 6 Ired. Eq., 452; *Clemmons* v. *Drew*, 2 Jones, Eq., 314; *Mason* v. *Pelletier*, 82 N. C., 40; *Hunt* v. *Frazier*, 6 Jones Eq., 90; *Potts* v. *Blackwell*, 3 Jones Eq., 449; *Small* v. *Small*, 74 N. C., 16; *Crowder* v. *Langdon*, 3 Ired. Eq., 476; *Wilson* v. *Land Co.*, 77 N. C., 445, cited and approved)

CIVIL ACTION to correct a deed tried at Fall Term, 1880, of PERSON Superior Court, before *Eure, J.*

Judgment upon the "case agreed" was rendered in favor of plaintiff, from which the defendant trustee (Briggs) appealed.

Messrs. Graham & Ruffin, for plaintiff.
Messrs. Reade, Busbee & Busbee, for defendant.

SMITH, C. J. On September 4th, 1876, the plaintiff, Stephen S. Day, then advanced in age, deaf and reposing

*Ruffin, J., was of counsel and argued this case before his appointment as associate justice.

implicit confidence in his son, the defendant, James R. Day, his wife joining with him in the act, conveyed to the said James R. Day, for no valuable consideration, the tract of land described in the complaint. The deed therefor was prepared by direction of the son and under an agreement between them that it should be so drawn as to reserve a life estate in the land to the plaintiff, and he supposed when the deed was executed that it contained such provision. It was not read over to the plaintiff, nor did he require this to be done, fully relying upon the integrity and business capacity of the son to carry out their common understanding and intent in the form of the instrument to be executed. Nor did the plaintiff know of the omitted reservation.

On December 31st, 1879, the defendant, Day, being insolvent, conveyed all his estate, real and personal, including the land thus acquired, except the exemptions allowed him by law, to the defendant, P. M. Briggs, in trust to secure his various creditors; the latter having no notice at the time of any mistake or omission in the plaintiff's deed, nor of any equity vested in him for a reformation of any of its provisions. Upon these facts, admitted by counsel of both parties, the court was of opinion that the plaintiff was entitled to have the deed corrected and reformed so as to carry out the purpose contemplated in its execution and secure to the plaintiff an estate in the land for his life; and to this end adjudged that the defendant, Briggs, re-convey and assure such life estate therein to the plaintiff, and that the costs of this action be a lien upon the reversionary interest remaining in the trustee.

The cases cited for the plaintiff in the brief of his counsel abundantly support the general proposition that contracts executory and executed under a mutual mistake, when the proof is full and clear, will be relieved against and reformed in a court of equity, so as to effectuate the real intent of the parties.—*Newsom* v. *Bufferlow*, 1 Dev. Eq., 379; *Pugh* v. *Brit-*

tain, 2 Dev. Eq., 34; *Brady* v. *Parker*, 4 Ired. Eq., 430; *McKay* v. *Simpson*, 6 Ired. Eq., 452; *Clemmons* v. *Drew*, 2 Jones Eq., 314; *Mason* v. *Pelletier*, 82 N. C., 40.

The jurisdiction to reform deeds is not exercised, however, unless the transaction is based on a valuable or *meritorious consideration*. *Hunt* v. *Frazier*, 6 Jones Eq., 90.

The extension of this equitable doctrine to the present case was not disputed upon the hearing, but it was contended that the defendant, Briggs, is a purchaser of the land for a valuable consideration, and without notice of any infirmity in the deed, and takes the estate free from the plaintiff's equity. For this is cited *Potts* v. *Blackwell*, 3 Jones Eq., 449, and the same case re-heard and reported in 4 Jones Eq., 58, as well as other cases.

This case does sustain the proposition that a trustee or mortgagee of land conveyed to secure pre-existing debts is "a purchaser for a valuable consideration within the provisions of the 13th and 27th of Elizabeth;" but it is at the same time declared that "they take subject to any equity that attached to the property in the hands of the debtor, and cannot discharge themselves from it on the ground of being purchasers without notice, in like manner as a purchaser at execution sale takes subject to any equity against the debtor, without reference to the question of notice."

The same doctrine is announced by the same eminent judge in *Small* v. *Small*, 74 N. C., 16, thus: "The counsel of the defendants did not refer to any case or give any reason in support of the position that a creditor who takes a deed of trust conveying a tract of land to secure an existing debt, stands in a better condition than the debtor in regard to an equity which has attached to the land in the hands of the debtor. The creditor who takes a deed of trust is not out of pocket one cent; *so he stands in the shoes of the debtor and takes subject to any equity binding the land in the hands of the debtor.*"

It is manifest then that the defendant, Briggs, stands in no better position to contest the plaintiff's demands for relief than the grantor from whom his title is derived, since neither he nor the creditors have parted with anything of value in obtaining this security for their debts.

Nor in our opinion will the objection prevail, which imputes to the plaintiff a culpable inattention to his interests, in executing an instrument without examining into its character, and inexcusable delay in making the discovery of its defects.

It is true, as remarked by NASH, J., speaking for the court in *Crowder* v. *Langdon*, 3 Ired. Eq., 476, that "where the fact is equally unknown to both parties, or where each has equal and adequate means of information, or where the fact is doubtful from its own nature, in any such case, if the party has acted with entire good faith, a court of equity will not interfere." But the rule thus laid down does not meet the facts of this case. The relation of the parties with the attending circumstances will excuse and account for the want of that vigilance and care which are expected and required in the ordinary dealings of men with one another, and precludes any demand for the aid of the court. The same unsuspecting confidence which evidenced the execution of the deed without scrutiny of its contents and prevented enquiry afterwards, seems to have received the first rude shock when he was about to be deprived of his home and discovered it was not secured to him in the deed. The laches, if such it may be called, ought not to deprive the plaintiff of that estate which he had supposed was and which ought to have been provided, according to the mutual understanding of both, in the deed itself.

It does not expressly appear that the omission to insert the agreed reservation was not known to the son, and if it was, it would be a fraud practiced upon the father equally entitling him to relief after its discovery, *Wilson* v. *Land Co.*,

77 N. C., 445, and the statutory bar will run only from that time. C. C. P., § 33 (9).

The plaintiff alleges that the discovery of the fraud or omission was not made until after December 31st, 1879, when the deed in trust was executed, and as this averment is not controverted, we must assume it to be true. If the form of the deed was the result of mutual mistake, the enforcement of it by the benefitted party would be a fraud upon the other; and so, as well as in case of actual fraud, the remedy would be equally open under the statute.

There has then been no such delay and inattention on the part of the plaintiff, nor does the statute intervene to deny to the plaintiff the remedy for the correction of his deed, so that it shall conform to the intentions of both, and be in effect what it was meant to be in form.

There is no error and the judgment must be affirmed.

No error. Affirmed.

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*JOHN N. DAVIS v. JACOB ROGERS and others.

Equity of Redemption—Reformation of Deed—Payment.

Where one brings his action against the widow and heirs at law of a person deceased to redeem land conveyed to the decedent upon payment of a debt which said conveyance was made to secure, and obtains a decree accordingly, the acceptance by the administrator of the deceased of the plaintiff's unpaid note is no satisfaction of such debt, and the land continues charged therewith until actual payment, notwithstanding an entry of satisfaction by the administrator, unobjected to by the clerk of the court, on the docket of the court where the cause is pending.

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

DAVIS *v.* ROGERS.

(*Barnes* v. *Morris*, 4 Ired. Eq., 22; *Hyman* v. *Devereux*, 63 N. C., 624; *Small* v. *Small*, 74 N. C., 16; *Walker* v. *Moody*, 65 N. C., 599; *Singletary* v. *Whitaker*, Phil. Eq., 77; *Kidder* v. *McIlhenny*, 81 N. C., 123; *Isler* v. *Murphy*, 71 N. C., 436, cited and approved.)

MOTION in the cause heard at Spring Term, 1880, of UNION Superior Court, before *McKoy, J.*

The plaintiff, assignee of John S. Pardue, brings his action against the widow and heirs at law of Mosely Rogers, deceased, to have a deed absolute in form, and conveying the tract of land described in the complaint, declared to be a security for debt, and to be permitted to redeem the same. At spring term, 1872, a decree was passed determining the rights of the parties and the amount of the encumbering debt, so much of which as bears upon the present controversy is as follows:

"It is thereupon considered, adjudged and decreed by the court now here, that upon John N. Davis, or any one for him, paying into the office of the superior court clerk of Union county, for the use of the defendants and for their benefit equally, the sum of $311.19, on or before the 26th day of April, 1872, or within twenty days thereafter, and all costs to be taxed by the clerk, including an allowance of five dollars for his report, then and in that event, a conveyance of the land mentioned in the pleadings, is hereby decreed from the defendants, each and all of them, to the plaintiff, John N. Davis; but inasmuch as many of the defendants are minors, it is further declared, adjudged and decreed, pursuant to law, (Revised Code, ch. 32, § 24,) that upon John N. Davis complying with the terms of this decree on his part, the effect of this decree shall be to transfer to the said John N. Davis, the legal title of the said property, to be held in the same plight, condition and estate, as though the conveyance decreed was in fact executed, and shall bind and entitle the parties, in the same manner and

to the same extent as the conveyance would, if the same were executed according to the decree," with an order for its enrolment.

There is no direction for a sale upon the plaintiff's failure to redeem, and in this respect the decree is incomplete and open to amendment if it becomes necessary.

The present proceeding was commenced by notice of an intended motion for an order of sale of the land, served on the plaintiff September the 27th, 1876, followed by another notice, served September 22d, 1877, of a motion to be made to strike from the docket the following entries in the cause:

"Recd. of G. W. Flow, clerk, three hundred and eleven dollars and nineteen cents, in full of this judgment, this 14th of May, 1872.

(Signed) ROBT. H. PARDUE."

"May 11th, 1872, satisfied and paid to office $350."

Numerous affidavits were offered in support of the motion for reforming the decree to which the plaintiff opposed his own answer on oath, in which he states in general terms that the conditions of the decree were fulfilled by his paying the money within the prescribed time, and that on May 11th, 1872, he paid to the clerk in currency $350, and took and was ready to produce his receipt therefor.

Upon this conflict of testimony the court directed the following inquiry to be submitted to the jury: "Has the decree of the superior court of $311.19 in this case made at spring term, 1872, been paid," to which the jury responded in the affirmative. On the trial of the issue the plaintiff testified that on the day stated he paid into the clerk's office the amount specified in the decree, with costs, except the sum of $138, for which he gave his individual note to the clerk, and had afterwards paid that; that the money first paid in was borrowed from R. H. Pardue, administrator of the intestate, Mosely, and the witness produced the administrator's acknowledgment of full payment, and the judg-

ment docket containing the memoranda set out in the notice of the motion to erase them from the record.

R. H. Pardue testified that, at the plaintiff's instance and for his convenience he accepted the plaintiff's note for the sum due by the decree ($311.19) executed on May 11th, 1872, to the witness individually, on which nothing has been paid, and he now offers to surrender it; that he never loaned the plaintiff money, nor was any paid into the office when he signed the receipt on the docket, and this was done solely at his suggestion.

The evidence of the clerk was to the effect that the plaintiff and the administrator came to his office together, and the entries were put on the docket by the direction of the former; that no money was paid except for the costs, and that he never had any note of the plaintiff, as stated by him to have been given.

Upon this evidence, the court charged the jury that R. H. Pardue, the administrator, was entitled to the money, and payment to him would discharge the plaintiff from liability therefor; that if the plaintiff paid the amount, or gave his note therefor to the administrator, and it was accepted by him, in the absence of a fraudulent intent, and satisfaction of the decree was entered with their concurrence and receipted by the clerk, it would be a discharge of the decree. The exception to this instruction is alone before us, on the defendant's appeal.

Messrs. Battle & Mordecai, for plaintiff.
Messrs. Wilson & Son, for defendants.

SMITH, C. J., after stating the case. We do not approve of this ruling of the court. It is plain, that the execution and acceptance of the note, instead of payment, is not a compliance with the terms of the decree, by which the fund is declared to be for the use and equal benefit of the defend-

ants, and the personal representative had no control over it. The decree, until modified, is binding upon all the parties to the action, and its obligations cannot be evaded by the contrivance resorted to in this instance. The money when paid into the office, could only be paid out to the defendants, and a note given the administrator is not a substitute to satisfy the requirements of the decree. The court therefore erred in telling the jury that the giving and receiving the note, in place of paying the money, with the common intent evidenced by the entries, that it should be in discharge of the decree, can have such effect upon the rights of the defendants.

1. The execution of a note, never paid, is not a payment, unless so intended between the parties, and then, not as to other parties.

2. The administrator, being a stranger to the action, and not entitled under the decree, had no authority to exonerate the plaintiff.

3. The payment of the debt being a condition precedent and inseparable from the operation of the decree in passing the title, the estate in the land remains under the control of the court, as a still subsisting security therefor.

These propositions are supported by the following authorities. *Barnes* v. *Morris*, 4 Ired. Eq., 22; *Hyman* v. *Devereux*, 63 N. C., 624; *Small* v. *Small*, 74 N. C., 16; *Walker* v. *Moody*, 65 N. C., 599; *Singeltary* v. *Whitaker*, Phil. Eq., 77; *Kidder* v. *McIlhenny*, 81 N. C., 123, and other cases.

The entry made, under the circumstances detailed, if allowed the effect contended for, would be a successful fraud upon the rights of others, and secure the land to one who had never paid for it, and that under a decree that it should be paid for, before the title passed. The entry was unauthorized and inoperative.

In *Isler* v. *Murphy*, 71 N. C., 436, a receipt written opposite the case stated upon the docket, in these words: "Received

of J. T. Murphy the amount of this judgment and interest, and my fee and the plaintiff's costs," and signed by S. W. Isler, attorney for plaintiff, was held to be no part of the record, inasmuch as it was not entered as part of the proceedings, or by the direction of the court. In our opinion, how and by whom the entry or memorandum was put upon the docket, was a proper subject of enquiry, in determining its legal import and conclusive effect upon the defendants. While it is true the fund properly belongs to the administrator, and doubtless would upon his application be ordered to be paid over to him, instead of the defendants, so that the plaintiff could not be compelled to pay the money a second time, until the decree is modified it belongs only to those entitled under the provisions of the decree.

For the error assigned there must be a new trial, and it is so adjudged.

Error. *Venire de novo.*

ALICE D. BLAIR and others v. E. A. OSBORNE and others.

Construction of deed—Estate for life in Joint-tenancy.

1. The *habendum* in a deed shall never introduce one who is a stranger to the premises to take as grantee, but he may take by way of remainder; *Therefore*, a deed which in the premises gives a life estate to the mother grantee alone, and in the *habendum* to her and her children, operates to convey an estate for life to the mother, and an estate for life in joint-tenancy in remainder to her children.

2. The act of 1784, which converted joint-tenancies into estates in common, has reference only to estates of inheritance. (See following case.)

(*Powell* v. *Allen*, 75 N. C., 450, cited and approved.)

BLAIR *v.* OSBORNE.

SPECIAL PROCEEDING for partition of land commenced before the probate court and heard at Fall Term, 1880, of MECKLENBURG Superior Court, before *Seymour, J.*

The defendants made the defence of "sole seizin" and thereupon the case was transferred to the superior court where several issues were submitted to the jury, all of which were found in favor of the plaintiffs, the court reserving the question as to the effect of the deed from Margaret Blair to Araminta Blair (mother of plaintiffs), which deed is as follows: "This indenture made this 21st day of November, 1863, between Margaret Blair of the one part and Araminta Blair of the other part (both of Mecklenburg, &c.,) witnesseth, that said party of the first part for and in consideration of natural love; and further, said party of the second [first] part hath given, granted and doth hereby give, grant and convey to the party of the second part, all that lot or parcel of land lying in the town of Charlotte and county of Mecklenburg (describing the property) to have and to hold the same with the appurtenances thereto belonging to Araminta Blair, the party of the second part, to her and the children begotten upon her body by S. M. Blair, forever," * * *. Both parties claimed the land (to divide which the petition was filed) under Samuel Blair the father of plaintiffs.

Plaintiffs offered the register's books of the county to show that Margaret had conveyed to plaintiffs in May, 1863, as appeared from the registry. Defendants objected to the introduction of the registry on the ground that only the original or a certified copy from the register's record was competent. The objection was overruled and defendants excepted.

Plaintiffs offered evidence to show that they were children of Araminta Blair begotten on her body by S. M. Blair; that they were in existence when the said deed from Margaret was executed, and are still infants.

Defendants offered in evidence a deed from S. M. Blair and Araminta to one J. Y. Bryce, and a mortgage from Bryce to defendant, Bodfish, and a deed from Bodfish to defendant, E. A. Osborne as the assignee of the bank of Mecklenburg.

Upon the finding of the jury, His Honor on the point of law reserved being of opinion with plaintiffs gave judgment in their favor, from which the defendants appealed.

Messrs. Wilson & Son and *Dowd & Walker*, for plaintiffs.
Messrs. Shipp & Bailey, for defendants.

ASHE, J. The only question which need be considered in this case turns upon the interpretation of the deed made by Margaret to Araminta Blair. The deed operates as a covenant to stand seized to uses. In the premises of the deed, the land in dispute is given to Araminta alone, and the *habendum* is to her and her children. Do the children of Araminta take an immediate estate in joint-tenancy with their mother, or an estate in joint-tenancy in remainder for their lives?

The deed in the absence of any words of inheritance unquestionably conveys only a life estate to the donees, and whether the children take the estate jointly with their mother, or in remainder after her life, the estate is a joint-tenancy, for the act of 1784 which converted joint tenancies into estates in common, had reference only to estates of inheritance. Such is the reasonable construction of the act and the interpretation which has been given to it by this court in *Powell* v. *Allen*, 75 N. C., 450.

The premises of a deed are used to set forth the names of the parties, any recitals of deeds, &c., that may be deemed necessary to explain the reasons upon which the conveyance is founded and the consideration upon which it is made; and it is the office of the *habendum* to determine the

estate or interest which is granted, though this may be performed by the premises, in which case, the *habendum* may explain, enlarge or qualify the premises, but not be totally contrary or repugnant. 2 Blk., 298. A deed may be good without any *habendum*, but where it is used it may materially qualify the statement of the premises. In this deed, for instance, a life estate is given to Araminta in the premises, and the *habendum* is to her and her children. The effect of the *habendum* standing alone would give a joint estate to Araminta and her children, but to give it such a construction would be inconsistent with and repugnant to the premises, in which an estate is given to the mother alone. But the deed should have such a construction as is most favorable to the minds and intent of the parties as the rules of law will admit. We think it most probable when this deed was made, it was the intention of the donor to give the whole estate to Araminta for life and after death to her children absolutely, so as to exclude the husband of the donee from an interest therein. If that was the intention, the form of the deed for that purpose comports with the rules of construction, for the doctrine is laid down in Shepherd's Touchstone, 151, that "one who is not named in the premises may nevertheless take an estate in remainder by limitation in the *habendum*. 2 Roll. Abr., 68; Hob., 313. In 3 Leon Ca., 60, it is said that the *habendum* shall never introduce one who is a stranger to the premises to take as grantee, but he may take by way of remainder.

Applying this principle to our case, the construction must be to give an estate for life to Araminta, and an estate for life in joint-tenancy to her children, the plaintiffs, in remainder. This construction necessarily defeats the petition for partition, for it is a general rule prevailing in England and in this country, "that no person has the right to demand any court to enforce a compulsory partition, unless he has an estate in possession—one by virtue of which he

is entitled to enjoy the present rents or the possession of the property as one of the co-tenants." Freeman on Co-Tenancy, § 146.

There is error. The petition cannot be sustained. Let this be certified to the superior court of Mecklenburg county, that the issues and proceedings in that court may be transmitted to the superior court clerk of that county to the end that the petition be dismissed.

Error. Petition dismissed.

JAMES M. POWELL and others v. JAMES K. MORISEY and others.

Construction of Deed—Estate for life in Joint-tenancy.

A deed to five grandchildren without the use of any restrictive, exclusive or explanatory words conveys an estate for life in joint-tenancy. The act of 1784 applies only to estates of inheritance. (See preceding case.)

(*Powell* v. *Allen*, 75 N. C., 450, cited and approved.)

SPECIAL PROCEEDING for partition of land commenced in the probate court and heard at Spring Term, 1880, of SAMPSON Superior Court, before *Avery, J.*

The plaintiffs appealed from the judgment below.

Mr. D. J. Devane, for plaintiffs.

Messrs. E. T. Boykin, and *Reade, Busbee & Busbee*, for defendants.

RUFFIN, J. This was a special proceeding begun in the probate court of Sampson county for a sale of lands for the

purposes of partition, and which was tranferred to the superior court of that county, for the trial of certain issues raised by the pleadings. It comes to this court upon an appeal of the plaintiffs from a judgment of that court overruling a demurrer which they had interposed to the answer of the defendants; but we have not thought it necessary to elaborate that point, as we are of the opinion that the plaintiffs' case must fail because of an entire failure of title in them to the lands which are the subject of the action.

The facts as set forth in the pleadings are as follows: On the 10th day of April, 1860, James Vann, under whom all parties claim, executed a deed whereby, after reserving to himself a life estate in the lands, he conveyed them to his five grandsons, James Register, Harman Register, Gibson Register, John R. Register and Edmond Register, without the use however of any words of inheritance in the deed, and in 1866 he died leaving a will in which after making several special legacies and devises, he devised the residue of his estate to the plaintiffs who are also his grandchildren.

Of the grandsons mentioned in the deed, three died during the life of the grantor and one since his death, leaving John R. Register alone surviving from whom the defendants, since the death of all his brothers, have purchased.

The plaintiffs insist that the effect of the deed was to give to the grandsons only a life estate in the lands, whereas the defendants say that it was the intention of the grantor to give them a fee simple interest, and that the necessary words of inheritance were omitted through the mistake of the draughtsman, and they ask to have it corrected so as to give effect to such intention.

Of course if there be this mistake and the correction be made, then the plaintiffs cannot maintain their action; nor do we see that their condition will be bettered at all, if we give to the deed the construction insisted upon by them.

A copy of the deed is made a part of the case, and upon

reference to it we find that after reserving the land to the grantor for his life, it conveys a vested remainder to the five grandsons, without the addition of "any restrictive, exclusive, or explanatory words," such as is said by BLACKSTONE in his commentaries, to be necessary to prevent the estate created by it becoming a joint-tenancy. It has every element essential to constitute it an estate of that character as defined both by the author just quoted and LORD COKE, and must be so construed by us, and all the properties and incidents be given it, that properly belonged to such an estate at common law save as they may have been modified by statute.

In the very recent case of *Powell* v. *Allen*, 75 N. C., 450, it was decided by this court that a joint tenancy for life was not within the mischief intended to be remedied by the act of 1784 which abolished the right of survivorship in joint estates, and consequently was not affected thereby, but that the common law rule, so far as such an estate was concerned, remained unchanged; and it is difficult to conceive of a case more in point than this one, as it too was an estate for life given to several joint-tenants in remainder after a particular life estate, and in which several of the tenants had died before the falling in of the particular estate.

We are constrained to hold that upon the death of his companions and by virtue of the doctrine of survivorship, John R. Register as the last survivor became seized of the entire lands conveyed in the deed for and during the term of his life, and that the defendants as purchasers from him, are entitled to have the same and every part thereof for that period of time. As a necessary consequence to the failure of their title to the premises, the plaintiffs' petition should have been dismissed, and inasmuch as the plaintiffs are in no condition to complain of the action of the superior court in overruling their demurrer, their appeal to this court is dismissed.

Let this be certified to the court below that the cause may be proceeded with in accordance with this opinion.

No error. Appeal dismissed.

HENRIETTA J. RADFORD and *others* v. RICHARD G. ELMORE and others.

Covenant to reconvey—Legal and Equitable Estate.

In 1866, a testator made his will devising land, and died in 1870, but in 1869, the land was sold under execution against him, and the purchaser covenanted to reconvey to testator on payment of sum bid; after testator's death, the purchaser took possession and occupied the premises until his death in 1875; in a suit by the devisees for the rents and profits and a redemption of the land under the covenant, a judgment was rendered in their favor and also decreeing a sale of the land to pay amount due the intestate purchaser; and the purchaser at this last sale conveyed to the defendant devisees, no collision being shown to exist, and the funds of the devisees being used in the purchase; *Held*, that the devisees took the equitable estate vested in the testator under the covenant, and the conveyance to them by said purchaser passed the entire estate.

(*Robbins* v. *Windley*, 3 Jones Eq., 286; *Williamson* v. *Williamson*, 5 Jones Eq. 142; *Simpson* v. *Wallace*, 83 N. C., 477, cited and approved.)

SPECIAL PROCEEDING for partition of land commenced in the probate court and heard at Fall Term, 1880, of WAYNE Superior Court, before *Gudger, J.*

The plaintiffs appealed from the judgment of the court below.

Messrs. Allen & Isler, for plaintiffs.

Messrs. W. T. Faircloth, G. V. Strong and *W. T. Dortch,* for defendants.

SMITH, C. J. In April, 1866, Thomas R. Smith, who then owned the lands mentioned in the complaint, made his will, and therein devises to his infant children, the defendants, and to the feme plaintiff, an illegitimate child, in the following words of description: "all the property that I may die seized and possessed of, after paying my just and legal debts, after the death of Tilpha Elmore," the defendants' mother, as to one hundred acres given to her for life, with certain contingent limitations over in the event of the death of any or all of them without issue, which, as they are all alive need not now be considered. The testator died in January, 1870, previous to which time, (to wit, on the first of May, 1869,) the land, after an assignment of the tract first described in the complaint as a homestead and subject thereto, was sold under execution against the testator by the sheriff, and his deed therefor executed to John Coley; and the latter soon after entered into a covenant with Smith, the debtor, to re-convey the land to him on payment of the sum for which it was bid off.

After the death of Smith, Coley took possession of the homestead tract, and retained and used it during his lifetime. Upon his (Coley's) death in April, 1875, the plaintiff and infant defendants instituted an action against the executor of Smith, and the administrator and heirs at law of Coley, for an account of the rents and profits received by the latter during his occupation of the homestead and for a redemption of the land under the provisions of his covenant with the testator. In this suit the defendants recovered the said rents and profits, excluding the plaintiff from any share therein, and the land was adjudged to be sold to pay the residue of the purchase money due the intestate, and the defendant, John R. Smith, appointed commissioner to make the sale. The sale was accordingly made, and the land bought by one W. A. Deans, who afterwards conveyed it to the infant defendants.

The rents and profits of the homestead and the proceeds of sale of part of the land were used in making payment, but there was no evidence of collusion between the commissioner and Deans in the sale of the land to Deans, nor to impeach the *bona fides* of the transaction which vests the title in the defendants.

Two issues were submitted to the jury:

I. Are the plaintiff and defendants tenants in common?

II. Did the defendant, John R. Smith, pay for the land with money or other property in which the plaintiff had an interest?

The plaintiff's counsel asked the court to charge the jury that if they believed the evidence, they should find for the plaintiff. The court refused to give the instruction, and told the jury if they believed the evidence their verdict should be for the defendants. To both issues the response was in the negative. The estate of the testator in the land at the time of his death, was quite different from that he possessed when he executed his will; but his intent is manifest that all the property he had, with the exception already mentioned, should go to the defendants, his legitimate children, and the plaintiff; and, as under the act of 1844, a will is made to speak and take effect with reference to the real and personal estate comprised therein, "as if it had been executed immediately before the death of the testator, unless a contrary intent shall appear by the will;" and as such contrary intent does not appear in the instrument, the devisees take the equitable estate vested in the testator under the covenant of Coley. Battle's Revisal, ch. 119, § 6; *Robbins* v. *Windley*, 3 Jones Eq., 286; *Williamson* v. *Williamson*, 5 Jones Eq., 142.

The sale to Deans to pay the encumbering debt, passed the entire estate in the land divested of all equity, and in the same plight it is purchased with funds of the defendants and the proceeds of the sale of a portion of it, in neither of

which had the plaintiff any interest, and conveyed to them. *Simpson* v. *Wallace*, 83 N. C., 477.

His Honor therefore properly denied the request of the plaintiff's counsel, and directed the jury upon the evidence, if believed by them, to find for the defendants.

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

No error. Affirmed.

A. A. McLEAN and others *v.* JOHN PATTERSON and others.

Deed—Sale by Administrator.

Where a deed is executed by an administrator in pursuance of a decree to sell land to pay debts, the fact that the grantor signs the deed "as administrator" and not "as commissioner" does not operate to impair its effect in conveying title to the land therein described.

(*McNeill* v. *Morrison*, 63 N. C., 508; *Havens* v. *Lathene*, 75 N. C., 505; *Cox* v. *Blair*, 76 N. C , 78, cited and approved.)

CIVIL ACTION to recover land tried at Fall Term, 1879, of ROBESON Superior Court, before *Seymour, J.*

Verdict and judgment for defendants, appeal by plaintiffs.

Messrs. McNeill & McNeill and *W. F. French*, for plaintiffs.
Messrs. Rowland & McLean, for defendants.

SMITH, C. J. The plaintiffs derive title to the land in dispute under a grant from the state, issued in June, 1795, and a succession of conveyances thence to Joseph Thompson and Robert S. French, and a deed from the latter, executed March 11th, 1856, to Gilbert M. McLean, the ancestor of the plaintiffs.

The defendant introduced in evidence a transcript of the late county court, showing an application of A. A. McLean, one of the plaintiffs, and administrator of the intestate Gilbert M. McLean, for license to sell said land for assets to pay debts, the order licensing and directing the sale by the administrator, the report of sale and its confirmation, and a decree authorizing him to make title to John A. Sanders, the purchaser, and also the deed of the administrator, dated June 1st, 1866, conveying the premises to him. This deed describes the land as being "in the county of Robeson, on the east side of Shoeheel and east side of Long Branch, and on both sides of the Black Branch, adjoining the lands of Daniel Patterson, now deceased, Duncan Smith, deceased, Edward Wilkerson, John Patterson, Murphy C. McNair, Daniel H., and John McLean, and lands of Angus McLean, deceased, and embracing the lands conveyed by R. S. French and Joseph Thompson, to G. M. McLean, March 11th, 1856, and registered in book D. D., page 323, register's office of Robeson county, beginning at, &c., describing by course and distance and occasional calls for lines of adjoining proprietors, the several boundaries of the tract, and excepting therefrom 105 acres, included, but not intended to be conveyed. This description is identical with that contained in the deed from French and Thompson to the intestate down to the reference to their deed, the difference consisting in the designation of the boundary lines specifically set out as aforesaid in the administrator's deed.

The jury, under the charge of the court, rendered a general verdict for the defendant, which, on enquiry from the court, they stated, was based on the ground that the title had passed from the heirs at law, by the administrator's deed. The record shows two exceptions taken by the plaintiffs, viz:

1. To the validity of the deed to Sanders, because it is signed by A. A. McLean, not as commissioner, but with the

suffix to his name, "administrator of the estate of G. M. McLean."

2. To the instructions given to the jury.

The objection to the sufficiency of the deed, because of the manner in which it is signed, is untenable. The statute declares that, "upon the report coming in of the sale and confirmation thereof, title shall be made by such person, and at such time as the court may prescribe." Bat. Rev., ch. 45, § 68. Language of similar import is employed in reference to the sale of land for partition: "The court may authorize any officer thereof, or any other competent person, to be designated in the decree of sale, to sell the real estate under this proceeding." *Ibid.*, ch. 84, § 15.

The usual and preferable practice is to appoint the clerk to make the sales required in partition, as an official act, covered and protected by his bond, and in discharging the duty he need not name himself commissioner. *McNeill* v. *Morrison*, 63 N. C., 508; *Havens* v. *Lathene*, 75 N. C., 505; *Cox* v. *Blair*, 76 N. C., 78. The same practice, and for like reasons, is pursued in sales of an intestate's land for the payment of his debts. The court here directed the administrator to convey the estate descended to the plaintiffs, and this order fully authorizes the deed. The body of the instrument shows it was executed in pursuance of the decree, and by virtue of the power therein conferred, and neither does the absence of the word commissioner, or the presence of those superadded, expressing his representative character, impair its force and operation in transferring the estate.

2. The instructions of the judge are, in like manner, obnoxious to no just complaint of the appellants. These were quite as favorable as they could require. The charge in substance is that if the deed from A. A. McLean, in defining and describing the land by metes and bounds, did not include that claimed by the plaintiffs, their verdict should be for the latter; that if this description could not be loca

ted and fitted, the verdict should be for the defendant, inasmuch as the deed there identifies the land as that conveyed in the deed to the intestate, G. M. McLean.

The charge is undoubtedly correct. Aside from the additional recital of boundaries, the land is described in both deeds in the very same terms, and by express reference in the latter to the first deed, as embracing the land intended to be conveyed to the said Sanders. The only possible uncertainty springs from the special mention of the boundary lines, and this is removed by the ascertained inability of fitting them to any different tract. Indeed, without this finding, and upon the admitted facts, the court might properly have told the jury, as the opinion was expressed after verdict, that upon the construction of the deed to Sanders, its legal effect was to divest the estate out of the plaintiffs, and they were not entitled to recover. Certainly they can not complain that this question, as to the land conveyed, was left to the jury.

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

No error. Affirmed.

JOHN REED v. W. J. EXUM.

Deed made under duress, cancellation of—Counterclaim for Betterments.

Upon cancellation of a deed alleged to have been executed under duress, the plaintiff is entitled to a restoration of the land with compensation for its use and such damage as it may have sustained, recoverable out of rents not barred by the statute of limitations. But the defendant is entitled to the counterclaim for the increased value from improvements put upon the land by him, and for the purchase money.

(*Futrill* v. *Futrill*, 5 Jones Eq., 61, cited and approved.)

REED *v.* EXUM.

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

In this action, commenced on February 28th, 1876, the plaintiff demands the surrender for cancellation of a deed, conveying the land described in the complaint, executed by him to the defendant in 1862, as he alleges, under duress, the restoration of possession, and damages as rent during the defendant's occupation. Issues, eliminated from the pleadings, were prepared and submitted to the jury, which with their findings are as follows:

1. Was the deed from the plaintiff to the defendant, mentioned in the complaint, executed under duress? Ans. Yes.

2. What is the annual value of the land? Ans. $96.40 due December 1st of each year with interest, as improved. The annual rents without improvements would have been $42.90. The first payment was for half year and due December 1st, 1873.

3. What sum was paid the plaintiff by the defendant, and when? Ans. $390 in confederate money January 1st, 1863.

4. What amount should be allowed the defendant for permanent improvements made upon the land? In response, counsel agree that permanent improvements, worth $240, were put on the land by the defendant after the year 1866, but none before.

Thereupon the court adjudged that the defendant reconvey the land to the plaintiff and pay him the sum of $420.60, the aggregate annual rental, not barred by the statute of limitations, in its improved condition, without abatement for the betterments, and from this ruling the defendant appeals.

Messrs. G. V. Strong and *W. T. Faircloth*, for plaintiff.
Messrs. H. F. Grainger and *W. T. Dortch*, for defendant.

SMITH, C. J. The deed, though found by the jury to have been obtained by duress, was not for that reason void, but capable of being avoided or confirmed at the election of the grantor. "All grants that are made by duress are voidable by the parties that make them, or others that have their estates," and they may be validated. 2 Shep. Touch., 233, 238; Bacon's Ab., Title, Duress, D; *Somere* v. *Pumphrey*, 24 Ill., 231; *Deputy* v. *Staplefordd*, 19 Cal., 302. They should be avoided in a reasonable time after the vitiating force which produced the act has ceased to operate, and a long unexplained delay in asserting the right to annul raises a presumption of acquiescence and ratification. "There is no doubt," say the court in *Brown* v. *Peck*, 2 Wis., 261, "that by long acquiescence in a contract, merely voidable, the right to avoid it may be lost." But this aspect of the case and the consequences of the plaintiff's inaction are not presented in the record for our consideration, and we forbear to express an opinion as to the effect of the delay upon the plaintiff's claim to equitable relief. It would seem unreasonable for the plaintiff to remain quiet, while the defendant is expending his money in the improvement of property, believing to be his own, and to which no claim is put forth for a series of years, and then take it back through the instrumentality of the court without allowing any compensation for its enhanced value. If the apparent laches does not obstruct the recovery of the land, it at least entitles the grantee, who had no option in the matter, to an allowance for its increased value by reason of the expenditures, from the amount with which he may be charged for the use and occupation. While it may be true that the defendant knew, or is presumed to know, as a proposition of law, that a deed thus procured could be set aside by the injured party, it would not be at his own instance without the concurrence of the plaintiff, and he might reasonably infer from the long interval elapsing before any movement is made to

disturb his possession or title, that the plaintiff was content to let the transaction stand undisturbed. He who asks equity must do equity, and the court in the exercise of its equitable jurisdiction will compel a reconveyance on terms that are just to both parties. *Futrill* v. *Futrill*, 5 Jones Eq., 61. All that the plaintiff is entitled to is the restoration of his land in the state in which it was taken from him, with compensation for the use meanwhile and for any damages it may have sustained. On the other hand, its increase of value from improvements is a proper counter-claim against the wronged owner. But this counter-claim should be discharged from the earlier annual rents, as well as the purchase money paid, and when the successive rents have absorbed the amount of these demands of the defendant, the remaining rents of the land as improved, not extending back beyond three years from the commencement of the suit, will be the measure of the plaintiff's recovery. This increased rent is given because the improvements will then have been discharged out of the plaintiff's funds.

While the record is silent as to the adjustment of the respective claims whereby the sum adjudged is ascertained, and it would seem that all originating before the statutory bar interposes are disregarded, the same result will be reached, if these anterior rents are sufficient upon an estimate in accordance with this opinion; if not, the excess due the defendant must be met from the rents which are not barred.

There must therefore be a reference to the clerk to make the computation upon the basis suggested, unless the parties themselves can agree upon the amount, and when ascertained, the plaintiff will be entitled to judgment therefor and for a reconveyance.

PER CURIAM. Judgment modified.

MIBRA GULLEY and others v. E. O. MACY, Adm'r. and others.

Deed—Title—Contract in regard to land—Parol Proof.

1. A grantee under a deed absolute on its face, but intended as a security for a debt (or one purchasing from him with notice of such defect) acquires no title as against creditors or subsequent purchasers, even though there be no intent to defraud creditors.
2. If complaint states a parol contract in regard to land and the answer sets up another and a different contract, it is not competent to the plaintiff to offer oral proof in support of his claim, if objected to by defendant; and this, though the statute of frauds be not pleaded. (When such contract will be enforced, stated by RUFFIN, J.)

(*Gregory* v. *Perkins*, 4 Dev., 50; *Halcombe* v. *Ray*, 1 Ired., 340; *Lyon* v. *Crissman*, 2 Dev. & Bat. Eq., 268; *Allen* v. *Chambers*, 4 Ired. Eq., 125; *Barnes* v. *Brown*, 71 N. C., 507; *Bonham* v. *Craig*, 80 N. C., 224; *Morrison* v. *Baker*, 81 N. C., 76; *Weinstein* v. *Patrick*, 75 N. C., 344, cited and approved.)

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

The defendants appealed from the judgment of the court below. See same case, 81 N. C., 356.

Messrs. T. M. Argo and *A. M. Lewis*, for plaintiffs.
Messrs. D. G. Fowle and *Battle & Mordecai*, for defendants.

RUFFIN, J. For present purposes we may treat the following as the undisputed facts of the case: In February, 1863, Thomas C. Nichols executed a deed, absolute on its face, conveying the land which is the subject of controversy to the defendant, George W. Thompson, and soon thereafter entered the army, where he remained until his death in January, 1864. He left surviving him as his widow the plaintiff, Mibra, (since intermarried with George W. Gulley) and the other plaintiffs, his children. On the 20th of May, 1863, Daniel White, the father of Mibra, gave her the sum

of one thousand dollars, and at the same time executed an instrument in writing wherein he declared that he gave her that sum to be accounted for as an advancement in the distribution of his estate, and directed her to use it in "the redemption of her land now under a mortgage deed in the hands of one Mr. Thompson, said land to be for her use and benefit during her life, and then to her children equally." This money she paid to Thompson in June, 1863, who made her no deed but simply surrendered that which he had received from her husband, which had not then been registered, but has been since the beginning of this suit. After the death of Nichols, the defendant, Macy, became his administrator and in 1872 instituted certain proceedings in the probate court for a sale of the same land for assets to pay the debts of his intestate, and obtaining an order sold the same on the 1st June, 1872, when the defendant, Allen, became the purchaser at the price of $627, upon the payment of which amount he took a deed from the administrator, the said proceedings however being inoperative because of the great irregularities therein. The defendant, Allen, soon after so purchasing, took possession of the land and has continued it ever since, except as to a small piece which he sold to the defendant, High, and placed him in the possession thereof.

The facts in dispute between the parties are as follows: The plaintiffs allege that Thompson had *purchased* the land of Thomas C. Nichols, and that the deed of February, 1863, in being an absolute one, expressed the true intent of the parties; that plaintiff, Mibra, also *purchased* it, when in June, 1863, she paid Thompson the very money which had been advanced her by her father, and upon the express trusts declared by him, and that both of the defendants, Allen and High, had notice of all these facts at the time of their respective purchases. On the other hand the defendant, Thompson, alleges that said deed was intended only as

a security for an amount which Nichols owed him, at the time of its execution, and for certain other amounts then advanced to him or assumed for him, and that there was an express understanding between them that it should not be registered, but should be surrendered upon payment of the amounts intended to be secured, and that it was further agreed that Nichols and his family were to remain in possession of the land; and he expressly denies that there was any contract in regard to the land, between the plaintiff, Mibra, and himself, but says she paid him the money as agent for her husband, who was then in the army, and with the purpose simply to *redeem* his land in accordance with the understanding between them, and therefore he surrendered her the deed, and made her none; that he knew that the money paid him had been furnished by her father, but had not the slightest intimation of the trusts imposed.

The defendants, Allen and High, deny all notice of any irregularity in the proceedings for the sale, and of the claim of the plaintiffs, or any of them, to the land, and the former alleges that the money he paid for the land was used by the administrator of Nichols in the payment of his intestate's debts, and that believing the land to be his, he has put improvements upon it.

The prayer of the plaintiffs is to have the defendant, Thompson, declared a trustee of the legal title for them; and that he be decreed to execute a deed conveying the land to the plaintiff, Mibra, for life with remainder in fee to the other plaintiffs, and that the proceedings in the probate court for a sale by the administrator be declared irregular and void, and the deed to Allen be cancelled, and that they recover the possession of the land.

The defendants, Allen and High, deny the right of plaintiffs to recover the land, and the former asks, in case the sale to him be set aside, that he be allowed for his improvements,

and also subrogated to the right of creditors, to whom his money was paid, against the land as the property of Nichols.

On the trial in the court below, the plaintiff, Mibra, was introduced as a witness for the plaintiffs and testified that she first saw the deed from Nichols to Thompson in June, 1863, when she went to see the latter for the purpose of buying the land back; that she told him that she had gotten some money from her father and wanted to buy the land back, when he said he would call and see her; that he did not take the money that day, but the next week she went again and paid him the money and he delivered to her the deed from Nichols to him, and that there was nothing said about that deed being a sufficient title, nor did she ask him. This was the whole of the evidence offered by the plaintiffs as to the alleged purchase of the land of Thompson by the plaintiff, Mibra.

The defendants introduced the defendant, Thompson, and offered to show by him the real consideration of the Nichols deed, and that it was only intended as a security, and to be surrendered upon the payments of the amounts secured, and the understanding between them that it should not be registered, but upon the objection of the plaintiffs the court excluded the evidence and the defendants excepted. This witness then stated that the plaintiff, Mibra, came to his house and told him that she had brought the money to "redeem the land" or else that she had "come to pay back the money" lent her husband, and he could not say which of the two expressions she used; that she paid the amount and not a word was said about her buying the land or his making her a deed, and that he had no such understanding; that at the time he surrendered the deed to her, he told her that it had never been registered because he expected the land would be redeemed; that he had told her, too, that it had been the understanding between Nichols and himself that when his money was paid he was to surrender the land,

and that he accompanied the act of delivery with the words, "I now surrender the deed in compliance with that promise." That he had previously told her of the understanding that he was to surrender the land when his debts were paid; that he had signed no writing of any sort binding himself to convey the land to the plaintiff, Mibra, or any other person, that his debt had been paid and he had no further interest in it, and if there was any title in him he was willing to convey to any person to whom the court might direct.

The defendant asked the court to charge the jury—

1. "That if they believed from the evidence that the deed from Nichols to Thompson was not registered while in Thompson's hands because of an agreement between them that it should not be so done, then the same was but a security and vested no title in Thompson against creditors."

2. "That under the registration laws the deed was void because absolute on its face while it was intended as a security only."

3. "That there was no *legal evidence* that Mibra Gulley bought the land from Thompson for herself and her children in remainder."

The court declined to give any of the instructions asked for, but told the jury that if Mibra Gulley purchased the land with money furnished by her father, as a separate estate for herself with remainder in fee to her children, and had received from Thompson a surrender of the Nichols deed without the same having been registered and had retained the same in her possession and with her children lived upon the land, then, she had made a valid purchase of the land, though Thompson had made her no deed. His Honor further instructed the jury, that if she, at the time of getting the money from her father and when she paid it to Thompson for the land, treated the deed from Nichols to Thompson as a mortgage and paid her money on

the understanding that the same was a mortgage, she is estopped from denying the contrary.

As we interpret the instructions asked for by the defendants and His Honor below seems to have understood them, we think they should all have been given to the jury, but as there is some obscurity in the first one, we should not feel willing to disturb the judgment of the superior court, if that stood alone, as we deem it to be the duty of parties so to present their points as to be clearly apprehended by the court below, and to show certainly to this court that there was an error committed, of which they have a right to complain. Taken literally, that one instruction if given, would have made the validity of the deed from Nichols to Thompson depend upon the agreement of the parties merely as to its non-registration, and without regard to the character of the deed itself, and might possibly have been properly refused. But we are convinced from the tenor of the examination of the witnesses and the charge of the court itself, that the point really intended to be made by the first two requests for instructions, was, that the deed being absolute on its face was void as to the creditors of Nichols, if the jury should be satisfied that it was only intended as a security for his debt to Thompson; and this, because of the agreement of the parties that it should not be registered, and of the fact that it could not be registered, and we are confirmed in this opinion by seeing that the counsel for the plaintiffs seem to have understood it and have argued it in that light in their well-considered brief filed in this case.

Assuming that to be the true intent of the defendants first two requests for instructions, we think His Honor should have charged the jury accordingly. That a deed absolute on its face but only intended as a security is fraudulent as to the creditors of the maker, has been thought to be the settled law of this state since the case of *Gregory* v. *Perkins*, 4 Dev., 50, and the case soon following it of *Halcombe* v. *Ray*,

1 Ired., 340. Such a rule, the court declares in those two cases, is necessarily deducible from the statutes requiring mortgages and deeds in trust to be registered, and as those statutes were passed because of the experience of the evils resulting from secret trusts and encumbrances, the courts felt constrained to extend their operations to the extreme limit of the mischiefs intended to be remedied, so as to embrace every instrument which (whatever its form) was intended by the parties to be a security only, and this without regard to any intent on their part to defraud creditors. Such a grantee can acquire no title as against creditors or subsequent purchasers, not because of any evil intent to perpetrate a fraud, but because he cannot bring himself within the provisions of a statute which allows mortgages and deeds in trust to take effect from their registration only. As an absolute deed, it cannot be registered because such is not the intent of the parties; nor as a mortgage, because it does not purport to be one and would fail to give that notice to others dealing with its maker, which it was the object of the statutes to secure.

His Honor should therefore have charged the jury, that if the deed in question absolute on its face, was in reality but a security and was so intended and treated by the parties, it was void as to the creditors of Nichols, and that if the plaintiff, Mibra, had notice of such defect in it she was affected thereby, even admitting that she had purchased the land as she claims to have done. Coming in under Thompson with notice, she would stand in his shoes and be subject to every attack from creditors and purchasers to which he was liable.

We come now to the defendants' third prayer, proceeding upon the idea that the only evidence offered by the plaintiff, Mibra, of her alleged purchase of the land from Thompson was by parol, and that it was not, under our statute of frauds, "*legal evidence*" for that purpose. As stated by POMEROY in

his treatise on the Specific Performance of Contracts, § 70, while many of the American states have by their statutes of frauds changed the phraseology of the English statute of 29, Charles II, and especially in declaring the several contracts specified *to be void* unless written, while that merely prohibits the bringing of actions upon them, still it has not had the effect, *except in a few states*, of bringing about any very marked change in the decisions of the courts, most of them having adopted, in construing the provisions of their several statutes, the interpretation given by the courts of England to the corresponding provisions in that statute, notwithstanding the discrepancy in the language employed. This state must be classed with the few excepted states, and is so classed by the author just quoted. § 97. Our courts seem to have thought that in thus changing the language of the statute, the legislature must have intended *something*, and not being willing to defeat that intention made their decisions to correspond therewith, thus avoiding many subtle distinctions made by the courts of England, and the courts of the several states that have gone with them in their construction of the statute, and in which they seem many times to be endeavoring to defeat than to enforce it.

The difference in the two constructions manifests itself at the very first step taken. The courts of England hold that the statute does not affect the substance of such contracts as are within its provisions, but simply prescribe a rule of evidence for their enforcement, and hence that it is necessary in order to get the advantage of the statute that it should be regularly pleaded. Whereas the courts of this state have held that it goes to and affects the contract itself, so that whenever and wherever a party is put to prove the contract which he seeks to enforce, he must show it to be of the character contemplated by the statute, and that by legal evidence.

It is true that in the early case of *Lyon* v. *Crissman*, 2 Dev. and Bat. Eq., 268, it was held by this court that the objection that a contract is void because not in writing cannot avail a party who does not set it up in his pleadings, and Judge GASTON in delivering the opinion says, that as the plaintiff has alleged one parol agreement, and the defendant another, without reference to the statute, it has then become a matter to be determined by proof, which representation of the transaction is the true one, and accordingly the plaintiff was deemed to have a specific performance of an unwritten contract for the purchase of land. Still there was no question made in the case as to the competency of the evidence, and indeed could not have been, as the object of the bill was to enforce a trust growing out of the alleged purchase of the land by the defendant, partly with the money of the plaintiff and upon an agreement to convey to him upon his paying the balance, thus making a case that was never thought to be within the statute of frauds, but might always be established by oral proof. But be that as it may, this court has since that day, so often and so unequivocally declared that although the defendant does not plead the statute, yet if he deny the contract as stated by the plaintiff, the court will not hear parol evidence in support of the plaintiff's claim. Such was the ruling in the case of *Allen* v. *Chambers*, 4 Ired. Eq., 125, which is one of the cases referred to by POMEROY in his treatise before quoted, to illustrate the effect which the changes in the wording of the statute has produced upon the decisions of this court. In that case the plaintiff alleged that the defendant had made a parol contract to sell him a parcel of land containing a certain number of acres and at an agreed price per acre, had accepted a part of the purchase money and admitted the defendant in the possession of the premises, averred a tender of the whole of the purchase money, which the defendant had refused to accept, and prayed that he

might be decreed to do so, and to make the plaintiff title. The answer admitted that the parties had entered into a parol contract for the land, and that under it the defendant had received some portion of the purchase money, but expressly denied that the contract was such as was stated in the bill, and proceeded to show wherein it essentially differed, and averred that he had offered and was still willing to carry out his contract as he understood it to be. After proofs taken by both parties the case was brought to this court, and in disposing of it the court say: "The defendant, if he had chosen that mode of defence, might have brought the case to an end at once by a plea of the statute, but he has thought it due to himself to state his willingness and endeavor to deal fairly, and this he does by denying the contract as set out in the bill in two essential particulars. The parties are therefore directly at issue as to the substance of their contract, and as it is admitted to be by parol, there is no mode of ascertaining which is right, but by hearing the oral testimony of witnesses. That the legislature must have meant in such case to exclude." And again they say: "If the defendant deny the agreement charged in the bill altogether, or deny it as charged, and set up a distinct and inconsistent agreement, it is impossible to move one step further without doing so in the teeth of the act, which as a rule of evidence upon a point of fact in dispute between the parties, must be as binding in this court as in a court of law."

The same doctrine was held in *Barnes* v. *Brown*, 71 N. C., 507, which in many of its particulars was not unlike the present case. There, the ancestor of the plaintiffs had given the first mortgage to one King, the ancestor of the defendants, and a second mortgage to other parties, under which last the land was sold and purchased by King who, the plaintiffs alleged, had agreed to reconvey to their ancestor whenever repaid the amount the land had cost him, and

had received the entire amount thereof. The defendants without pleading the statute denied the allegations of the plaintiffs' complaint and their right to the property. In speaking for the court, Judge RODMAN states the question to be, whether such a contract being in parol can be enforced consistently with the statute, and concludes that it cannot be; and this too, after the defendants had not only failed to plead the statute, but had allowed the plaintiffs to offer evidence in support of their allegations without objection so far as is disclosed in the case. And in this last particular it resembled the case of *Allen* v. *Chambers*, *supra*, for there, evidence had been taken on both sides and the cause set for hearing and removed by consent of parties to this court, and before any objection was interposed as to the nature of the contract. So that it is clear that both of the cases cited turned upon the *legal insufficiency* of the evidence offered in support of the contract. The very same point was discussed by the present Chief Justice in *Bonham* v. *Craig*, 80 N. C., 224, and determined in conformity with the decisions referred to above. And so also is *Morrison* v. *Baker*, 81 N. C., 76, where the rule is thus stated: "A contract which the law requires to be in writing can be proved only by the writing itself, not as the *best*, but as the *only admissible evidence of its existence.*"

The farthest our courts have gone, and the farthest they seem inclined to go, is, to hold that the contract will be enforced when the defendant in his answer submits to perform a parol contract as charged in the bill, or when he admits it and neither by plea nor answer insists on the statute.

Since the defendant, Thompson, by his answer in direct terms denies that there was any contract of purchase between the plaintiff, Mibra, and himself, it brought the case within the principle established in the cases cited, so that the defendants (Thompson being among them and joining in the

prayer) were entitled to the charge as asked, and it was error in the court to refuse it.

As there is to be a new trial, we have not thought it necessary to consider the question as to the competency of the defendant, Thompson, to testify as to the transaction between Nichols and himself, and their understanding in regard to the registration of the deed and the right of the former to redeem the land, further than to say, that it seems difficult to distinguish this case from *Weinstein* v. *Patrick*, 75 N. C., 344, in which it was held that a party very similarly situated was incompetent under section 343 of the Code.

As the alleged contract of purchase by the plaintiff, Mibra, is admitted to be by parol and therefore incapable of being specifically enforced, and as all other matters in dispute between the parties seem to be concluded by the verdict of the jury upon the issues submitted, and the defendant, Thompson, admits his debts to have been satisfied, it occurred to us at one time that it would be proper for this court now to declare the rights of the parties in the premises. But as it may be possible for the plaintiffs on another trial to offer other and competent testimony of the contract of purchase with Thompson, or to induce the parties to abandon their objection growing out of the statute to that now in their reach, we have thought it just that they should be allowed the opportunity to do so. If however finding themselves unable to remove from their path the obstacles interposed by the statute, they should decline another trial, this court is of the opinion that the plaintiff, Mibra, is entitled to be subrogated to the rights of the defendant, Thompson, whose debts she paid, and to have the value of her money with interest, subject however to the prior claims of the creditors of Nichols, as to whom his deed was void under the registration law of the state; that the defendant, Allen, is entitled to be reimbursed the amount he paid for the land with interest, as that went to satisfy the creditors;

that he is also entitled to be reimbursed the present value of his permanent improvements, provided the sum does not exceed the amount due from him for rents and profits during the time he had possession of the premises; and that he is liable to pay rents and profits upon the land as unimproved during the whole time of his possession, as the plaintiff heirs at law of Nichols are all infants; and that all necessary accounts be taken and the land be sold and the proceeds be disposed of as above suggested.

In determining the rights of parties as above, we have not considered how they may be affected by the recent act of 1879, ch. 257, providing a cure for certain irregularities in judicial proceedings in which infants and other persons under disabilities are parties, as that matter was not made a point in the case, and the parties are not intended to be concluded in regard to it.

Error. *Venire de novo.*

WILLIAM JOHNSTON v. WILLIAM R. COCHRANE and wife.

Contract of sale of land to Feme Covert—Equitable Rights of Vendor.

Plaintiff entered into a contract with a feme covert to sell and convey her certain land upon payment of a stipulated sum, and thereupon she and her husband entered into possession and still occupy the premises, having paid a part of the price; *Held*, on default of payment of balance, the plaintiff is entitled to relief in having the trusts growing out of the transaction closed, and if the amount found to be due under the contract of sale be not paid, to have the land sold by decree of court and proceeds applied to the debt. The feme defendant does not set up the defence of coverture, nor elect to repudiate her obligation.

(*Kornegay* v. *Carroway*, 2 Dev. Eq., 403; *Oliver* v. *Dix*, 1 Dev. & Bat. Eq., 605; *Mebane* v. *Mebane*, 80 N. C., 34, cited and approved.)

JOHNSTON v. COCHRANE.

CIVIL ACTION tried at Spring Term, 1880, of MECKLENBURG Superior Court, before *McKoy, J.*

The defendants appealed from the judgment below.

Messrs. Jones & Johnston, for plaintiff.

Messrs. W. W. Fleming and *Walter Clark*, for defendants.

SMITH, C. J. On the 24th day of April, 1877, the plaintiff, owning the lot of land described in his complaint, entered into an agreement with the feme defendant, wife of the other defendant, for the sale and conveyance to her of one undivided moiety thereof for the consideration of $2,190.38, and executed his bond to make title when the same was paid. He further contracted to cause to be transferred for her use a judgment recovered by the Commercial National Bank against the defendant, her husband, principal debtor and himself as surety, for about $1,800, which had been assigned to a trustee for the plaintiff's benefit. The feme defendant at the same time signed and delivered to the plaintiff her promissory note for the purchase money, to be paid on the 1st day of January of the next year. The defendants entered into possession and have since occupied the premises under said contract, and on the 3d day of November, 1879, paid the plaintiff $500 in part of the purchase money. The residue remains still due. The plaintiff is prepared and offers to comply with all the stipulations assumed by him, on payment of the remainder of the money. These facts are alleged and admitted, and there is in the pleadings no controverted statement admitting an issue and requiring the intervention of a jury to determine it.

The plaintiff's right to relief in any form is resisted in the argument before us, on the ground of a want of capacity in the feme covert to enter into a binding contract, and on account of the omission of an averment, to be sustained by

proof, of the plaintiff's tender of a deed, before the commencement of the suit. But the defense of coverture is not set up in the answer, nor the invalidity of the contract for that reason relied on, but on the contrary, recognized in the partial payment made under it. It is true her obligation may be repudiated, when not entered into according to the requirements and under the conditions prescribed under the statute, the disabilities of coverture remaining as before the law which secures to married women their separate estate, yet her election to do so ought to be manifested in her answer to the complaint. The obligations arising out of the agreement are mutual, and unless binding upon both, are binding upon neither of the parties. The feme defendant cannot hold the land without payment of the purchase money, the condition on which the estate was to be conveyed. The contract of the plaintiff may be enforced, and he has a plain right to have the defendant's election to annul or abide by their mutual and concurrent agreement, as an entirety and not severable in parts.

"Married women may take by purchase, unless their husband's dissent," says TILGHMAN, C. J., in *Baxter* v. *Smith*, 6 Bin., 427.

"If a contract be made with the wife on good consideration, during the marriage, the husband may take advantage of it, and recover in an action on it, in which he may join his wife as co-plaintiff. And if he die without taking any such step, the right to sue upon it will survive to the wife." Smith Contr., 221. The same principle is asserted by PARK, B, in *Gaters* v. *Modely*, 6 M. & W., 432, and fully recognized in *Kornegay* v. *Carroway*, 2 Dev. Eq., 403, where the efficacy of a deed conveying a remainder after the life estate in shares to the wife, was upheld.

The plaintiff, however, does not here demand a judgment against the feme for the full amount of her note, as a binding contract, but that the trusts growing out the agreement,

may be closed, and if the defendants refuse to pay what remains due under the contract of sale, the land itself may be sold, and the proceeds applied thereto. This equity is clear and incontestable, and this relief only, is afforded in the judgment appealed from.

The objection based upon the failure to tender performance, is untenable in itself, and would be rendered so by the defendant's resistance to the action. *Oliver* v. *Dix*, 1 Dev. & Bat. Eq., 605.

The judgment must be modified, however, so as to require the sale, if made, to be reported for confirmation, the proper practice prescribed in *Mebane* v. *Mebane*, 80 N. C., 34, and in other respects must be confirmed.

This will be certified for further action in the court below.

PER CURIAM. Modified and affirmed.

G. W. SWEPSON and others *v.* MCKEAN JOHNSTON.

Specific Performance—Contract to convey land.

In an action to enforce the specific performanee of a contract to convey land, the inability of the vendor to convey the title for want of it in himself after reasonable efforts to obtain it, is a good defence.

(*Love* v. *Camp*, 6 Ired. Eq., 209; *Taylor* v. *Kelly*, 3 Jones Eq., 240; *Sugg* v. *Stowe*, 5 Jones Eq., 126; *Love* v. *Cobb*, 63 N. C., 324, cited and approved.)

CIVIL ACTION to enforce specific performance of a contract to convey land, tried at June Special Term, 1880, of HENDERSON Superior Court, before *Schenck, J.*

Defendant appealed from the judgement below.

Messrs. J. H. Merrimon and *T. F. Davidson*, for plaintiffs.
No counsel for defendant.

SMITH, C. J. On February 3rd, 1865, the defendant entered into a covenant with the plaintiffs to convey to them within twelve months the legal title, free from incumbrances, "to thirteen hundred and seventy acres of land, comprising eleven different tracts, situate, lying and being in Transylvania county, in the State of North Carolina, on the waters of French Broad, and being the lands upon which the said Johnston has recently resided," and at once to put them in possession. The action begun on October 27th, 1868, has for its object the enforcement of the specific performance of this obligation.

The defendant, brought in by publication, in his answer denies that he has title to one thousand seventy-three acres of the land which had been conveyed by one E. Clayton to Thomas L. Webb, trustee, in a deed of marriage settlement for the separate use of the defendant's wife and the use of their children; but admits his ownership of two hundred and ninety-seven acres, adjacent to the large tract, and alleges that these matters were fully explained to the plaintiffs at the time of making the contract. In explanation of his failure to carry it into effect, he states that when the agreement to sell was made in October, 1864, and before the title bond set out in the complaint was executed, he expected to procure the assent of the trustee to the proposed conveyance, and that this was afterwards withheld because during the interval of delay in payment, a tract of land, for the purchase of which negotiations were then in progress, owing to the depreciation of confederate currency, was withdrawn from market, and the money could not be re-invested for the benefit of the trust estate.

At fall term, 1870, the plaintiffs filed a supplemental bill, accepting the defendant's admission of the ownership of the

smaller tract, the boundaries of which they do not know and call upon him to define, and demand that he make them title thereto, and also to his contingent equitable life estate in a share of the larger tract, which they insist passes to him under the Clayton deed; and these they offer to accept in fulfilment of the stipulations of the contract.

In response to the supplemental complaint, the defendant says that he has the legal title to one hundred and twenty-one acres only, consisting of two tracts, the one conveyed by one McJenkin to him by deed, of which he annexes a copy, the other known as the "Wilson tract" containing one hundred and eighty-three acres, one undivided third of which he owns, and the remainder he bought at a sale under a decree of the court of equity for five hundred dollars, no part of which has he paid or secured, nor has he any certificate of purchase from the clerk and master, though he has since been in possession paying to the life-tenant of the land the annual interest on the purchase money.

The defendant further states that in 1853 after his purchase of the McJenkin farm and the one-third interest in the Wilson land, he contracted in writing with the trustee of his wife, with her assent, for the sum of $1,406.25 which has been paid him out of the trust fund, to convey these lands to said trustee to be held upon the trusts of the marriage settlement, which contract has not hitherto been carried into effect by deed for that purpose.

He further says that the deed of Clayton was intended by the parties to convey the land upon the same trusts, but it was by mistake so drawn as to secure a contingent equitable estate to the defendant, and he asks that it be so corrected as to conform to this common intent. The other material allegations are controverted.

At the same time, the trustee, Webb, was allowed to interplead and assert his equitable estate in the premises, and

he reiterated the allegations contained in the second answer in regard to his purchase of the land for the trust fund, and his payment therefor from the sale of slaves conveyed in the deed of marriage settlement, and he demands of the defendant his specific execution of his prior contract to convey the same.

At spring term, 1872, the death of the trustee was suggested and an order made that notice issue to the plaintiffs to show cause at the next term why his successor should not be made a party in his stead. After many continuances, the cause was removed by consent to Buncombe and thence to Henderson superior court, and there tried at a special term in June, 1880, upon issues to the jury, which, with their responses, are as follows:

1. Did the plaintiffs pay all the purchase money as alleged in the complaint? Yes.

2. Did the plaintiffs, when the bond was executed, know of the claim or interest of Webb, the trustee, in the Clayton land of one thousand and seventy acres? Yes.

3. Was the McJenkin land purchased with the trust funds or for the purposes of the trust upon the written request of the defendant and his wife to the trustee, and did he assent thereto? Yes.

4. Was the Wilson land purchased under similar circumstances? Yes.

5. Did the plaintiffs, or either of them, on February 3rd, 1865, have notice of these facts in regard to those two tracts? No.

6. What damages have the plaintiffs sustained in the premises, if any? $500.

The court thereupon adjudged that the defendant make title as demanded in the supplemental complaint, and that the judgment itself operate as a conveyance thereof under the statute, from which the defendant appeals.

The exceptions in the record are, first, for that there was

no party to represent the interests of the trustee or the *cestuis que trust* involved in the action; and secondly, for errors assigned in the form of the decree itself.

If the purpose of the suit was to settle the title to the land, in order to such effect it is obvious that the antagonistic equitable claims of the wife, through her trustee, should be represented and concluded by the result. C. C. P., § 61. But the action is *in personam* and to compel the specific execution of a covenant to convey an estate in land. This, in a proper case, he will be required to do when the title is vested in him; and when not, he may be required to make reasonable efforts to acquire such title as he has contracted to convey, and be punished if he will not. But the force of the judgment is spent upon the person of the recusant contractor, and hence if he is unable to comply with his contract and has a sufficient legal excuse for his failure, the plaintiff is without this remedy.

It is a defence to the suit that the vendor is unable to convey the title, for want of it in himself, after reasonable efforts to obtain it. Fry Spec. Perf., § 658; Pom. Cont., § 203. And the doctrine is carried so far as to apply to the case in which the vendor, after his contract, has sold and conveyed the land to a *bona fide* purchaser for value and without notice of the prior equity. *Ib.;* LORD KENYON in *Denton* v. *Stewart*, 1 Cox, 258. And also when the concurrence of others is necessary to perfect the title. Fry Spec., Perf., § 665; Pom. Cont., § 295.

In *Green* v. *Smith*, 1 Atk, 572, LORD HARDWICK ruled that this relief will never be given, when the act is impossible to be done, and will leave a party to his remedy at law. And in *Columbine* v. *Chichester*, 22 Eng. Chan. Cases, 27, LORD CHANCELLOR COTTENHAM refused to make a decree for specific performance because of the absence of an averment in the bill of the defendant's ability to make title, while it was inferable from the statements of the plaintiff that he

could not. The general principle is that the performance of a contract will not be decreed, when the decree, by reason of the defendant's incapacity to perform, would be a "vain thing."

In *Love* v. *Camp*, 6 Ired. Eq., 209, it is decided that a vendor undertaking to sell land which he does not own to a purchaser who is ignorant of his want of title, will be compelled to make efforts to procure the title and will not be excused merely upon the ground that he does not possess it. The same learned judge, delivering the opinion of the court in *Taylor* v. *Kelly*, 3 Jones Eq., 240, declared and enforced the plaintiff's right to secure the amount for which the defendant subsequently sold the land to a *bona fide* purchaser, though the land itself could not be pursued and reclaimed, and the same equity is reasserted in *Sugg* v. *Stowe*, 5 Jones Eq., 126. A less vigorous and more reasonable statement of the doctrine is made by READE, J., in *Love* v. *Cobb*, 63 N. C., 324, in assigning reasons why the application could not be sustained for a judgment against the vendor. "And (3) if a specific performance were decreed, it might amount to the perpetual imprisonment of Cobb, upon his failure to make title, for he has not the title; or at least it would put him in the *power of Homesly to demand an unreasonable price for title. It would be otherwise if the court could see that it was quite within the power of Cobb to get the title upon fair terms.* Nor would it avail the plaintiff anything to have a decree against Cobb with covenants of warranty of title, so as to give the plaintiff remedy at law upon the warranty, for he has the like remedy now upon the contract, if it be valid."

In the present case the defendant can only fulfil his contract, by acquiring the equitable estate vested in the trustee and arising out of the defendant's prior contract with him, for which full payment has been made, and this can only be effected by the concurrence of the wife, for whom and her

children it is held by the trustee. To compel the defendant to perform his contract and in order thereto to obtain a conveyance from his wife, may involve an exercise of authority utterly inconsistent with that freedom of volition essential to its validity, and the absence of which undue influence must appear upon a private examination to give effect to her deed. "The wife ought not," in the words of the same judge, "to be exposed to this compulsion on the part of her husband."

The plaintiffs do not demand a decree to compel the defendant to acquire, in order that he may convey, the title stipulated in his covenant, but that such estate and interest as he does possess shall be transferred to them. Ordinarily this proposition would be free from objection, for certainly a vendor ought to do what he is legally capable of doing in carrying out his agreement. But here the defendant, in his relations to his wife's trustee, holds only the naked legal title, the whole equitable estate being in the trustee, and such a decree would in effect disable the defendant from performing his previous and superior obligation, while it would be but a change of trustees in the substitution of the plaintiffs in place of the one appointed in the deed. The trusts would follow the transfer and would be asserted against them. So that if the trustee had remained a party his paramount equity would have prevailed; and to avoid circuity, the controversy would have terminated in a judgment directing the conveyance of the legal title to himself. The verdict determines the material facts, and the absence of the succeeding trustee from the record cannot enlarge the plaintiffs' rights in this regard. While then the plaintiffs may insist that the defendant shall make proper efforts to remove the impediment arising out of his prior contract and thus enable himself to perform that entered into with the plaintiffs, it would be manifestly unjust for the court itself to take any action impairing the rights of the trustee, or obstruct-

ing his remedy against the defendant to obtain the outstanding legal estate and thereby perfecting his title.

Again it is a well settled rule that where there are equal equities, and one acquires the legal estate, he will not be disturbed in the possession of his legal advantages by the interference of a court of equity. If the transfer of the legal estate by virtue of the judgment places the plaintiffs in this favorable possession, it would be in effect to destroy the older and better for an inferior and junior equity; and if not, it would subject the former to the inconvenience of pursuing and asserting it against the plaintiffs.

The difficulty is not obviated by the form of the decree, which itself undertakes to pass the defendant's estate without the execution of a deed, for the purpose and effect of the statutory provision are only to obviate the necessity of an actual conveyance, and to give to the decree the same force and operation. But it appears that the defendant has an interest in the larger tract of land and the plaintiffs are entitled to that. But for the reasons stated, the judgment is erroneous and must be reversed, and the cause remanded for such further proceedings as the plaintiffs may be advised to take, according to this opinion.

Error. Reversed.

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*SAMUEL WITTKOWSKI and another v. CALVIN WATKINS and others.

Ejectment—Evidence—Preparation of Issues.

1. In an action to recover land it appeared that defendant had executed a mortgage to plaintiff with power to sell, and the land was sold there-

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

under, and bought by a third party who received a deed and afterwards reconveyed to plaintiff, and the defendant offered to show that said party acted in the purchase as agent of plaintiff; *Held*, that the evidence was immaterial, as the plaintiff is entitled to recover upon the strength of his title as mortgagee.

2. The rule prescribed by the supreme court (80 N. C., 495) for the preparation of issues in the trial of causes, is merely directory.

CIVIL ACTION to recover land tried at Fall Term, 1880, of ANSON Superior Court, before *Avery, J.*

This was an action for the recovery of the possession of a tract of land, and to show title in themselves the plaintiffs alleged in their complaint, and proved on the trial, that on the 18th of December, 1872, Joseph W. Pond and his wife, the defendant Ellen C. Pond, conveyed the land to plaintiffs by mortgage in which there was a power of sale; and under which they sold the lands on the 27th of September, 1873, when one W. R. Jones became the purchaser, to whom a deed was made; and who reconveyed the same land to the plaintiffs by deed on the 30th of October, 1873.

The defendants in their answer, make a general denial of the title of the plaintiffs to the land in dispute, and their right to have possession of the same; and as a second defence, the defendant, Ellen C. Pond, denies that she voluntarily executed the mortgage to the plaintiffs; or that she ever acknowledged its execution before the judge of probate for registration, and she asks that both the deed and the certificate of probate may be cancelled.

The complaint was filed at spring term, 1876, and the answer at fall term, 1877; and when the case was called for trial at fall term, 1880, it did not appear that any issues had ever been prepared and submitted by the plaintiffs, but they proposed to do so then; to which the defendants objected and insisted that they could not be compelled to try until the issues had been agreed upon, or settled, as prescribed by the rule published by the supreme court. The presiding

judge allowed the plaintiffs to prepare and tender the issues they wished, and required the defendants to state their objections thereto, if any, and permitted them to tender such others as they wished to submit, which they did; and the court then settled the issues to be tried, and directed the trial to be proceeded with, to which the defendants excepted.

In the course of the trial, the plaintiff, Samuel Wittkowski was introduced as a witness for the plaintiffs, and the defendant proposed to prove by him that at the sale by the mortgagees, on the 27th of September, 1873, Jones purchased the land for them and as their agent, and that the deed was made to him with the distinct understanding that he should reconvey the land to the mortgagees, the plaintiffs. This evidence was objected to by the plaintiffs upon the ground first, that no such defence as that sought to be proved was set up in the defendants' answer, and secondly, that it was immaterial, as the plaintiffs were entitled in any event to the possession under their mortgage, and His Honor concurring with the plaintiffs excluded the evidence and defendants excepted. Verdict and judgment for plaintiffs, appeal by defendants.

Messrs. Burwell & Walker and *Gilliam & Gatling*, for plaintiffs.

Messrs. John D. Shaw and *W. A. Guthrie*, for defendants.

RUFFIN, J. The position taken for the plaintiffs, in regard to the point of evidence raised on the trial, cannot be questioned. They were so clearly entitled to recover the possession of the land in dispute, upon the strength of their legal title as mortgagees, even, if their sale to Jones and his reconveyance to them should be held to be invalid, as to make it perfectly useless to inquire into that matter. That may become of interest to the parties at some future day, but

could not possiby affect the issues involved in the present action, and therefore was correctly excluded upon the ground of its immateriality.

This leaves for consideration, only, the question of practice under the rule prescribed by this court for the preparation and settling the issues in causes to be tried in the superior courts. That rule, in substance, directs that at the term at which the pleadings in an action are completed, the plaintiff's attorney shall put in writing such issues as he may deem material and submit them to the defendant's attorney, who if he approve shall sign them, and they shall be treated as the issues for trial; but if he disapprove them, then he shall prepare such as he may deem material, and the whole shall be handed to the judge "who shall settle the *issues* and file them with the clerk, *to stand for trial at the next term.*" It was adopted, under the general supervisory power conferred on this court by the constitution, with a view to simplify, as much as possible, trials in the superior courts, but was never intended to be more than directory to those courts, and to parties to the actions to be tried therein. Notwithstanding the rule, the preparation of the issues in any case may be omitted to the moment of the trial; and we all know that such has been the general, if not the universal practice; and while its observance may most likely conduce to the orderly conduct of causes generally, it is, at last, a matter that must be in a great measure left to the judgment of the attorneys, and the sound discretion of the courts. Either party can, at any proper time, have the benefit of the rule, independent of the wish of the other, by simply calling the matter to the attention of the court and asking for its enforcement; and as it may be had, so it may be waived.

In the present action, the pleadings were made up at fall term, 1877, three years before it was called for trial, and neither party had, in all that time, moved in the matter of

settling the issues, or invoked the interference of the court. So that we think His Honor might fairly presume, as he did, that a compliance with the rule had been waived by mutual consent of the parties, both plaintiff and defendant.

If the defendants were surprised by any issue that was adopted, so as to be unprepared with their proofs, all they had to do was to ask for a continuance of the cause, and we cannot doubt that it would have been granted them. Indeed, from the particularity with which His Honor called on the defendants, as shown in the case, to state their objections, if any, to the issues proposed by the plaintiffs, we understand that he was using all possible care to avoid putting either party to any sort of disadvantage.

Instead, however, of asking for a continuance, or showing how they were in any wise inconvenienced by the action of the court, or of the opposing party, the defendants seemed to have looked upon the rule as strictly obligatory, and as entitling them, as a matter of law, to the next term after the issues were settled, before they could be required to try. In this we think they misapprehended the true intent of the rule and their rights under it, and therefore we hold there is no error in the rulings of His Honor.

No error. Affirmed.

J. T. EVANS, Trustee *v.* J. L. HOWELL and others.

Evidence—Landlord and Tenant—Application of Rents—Judge's Charge—Partner—Ratification.

1. Declarations by the owner of a commodity accompanying his delivery of the same to another party are competent to show the purpose of such delivery.

2. A statement by a lessee to his landlord that he has applied the first of the crop (leaving enough to pay the rent, but before paying the same) to the discharge of a debt due a firm of which the landlord is a member, followed by an expression by the latter of an intention to take such residue, is *some* evidence that the landlord consented to such appropriation.
3. Where the jury find in such a case that what was left of the crops after paying the firm debt went into the lessor's hands and was sufficient to pay the rent, the application of the first crop to the firm debt will not be disturbed.
4. A correct exposition of the law, though irrelevant to the matter in hand, is not assignable for error, unless some positive harm or misconception is shown to have resulted therefrom.
5. While a partner is not at liberty to use a fund belonging to his copartner individually in payment of a partnership claim to his injury, yet, a subsequent ratification by the latter will make the act valid.

(*State* v. *Mikle*, 81 N. C., 552; *Carter* v. *Beaman*, 6 Jones, 44, cited and approved.)

CIVIL ACTION tried at November Special Term, 1880, of HALIFAX Superior Court, before *Graves, J.*

The plaintiff, Evans, brought this action, as trustee for the firm of Winfield & Emry, for the recovery of one hundred dollars due by note. The facts appear in the opinion. Verdict and judgment for defendants, appeal by plaintiff.

Messrs. R. B. Peebles and *Mullen & Moore,* for plaintiff.
Messrs. Day & Zollicoffer, for defendants.

SMITH, C. J. This action, commenced before a justice of the peace and removed by appeal to the superior court, was tried upon the defence of payment.

The alleged payment was made by the delivery of four bales of cotton (grown upon land belonging to the plaintiff, Emry, and by him rented to the defendant, J. L. Howell, for the year 1877) to the plaintiff, Winfield, who and the said Emry constituted the mercantile firm of Winfield & Emry. The substantial facts testified to are that three bales were

delivered to Winfield, of the agreed value of $126, to pay the debt due on the bond in suit, according to the concurring evidence of the said J. L. Howell, and his co defendant, Fulghum; but, as testified by Winfield, accepted and to be so applied only with the consent of Emry, whose claim for rent was entitled to priority of payment, and which consent was refused when the facts were made known to him. A fourth bale, grown upon the same land, weighing 461 lbs. and of the estimated value of $40.56, was afterwards, in February, 1878, carried to the store, and delivered to Winfield by Fulghum, and the proceeds except five dollars thereof then paid him, were to be applied to the rent.

Emry testified, that finding the three bales at the store of Winfield & Emry, he took possession of and appropriated them to his rent, and that he never consented that they should be taken in payment of the bond. During the examination of Fulghum, he was permitted after objection to testify that when he delivered the bales to Winfield, he told him it was for the rent due Emry; and further, that shortly after three bales went into Winfield's possession, the witness met Emry, and said to him, there was a plenty of cotton to pay him, and to go and get it, and that Emry said he would, at the same time declaring that he would not allow that delivered to go on the bond due the firm.

Under the directions of the court, the jury rendered their verdict in these words: We say that the note was paid, and that the $26 surplus on three bales of cotton, and the net proceeds of one bale of cotton, less $5, be applied to the rent, and the rent was one fifth of the crop; no damage for fence.

The exceptions are to the admission of the evidence mentioned, and to the instructions of the court which will now be considered.

1. Ex. It was entirely competent to prove the purpose for which the last bale was delivered, and this was properly shown by the accompanying declarations. The act would

be equivocal in the absence of the evidence of the directions. They were also made to one of the plaintiffs in the action. We see no basis upon which the exception can stand.

2. The conversation which passed between the defendant, Fulghum, and the plaintiff, Emry, was in like manner admissible, and as evidence of his assent to the appropriation of the first cotton delivered to the firm debt, and his willingness to look to that which remained for the rent, notwithstanding his previous refusal to part with what had gone into his possession. It was proper to be heard, and the consideration due it, lies exclusively with the jury to determine.

3. The court charged in effect that if Winfield knew of the writing, that the cotton was raised upon the rented land, and that the rent was unpaid, and with this knowledge received the cotton in discharge of the debt, it would be in law a payment: The exception is to the correctness of this ruling, and further, that there was no evidence that Winfield possessed the supposed knowledge, so as to make the proposition applicable to the proofs. Winfield himself testifies that he knew that Howell was a tenant of Emry, and agreed that, with the latter's consent, the proceeds of the cotton should go to the payment of the bond. This condition implies that Emry had a claim upon the property, preferable to that of the firm, and the jury might infer from this that he knew that the cotton was under a lien for the rent, without which there would be no restraint on the right of the tenant to dispose of the crop. While the crop could not be diverted to any other use without the consent of the lessor, until his claim for rent was satisfied, yet, if this claim was afterwards in fact paid out of the excess in value of the three bales, above the sum due on the bond, and the last bale, the first sale would be rendered valid; and we are not prepared to say that the acting partner may not accept the delivery in payment, although the lien re-

mains, upon his own assurance that the rent will be paid from other sources, and the lien thus discharged. But whether the charge be erroneous or not, upon this point, it manifestly can work no injury to the plaintiffs, when by the finding of the jury, enough of the crop has gone into the possession of Emry, and of Winfield, in behalf of the firm, to pay both debts, and under directions valid, so far as they require the proceeds to be applied to the partnership demand in preference to all others, except that for rent. This error, if it be an error, is thus rendered harmless by the findings of the jury, and does not warrant the setting aside the verdict. *State* v. *Mikle*, 81 N. C., 552.

4. This exception is not to the proposition of law in reference to the application of payments, but is based upon the absence of facts to sustain it, and its alleged tendency to mislead. It is seldom that a correct exposition of the law can be the subject of exception, and never, unless the court can see how it may have such tendency, under a possible or probable misunderstanding of the jury, and we can see no indication of it in the present case. Besides, the witnesses somewhat differed in their statements about the first delivery, and the uses to which the cotton was to be applied, and it was not inappropriate to explain the respective rights of the debtor and creditor, and when to be exercised by each in applying payments.

5. The court submitted to the jury, the inquiry, whether rent was due Emry, and how much: This direction was necessary in determining the excess in value of all the cotton received above the preferred claim, because, in one aspect of the controversy, this excess went towards the payment of the bond.

6. The charge to which this exception is directed, was, that if the cotton was not accepted in payment of the bond, Emry had the right to apply it to his rent, and in such case, the jury must ascertain the difference between its value and

the sum due for rent; and if the cotton was more than sufficient to pay the rent, they should further enquire whether there was any direction to apply the excess to the bond. For reasons already given, we think the jury were properly directed to make the enquiry.

7 and 8. The objections to the charge involved in these exceptions are the want of evidence of the facts to which it is adapted, and are founded on a misconception of the testimony. There was evidence of an intended appropriation of the three bales to the bond in suit, and of the last bale to the rent. The whole fund was directed to be applied to these two demands in preference to all others, and the direction was lawful as to all of the fund, if the rent was paid.

9. This exception refers to the testimony of what transpired between Fulghum and Emry, and the consequences inferable therefrom: This was proper to be heard by the jury, as evidence of Emry's acquiescence in the appropriation of the cotton to the partnership debt, the force of which they were to determine. It may be slight, but it was not therefore to be excluded from their consideration. While upon the authorities cited, and on principle, a partner is not at liberty to use a fund, belonging to his co-partner individually, in payment of a partnership claim, to his injury, yet a subsequent ratification by the latter, will render the act valid. This is declared in *Carter* v. *Beaman* 6 Jones, 44, in which case Beaman had, by an arrangement with Jackson, discharged the individual debt of Jackson to himself, by applying to it a debt due by himself to the firm of Carter & Jackson; and this was relied on as a defence to the action at the instance of Carter & Jackson. The court declared that the fraud in this misuse of the partnership property for individual purposes "is repelled when it appears that the other partner assented to the transaction * * * and that it did not require evidence of express or previous as-

sent to the particular transaction, but that it might be inferred from other facts, &c."

The evidence was also competent, in connection with the testimony of Winfield, that the cotton, with Emry's consent, should be put on the bond, at the price of ten cents per pound, and if on Emry's debt, at a less sum per pound, thus contemplating an application of the proceeds to one or other of these debts, to the exclusion of others.

We are therefore of opinion that there is no error, and the judgment must be affirmed.

No error. Affirmed.

JAMES H. PARKER v. SARAH ALLEN and others.

Summary Proceeding in Ejectment—Duty of Court—Equities.

In a summary proceeding in ejectment before a justice of the peace, or on appeal, it is the province of the court to determine whether the title to the land is in controversy, and where the testimony shows that such controversy exists or that equities growing out of a contract of purchase are to be adjusted, as in this case, the proceeding should be dismissed for want of jurisdiction.

(*McCombs* v. *Wallace*, 66 N. C., 481; *Turner* v. *Lowe*, Ib., 413; *Greer* v. *Wilbar*, 72 N. C., 592; *Davis* v. *Davis*, 83 N. C., 71; *Green R. R. Co.*, 77 N. C., 95, cited and approved.)

SUMMARY PROCEEDING in ejectment commenced before a justice of the peace and heard on appeal at Fall Term, 1880, of HALIFAX Superior Court, before *Graves, J.*

It was adjudged in the court below that the proceeding be dismissed upon the ground that the justice had no jurisdiction, and the plaintiff appealed.

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

SMITH, C. J. The summary proceeding before a justice for the recovery of possession of land may be sued out by the landlord in the specified cases under the statute.

1. Whenever a tenant in possession of real estate holds over after his term has expired.

2. When the tenant, or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased. Bat. Rev., ch. 64, § 19.

If it appear 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 costs. Ib., ch. 63, § 17.

The statute conferring the jurisdiction has been construed to apply only "to a case in which the tenant entered into possession under such contract, either actual or implied, with the supposed landlord, or with some person under whom the supposed landlord claimed in privity, or where the tenant himself was in privity with some person who had so entered, and not to extend to cases where the vendee has entered under a contract of purchase, or the vendor remains in possession. *McCombs* v. *Wallace*, 66 N. C. 481.

The jurisdiction is not co-extensive with the operation of an estoppel which forbids a tenant, who has acquired possession under another, to dispute his title until the land has been restored, but it can be exercised only where those relations mentioned in the statute exist, and those relations are not complicated with others which would entitle the defendant to relief against the enforcement of a judgment when recovered, under our former system. "Where law and equity were administered by distinct tribunals," remarks RODMAN, J., in *Turner* v. *Lowe*, 66 N. C., 413, "the tenant was obliged to go into a court of equity for that pur-

pose (relief from the judgment at law). But now that they are administered by the same court and without any distinction of form, the tenant can set up in his answer any equitable defence he may have to his landlord's claim." As the equities which a tenant may have, growing out of the associated relations of vendor and vendee, and mortgagor and mortgagee, may now be asserted as a defence to the action for his eviction, and as well before a justice as in the superior court, it becomes the duty of the justice when during the trial they appear and the equitable title is in controversy to cease to exercise jurisdiction and dismiss the proceeding, for the justice is not competent to deal with such issues.

The subject is very clearly discussed by PEARSON, C. J., in *Greer* v. *Wilbar*, 72 N. C., 592, and the want of jurisdiction shown. "If the plaintiffs get possession by this summary process, in order to clear their title, it will be necessary to bring an action to foreclose the equity of redemption, or else the defendant may have an action at any time within ten years to redeem with a provisional remedy to protect him from being turned out of possession until this equitable title is adjudicated. All of the difficulties are obviated by adhering to the principle in *McCombs* v. *Wallace*, and confining the summary proceeding to the case of the simple relation of lessor and lessee who holds over after the expiration of his term, *when there is no other relation to complicate the question.*"

However relentless the rule may be which forbids the tenant to dispute the title of the person from whom he acquired possession, as long as he retains it, and from which disability he is relieved only by a surrender, it "does not preclude the tenant from showing an equitable title in himself, or 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." *Davis* v. *Davis*, 83 N. C., 71.

These adjudications settle the construction of the statute and determine the rule that although there has been a contract of lease for a definite period, which has expired and the lessee refuses to restore possession to the lessor, if there is also a subsisting unperformed executory agreement between the parties for a sale of the land, and the fact, or a *bona fide* controversy regarding it, is manifest during the trial, it puts an end to the exercise of further jurisdiction in the premises. On this point in its nature preliminary, but which may be developed during the delivery of the testimony, and to be determined by His Honor, he was of opinion after hearing the testimony of the plaintiff, Parker, that there was a *bona fide* controversy in regard to the title to the land, and dismissed the cause. If there was any legal evidence to authorize this finding, for of its sufficiency he and not ourselves are to judge, the ruling must be sustained, and hence it becomes necessary to examine the testimony and see if there was evidence to authorize his finding.

While under examination, Parker, on notice to produce the original, or secondary evidence would be offered of its contents, produced a written memorandum as follows: Sale of the tract of land whereon the said McDowell lives to M. G. Allen.

Said Allen's note, A. H. Davis and L. Arrington for $1,000; twelve months' interest off, $940; Allen's bond to J. H. Parker, $3,000; two drafts given by A. H. Davis, $1,000 each, at 60 days' interest off, $980. This statement is this day made out by J. H. Parker and E. C. McDowell. (Signed by Parker and McDowell, on December 21st, 1865.)

A line is drawn through each signature and across the face of the paper are written the words, "This trade was not carried out and became null and void."

On his cross-examination the plaintiff, Parker, a witness in his own behalf, testified that he took the note of Allen,

Davis and Arrington for $1,000, but had never collected or demanded any money due on it. That the memorandum was written by McDowell, to show how he would stand in case the contract for the sale of the land between Allen and McDowell was carried out; that Allen was not present and never had possession of the paper, and that when it was prepared he (the witness) wrote the words across the face of the paper and run the line through the names, and that on the reverse side was entered a statement of the indebtedness of McDowell to himself.

He testified further that McDowell originally bought the land and conveyed it in trust to the witness; that he sold it as trustee and bought it for $3,000, that the trade with Allen was made by McDowell, for the sum of $6,000, to be paid in gold, or $7,000 in greenbacks; that Allen gave two drafts for $1,000 each to witness, which were paid him. Witness did not remember whether the drafts were given in payment for the land; that at the time Allen owed him thousands, and he told him if he could not carry out his contract the money would be applied to his general indebtedness; that Allen paid by another draft, in 1869, for $500 which was in settlement for rent, but he did not know that it was so intended by him.

Upon this showing His Honor, having intimated an opinion upon the question of jurisdiction adverse to the plaintiff, nevertheless allowed the witness to proceed and testify that no contract in writing had ever been entered into with Allen or defendants, continuing the possession since his death. Thereupon His Honor adjudged that there was a *bona fide* controversy about the title to the land, directed a juror to be withdrawn and dismissed the action.

While we do not undertake to pass upon the sufficiency of the evidence, we are clear that there was evidence warranting the finding upon which the question of jurisdiction

depended, and there is no error subject to review in the conclusion reached.

The exceptions argued in this court for the appellant, besides that already noticed, are:

1. That the judgment was precipitate and should have been deferred until all the testimony was heard.

2. The existence of a *bona fide* dispute about the title is a fact to be determined by a jury and not by the court.

3. That the alleged contract of sale not being in writing creates no equitable estate which can enter as an element in the controversy.

We think that neither proposition can be maintained.

The court is not required needlessly to prolong a trial when the testimony discloses an element of controversy fatal to the jurisdiction and there is no suggestion that there is further evidence which may change the aspect of the case. If there was such, it was the duty of counsel so to inform the court and ask a suspension of the decision until it could be adduced and such indulgence would doubtless have been granted. It cannot be assigned for error that further testimony on the point was not heard when none was offered, and none is now suggested at variance with that before the court.

Nor was it the province of the jury to pass upon the preliminary question on which the jurisdiction was dependent. What matters are in issue are decided by the court, and what are the facts must be left to the jury upon issues made up and submitted. When the judge discovers that there is a *bona fide* controversy which ought to be settled in the suit, and to the solution of which the powers conferred upon a justice are legally inadequate, necessarily acting upon his own knowledge and judgment he refuses to proceed further.

It is the duty of the judge on the appeal to do what the justice himself ought to have done.

The objection that the contract of sale was inoperative

under the statute of frauds is equally unavailing. If the vendors assent to the performance of the contract, the moneys received under it cannot be recovered by the vendees. If they refuse they are liable to account to the vendees for what has been paid. In either case there are equities to be adjusted growing out of the contract of purchase, and if the vendors are content to abide by its provisions, the vendees have an equitable estate, and hence arises the controversy which under the law belongs to a higher and superior jurisdiction to dispose of. *Green* v. *N. C. R. R. Co.*, 77 N. C., 95.

The ruling of the court must therefore be sustained and the judgment affirmed and it is so ordered.

No error. Affirmed.

JOHN HUGHES and another v. LUKE MASON.

Summary Proceeding in Ejectment—Jurisdiction of Justice excluded where contract is one of Purchase.

1. Summary proceedings in ejectment before a justice of the peace under the landlord and tenant act can only be had where the simple relation of lessor and lessee exists, and there is a holding over after the term.
2. And the jurisdiction of the justice is excluded where the relation is that of mortgagor and mortgagee or vendor and vendee.
3. In such proceeding it appeared that plaintiff and defendant signed articles of agreement stipulating that plaintiff agreed to sell a town lot to defendant for a certain sum; defendant executed a mortgage on other lands to secure the price with power of sale on default, and if proceeds were not sufficient then plaintiff to take possession of town lot and retain whatever payments were made, as rent for the same, in which event the relation of landlord and tenant should exist and possession be secured as in case of tenant's holding over; mortgaged prem-

ises were sold, but proceeds not sufficient to discharge debt, and no other payments made; *Held* to be a contract of purchase.

4. *Held further;* That plaintiff's subsequent demand for possession and agreeing to let defendant hold for three months on certain terms, the defendant to become his tenant and the payment as rent to be applied to debt for town lot, did not operate to destroy the relation of vendor and vendee, although defendant failed to perform the stipulations.

5. *Held further;* The justice's jurisdiction being excluded, it could not be conferred by consent of parties as provided in the articles of agreement.

(*Credle* v. *Gibbs*, 65 N. C., 192; *McCombs* v. *Wallace*, 66 N. C., 481; *Forsythe* v. *Bullock*, 74 N. C., 135; *Heyer* v. *Beatty*, 76 N. C., 28; *Abbott* v. *Cromartie*, 72 N. C., 292; *Calloway* v. *Hamby*, 65 N. C., 631; *Turner* v. *Lowe*, 66 N. C., 413; *Greer* v. *Wilbar*, 72 N. C., 592, cited and approved.)

SUMMARY PROCEEDING in ejectment commenced before a justice of the peace under the landlord and tenant act, and heard on appeal at Fall Term, 1880, of CRAVEN Superior Court, before *Graves, J.*

The defendant moved to dismiss the action for want of jurisdiction in the justice of the peace, and the judge found the following facts: The plaintiffs showed a written agreement between the parties, which agreement was substantially "that plaintiffs had agreed to sell to defendant a lot in the city of Newbern, for which the defendant agreed to pay $1,500, in five annual instalments, with interest, and that defendant was to put the wharf and warehouse in good condition, and give a mortgage on another lot owned by defendant as collateral security for the payment of the instalments, and on failure to pay the same, a power was given to plaintiffs to sell the mortgaged premises, and if the proceeds should not be sufficient to pay the said price, the plaintiffs should take immediate possession of the wharf and warehouse property, and the payments made should be retained as rent for the same, and in that event, the relation of landlord and tenant declared to exist, and possession be secured as in case of a tenant's holding over after his term when no-

tice has been duly served, but no such notice shall be required in this case." (Signed by the parties).

The mortgaged land was sold and the proceeds, seventeen dollars, applied to plaintiffs' debt for the price of the lot described in the agreement, and no other payment was made on the same. In January, 1879, the plaintiffs demanded possession of said lot, but agreed to allow the defendant to remain in possession until the first of April following, if he would pay seventy-five dollars as rent; and defendant verbally agreed to become the tenant of plaintiffs, and also, that if he paid the said sum on or before the said first of April, the amount should go as a payment on said lot.

Upon this finding, the court dismissed the case for want of jurisdiction in the justice of the peace, and the plaintiffs appealed.

Mr. W. W. Clark, for plaintiffs.
No counsel for defendant.

DILLARD, J. Upon the facts found by His Honor, and contained in articles of agreement referred to, and made an exhibit in the judge's statement of the case of appeal, we concur in the opinion of the court below, that the action was not cognizable by a justice of the peace under the landlord and tenant act, and in our opinion, there was no error in dismissing the same.

The landlord and tenant act in Battle's Revisal, ch. 64, § 19, by its terms, and the construction put upon it by the court, gives the remedy of summary ejectment before a justice of the peace, only in the case when the simple relation of lessor and lessee has existed, and there is a holding over after the term has expired, either by afflux of time, or by reason of some act done or omitted contrary to the stipulations of the lease. *Credle* v. *Gibbs*, 65 N. C., 192; *McComhs* v. *Wallace*, 66 N. C., 481; *Forsythe* v. *Bullock*, 74 N. C., 135.

And it is equally were settled, that the jurisdiction does not extend to the relation of mortgagor and mortgagee and vendor and vendee, in which, although the mortgagor and vendee may technically be tenants at law, they are viewed in equity as the owners of the estate and are allowed in order to avoid the circuity of letting judgment go and then going into equity to enjoin the execution, to set up in one action under our present system their equitable title in defence to any action which may be brought to recover the possession. *Heyer* v. *Beatty*, 76 N. C., 28; *Abbott* v. *Cromartie*, 72 N. C., 292; *Calloway* v. *Hamby*, 65 N. C., 631; *Turner* v. *Lowe*, 66 N. C., 413; *Forsythe* v. *Bullock*, *supra*.

In view of the jurisdiction of a justice of the peace as thus defined, the case of the plaintiffs falls not within the first class above-mentioned, but in our opinion plainly within the second one. The contract between the parties is not in its terms or legal import a lease with a certain definite duration, nor is it a tenancy at will determinable at the will of the parties, and therefore there could not be said to be a holding over after the expiration of a term, nor a forfeiture for any act done or omitted contrary to the stipulations of a lease. But the articles of agreement executed by the parties and made a part of the judge's statement for this court, make the contract one for the sale of the land sought to be recovered, at the price of $1,500, payable in equal annual instalments of $300, and without controversy, the entry of the defendant as purchaser, under the authorities cited, clothed him with the right to have specific performance involving incidentally a reference as to the title, and also an account of the amount due, all of which a justice of the peace is incompetent to deal with; and, therefore, his jurisdiction is excluded, unless there be something in the other provisions of the contract or since occurring, which takes the case out of the rule in relation to purchasers, and brings it within the landlord and tenant act.

The plaintiffs however urge that the defendant, although he may have entered as purchaser, might surrender the contract of sale and all his rights under it, and thereafter enter into a contract of lease so as to be liable to be evicted in a summary proceeding in a justice's court: and they insist, that such surrender and waiver of rights were made by defendant in this case either by virtue of the stipulations of the written contract, or the agreement of the defendant to pay rent since the alleged default.

The provisions in the contract, relied on to put an end to the original relation of vendor and vendee, and to establish that of lessor and lessee, were, that defendant forthwith after his entry into the possession should repair the warehouse and wharf on the premises, and should there be default in not paying the first instalment of $300, and the interest on the whole purchase money, making together the sum of $390, then the plaintiffs were to be at liberty to sell the lot conveyed by mortgage for its security, and in the event that the proceeds of the sale added to the voluntary payments of the defendant fell short of the sum then due, the plaintiffs were to be entitled to re-enter and retain the amount received, as rent; and thereupon, the relation of lessor and lessee was to take place with a right in plaintiffs to resort to the summary action of ejectment, if necessary. Upon these stipulations the plaintiffs claim that the defendant's failure to make the final payment created the relation of lessor and lessee, and gave them the benefit of the summary remedy to eject the defendant, or if not, they have it by virtue of defendant's promise, on demand of possession to pay them $75 for a three months use and occupation.

In our opinion, the special stipulations relied on do not, singly or all together, relieve the case of the difficulties attending the original relation of vendor and vendee, but on the contrary serve to make it more complicated, and demonstrate the wisdom of the decisions which confine the juris-

diction to the simple relation of a lessee holding over after the expiration of his term.

The right of re-entry contended for by plaintiffs, might as well be, according to the terms of the contract, on failure to pay the first instalment of $390 by a few dollars, as in the case of default in a large part thereof; and supposing the repairs made and all of the instalments paid by the defendant except a trifling sum, then plainly if plaintiffs have back the land, they will have it enhanced in value by the repairs, and also have in hand money returned as rent, largely more than one-fourth of the contract price for the fee-simple title. Upon such a supposition it cannot be questioned, we think, that on a bill for specific performance a claim of that kind now set up by plaintiffs would be viewed as in the nature of a penalty or forfeiture, and the court would proceed to decree performance, adjusting the payment retained as rent as a credit to defendant on a reference to ascertain the balance due of the purchase money.

But it is alleged and so stated to be the fact in the judge's statement, that plaintiffs derived only seventeen dollars from the sale of the mortgaged lot and received no other payment on the land, and the smallness of the amount is urged as repelling the features of penalty and forfeiture, last above commented on, as grounds of equitable relief. This, in our view, is but an additional complication. On a suit for specific performance the sale under the mortgage, yielding so small a sum, might itself be made the subject of consideration with a view to a resale or a larger credit, on proper allegations to that end if the facts should so justify.

Thus it would seem, whether the default was in a non-payment of a large or a small part of the first instalment, that defendant would be entitled to sue for a title, and on performance on his part, under the orders of the court, might obtain a decree for a conveyance by plaintiffs, and therefore, in a legal sense, the title was in controversy, and

being so the jurisdiction of the justice of the peace was excluded.

As to the provision in the articles of agreement, that on entry by the plaintiffs the relation of defendant should be that of lessee, holding over after the expiration of a term, and that plaintiffs should have liberty to use the summary proceeding before a justice of the peace to eject defendant, it is enough to say, that if the jurisdiction was excluded by the fact of the title being in controversy as above determined, then no consent of parties could confer it. And as to the subsequent agreement of defendant to pay rent for three months, that was a promise made on the occasion of the demand of possession by plaintiffs, and when considered in connection with an apparently good right of action for specific performance, it will be taken as prompted by the necessity he was under to continue his possession, and not evincing a surrender of his rights under the contract as a purchaser. *Greer* v. *Wilbar*, 72 N. C., 592.

So we must declare our opinion to be, that the original rights of defendant acquired as a purchaser have never been surrendered or waived and the new relation of lessee established in such manner as to bring the case within the landlord and tenant act, and therefore we must hold that there is no error in the judgment of the court below dismissing the action. Let this be certified.

No error. Affirmed.

R. W. WHARTON, Admr. v. MOORE & ADAMS, and others.

Betterments, mortgagor not entitled to.

Improvements put upon land by a mortgagor become additional security for the debt, and do not entitle him or any one claiming under him to any part of the proceeds of a foreclosure sale, unless there be a surplus after satisfying the debt. (Doctrine of betterments discussed by ASHE, J., and conveyance of equity of redemption, imperfect equities, &c., touched upon.)

(*Linker* v. *Long*, 64 N. C., 296; *Winborn* v. *Gorrell*, 3 Ired. Eq., 117; *Parker* v. *Banks*, 79 N. C., 480; *Gilliam* v. *Bird*, 8 Ired., 280; *Sikes* v. *Basnight*, 2 Dev. & Bat., 157; *Albea* v. *Griffin*, 2 Dev, & Bat. Eq., 9; *Wetherell* v. *Gorman*, 74 N. C., 603; *Hill* v. *Brower*, 76 N. C., 124; *Smith* v. *Stewart*, 83 N. C., 406, cited and approved)

CIVIL ACTION tried upon a case agreed at Fall Term, 1880, of WAKE Superior Court, before *Graves, J.*

The following are the facts: On the 18th day of August, 1873, the defendants Russ and wife conveyed by mortgage duly proved and registered to Rufus H. Jones a lot in the city of Raleigh lying between Martin and Hargett streets, containing two acres, to secure a debt due to him. Thereafter on the 8th day of January, 1874, the said Russ and wife conveyed the same lot to J. B. Batchelor by mortgage duly proved and registered to secure a debt due to him. After that on the 9th day of June, 1874, the said Russ and wife conveyed the same lot to plaintiff's intestate, D. M. Carter, by a mortgage duly proved and registered to secure a debt due to him. And on the 9th day of March, 1876, the said Russ and wife conveyed by deed of bargain and sale to each of the defendants, J. T. Moore and Len H. Adams, a lot 46x120 feet, part of the above described lot, theretofore conveyed by mortgage to plaintiff's intestate, Carter, of which mortgage to said Carter the said Moore and Adams had no actual knowledge, and on the same day, 9th of March, 1876,

the said Batchelor and Jones released their liens (by endorsements on the deeds made by Russ and wife) to Moore and Adams.

After that the said Moore and Adams believing the lots so conveyed to them to be free from incumbrances, erected buildings thereon at a cost of six hundred dollars each, of which said Carter had no knowledge or information. Upon action by plaintiff as administrator of Carter, to foreclose the mortgage made by Russ and wife upon the lots sold to Moore and Adams, the same have been sold and the proceeds of sale are held subject to the order of the court, the entire property bringing just enough to pay the plaintiff's debt. The Moore and Adams lots were sold separately and last. The value of the lots unimproved was two hundred and fifty dollars each. The improvments have added about five hundred dollars to the value of each. The value of rents of the lots sold to Moore and Adams, since the sale and without the improvements, is not more than the state, county and city taxes which they have paid on them. The plaintiff claims all of the proceeds of the sale of the said lots, and the defendants, Moore and Adams, that they are entitled to the value of the improvements to the extent of which they have enhanced the value of the lots. His Honor being of opinion with the plaintiff so adjudged and the defendants appealed.

Messrs. Gilliam & Gatling, for plaintiff.
Messrs. Geo. V. Strong and *W. H. Pace,* for defendants.

ASHE, J. The effect of these several conveyances was to convey the legal estate of Russ and wife to Jones (or Thompson, the trustee for his use) and the equity of redemption to J. B. Batchelor, and imperfect equities, first to Carter, the plaintiff's intestate, and then to Moore and Adams, the defendants.

The releases of Jones and Batchelor endorsed on the deeds from Russ and wife not being under seal did not convey the legal estate to Moore and Adams, but left it in Jones or his trustee. *Linker* v. *Long*, 64 N. C., 296. So that the deed of bargain and sale executed by Russ and wife to Moore and Adams passed only such an interest as the vendors had at the time, which was a subsequent equity. The purchaser of an equitable title always takes it subject to prior equities. It is only the purchaser of the legal title, without notice of a prior equity, who can take it against such equity. *Winborn* v. *Gorrell*, 3 Ired. Eq., 117. But whether the estate conveyed by Russ and wife to Adams and Moore was legal or equitable, the mortgage to Carter had been previously executed and registered, and the registration of a mortgage is notice to all purchasers from the mortgagor subsequent to such registration, not only of the existence of the mortgage, but of everything contained in it, which is as much an integral part of his title as if it had been inserted in his deed from the mortgagor. *Parker* v. *Banks*, 79 N. C., 480.

After the liens of Jones and Batchelor were put out of the way by releases, Carter acquired a first lien upon the lot. Russ and wife by their deed of mortgage to him were estopped from disputing his title, and Adams and Moore claiming title under them, especially as they were affected with notice and acquired only an equitable title, were also estopped. *Gilliam* v. *Bird*, 8 Ired. 280. *Sikes* v. *Basnight*, 2 Dev. & Bat. 157.

Whatever title Moore and Adams derived through their deed from Russ and wife, was subject to the equity of Carter. He had a lien upon the lot as a security for his debt, and the defendants must pay his debt before they can acquire the absolute estate. This then to all intents and purposes established between them the relation of mortgagor and mortgagee.

Having ascertained the relation of the parties to the lot in question, the next inquiry is, how shall the proceeds of the sale be appropriated? The whole of the lot was sold and did not bring more than enough to satisfy Carter's debt. The land in the unimproved state when Carter received his mortgage was worth only two hundred and fifty dollars; and improvements were put on it by Moore and Adams after the conveyance to them, which enhanced its value at least one thousand dollars. Carter's administrator contends that he is entitled to the whole of the proceeds, and Moore and Adams insist that by reason of their improvements they have a right to so much of the proceeds as the lot has been enhanced thereby.

This right to betterments is a doctrine that has gradually grown up in the practice of the courts of equity, and while it has been adopted in many of the states, it is not recognized in others. But it may now be considered as an established principle of equity, that whenever a plaintiff seeks the aid of a court of equity to enforce his title against an innocent person, who has made improvements on land, without notice of a superior title, believing himself to be the absolute owner, aid will be given to him, only upon the terms that he shall make due compensation to such innocent person to the extent of the enhanced value of the premises, by reason of the meliorations or improvements, upon the principle that he who seeks equity must do equity. *Story's Eq. Jurisp.* § 799; 2 *Greenleaf on Ev.* § 549. But it was only in these cases where the right has been set up by way of defence that the courts have lent their aid. It had not been given to a party seeking affirmative relief, before the case of *Bright* v. *Boyd*, 1 Story Rep., where Judge STORY held, that a plaintiff, after a recovery at law against him of a tract of land by reason of illegality in the proceedings of an administrator to sell, under which he had purchased, could recover by bill in equity the value of lasting improve-

ments put by him on the land. The case of *Matthews* v. *Davis*, 6 Humphrey 324, and *Henry* v. *Polland*, 4 Humphrey, 362, (Tenn.) soon followed and were to the same effect, relying upon Judge STORY's decision as authority. But these cases pressed the doctrine further than we have found it carried in any other state except in this. In the case of *Albea* v. *Griffin*, 2 Dev. & Bat. Eq., 9, which was a bill filed by the vendee for a specific performance of a contract for the sale of land, and the defence was the act of 1819 avoiding parol contracts for the sale of land, Judge GASTON, giving the opinion of the court, says: "Although payment of the purchase money, taking possession, and making improvements, will not entitle the vendee to a specific execution of a parol agreement for the sale of land, yet he has in equity a right to an account of the purchase money and the value of his improvements, deducting therefrom the annual value during his possession."

This court in several cases has recognized the doctrine of betterments to the extent of the enhanced value of the land, in cases where the contract for the sale of land has been rescinded, or the title has failed by reason of the contract not being in writing. *Wetherell* v. *Gorman*, 74 N. C., 603; *Hill* v. *Brower*, 76 N. C., 124; *Smith* v. *Stewart*, 83 N. C. 406.

But we have been unable to find any case in which the doctrine has been held to apply to mortgagors. In our act of 1871–'2, providing a remedy to recover betterments for innocent defendants against whom a recovery may be had in an action in nature of ejectment, it is expressly declared in the act that its provisions shall not apply to any suit brought by a mortgagee against a mortgagor to recover the mortgaged premises. It is very probable the legislature in making the exception had in view the generally admitted principle that the right to betterments is not conceded to mortgagors, for the current of authorities is to the effect

that it has no application to them. In 2 Washburn on Real Prop., it is laid down that, "if the mortgagor or any one standing in his place enhances the value of the premises by improvements, they become additional security for the debt, and he can only claim the surplus, if any, upon such sale being made after satisfying the debt."

In *Martin* v. *Beatty*, 54 Ill. Rep., 100, it is held that money expended in improvements upon mortgaged premises by the mortgagor or his grantee subsequent to the mortgage cannot be given a lien prior to that of the mortgagee. And in *Rice* v. *Dewey*, 54 Barb., 455, (N. Y.) it was decided that "where lands sold and conveyed by mortgage are charged with the mortgage debt, improvements that constitute a part of the realty, irrespective of the question by whom made, are equally subject to the lien of the mortgagee as the land upon which they are made."

In Massachusetts it is held that the owner of an equity of redemption is not entitled as against the mortgagee to be allowed for improvements made upon the premises. *Childs* v. *Dolan*, Allen's Rep., 319.

To the same effect are the *Union Water Co.* v. *Murphy*, 22 Cal. Rep., 621; *McCumber* v. *Gilman*, 15 Ill., 381, and 1 Jones on Mortgages, § 147.

There is no error. Let this be certified to the superior court of Wake county that proceedings may be there had in accordance with this opinion.

No error. Affirmed.

N. W. RAY, Adm'r v. OLIVER W. PEARCE and others.

Mortgage Debt, presumption of payment of—Evidence—Declarations.

1. A mortgage debt will after lapse of time (here thirty years) be presumed to be paid unless circumstances be shown, such as payment of interest, to repel the presumption. Rev. Code, ch. 65, § 19. A reconveyance of the legal estate will also be inferred against the mortgagee (or his assignee) even although the deed and bonds secured remain in his possession.
2. Declarations of parties during their respective occupation of land, cannot have the effect of divesting or changing an estate, and are inadmissible in support of claimant's title.

(*Roberts* v. *Welch*, 8 Ired. Eq., 287; *Brown* v. *Becknall*, 5 Jones Eq., 423; *Roberts* v. *Roberts*, 82 N. C., 29; *Ryan* v. *McGehee*, 83 N. C., 500, cited and approved.)

SPECIAL PROCEEDING to sell land for assets commenced before the clerk, and tried at Fall Term, 1880, of CUMBERLAND Superior Court, before *Avery, J.*

The plaintiff, administrator of J. W. Pearce, in his application for a decree of sale of the land of his intestate for the payment of debts, specifies among others a tract known as the "Pearce Mill Place," of an undivided moiety of which he alleges the intestate to have been seized and possessed at the time of his death, and which descended to the defendants, his children and heirs at law. The defendants deny the allegation and set up title in themselves under the will of Ann Pearce, their aunt.

The land in controversy belonged to Thomas C. Hooper, who, on the 1st of August, 1820, conveyed it in fee to Clarissa Pearce, the mother of the intestate and the said Ann Pearce. She on the same day executed a mortgage deed therefor to Cyrus Dyer to secure her three several bonds of that date, drawn payable to him and endorsed for her

benefit, each in the sum of $233.33, maturing at six, twelve and eighteen months respectively, with condition to be void if the mortgagor paid the debts as they became due, and she fully indemnified the said Dyer, her surety, in the premises. Clarissa afterwards intermarried with one Howell and resided on the land with said Ann, until her death in 1853.

The bonds were produced in evidence for the defendants. On the back of that first maturing is a partly obliterated acknowledgment of full payment in 182 , the last figure torn off. On the second is endorsed under date of June 1st, 1821, a partial payment of $137.22, and an undated receipt in full. On the third are three credits—$100 paid by J. W. Howell, September 11th, 1822; $20 by the same, March 10th, 1824; $50, by whom paid does not appear, March 29th, 1825; and there is an anterior entry endorsed in these words, "Received the within of C. Dyer," signed by Thomas C. Hooper.

The defendants, to show sole seizin in their testatrix who devised all her real estate to them, proposed to prove by Ella, one of their number, that the bonds and mortgage deed were kept among the valuable papers of the testatrix and in her exclusive possession up to the death of her mother; that J. W. Pearce, her brother, while managing the farm professed to be acting for said Ann, and that both Clarissa and her husband, Howell, declared that the land belonged to Ann Pearce, and she had sufficient means to take up the mortgage bonds. It was in proof that J. W. Pearce and Ann Pearce died in 1879, and that Howell was dead at the institution of the suit. It was admitted that the mortgage had been foreclosed.

The court held that the offered testimony, if received, was insufficient to show title exclusively in the testatrix, and refused to admit it. There was a verdict against the defendants on the issue, and from the judgment thereon they appealed.

Messrs. Hinsdale & Devereux, for plaintiff.
Messrs. McRae & Broadfoot, for defendants.

SMITH, C. J. The equitable right to have the legal estate restored upon payment of the encumbering debt remained in Clarissa, the mortgagor, after the making of her deed and after default, and such payment is presumed from the lapse of time since forfeiture, or the last payment reduced to ten years under the statute. Rev. Code, ch. 65, § 19. More than thirty years had passed since the forfeiture, and nearly that period since the last known payment on the secured debt, during which and for the residue of her life the mortgagor remained in the possession and use of the land without interruption from the mortgagee. "As the mortgagor," remarks Chief Justice RUFFIN, referring to the rule in England, "is shut out of redemption by the mortgagee's possession for twenty years, it was thought reasonable and convenient that the bar should be reciprocal on the mortgagee who did not act on his debt or mortgage until the debt was presumed to be satisfied by the lapse of twenty years." *Roberts* v. *Welch*, 8 Ired. Eq., 287. The supreme court of the United States, in *Hughes* v. *Edwards*, 9 Wheat., 489, lay down the rule in similar terms when the mortgagor retains possession, that the "mortgage will after a length of time be presumed to be discharged by the payment of the debt or a release, unless circumstances be shown to repel it —as payment of interest or some acknowledgment of the mortgagor that the mortgage is subsisting." The same proposition is asserted in *Brown* v. *Becknall*, 5 Jones Eq., 423, in terms equally explicit, and the Chief Justice adds that "loose declarations, such as are proved in the case, after the right is presumed to have been abandoned, cannot be allowed the effect of rebutting the presumption."

The estate thus freed from the mortgage and vested in the said Clarissa, descended to her children and heirs-at-law,

the intestate and his sister, Ann, as tenants in common, and they thus having title continue in consistent possession and use of the premises afterwards. The legal consequences of the common occupancy of the rightful owners the defendants seek to obviate, and to show the transfer of the estate of the one to the other tenant in common and thus vest the entirety in the latter, by proof of declarations made by Clarissa and her husband and by the intestate, while they were respectively in possession, that the land belonged to Ann Pearce. His Honor ruled and in our opinion correctly, that the evidence, though competent as qualifying and explaining the possession then held by the several parties when material in a controversy, is insufficient to warrant the jury in finding that the moiety of the intestate has been transferred to his co-tenant, thus giving the sole seizin to her. Declarations of a party in possession are received in disparagement or qualification of his title and to remove its apparent hostile character, but when they proceed from the owner himself in the occupation, they cannot have the effect of divesting or changing his estate, for the simple reason that the title to land does not pass by parol. *Hurman* v. *Pellett*, 7 E. C. L. Rep., 75; 1 Greenl. Ev., § 109; *Roberts* v. *Roberts*, 82 N. C., 29; *Ryan* v. *McGehee*, 83 N. C., 500.

The argument for the defendants, pressed with earnestness, is, that the possession of the mortgage deed and bonds by the testatrix, presupposes an assignment of both to her, and that the former remains in force for the security of the latter. To this the answer is obvious. The statute raising the presumption of satisfaction of the bonds by whomsoever held, in support of the mortgagor's long and uninterrupted possession, presumes also a reconveyance of the legal estate to her. The assignee of the bonds, if there has been an assignment, (and the possession and production of satisfied bonds and a discharged mortgage deed furnish very slight if any evidence of the alleged assignment) stands in no more

favorable relation to the mortgagor or the mortgage than would the assignor. The reconveyance is equally inferred against both. It is plain then that the defendants acquired their father's share in the land by descent, and did not derive the entire estate under the devise from their aunt of all her real estate.

There is no error and this will be certified.

No error. Affirmed.

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*JAMES M. JACKSON v. JAMES H. HALL.

Mortgagor and Mortgagee—Chattel Mortgage.

A mortgagee who takes possession of personal property conveyed by a chattel mortgage, before default, is answerable to the mortgagor for the value of any reasonable use to which the property is or could have been put. But an injury to a crop resulting from the taking of a mule needed in its cultivation is too remote to be recoverable as consequential damages.

(*Morrison* v. *McLeod*, 2 Ired. Eq., 108; *Sledge* v. *Reid*, 73 N. C., 440, cited and approved.)

CIVIL ACTION tried at Fall Term, 1880, of ROCKINGHAM Superior Court, before *Eure, J.*

The defendant appealed from the judgment below.

No counsel for plaintiff.

Mr. Thomas Ruffin, for defendant.

SMITH, C. J. The plaintiff being indebted to the defendant in the sum of seventy-two dollars by bond on the 1st

*Ruffin, J., was of counsel and argued this case before his appointment as associate justice.

day of October, 1879, on the 14th day of May previous by deed of mortgage conveyed to the latter a black mare mule, carry-all and harness with certain other property, in trust to secure said debt, and with a power of sale in case of default after its maturity. On July 17th, thereafter the plaintiff, his wife and daughter were carried before a justice of the peace to answer a charge for forcible trespass on land, and the defendant finding the mortgaged articles in the street and the driver absent from them, took possession, and on the plaintiff's demand the next day refused to surrender unless he was paid sixty-two dollars which would be accepted in discharge of the debt. They remained in the defendant's custody and care, unused except on one occasion when some water was hauled a short distance, until the 21st day of October, when they were sold under the mortgage for $73.75.

The action has for its object to charge the defendant with losses to the plaintiff's crop, caused by his deprivation of the means of its successful cultivation, the value of the use of the property while in defendant's possession, and the damage sustained for want of proper care. Several issues were submitted to the jury which, without needless verbiage, with the response to each, are as follows:

1. What damage did the plaintiff sustain by the taking of the mule, carry-all and harness from his possession before the debt became due? $30.

2. What injury did the property suffer during that time in value? $5.

3. Was any and what sum included in the bond without consideration? $10.

4. By how much do the proceeds of sale exceed the mortgage debt? $12.

Upon the findings the court rendered judgment against the defendant for forty-seven dollars, from which he appeals on the ground that the defendant as mortgagee having title

and right of possession, is not answerable for any of the damages assessed.

The injury to the crop, resulting from the taking and keeping the mule needed in cultivating the land, is too remote to be recoverable as consequential upon the act if wrongful. *Sledge* v. *Reid*, 73 N. C., 440.

Interpreting the first issue, somewhat indefinite in terms, in the light of the instructions given to the jury, we understand the sum found in response, as intended to be an estimate of the value of the use or hire of the several articles while withheld by the defendant, irrespective of the fact of his use of them himself or deriving profit from their use by others. The charge was in effect that if when the defendant seized the property it was not exposed to peril of loss or injury impairing its value as a security, and the defendant had no reasonable grounds to believe it was so exposed, he would be liable to account for its use while so held at a reasonable value. While the defendant invaded no right of the mortgagor in taking and keeping possession until the day of default, whether the property was or was not in danger of being lost or injured, yet he was meanwhile acting as trustee bound to exercise that diligence and care expected of one in the preservation and management of his own property, and to account not only for profits actually received but for the value of any reasonable and prudent use to which it could have been put without detriment to the property itself, since he has as the verdict finds needlessly deprived the plaintiff of its use. We apply the remarks to the mule alone which could be moderately worked not only without injury but with advantage to it; and not to the other articles, the safe preservation of which alone devolved upon the mortgagee, and is the measure of his legal obligation. If he has made reasonable efforts to find employment for the mule and failed, this would be a defence to the claim. This rule of responsibility has been applied to the posses-

sion of slaves by the mortgagee and seems to be equally appropriate to horses trained to work and capable of earning remuneration.

Mr. Justice McLEAN, in *Bennett* v. *Butterworth*, 12 How U. S. 367, referring to a possession of slaves by the defendant, who held them to secure a present indebtedness and future advances, says: "The defendant having possession of the slaves and an entire control over them was bound to exercise a reasonable diligence in keeping them engaged in useful employments so as not only to pay their necessary expenses, but also to *obtain a reasonable compensation for their labor*." "Certainly a mortgagee in accounting for the hire of a mortgaged slave," says the court in *Overton* v. *Bigelow*, 10 Yerger (Tenn.) 48, "is never charged a larger sum than could be procured for the slave by a contract which would create upon the part of the hirer all those duties and responsibilities, and it is difficult to see why the mortgagee should not be held to their performance." "If the mortgagee is in possession," remarks REEVES, J., in *Whitmore* v. *Parks*, 22 Tenn., 94, "so far from being entitled to the beneficial enjoyment of hire or rents and profits, he is liable to account for them to the mortgagor."

A recent author, quoting the language of Mr. Justice McLEAN, says, "the doctrine established by the adjudicated cases is equally applicable to other property yielding an income to its owners, and includes horses within its operation." Hum. Chat. Mort., § 140. So in regard to land, Chief Justice RUFFIN declares: "Whatever may be the rule when a mortgagee enters into possession by receipt of rent of premises occupied by tenants, we conceive that when he enters by taking the actual possession and occupies himself, he makes himself tenant of the land, and *subjects himself to the highest fair rent* and becomes responsible for all such acts or omissions as would, under the usual cases, constitute claims on an ordinary tenant." *Morrison* v. *McLeod*,

2 Ired. Eq., 108. Again, while the defendant might properly refuse to surrender the articles, unless additional security was furnished for the debt or the safety of the goods, he had no right to demand a premature payment of the debt, and his retention under these circumstances imposed upon him the duty of so managing it as to render it reasonably remunerative to the owner. The issue however comprehends the carry-all and harness as well as the mule and the value of all is in one inseparable sum. We do not think any higher duty than the safe custody of the carry-all and harness was imposed, since such articles deteriorate and wear out by use, and the use may be injurious to the owner. The verdict must therefore be set aside and a new trial had.

The action is one for account, and the matters passed on by the jury are but items of it. These appropriately belong to a reference, but as the dispute is limited to a few points we have considered them as properly before us in the absence of exception. Let this judgment be certified.

Error. *Venire de nova.*

W. E WEAVER v. J. R. ROBERTS.

Amendment—Attachment Proceeding—Affidavit of Attorney.

1. The court has power to allow an amendment of a printer's affidavit so as to show the date upon which the publication of a summons began.

2. An affidavit to obtain an order of publication of summons in attachment proceedings may be made by an agent or attorney, and the same is not subject to exception where the requirements of section 83 of the Code are complied with.

(*Wolfe* v. *Davis*, 74 N. C., 597; *Bruff* v. *Stern*, 81 N. C., 183; *Wheeler* v *Cobb*, 75 N. C., 21; *Hess* v. *Brower*, 76 N. C., 428, cited and approved

WEAVER v. ROBERTS.

MOTION to set aside a judgment heard at Spring Term, 1880, of BUNCOMBE Superior Court, before *Schenck, J.*

Motion refused and defendant appealed.

Mr. C. A. Moore, for plaintiff.

Mr. J. H. Merrimon, for defendant.

RUFFIN, J. This was a motion to set aside a judgment because of irregularities in the following particulars: 1st. That the affidavit of the printer, as to the publication of the summons and warrant of attachment in his newspaper, failed to state the day on which such publication began. 2nd. That the affidavit for publication was made by the attorney of the plaintiff instead of by the plaintiff in person. 3rd. That such affidavit of the attorney for publication was insufficient because it failed to set out the sources of his information.

When the motion was heard in the superior court the presiding judge allowed the affidavit of the printer to be so amended as to show the true date upon which the publication began, and declined to set aside the judgment for any of the reasons assigned, and the defendant excepted; and also to the action of His Honor in allowing the amendment in the printer's affidavit.

1. That the court had the power to allow the amendment in the printer's affidavit, and that it was rightfully exercised in this instance cannot, we think, be doubted. It was not denied that the publication was in fact made according to the terms of the order of publication and the requirements of the law as to time and place; and the amendment allowed extended no further than to make the record speak the truth as to what was really done. So that it comes strictly within the rule as laid down in *Wolfe* v. *Davis*, 74 N. C., 597.

2. Neither do we see why the affidavit upon which the

order of publication was moved for might not have been made by the plaintiff's attorney. The statute does not prescribe by whom it shall be made, but only provides that the order may be granted when the defendant cannot, after due diligence, be found within the state and "that fact shall appear by affidavit" without saying by whom. The distinction in this particular between the verification of complaints which call for answers from parties on oath and those affidavits which seek only ancillary remedies or orders in the progress of a cause, is clearly pointed to in the case of *Bruff* v. *Stern*, 81 N. C., 183. And by reference to the cases of *Wheeler* v. *Cobb*, 75 N. C., 21, and of *Hess* v. *Brower*, 76 N. C., 428, it will be seen that the affidavit was made by the attorney of the party in one and by an agent in the other, and in neither case was there any point made as to the sufficiency of the affidavit, either in the court below or in this court.

3. The affidavit of the attorney, made in this case, distinctly sets out that the summons had been regularly issued and placed in the hands of the sheriff, who had returned it not served and for the reason that the defendant could not after diligent search be found in the county; and further, that the plaintiff and his attorney had, both, after the exercise of all due diligence, been unable to find him within the state; and this was quite as full as it was required to be by the statute. C. C. P., § 83.

The defendant's counsel took other exceptions in his argument before us; but as the record shows they were not taken in the court below, we have given them no consideration.

No error. Affirmed.

T. E. HENDERSON, Ex'r. v. ROBERT D. GRAHAM and another.

Amendment of Process.

It is error in the court to refuse to amend a summons upon the ground of a want of power. Whether the same should be amended is a discretionary matter and not reviewable. The authorities upon amendment of process (here, to allow clerk to affix his signature to summons) reviewed by SMITH, C. J.

(*Winslow* v. *Anderson*, 3 Dev. & Bat. 9; *Freeman* v. *Morris*, Busb., 287; *McKinnon* v. *Faulk*, 68 N. C., 279; *Phillips* v. *Holland*, 78 N. C., 31; *Clark* v *Hellen*, 1 Ired., 421; *Purcell* v. *McFarland*, *Ib.*, 34; *Seawell* v. *Bank*, 3 Dev. 279; *Cheatham* v. *Crews*, 81 N. C., 343; *Folk* v. *Howard*, 72 N. C., 527; *Etheridge* v. *Woodley*, 83 N. C., 11; *Shepherd* v. *Lane*, 2 Dev., 148; *Finley* v. *Smith*, 4 Dev., 95; *Shackleford* v. *McRae*, 3 Hawks, 226, cited and approved.)

MOTION heard at Fall Term, 1880, of MECKLENBURG Superior Court, before *Seymour*, *J.*

The plaintiff appealed from the judgment below.

Messrs. Jones & Johnston, for plaintiff.
Mr. Walter Clark, for defendants.

SMITH, C. J. The plaintiff's testator sued out of the office of the clerk of the superior court of Mecklenburg a summons against the defendants directed to the sheriff of the same county, authenticated with the seal of the court but without the written signature of the clerk in the blank space at the end of the instrument intended for that purpose, and concluding with these printed words: "Witness, J. R. Erwin, clerk of our said court at office in Charlotte, this the 4th day of January, 1879.

....
Clerk of the Superior Court
of Mecklenburg county."

The summons was served and returned to March term following, and the complaint verified, then put in. Upon the death of David Henderson who brought the action, the present plaintiff, his executor, became a party in his stead, and the cause transferred from the civil issue to the trial docket there remained until the fall term, 1880, when the defendant's attorney entering a special appearance moved the court to dismiss the action. At the same time the plaintiff's attorney asked leave to amend by allowing the clerk then present to affix his signature to the summons *nunc pro tunc*. The court refused to allow the amendment for the want of power in the court to permit it, and dismissed the action, and from this ruling the plaintiff appeals.

It has been repeatedly held, that while no appeal lies from the exercise of an admitted discretion, reposed by law in the superior court, in permitting or refusing to permit an amendment of the record to be made, yet when the refusal proceeds from a supposed want of authority, and the discretion has not been exercised, the error will be reviewed and corrected in this court. *Winslow* v. *Anderson*, 3 Dev. & Bat., 9; *Freeman* v. *Morris*, Busb. 287; *McKinnon* v. *Faulk*, 68 N. C., 279.

The only question then to be considered is this: Has the court the power to allow the amendment and the defect in the process to be remedied in the manner proposed?

The right to amend the proceedings in a pending and undetermined suit, ample before, is still more liberal under the present practice. Section 132 of the Code declares that "the court (the clerk) may before, and the judge may after, judgment, in furtherance of justice and on such terms as may be proper, *amend any pleading, process or proceeding by adding or striking out the name of a party or by correcting a mistake in the name of a party or by correcting a mistake in any other respect.*" If the summons is imperfect by reason of the absence of the *written signature* of the clerk, and the printed

name is insufficient, its official character is shown by the attached seal (though a seal is dispensed with by a recent act) and it conforms in every other particular to the requirements of the statute and gives notice (its special office) of the plaintiff's action. It has served to bring the defendants before the court in their appearance by counsel to make the motion, and no suggestion is made that the amendment will prejudice the rights of others or deprive the defendants of any defence to which the institution of a new suit would be exposed, or operate otherwise than to expedite the trial of the cause. Amendments of process are not admissible when the effect will be to prejudice acquired interests or take away any defence which could be made to an action begun at the time of the amendments. *Phillips* v. *Holland*, 78 N. C., 31. The power has been exercised in numerous cases in this state and precedents established for the present application. Thus it is held that a seal may be affixed to a writ issued to another county, after its return, and the process void without seal, thus rendered effectual. *Clark* v. *Hellen*, 1 Ired., 421. And this may be done to a *fieri facias* under which the defendant's land has been sold, for the purpose of perfecting the purchaser's title. *Purcell* v. *McFarland, Ib.*, 34; *Seawell* v. *Bank*, 3 Dev., 279.

The extent to which the power of amendment has been carried will appear in the numerous cases which have come before this court and to which it is needless to refer in detail. Some of them are cited in *Cheatham* v. *Crews*, 81 N. C., 343. While there is no direct authority to sustain the plaintiff's motion found among the decisions in this state, our attention has been called by the plaintiff's counsel to the case of *Austin* v. *Ins. Co.*, 108 Mass., 238, the essential features of which are so similar to the present, that we are content to quote from the opinion of the court without comment of our own: "It is required," says AMES, J., "both by the constitution and statutes of this commonwealth that

every original writ should be under the seal of the court from which it issues, should bear test of the first justice of the court to which it is returnable and *should be signed by the clerk of the court.* The writ was issued without the signature of the clerk and for that reason is liable to be abated or dismissed. The only question is whether it must be necessarily thus disposed of or whether in the exercise of the discretion allowed by modern legislation in regard to the effect of errors in matters of form, the court can allow this particular defect to be cured." After a full discussion of the subject with numerous citations he concludes thus: "It appears to us that any defect or omission of a formal character which would be waived or remedied by a general appearance or answer upon the merits, may be treated under our present statutes as a matter which can be remedied by amendment and *that the mistake in this case is one of that description.*"

The cases relied on in the argument for the defendants, (*Folk* v. *Howard*, 72 N. C., 527; *Phillips* v. *Holland*, *supra*; *Etheridge* v. *Woodley*, 83 N. C., 11), and that recently decided in the circuit court of the United States for the southern district of New York, (*Dwight* v. *Merrit*) to which our attention has been called since the argument, are not repugnant to the conclusion to which our examination of the authorities and our own reflections have led. In the first, the form of the summons was unauthorized by law and did not warrant an order for the issue of an *alias* to connect by relation with the former. In the second, the summons was directed and delivered with a requisition for the seizure of certain property in an action of claim and delivery to the sheriff of Davidson. The requisition was afterwards changed by the clerk in substituting Forsyth for Davidson, and the deputy sheriff altered the summons to correspond, and then both were delivered to the sheriff of the former county. It was held by this court that the papers could not be restored to

their original form, so as to withdraw the protection which they afforded to the sheriff of Forsyth.

In *Etheridge* v. *Woodley*, it is decided that an interval of more than three years which had elapsed between the original and the next process severed their connection and let in the bar of the statute of limitations which interposed before the issue of the second summons which was in law the commencement of the action. In the last case it is ruled by BLATCHFORD, J., that a summons in the form prescribed by the laws of New York, but neither signed by the clerk nor issued under the official seal of the circuit court, is a nullity under the act of congress which declares that "all suits and processes, issuing from the courts of the United States, shall be under the seal of the court from which they issue and shall be signed by the clerk thereof. *Rev. Stat. U. S.*, § 911. "The power to amend conferred by sections 948 and 954," remarks the court in refusing to allow an amendment, "is power to amend a defect in process and power to amend a want of form in process. But there must be something to amend and amend by. This paper is no process. The process which can be amended under the power conferred *is process issuing from the court.*" It was also urged that the statute would bar a new action, and thus the proposed amendment would divest an existing right of defence. This last objection would be sufficient to induce the court to withhold its assent under the rulings in this state; but our case differs in the essential fact that here the process did issue from the clerk's office bearing the impress of official authority in the seal annexed, and purporting to be authentic with the printed but without the manuscript signature of the clerk himself. So then the defect is in the process and there is both something to amend and something to amend by, in removing the imperfection.

Since the argument, our attention has been called by the defendants' counsel to several cases in which it is held that

writs issued without seal to be served out of the county are void, and no responsibility is incurred by the sheriff in disregarding their commands. *Shackelford* v. *McRea*, 3 Hawks, 226; *Shepherd* v. *Lane*, 2 Dev., 148; *Finley* v. *Smith*, 4 Dev., 95. While this is so, it is decided in the cases cited that they may be rendered effective by amendment and attaching the seal when the rights of other persons are not affected, and no protection is thus withdrawn from the officer. Amendments will not be made when such will be their effect.

We are therefore of the opinion that the power to permit the proposed amendment is vested in the judge, on such terms, if any, as he may deem proper; and in the exercise of this discretion, his decision is not subject to review. There is error and this will be certified.

Error. Reversed.

MALCOLM FAULK v. WARREN J. SMITH.

Attachment—Order of Publication.

An affidavit in attachment proceedings which fails to show that defendant "cannot after due diligence be found in this state," does not warrant an order of publication.

(*Wheeler* v. *Cobb*, 75 N. C., 21, cited and approved.)

MOTION to vacate attachment heard on appeal at Spring Term, 1880, of CUMBERLAND Superior Court, before *Eure, J.*

The motion was allowed, action dismissed, and the plaintiff appealed.

Mr. N. W. Ray, for plaintiff
Messrs. McRae & Broadfoot, for defendant.

SMITH, C. J. This action was commenced by summons issued by a justice of the peace, and upon the sheriff's return that the defendant was not to be found, the plaintiff gave bond, sued out an attachment and obtained an order of publication upon an affidavit in these words: Malcom Faulk, plaintiff above named, being duly sworn, says:

1. That the defendant, Warren J. Smith, is indebted to plaintiff in the sum of fifty dollars and forty cents on settlement by due bill dated June 3rd, 1879.

2. That the defendant has departed from the state, or keeps himself concealed therein to avoid the service of a summons with intent to defraud his creditors.

3. That the defendant has an interest in property in this state which the plaintiff is informed and believes he is about to assign or dispose of with intent to defraud his creditors. (Sworn to and subscribed on the 30th of July, 1879.)

Publication was accordingly made, copies of the summons and order of publication transmitted by mail to the defendant at Hempstead, Texas, his supposed place of residence, and the warrant of attachment returned with the sheriff's endorsement of his levy, for want of goods and chattels, upon certain real estate of the defendant, particularly described.

At the hearing the defendant's attorneys, who appeared for that special purpose only, moved to vacate the warrant of attachment, which being refused and judgment rendered against the defendant, they appealed to the superior court.

On the trial in the superior court, several causes are assigned in support of the motion to vacate, only one of which do we deem it necessary to notice—the insufficiency of the affidavit to warrant an order of publication, in that it fails

to show that the defendant "cannot after due diligence be found within the state."

This averment or its essential equivalent is a prerequisite to an order of publication, the effect of which is to bring an absent debtor before the court and subject his property to condemnation and sale for his debt. As it is a statutory substitute for personal service of process, the requirement of the statute must be strictly pursued. "Everything necessary to dispense with personal service of the summons," says BYNUM, J., in *Wheeler* v. *Cobb*, 75 N. C., 21, "must appear by affidavit."

The only allegation of the plaintiff is that "the defendant has departed from this state or keeps himself concealed therein to avoid the service of a summons with intent to defraud his creditors." It may be consistently with his averment that his place of concealment could by reasonable efforts have been discovered and process personally served, and it does not appear from the affidavit that due diligence has been used to find out where he is.

While, then, the affidavit is sufficient to obtain the warrant of attachment, it falls short of the demands of the statute to bring the defendant before the court. As the objection is fatal to the prosecution of the action, it must be equally so as to the attachment which is ancillary and dependent upon it.

It must therefore be declared there is no error in the record and the judgment dismissing the action is affirmed.

No error. Affirmed.

*RICHMOND & DANVILLE RAILROAD COMPANY, Lessee, &c., v. COMMISSIONERS OF ALAMANCE.

Taxation—Railroads.

1. Under the charter of the North Carolina railroad company, all real estate held by the company for right of way, for station places and workshop location, the machinery, tools and implements employed in the manufacture and repair of cars and engines, and office lots necessary for the use of its officers, are exempt from taxation until the dividends of profits shall exceed six per cent. per annum.

2. Where the court apportioned the valuation of the rolling stock of said company for taxation among the counties through which the road runs and assigned to one county a share proportionate to the length of the road therein; *Held* no error.

3. The company is liable to be taxed upon money on hand and on deposit; and not entitled to the credit claimed, of three-fourths of the taxes paid between 1869 and 1874; and is also liable upon shares of stock held by it for the years 1875 and 1876.

4. The act of assembly relating to the taxation of the property of this company and the method of assessment thereof by the state board, and the adjustment of the claims of the respective parties to this proceeding, discussed and pointed out by SMITH, C. J.

R. R. Co. v. *Com'rs*, 76 N. C., 212; *Makepeace Ex Parte*, 9 Ired., 91; *Bryan* v. *Lawrence*, 5 Jones, 337; *Latham* v. *Blakely*, 70 N. C., 368; *Bond* v. *Coke*, 71 N. C., 97; *Deal* v. *Palmer*, 72 N. C., 582; *Moore* v. *Vallentine*, 77 N. C., 188; *R. R. Co.* v. *Com'rs*, 72 N. C., 10 and 15, cited and approved.)

PROCEEDING to revise and correct the tax list heard at Fall Term, 1880, of ALAMANCE Superior Court, before *Eure, J.*

The plaintiff company applied to the defendant commissioners for a correction of the tax lists and moved to strike therefrom the property mentioned in the opinion of this court; the motion was refused and the plaintiff appealed to

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

the superior court, where the ruling was reversed and the defendants appealed to this court.

Messrs. J. W. Graham, D. G. Fowle and *J. E. Boyd,* for plaintiff.

Messrs. E. S. Parker and *Scott & Caldwell,* for defendants.

Smith, C. J. The errors assigned in the record of the defendants' appeal are in the rulings of His Honor, directing to be stricken from the list of taxables for 1879, as not subject to taxation, the following property of the company: 1. The lot at the company shops, No. 7 and known as the office lot, valued at $2,000. 2. The machinery in the work-shops at the same location at the value of $10,467.

I. The office lot consists of about two acres, and in the office used by the president, secretary and treasurer of the North Carolina railroad company, and by the directors when they meet, are kept the records of this company. It is also used by the paymaster of the lessee, the Richmond and Danville railroad company, and for a post-office. On the premises are two log buildings occupied by private persons as a store and warehouse; the lot is included in the lease by the former to the latter company.

II. The machinery declared exempt consists of one stationary engine encased in masonry within the building, and a second engine working outside, but by gearing connected with the operations inside. It is cumbrous and heavy, some of it being fastened to the floor by screws or nails, and part kept in position by its own weight. This machinery is employed in the manufacture and repair of cars and engines and for other objects required in the running of the road, and is known as stationary machinery in contradistinction from the loose tools and implements used in operating it. Upon these facts found by the court, it is held that the lot and machinery become fixtures and are exempt, while the tools and implements used in operating, are not.

The amendment to the charter of the North Carolina railroad company made by the act of February 14th, 1855, provides that "all the real estate held by the company, for right of way, for station places of whatever kind, and for workshop location, shall be exempt from taxation until the dividends of profits of said company shall exceed six per centum per annum." It is manifest that the erection of workshops such as those put up on the lands of the company were in contemplation of the legislature when the act was passed, and a fair and reasonable construction of the language will take in the machinery and its accessories to be operated in the workshops. Of what use is the naked building or land without these fixtures and implements in accomplishing any benefit to the road, and why should the one and not the other, so intimately associated for a common purpose, be relieved from the burden? Accordingly the court say in construing this clause in the charter that "the term 'workshops' in reference to a great road like this, embraces foundries, engine houses, depots, machine shops, necessary offices, *all the usual appliances for the manufacture and repair of engines, and other stock required for the operation of the road.*" *R. & D. R. R. Co.* v. *Commissioners of Alamance*, 76 N. C., 212.

We do not enter into the niceties and technical distinctions in reference to what are and are not fixtures, and pass with the land in controversies between landlord and tenant, vendor and vendee, and others, but looking to the broader purpose of the exemption in inviting the investment of capital in a great self-supporting enterprise for the improvement of the state, in connection with the large contribution of the state itself to ensure its completion, we cannot separate the building from the machinery and necessary adjuncts within in giving effect to the provision for exemption, and in our opinion all are protected alike. The cases cited in the brief are but in confirmation of this view.

Makepeace ex parte, 9 Ired. 91; *Bryan* v. *Lawrence*, 5 Jones, 337; *Latham* v. *Blakely*, 70 N. C., 368; *Bond* v. *Coke*, 71 N. C., 97; *Deal* v. *Palmer*, 72 N. C., 582; *Moore* v. *Vallentine*, 77 N. C., 188.

The ruling of the court in so far as it exempts the stationary machinery in and at the workshops must be sustained and the exception thereto is inadmissible, but it is erroneous in not comprehending the implements necessary in their management and legally inseparable therefrom, for the purposes of taxation. We think the lot of land at the company shops known as the office lot, and used and occupied in the manner stated, notwithstanding the other uses to which the log houses and a part of the office buildings are put, are within the exempting clause, for these are but incidental to the main and predominant objects for which the lot is occupied.

The remaining exceptions to the judgment against the defendants for costs and the order for a correction of the tax lists consequent upon the rulings of the court are also untenable.

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

No error. Modified and affirmed.

In a case between same parties:

SMITH, C. J. The errors assigned in the record of the defendants' appeal consists in the rulings of the court correcting the tax lists and exonerating the plaintiff corporation from liability for taxes upon certain property therein contained. The exceptions thereto we are required to review. The first and second exceptions which relate to the reduction of the valuation of the property in the revised lists for the successive years from 1869 to 1874 inclusive,

and the exemption of the stationary machinery at the work shops have already been considered and disposed of in deciding the plaintiffs' exceptions.

3 Ex. The court apportioned the valuation of the rolling stock among the counties which the railroad traverses and assigned to Alamance a share proportionate to the length of the road in that county: The defendants insist that this constantly moving property has its only *situs* for taxation in the county wherein its principal office or place of business is situated. Acts of 1868–'69, ch. 74, § 10. The statute defines the residence of a corporation, but provides if it "have separate places of business in more than one township it shall give in each the property and effects therein." But the same act which undertook to form a state board to assess the value of the franchise and of the rolling stock directs the valuation to be transmitted "to the county commissioners in which any part of said roads or canals, or navigation works shall be, and that the tax collected in each county and township shall be in proportion to the length of such road, canal or works lying in such county or township respectively." *Ibid.*, § 13. The purpose of the act under which the present proceedings are had is to restore the tax to which Alamance would have been entitled in the execution of the then existing law, had it not contravened the constitution in substituting certain state officers in place of the township board of trustees to whom is committed the duty of assessing the taxable property of their townships." Const., Art. 7, § 6; *W. C. & A. R. R. Co.* v. *Commissioners of Brunswick*, 72 N. C., 10. The exception must be overruled.

5 Ex. This exception has been considered in the plaintiff's appeal and the ruling of His Honor affirmed.

6 Ex. The defendants except to the striking from the lists made for the years from 1869 to 1876, inclusive, the money on hand and on deposit, as solvent credits surpassed

in amount by the indebtedness of the company and therefore non-taxable. The proposition maintained in argument is undoubtedly correct, that a general deposit of money in a bank or banking institution subject to the check of the depositor constitutes the relation of creditor and debtor between the parties, and the deposit becomes a credit as truly as a loan of money for which any other form of security is taken. But this does not seem to be the sense in which the word is used in the statute and it must have the meaning there intended. The revenue act of 1869 (acts 1868-'69, ch. 74, § 12, par. 4) designates in the division of the subjects of taxation "money on hand or on deposit in any bank," while the next paragraph mentions "solvent credits owing by a party, whether owing by bond, note, bill of exchange, open account, or due and payable by any government," &c., with certain exceptions, and allows these to be offset and reduced by the amount the tax-payer may himself owe to others. This discrimination runs through the various revenue laws to the enactment of January 17th, 1872, (acts 1871-'72, ch. 49, § 9, par. 4) where the variation consists in adding to the clause the words "including therein all funds invested within thirty days before in United States bonds, national bank stock or other non-taxpaying whatsoever, with the intent to evade the payment of state, county or other taxes." But the distinction is still steadily maintained between "money in hand or on deposit" and "solvent credits" subject to reduction. We are therefore constrained to construe the act as imposing the tax on money on deposit as on other property and to be paid without abatement. This exception to the ruling of the court must therefore be sustained.

8 Ex. The claim to the taxes levied in the acts passed for the issue of what are known as special tax bonds is properly abandoned in view of the recent constitutional amendment.

9 Ex. This exception is also disposed of in the other appeal as too indefinite and speculative to be entertained.

10 Ex. The plaintiffs claimed and were allowed a credit for three-fourths of the taxes paid between 1869 and 1874, the proportion of the stock owned by the state. The act of 1879 prescribing the assessment for these years proceeds upon the idea of an assessment of all the taxable property of the plaintiff as if no taxes had been levied and collected, and from the annual amounts thus ascertained an annual deduction of all taxes actually paid, whether illegal or not, and the several differences, when the sum paid falls short of the sums due, become the true balances to be paid by the company. When the lists are revised and reformed according to the rulings of the court, they will contain the estate and property subject to taxation, and the taxes levied thereon will be abated under the directions of the act and no further. We are unabled to see upon what ground any further credits are to be admitted. The same result is reached by leaving out such property as was regularly and properly given in and taxed, and the taxes paid, and restricting the adjustment required by the law to other taxable property of the plaintiff. The court then erred in directing a further three-fourth deduction under the previous rulings by which only one-fourth of the taxable property of the company in value is entered upon the list. The exception must be sustained.

There is no error in the judgment for costs.

Error. Modified.

In same case:

SMITH, C. J. The plaintiffs' appeal requires us to revise certain rulings of the court in relation to the subjects of taxation embraced in the act of March 8th, 1879, and the exceptions taken thereto, and these we proceed to examine:

1. The plaintiffs except to the refusal of the court to

strike from the tax list as made up, the personal property and money on hand for the assigned reason that they are included in the returns made by the officers of the company to the governor, treasurer and auditor, constituting the state board of assessment for certain purposes, as do the defendants object to the order reducing the assessed value thereof to one-fourth, the proportionate number of shares in the capital stock belonging to individual owners. These exceptions to the action of the court are so closely associated as to admit of, if not require, the consideration and disposition of both at one time.

The plaintiffs' objection rests upon an alleged presumption that all the property enumerated and valued in the returns is assessed and charged in the aggregate valuation of the board and should not be again taxed. The reduction to one-fourth, which represents the interest of stockholders other than the state, is in accordance with the directions in the successive revenue acts from 1869 to 1874 inclusive, which contain this provision: "In valuing the property of railroads and other corporations in which the state is a stockholder, the whole property shall be valued, but a part of the valuation shall be deducted proportionate to the interest of the state and the tax levied on the residue only. The tax so levied when paid by the corporation shall be charged by the corporation on the individual corporators only, and when any dividend shall be declared, the dividend to the state shall exceed that to the individual corporators by the amount of all taxes previously paid. Stocks or shares in incorporated companies shall not be taxed, when the property of the company is taxed." Acts 1868-'9, ch. 74, § 16, and subsequent revenue acts. As this was the method of procedure prescribed by the law in force during the period for which the assessments and levies directed by the act of 1879 are now to be made, the same rule was properly pursued under its positive directions. It is sug-

gested in the argument for the defendants that the exemption of three-fourths of the taxable property is within the inhibition of the constitution (Art. v., § 3,) which prescribes a uniform rule of taxation upon "all real and personal property according to its true value in money." We do not concur in this view, nor is the point presented in the exceptions in this record. This is but a mode of giving effect to section five, which exempts from taxation "property belonging to the state." The appellants' exception is not directed to the order reducing the total valuation of the property to one-fourth, but to the refusal to strike it all from the list, and to the finding (without evidence) the facts upon which the ruling is predicated. Those facts pertaining to the exception are these:

The state board included in the valuation of 1874, the franchise of the company and its rolling stock only in their estimate of $415,000, which sum was apportioned among the counties through which the railroad runs and according to its length in each. Alamance county contains $21\frac{12}{100}$ miles of the track and its share of the valuation was $37,297; the tax on this amount was levied in the county but its collection prevented by a perpetual injunction. In 1877, the share of the county in the valuation of the franchise by the state board was collected, but nothing on the rolling stock of the company. The court restricted the tax to the unpaid and untaxed rolling stock.

Upon these facts, not disputable upon the appeal, unless found without evidence, the ruling of the court is free from objection. Although the chief officers of the company for that and preceding years on the requirement of the board rendered an inventory and estimate of value of the entire corporate property, the act in express words limits the action of the board to an assessment "of the value of the franchise of every railroad, canal, turnpike, plankroad, navigation and banking company" whose president or chief

officer is required to return the same, and that "the rolling stock of any railroad company, and the vessels employed by any canal or navigation company on its canals or works shall be valued with the franchise." Acts 1873-'74, ch. 133, § 10. The presumption must prevail until removed by evidence to the contrary that the board pursued the directions of the law and valued only such property as it required them to put a value on. Not only do we not assent to the argument that there was no, or insufficient, proof to support the findings of fact, but upon the maxim, *omnia rite acta*, it be assumed in the absence of other evidence that the board discharged the official duties devolved on them by the law conformably to its provisions. It was forcibly argued against the inferences drawn from the demand of the board for a full statement of the corporate property that all was assessed, that the information was material, and may have been sought as an aid to a correct estimate of the value of the franchise as defined by the court in *W., C. & Aug. R. R. Co.* v. *Commissioners of Brunswick*, 72 N. C, 10, and *Wilmington Railway Bridge Co.* v. *Commissioners of New Hanover, Ibid.*, 15. This information indicates the extent of the business operations of the company and is serviceable in a greater or less degree in conducting the board to a just estimate of the value of the corporate privileges. But whatever may have been the object in seeking the information, we are not at liberty to suppose that the plain mandates of the statute were disregarded in making the estimates and the more especially as they fall so much short of the estimates of the officers of the company.

We are not at liberty to look into the returns made to the state board, the only proofs transmitted, except to see whether they furnish any reasonable evidence to support the findings of fact by His Honor. But if we were, the returns show that the rolling stock alone exceeds the valuation of the board, and during the years when the real estate

was also given in, one-fourth of their aggregate value as returned is in excess of the valuation of the board. We can not seek information out of the returns and it is clear to us that they warrant the findings of fact by the court. The exception must be overruled.

2 Ex. The plaintiffs further except to the retention in the tax lists from 1869 to 1876 inclusive, of one-fourth part of the shares of its own stock held by the corporation, for that, while so held, it ceased to be property subject to taxation. We are unable to find any good reason for the distinction between the individual and corporate ownership of the stock. It is as truly property in the hands of the company as in the hands of an individual, and of equal exchangeable value. It does not become extinct when the company acquires it, or it would cease to be assignable. It is part of the general property and equally liable to its part of the public burdens. But during the greater part of this interval and up to 1874, the stock held in a corporation was not liable to taxation under the law then in force, when the property of the corporation was taxed, (acts 1868–'69, ch. 74, § 12, par. 6) and this would seem to apply although part of corporate property is exempt. The exception must thus far be sustained, but the ruling is correct as to the years 1875—1876.

3 Ex. The appellants insist upon a credit for such amount of taxes collected in any one year as are in excess of two-thirds of one per cent. on the valuation. This exception is based upon no definite facts and is entirely contingent upon a further enquiry whether a portion of the tax was authorized by the general assembly, or was to pay debts contracted before the adoption of the constitution, and the amount of these was such. An opinion would therefore be speculative, and according to the practice will not be given. We can only say that there is no ground upon which we can be called on to uphold the exception.

4 Ex. The tools used in the workshops and necessary in

the operations therein conducted are exempt with the workshops under the charter. This exception is well taken for the reasons assigned in the opinion upon the defendants' appeal (and which it is needless to repeat) in the case involving the assessments for 1879.

The judgment of the court upon the exceptions presented and decided in both appeals will be certified to the superior court of Alamance to the end that the necessary corrections be made, and the taxes adjusted and collected under the provisions of the act of 1879.

Error. Modified.

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*JAMES McLEOD v. C. W. BULLARD and others.

Production of Deed—Evidence of Judgment—Fraud—Evidence of Handwriting—Trial—Mortgagor and Mortgagee—Burden of Proof.

1. Under the law of this state, the courts have power to require the production of documents and private writings containing evidence pertinent to the question at issue.
2. A certified transcript of a judgment is sufficient evidence to prove the existence of the judgment.
3. Where the plaintiff alleged that while drunk he was induced by the fraudulent representations of the defendant to make him a deed for land, the defendant saying it was only an arbitration bond; *Held*, in an action to cancel the deed; (1) It being proved that plaintiff was in the habit of getting drunk, and in connection with the other facts proved in this case, it is competent to show that the defendant kept a bar-room. (2) In corroboration of plaintiff's testimony, it is admissible to show that soon after the deed was signed, the plaintiff stated to

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

witness that he understood it to be an arbitration bond. (3) And to show by an expert whether there was any difference between two signatures of the plaintiff—the one to said deed, and the other to an affidavit filed in the cause.

4. Where fraud is alleged in the execution of a deed, the consideration set forth therein may be contradicted by parol. Want of consideration and inadequacy of price are some evidence of fraud.

5. The refusal to allow a letter written by one member of a firm to be introduced in evidence to contradict the testimony of a witness (the other member of the firm), is not error where it appeared that its contents related to other than partnership matters and that witness had not authorized it and knew nothing of it.

6. Upon trial of an issue of fraud, evidence that defendant purchaser at execution sale stated he was buying the land for the benefit of plaintiff (debtor) thereby suppressing competition among bidders, is admissible.

7. Only such issues as are raised by the pleadings should be submitted to the jury.

8. Where a mortgagee buys the equity of redemption of his mortgagor, the law presumes fraud and the burden of proof is upon the mortgagee to show the *bona fides* of the transaction.

(*Branson* v. *Fentress*, 13 Ired., 165; *Justice* v. *Bank*, 83 N. C., 8; *Scott* v. *Bryan*, 73 N. C., 582; *Powell* v. *Heptinstall*, 79 N. C., 206; *Darden* v. *Skinner*, 2 Car. Law Rep., 279; *Futrill* v. *Futrill*, 5 Jones Eq., 61; *Hartly* v. *Estis*, Phil. Eq., 167; *State* v. *Bowman*, 80 N. C., 432; *Neely* v. *Torian*, 1 Dev. & Bat. Eq., 410; *Bullinger* v. *Marshall*, 70 N. C., 520; *Mulholland* v. *York*, 82 N. C., 510; *Chapman* v. *Mull*, 7 Ired. Eq., 292; *Lea* v. *Pearce*, 68 N. C., 76; *Whitehead* v. *Hellen*, 76 N. C., 99, cited and approved.)

CIVIL ACTION tried at Fall Term, 1880, of RICHMOND Superior Court, before *Avery*, *J.*

The plaintiff alleges:

1. That in November, 1870, one A. A. McKethan, having recovered a judgment against him in Cumberland superior court, caused his land, lying in Richmond county, to be levied upon and advertised for sale thereunder; that wishing to save his land, he placed an amount of money sufficient to satisfy said judgment in the hands of the defendant, Charles W. Bullard, who agreed to attend the sale as

the agent of the plaintiff, and buy in the land for him; that said Charles W. did attend the sale and buy the land with the plaintiff's money, but took the deed in his own name; that by pretending, at the sale, to be buying it for the plaintiff, the said Charles W. succeeded in suppressing the bidding for the land and thereby was enabled to buy it at an under-value.

2. That on the 23d of January, 1873, the said defendant, Charles W. Bullard, fraudulently induced the plaintiff to make him a deed to the same land, by representing to him that it was only an agreement to submit all matters of account between them to arbitration—the plaintiff at the time being so drunk as to be incapable of understanding what he was doing.

3. That in 1870, the plaintiff gave a mortgage to the said defendant, Charles W., to secure advances for agricultural purposes, under which he had received some small advances; but that said defendant had taken possession of his land; and the rents thereof, together with some payments in money, had not only been sufficient to discharge said advances, but to bring the said defendant in debt to the plaintiff.

Thereupon the plaintiff asks that the two deeds—the one from the sheriff to said defendant, and the other from himself to the defendant, dated the 23d of January, 1873—may be decreed to be cancelled; that he recover of the defendants the possession of the lands, and that an account be taken of the rents received by said defendant and the payments made him.

The defendant, Charles W., admits in his answer the execution of the mortgage as alleged by the plaintiff, but says there is a large sum due under it to himself, for advances made the plaintiff; and he denies all the other allegations made in the plaintiff's complaint.

1 Exc. When the case was called for trial and before the

jury were empanelled, the plaintiff referred to an affidavit which he had filed at spring term, 1875, alleging that an inspection of the deed of the 23d of January, 1873, was necessary to him on the trial of his cause; and to a motion then made that the defendant should be required to produce it—which motion had been continued by the court; and he moved the court to order the defendant to produce the deed, alleging that the face of the deed itself furnished some evidence of the fraud practiced in procuring its execution. The defendant objected to this upon the ground that the plaintiff had not prosecuted his motion; and insisted that time should be given him to answer the affidavit. The judge then inquired of the defendant's counsel what reason the defendant would assign in his answer, if allowed the time to make one, why the deed should not be produced and inspected as asked for, saying that if the reason seemed a valid one, he would extend the time; to which the counsel replied that he expected to set forth in his answer that the allegations of fraud in the affidavit and complaint were not true. The judge thereupon refused to extend the time to answer and ordered that the deed be produced; to which the defendants excepted.

2 Exc. The plaintiff, being introduced as a witness in his own behalf and having testified that he was indebted to A. A. McKethan, was about to speak of said McKethan's having obtained a judgment against him in Cumberland superior court, when the defendants objected. The plaintiff then offered in evidence a transcript of such judgment of the superior court of Cumberland, which had been filed and docketed in the superior court of Richmond county; to which the defendants objected, and upon their objection being overruled and the said transcript admitted in evidence, they excepted. The plaintiff then testified that in November, 1870, he gave to the defendant, Charles W. Bullard, three bales of cotton to sell and satisfy the McKethan

judgment; that he and said defendant went together to Fayetteville in January, following, and he saw Bullard pay sixty-five dollars to McKethan, who agreed to accept that sum in discharge of his judgment, except the costs; that the sale of plaintiff's land, under this judgment, took place in April next after the payment of the money in January; that he did not attend the sale, but said defendant, Charles W., agreed to do so and buy the land for him. The plaintiff then offered in evidence the deed of the 23d of January, 1873, being that one which the said defendant had produced at the trial under the order of the court, and testified that he first saw the paper at a place called "Laurel Hill," where the said Charles W. was doing business, and where he had lived up to a short time before, when he and his family had taken possession of plaintiff's house. In regard to the manner of his taking possession of his house, the plaintiff testified that, on one occasion, previous to the execution of the deed of the 23rd of January, the other defendant, W. W. Bullard, had come to his house and induced the plaintiff to return home with him; and on the next day, by one pretense or another, had prevailed on him to go to several other places with him, so that plaintiff did not reach his own home until after dark on the second day; that, upon getting there, he found the defendant, Charles W., and his family, occupying his house, and his own things removed to another apartment; that this was the first intimation he had of any purpose to take possession of his place, and he had never consented that the same should be done; and the fact that it was done had the effect to cause him to drink to great excess; that soon thereafter, the defendant, Charles W., said to plaintiff that he wanted the matters between them settled and was willing to compromise them, and proposed that they should go together to Laurel Hill, to which plaintiff assented: that he was drunk before he started, and

after getting to the place (which they did about 9 o'clock, a. m.), he got more spirits from said defendant and drank it.

3 Exc. The plaintiff then proposed to prove, by himself as witness, that the said defendant had a bar-room at Laurel Hill, to which the defendant objected, and upon his objection being overruled, excepted. Plaintiff then testified that said defendant did keep a bar-room at the place, and that he furnished the plaintiff with spirits therefrom on that day, by the use of which he became so drunk as to be incapable of knowing what he did; and that while in that condition, he was induced to sign the deed, which had been prepared by J. C. Davis, who was the attorney for the defendant, and whose name is signed as the subscribing witness to the same.

4 Exc. The plaintiff also proposed to ask this witness what consideration, if any, he received for executing the deed, to which the defendants objected, and upon their objection being overruled, excepted. The plaintiff then testified that he did not receive a cent in the way of consideration for signing the deed, and was not to do so.

5 Exc. On his cross-examination, the plaintiff was asked by defendants' counsel whether two-thirds of the cotton furnished to Bullard did not belong to the plaintiff's tenants and the proceeds thereof paid to their use? Whether the proceeds of the other third had not been, by the express agreement between the parties, applied to plaintiff's indebtedness to said Bullard? Whether he was not still indebted to Bullard for supplies furnished under the mortgage? Whether he had not got his supplies from Bullard for two years before the deed was made; and whether the deed was not made in consideration of his indebtedness to Bullard? All of which questions he answered in the negative, except that he admitted that he had received from Bullard some supplies which had been more than compensated for by the use of his land by Bullard. On his re-direct examination, he was asked by his counsel,

whether he owed said Bullard anything before the execution of his mortgage to him; to which the defendant objected, and upon his objection being overruled, excepted. Plaintiff then testified that he owed Bullard nothing prior to the execution of the mortgage; that about the time the deed was executed at Laurel Hill, Bullard claimed the plaintiff owed him some two hundred and fifty dollars, but would never furnish witness a statement of his account; and that in fact, Bullard was at the time indebted to him. A. A. McKethan was then introduced as a witness for the plaintiff, and, after testifying to the fact that he had recovered the judgment against the plaintiff, and the levy of the execution upon the land, and of his having written to the plaintiff of his willingness to accept from him the principal of his debt and the costs, he stated that plaintiff and Charles W. Bullard came together to Fayetteville and paid him sixty-five dollars, which was his principal; and that he wrote the sheriff, whenever the costs were paid, to return the execution satisfied; and that there was some talk, then, between the plaintiff and Bullard whether it would not be better for the plaintiff to have the land sold. On his cross-examination, this witness stated that the debt against the plaintiff belonged to himself alone, and not to A. A. McKethan & Son, which firm was composed of witness and his son; that his son had, of course, authority to bind the firm, but had no general authority to manage the business of witness outside of the firm. The defendants' counsel then handed witness a letter, which, after inspecting, he said was in his son's handwriting, but that he had never authorized him to write it and that he had never seen it before—the letter was in the firm name.

6 Exc. The defendants' counsel then offered to read the letter to the jury, alleging that it contained matter contradictory of his evidence on trial; but on objection by the plaintiff, was not permitted to do so, and thereupon they excepted.

7 Exc. John A. Long was introduced by the plaintiff, and testified that he attended the sale of plaintiff's land by the sheriff, and made a bid for it. That C. W. Bullard took him to himself, and told him that he was bidding for the plaintiff and asked him not to bid against him, which he agreed to do. On his cross examination, the counsel for the defendant asked the witness several questions with a view to contradict or discredit him. Maj. Long was then introduced by the plaintiff, and testified that he attended the sale with the intention of buying the land, but did not bid. The plaintiff's counsel then proposed to show that the reason for his not bidding was, that when he went up to the place of sale, something was said in the crowd standing around (which crowd was composed of the defendant, C. W. Bullard, and seven or eight others) that induced him to believe that said Bullard was bidding for the plaintiff; which evidence, as explained by counsel, was offered with the double view of corroborating the testimony of the previous witness, John A. Long, and of showing that the impression that Bullard was buying for the plaintiff was either created by him, or allowed by him to exist; and thereby he obtained the land at less than its value. The defendant's objection was overruled and they excepted. Witness then testified that he did not bid for the land, because he heard it said in a crowd of seven or eight persons standing at the place of sale (C. W. Bullard being one of them) that said Bullard was bidding for the plaintiff; that he could not remember whether Bullard made the remark or some one else, but that it was said when he was present, standing close around; and but for the remark, witness would have given much more for the land than it brought.

8 Exc. D. W. Morrison was the plaintiff's next witness, and testified that he attended the sale for the purpose of buying the land, but did not bid more than once for it. The plaintiff's counsel then made the same offer of proof and for

the same purpose as in the case of the last witness, when the defendant objected, and, upon their objection being overruled, excepted. Witness then stated that he got the impression that the defendant, Bullard, was bidding for the plaintiff from something that was said, either by said Bullard or John A. Long, at the place of sale; that it was said by some one in a company of some eight or ten persons standing about the place—Bullard being one of them. But for this impression, he would have bid more for the land than it brought.

9 Exc. The plaintiff then introduced J. C. Davis, the subscribing witness to the deed of the 23d of January, 1873, and after examining him as to its execution and the plaintiff's condition at the time, and as to what was said about its being an arbitration bond, proposed, in order to corroborate the evidence of the plaintiff, to show by the witness what was said to him by the plaintiff a short time after the transaction, about his having signed the instrument under the belief that it was only an agreement to submit the matters of account between the parties to arbitration; to which the defendants objected, but the court overruled their objection; and the witness then stated that within a week after his signing the deed, the plaintiff came to witness and said to him that it was reported in the neighborhood that he had signed a quit-claim deed to his land, but that he understood it to be an arbitration bond. Defendants excepted.

10 Exc. W. J. Everett was next introduced by the plaintiff, and, after qualifying him to speak as an expert as to handwriting, and his ability to distinguish genuine from spurious signatures, the plaintiff's counsel handed him the deed executed 23d January, 1873, together with an affidavit which the plaintiff had made in the cause, and proposed to ask him whether the signatures to both were alike (it being admitted that plaintiff had signed both), with a view to corroborate the testimony of the plaintiff and the witness, Davis,

(both of whom the defendants' counsel had attempted to discredit on their cross-examination) as to the condition of the plaintiff when he signed the deed. To this the defendants objected, but the court admitted the evidence; and witness then testified to a want of resemblance between the two signatures. Defendants excepted.

11 Exc. N. A. McNair was introduced, and plaintiff proposed to ask him the value of the land in controversy, in order to show that the price paid by defendant, Bullard, at the sheriff's sale, and the consideration stated in the deed of 23rd of January, were grossly inadequate; and as tending to show a suppression of bidding at the sale and a fraudulent procurement of the deed. The defendants objected, objection overruled, and witness testified that the land was worth some $3,000 or $3,500. Defendants excepted.

12 Exc. The defendants' counsel asked that an issue might be submitted to the jury as to whether the alleged agreement, on the part of the defendant, C. W. Bullard, to purchase the land for the plaintiff at the sheriff's sale, was in writing; but His Honor declined to submit such an issue upon the ground that the plaintiff had not alleged, or attempted to prove, that there was any such agreement in writing; on the contrary, alleged that it was by parol. Defendants excepted.

13 Exc. Amongst other instructions not excepted to, His Honor charged the jury as follows: "It is a rule of law that a party who alleges fraud must prove it so as to create a belief in the minds of the jurors that the allegation is true; and the burden of proof is ordinarily on the plaintiff alleging fraud and seeking to set aside his deed. If, however, the relation of mortgagor and mortgagee has been shown to exist, and it also appears that, while that relation was subsisting, the mortgagor conveyed his equity of redemption in the morgaged property to his mortgagee, then the burden of proof would be shifted from the plain-

tiff, and the presumption of law would arise that the conveyance is fraudulent, but this presumption, could be rebutted by the defendants' showing that the consideration of the deed was a fair and adequate one and that there was no fraud practiced." The defendants excepted.

The jury found all the issues in favor of the plaintiff, and from the judgment thereon the defendants appealed.

Mr. John D. Shaw, for plaintiff.
Messrs. Burwell & Walker, for defendants.

RUFFIN J. 1st Exc. That the defendant, C. W. Bullard, was required to produce on the trial the deed of January 23rd, and was refused further time to answer the plaintiff's affidavit; This affidavit states particularly the circumstances connected with the execution of the deed, and explains how its inspection is necessary to the plaintiff's case, and seems fully to meet every requirement of the rule of the courts in this regard. Whatever doubts may have once existed as to the power of the court to coerce the production of *private writings*, they have been removed so far the courts of this state are concerned, by express statute. The Revised Code, chap. 31, § 82, provides that courts of law shall have power to require the production of papers and documents "in cases and under circumstances where the parties might be compelled to produce them by the rules of chancery;" and the Code of Civil Procedure confers still more ample power upon the courts. § 331. Under these two statutes, the courts have been wont to require the production of every document containing evidence relating to the merits of an action, whenever the justice of the case seemed to require it. *Branson* v. *Fentress*, 13 Ired., 165; *Justice* v. *Bank*, 83 N. C., 8. The defendants had ample notice of the plaintiff's motion, and, indeed, appear to have come prepared to respond to it, from the fact that they had the deed in court,

ready to produce when required; thus proving that there was no necesity for further delay in the matter.

2nd Exc. That a transcript of the judgment of the Cumberland superior court, instead of the judgment-roll, was allowed to be used as evidence: The point in dispute between the parties was not the *validity*, regularity or consequences of that judgment, but its *existence*, as a mere matter of fact, and for a purpose altogether collateral. For such purpose the certified transcript of the judgment alone was certainly sufficient, as was said in the case of *Scott* v. *Bryan*, 73 N. C., 582.

3rd Exc. That plaintiff was allowed to speak of the fact that the defendant, C. W. Bullard, kept a "bar-room" at Laurel Hill, when the deed was executed: Taken in connection with other facts deposed to by the witnesses, this was not an immaterial matter. Those other facts were, in substance, that the plaintiff was much addicted to intemperance; that the defendant, knowing this and intending to take advantage of his weakness, sought to inveigle him into executing a deed for his land under the pretence that it was an agreement to arbitrate their differences; that in furtherance of this scheme, he plied the plaintiff with liquor at home, and then persuaded him to go to Laurel Hill, where he had an attorney, ready to prepare the deed and present it for signature just at the moment when the plaintiff might get into a condition the most easily to be deceived. It thus became a circumstance full of significance, that the place selected for the transaction was one where the plaintiff would be exposed to temptation, and where the means for the gratification of his appetite could be given, or withheld, at the will of the defendant. As the jury had to pass upon the truth of those other facts, they were entitled to have the benefit of every circumstance that could possibly throw light upon them.

4th Exc. That the plaintiff was allowed to show that the deed was without consideration.

5th Exc. That he was allowed to testify that he was not, at the time of its execution, indebted to the defendant.

11th Exc. That the witness, McNair, was permitted to speak of the value of the land, to show an inadequacy of consideration.

These three exceptions, relating to kindred matters, are considered together. The technical rule that the recital of the consideration set forth in a deed, cannot be contradicted by parol, does not apply to cases of fraud. *Powell* v. *Heptinstall*, 79 N. C., 206. The distinction is thus drawn in Starkie on Evidence, 671: "The objection to parol evidence does not apply when offered, not for the purpose of contradicting or varying the effect of a written instrument of admitted authority, but when, on the contrary, it is offered to *disprove the legal existence*, or *rebut the operation* of the instrument. To do this is not to substitute mere oral testimony for written evidence—the weaker for the stronger; but to show that the written ought to have no operation whatsoever—an object which must usually be accomplished by oral evidence." If any authority is needed to support the proposition that a want of consideration and a gross inadequacy of price are each some evidence of fraud, and may, in connection with other circumstances of imposition or oppression, furnish ground sufficient for setting aside a contract, it will be found in any one of the following cases: *Darden* v. *Skinner*, 2 Car. L. R., 279; *Futrill* v. *Futrill*, 5 Jones Eq., 61; *Hartley* v. *Estis*, Phil. Eq., 167, and the numerous authorities cited therein.

6th Exc. That the court refused to admit in evidence the letter from "McKethan & Son": We can discover no principle under which the letter *could* have been received in evidence, offered, as it was, solely for the purpose of contradicting the statements made by the witness, McKethan, at the trial. There was literally nothing to show that he had authorized it to be written, or that he knew of its contents, or, indeed, of its existence, up to the very moment of its pro-

duction on the trial. It is true, it appeared to be in the handwriting of his partner and son, but it related to other than partnership matters; and the father swore that the son had neither a general nor special power to speak for him in this particular instance, and there was no evidence to contradict him.

7th Exc. That the witness, Long, was permitted to testify to the remark made in the company of persons present at the sale, about the defendant's bidding for the plaintiff: If the evidence had left it doubtful whether the remark, though made in defendant's presence, was in fact heard by him, it would have been proper in His Honor, as was said in the case of the *State* v. *Bowman*, 80 N. C., 432, after admitting it to be spoken of by the witness, to have instructed the jury to give it consideration or not, as they might find the fact to be that he heard, or did not hear it. But it is clear, from the statement of the case, that the doubt, which the witness intended to express as existing in his mind, was not whether the defendant heard the remark, but whether he was not, himself, the author of it; and as it was equally competent, whether made by himself or another in his hearing, no such caution was needed at the hands of the judge. Beside this, that such a remark was made at all at the time (there being only eight or ten persons in attendance on the sale), goes to show that all the persons present participated in the belief that the defendant was bidding as the friend of the plaintiff. If so, and thereby the defendant was enabled to purchase the plaintiff's land at an undervalue, it is against good conscience in him to retain an advantage so unduly obtained, even though he had no active agency in creating that belief. It was so held in the leading case of *Neely* v. *Torian*, 1 Dev. & Bat. Eq., 410.

The same reasoning applies to the defendants' eighth exception.

9th Exc. That plaintiff was allowed to give in evidence his statements, made shortly after the transaction, in corroboration of his testimony on the trial: The right to corroborate an impeached witness by proving that, soon after the matter occurred, he had made similar statements in regard to it, is too well established to need the citation of authority in its support. In the case of *Bullinger* v. *Marshall*, 70 N. C., 520, it was decided that the same right exists in favor of a party examined as a witness in his own behalf. "Why should not this follow?" asks the late Chief Justice PEARSON in that case. "It is in conformity to the avowed policy of the statute by which rejection of testimony, on the ground of incompetency, is ignored, and the testimony is to be admitted and weighed by the jury in the scale of credibility."

10th Exc. That the plaintiff was allowed to show by an expert that the signature to the deed differed from his natural and ordinary signature, affixed to an affidavit filed in the cause: The comparison between the signatures to the two instruments was not instituted for the purpose of assailing or supporting the genuineness of either, for both were admitted to have been the work of the plaintiff; and therefore the ruling of His Honor, in permitting it to be made, did not impinge upon the rule of those cases which forbids the comparison of handwritings for such purposes. But it was made solely to ascertain whether there was any discrepancy in the manner of their execution; and, if so, whether that discrepancy could be accounted for by the alleged drunken condition of the plaintiff at the time he signed the deed, and in this way furnish some corroboration to the positive proof which had been offered on that point. Considered in this light, the case seems to come fairly within the line of those cases in which experts have been called to say whether two documents were written with the same pen and ink, and at the same time (34 Penn. St., 365); or

whether the different parts of the same instrument were written with the same care and facility (*Demerritt* v. *Randall*, 116 Mass., 331); or whether two documents, supposed to have been written in a disguised hand, were in fact written by the same person. *Reult* v. *Braham*, 4 Tenn. Rep., 497. In all these instances, a comparison of one document with another, or of one part of the same document with other parts, was sanctioned by the courts; and being matters of skill and experience, requiring a practised eye and close observation to determine them correctly, *experts* were used for the purpose. And so, we think, in the present case it required something more than the observation and experience ordinarily possessed by the jurors of the country to be able to perceive the difference between the two signatures exhibited in evidence, and to trace its probable cause.

12th Exc. The refusal of the judge to submit an issue whether the alleged agreement of the defendant, Bullard, to purchase the land for the plaintiff, was in writing: Only those issues should be submitted to the jury which are raised in the pleadings and are necessary to a certain legal determination of the matters in controversy. In the pleadings prepared by the parties in this case, there was no question made as to the nature of the promise, and no suggestion of the statute of frauds, and if there had been the latter it would still have been improper to have allowed the issue asked for to be submitted to the jury, for the reason that, however they might find it to be, it did not even tend towards a disposition of the rights of the parties to the action. Whether the promise be by writing or by word only, if made, it was equally binding on the defendant. *Mulholland v. York*, 82 N. C., 510, and the many cases there reviewed in the opinion of the present Chief Justice.

13th Exc. To the charge of the judge, in that he instructed the jury that if, while the relation of mortgagor and mortgagee subsisted between the parties, the defendant (the mort-

gagee) purchased the equity of redemption of his mortgagor, the law presumed it to have been fraudulently done, unless the defendant could show, by a preponderance of testimony, the *bona fides* of the transaction: It is not to be denied that this charge of His Honor is in conflict with the decision of this court as rendered in the case of *Chapman* v. *Mull*, 7 Ired. Eq., 292. In delivering the opinion of the court in that case, the late Chief Justice PEARSON expressly declares that the principles, in relation to dealings between *trustee and cestui que trust*, as adopted by courts of equity, do not apply to the case of mortgagor and mortgagee; but that such parties, there being no dependence or duty of protection involved in their relation, were at liberty to deal with each other, subject only to the ordinary principles. We understand, however, this decision to have been virtually departed from in the case of *Lea* v. *Pearce*, 68 N. C., 76; and in *express terms*, in the case of *Whitehead* v. *Hellen*, 76 N. C., 99; in both of which cases the opinions were delivered by the same learned judge. In the last named case, he uses the following emphatic words: "Courts of equity look with jealousy upon all dealings between *trustees and cestuis que trust;* and if the mortgagor had, by deed, released his equity of redemption to his mortgagee, we should have required the purchaser to *take the burden of proof*, and satisfy us that the man whom he had in his power, manacled and fettered, had without undue influence and for a fair consideration released his right to redeem." In this uncertainty of authority, proceeding from the same high source, we have to look for light from other sources. Bigelow, in his work on Fraud, page 160, says, there are certain relations, termed *relations of confidence*, from the existence of which the law raises a presumption of fraud, in any dealings that may take place between the parties, because of the undue advantage which the situation itself gives to one over the other. Of these "*relations of confidence*," he enumerates eight in number, and

in the following order: Attorney and client; principal and agent; partners; trustees and cestuis que trust; guardian and ward; executors and administrators; mortgagor and mortgagee; parent and child. Thus, he places the relation of mortgagor and mortgagee with the other well defined and universally acknowledged *fiduciary relations.* Upon principle, this should be so. It is due to good faith and common honesty that such a presumption should arise in every case where confidence is reposed, and the property and interests of one person are committed to another. To every such person his *trust* should be a sacred charge—not to be regarded with a covetous eye.

The several exceptions of the defendants are therefore overruled, and the judgment of the court below is affirmed.

No error. Affirmed.

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*W. W. FLEMMING and others v. G. M. ROBERTS and others.

Final decree, how impeached—Sale of Land under decree, rights of purchaser—Guardian and Ward.

1. A decree which decides the whole merits of a case without any reservation for further directions for the future action of the court, is final, and can only be set aside or impeached by a civil action in the nature of a bill of review, in which some error on the face of the decree or matter since discovered is alleged.
2. Land sold under decree of court is held *in custodia legis* as a security for the purchase money, and when that is paid the purchaser ordinarily has a right to a deed as a matter of course and without an order to make title.
3. A guardian instituted and conducted proceedings to sell the land of his wards without fraud or imposition; a commissioner sold the same

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

and took note for purchase money; an arrangement was subsequently made at the instance of the guardian with the sanction of the court and in the interest of the wards, by which the "sale note" was exchanged and surrendered for one executed to the guardian by the purchaser with good security; and thereupon the court ordered title to be made by the commissioner, in pursuance of which a deed was executed to the purchaser from whom through mesne conveyances the defendant acquired title for value and without notice of any alleged irregularities in said proceedings; *Held* in an action to subject the land to the payment of the purchase money (the makers of the note being insolvent) the defendant acquired a good title, and the redress of the wards if any is against the guardian.

(*Eure* v. *Paxton*, 80 N. C., 17; *Thaxton* v. *Williamson*, 72 N. C., 125; *Covington* v. *Ingram*, 64 N. C., 123; *Simms* v. *Thompson*, 1 Dev. Eq., 197; *Lord* v. *Beard and Merony*, 79 N. C., 5 and 14; *Brown* v. *Coble*, 76 N. C., 391; *Singeltary* v. *Whitaker*, Phil. Eq., 77, cited, distinguished and approved.)

CIVIL ACTION and MOTION in the cause heard at Fall Term, 1879, of BUNCOMBE Superior Court, before *Graves, J.*

The two cases between the same parties touching the same subject matter, being treated as one action, were tried together.

One case was an independent action brought by the plaintiffs to impeach a decree of the court of equity rendered in a cause then depending, where the plaintiffs as heirs at law of Samuel Flemming had filed a petition by their guardian, James H. Greenlee, (the petitioners being infants) for the sale of a lot of land in the town of Asheville, alleging that the land had been sold, bonds taken for purchase money, sale reported and confirmed, and a deed made to the purchaser by the clerk and master without any order of the said court authorizing him to make title; that no part of the purchase money has ever been paid, the bonds given by the purchaser had been surrendered, and other bonds taken by the guardian in their stead without authority, and the obligors thereof have become insolvent; and they ask that they may have a lien upon the land to

secure the payment of the purchase money and that the land be sold for that purpose and the costs of action.

The other was a petition in the suit in equity, setting forth the facts that a petition had been filed in the court of equity for Buncombe county in the year 1855, by the plaintiffs as heirs at law of Samuel Flemming for the sale of a lot in the town of Asheville; that they were all infants of tender years and brought the suit by their guardian, Jas. H. Greenlee; that the master was ordered to make sale of the lot, and in pursuance thereof the property was sold on the 12th of April, 1856, when James B. Rankin and Robert H. Chapman, junior, became the purchasers at four thousand dollars and gave their notes for the same with Robert Helt Chapman and James A. Patton as sureties; that the master made a report of the sale in due form which was confirmed by decree of court, in which the master was directed not to collect the purchase money until ordered to do so, and to withhold the title until the purchase money was paid; that John and Greenlee Flemming have since died without issue, and Mary Flemming has intermarried with the plaintiff, John Yancey; that the record of said proceedings in the petition for sale has been destroyed by fire, and that the foregoing is a correct statement of said proceedings; that the master has made a deed to said purchasers who afterwards sold and conveyed the premises to George W. Swepson, who conveyed the same to the defendants, that no part of the purchase money has ever been paid, and the master has made the deed without any decree of said court authorizing it; and they ask that the transcript referred to in the record as Exhibit A, of which the foregoing is a correct abstract, may be set up and established as the true record of the proceedings in said cause and that the same be enrolled, and for such other and further relief, &c.

The defendants in their answer admit that the matter

contained in the plaintiffs' Exhibit A is a correct transcript of the equity suit, except in the following particulars: They say that it is not true that the master was directed to retain the title until the purchase money was paid in full, nor is it true that he executed the deed to the purchasers without a decree authorizing him to make title. They aver that the report of the master was confirmed without at that time making any decree touching the collection of the purchase money or passing the title to the purchasers, but that at a subsequent term of the court, a proper decree was made to collect the money and make title; that the guardian, Greenlee, wished to lend out the purchase money, which he did to the said Chapman and Rankin, and took their notes for the same with Robert Helt Chapman and James A. Patton as sureties, which note was perfectly good, and that said guardian being a party to the record applied to the court of equity to sanction and confirm said arrangement, and a proper order to that effect was made and the notes given to the master cancelled and surrendered to the purchasers to whom the master was directed and commanded to make title, and that the costs were paid and the whole case passed from the docket and business of the court in the same manner as other completed business; that long after title was made as aforesaid, the purchaser, Chapman, sold the lot to Swepson who paid for the same full value and in good faith without notice of any defect or supposed defect in the record, and afterwards Swepson conveyed it to defendants who bought in good faith at a fair value and without notice of any defect in the record; that the petitioners came of age more than ten years before this proceeding was commenced, and not until it was discovered that by long delay of the guardian in the collection of said notes and by the disastrous result of the war the makers thereof had become insolvent, was any pretence or suggestion made in regard to defects or irregularities in the record of the equity suit.

At spring term, 1873, it was ordered by the court that the case be referred to W. M. Hardy to ascertain and set up the record in this case alleged to be lost, and report to the next term together with the evidence on which the record is founded, and at the ensuing term the referee filed a report setting out the record in said equity suit substantially the same as that proposed to be set up by the plaintiffs in their petition, and on the hearing it appeared to the court that the report was not full enough, and an order was thereupon made that the case be recommitted to the referee to ascertain and report more fully the record alleged to be lost or destroyed with the evidence thereon. In obedience to this order, the referee submitted additional facts and reported that when the notes for the purchase money became due in the year 1859, one Robert Helt Chapman, Junior, who was at that time solvent, at the request of said Greenlee the general guardian of said infant plaintiffs, executed to Greenlee, as guardian, the note for the principal and interest then due on the sale notes with approved security; that the arrangement was made with full knowledge and sanction and under the direction of the said court of equity in which at spring term, 1859, a decree in the cause was made as follows: "This cause coming on to be heard upon the petition, exhibits, former orders, decrees and reports herein, and it being made to appear that the purchase money is now all due, and James H. Greenlee, guardian of the petitioners, representing to the court that it is desirable and to the interest of the infants to keep said purchase money invested in good interest-bearing securities, and the said Robert Chapman, Junior, having tendered to the guardian his bond for the full amount of the purchase money with the interest accrued thereon, with R. H. Chapman, Senior, and James A. Patton, as sureties, bearing interest from date, and the court being satisfied the said bond is good and that it is to the interest of said infants to invest the money, and all parties therein

connected consenting; It is now ordered, adjudged and decreed that the said James H. Greenlee, guardian of the said infant petitioners, be and he is hereby permitted to accept from said R. H. Chapman, Junior, the bond aforesaid in satisfaction so received as aforesaid of the amount due upon the purchase notes given to the clerk and master, and that the master surrender and deliver up to said Chapman, Junior, the three several notes executed by him and his sureties for the purchase money at the time of the sale, in order that they may be cancelled; and it is further ordered and decreed that the master make and deliver to said Chapman, Junior, a good and sufficient deed in fee simple for the land mentioned in the pleadings and purchased by said Chapman as aforesaid, and that said Greenlee, guardian, pay the costs of the proceedings into court, and the record in the proceedings be enrolled, and the cause be not further continued on the docket." The referee also reported that in pursuance of this decree the purchase notes were surrendered by the master to said Chapman, and the latter executed his bond for the entire amount due thereon, with R. H. Chapman, Senior, and James A. Patton, as sureties, to said Greenlee as guardian, the deed was made as ordered, the costs paid, and the cause removed from the docket and finally disposed of.

There were several exceptions taken by the plaintiffs to the report, which, upon the hearing were overruled and the report confirmed (except that part saying, "and money be paid into court"), and the court found and declared that the record set out in the reports of the referee, as amended, is the record of the court of equity in the case of W. W. Flemming and others, by their guardian, Greenlee, for the sale of real estate in the town of Asheville. From which ruling the plaintiffs appealed to the supreme court where the case was heard at June term, 1877, and the ruling below sustained. *Flemming* v. *Roberts*, 77 N. C., 415.

At fall term, 1879, there was an order in the cause that notice issue to the defendants and to said Swepson to appear before the court and show cause why the purchase money alleged to be due on the sale of the said real estate should not be paid, or a resale ordered to pay it. Service of this notice was accepted by defendants' attorney, and thereupon the court ordered that the cause be reinstated on the docket —overruling the defendants' objection that the same had been regularly disposed of by final decree—and on plaintiffs' motion adjudged that it be referred to the clerk of the court to state an account of the purchase money due under the former decree of sale, if any, and report to the ensuing term, together with any other facts touching the matter in controversy between the parties, which may be deemed necessary by either to the maintenance of his rights in the premises. From this ruling the defendants appealed, and from the judgment dismissing the independent action the plaintiffs appealed.

Messrs. Reade, Busbee & Busbee, for plaintiffs.

Messrs. James H. Merrimon and *Merrimon & Fuller*, for defendants.

ASHE, J. The two cases were considered together in the court below and were discussed in this court as one case, and we will so continue to treat them.

The record of the proceedings of the petition in the court of equity has been ascertained and established by the report of the commissioner appointed by the superior court of Buncombe for that purpose, and it appears from the record that that suit had been finally disposed of and put off the docket. The record as set forth by the commissioner states, it was ordered, adjudged and decreed that the clerk and master make and deliver to Robert H. Chapman, Junior, a good and sufficient deed in fee simple for the land purchased by

him as aforesaid, and that the guardian pay the costs of the proceeding into court and the cause be not further continued on the docket. This was a final determination of the cause, expressed in unmistakable language. But aside from the unambiguous terms in which the determination of the cause is expressed, where a decree decides the whole merits of a case without any reservation for further directions for the future judgment of the court, so that it will not be necessary to bring the case again before the court, that constitutes a final decree; and after it has been pronounced, the cause is at an end and no further hearing can be had. *Bebee* v. *Russell*, 19 How., 285; Adams Eq., 388. In the case before us, there was nothing further to be done; there were no further questions or directions reserved for the future action of the court, and it was therefore ordered to be put off the docket and consigned to the shelves of finished business.

The fact being established that the decree in the equity suit was final, it follows that the remedy adopted to set it aside by a petition in that cause cannot be sustained. It can only be set aside or impeached by a civil action commenced by summons and complaint. *Eure* v. *Paxton*, 80 N. C., 17; *Thaxton* v. *Williamson*, 72 N. C., 125; *Covington* v. *Ingram*, 64 N. C., 123.

The plaintiffs however say they have prepared for a failure in this particular, by their other action pending in the same court (and considered with this) which is a civil action commenced by summons and complaint. The ground assigned for relief in that case is that the purchase money has never been paid, that the guardian took the note of the purchaser, Chapman, payable to him as guardian in lieu of the notes given to the master, without any authority so to do, and that the original notes were surrendered to the purchaser and a title to the land made to him by the master, without any order of the court authorizing him to make title.

Upon the state of facts set forth in the plaintiffs' complaint, it being made to appear that the suit in equity had not been determined but was still pending, His Honor dismissed the action on the ground that plaintiffs' remedy was by motion in the original cause. This would have made it unnecessary to give further consideration to the case, but for the fact that the other case, when the motion was made in the original suit in equity, was considered in connection with this, as constituting one case; and but for the further fact that the record of the proceedings in the equity suit was established in that case, and the fact is made to appear that there was a final decree in that cause. This independent action must then be viewed as an action in nature of a bill of review to impeach the decree in that case. The only two grounds upon which a bill of review will be entertained under the former equity practice, were, first, for some error apparent on the face of the decree; and secondly, for new matter since discovered. *Simms* v. *Thompson*, 1 Dev. Eq., 197. Treating this as an action in nature of a bill of review, it cannot be sustained, for it alleges no error on the face of the decree, nor does it disclose any newly discovered facts, and might therefore have been properly dismissed on that ground.

But stripping the cases of all technicalities and considering them on their merits, they are found to be different from any case that has been cited on either side of the question.

Unquestionably, when a decree is made by a court of competent jurisdiction for the sale of real estate, the court having cognizance of the case brings the land, as it were, *in custodia legis* and continues to hold control over it until the final disposition of the cause by the payment of the purchase money and execution of the deed to the purchaser by the regular order of the court. *Lord* v. *Beard* and *Merony*, 79 N. C., 5 and 14. The principle decided in these cases and others we might cite, is, that the court takes and

holds control over the land sold under its decree, as a security for the purchase money. After payment of the purchase money, an order to make title is not necessary, and a deed made without such an order passes the title. "The withholding the title after a sale has been confirmed can have no other object than to secure the purchase money, and when that is paid, the purchaser in the absence of special circumstances has an absolute right to a conveyance of the legal estate." *Brown* v. *Coble*, 76 N. C., 391. The withholding the title until the purchase money is paid is a matter lying in the discretionary powers of the courts and to be exercised by them for the benefit of the parties before them, especially where they are infants—the courts in their equitable jurisdiction being the general guardian of infants. They have control over the whole matter—the subject of the action as well as the persons of the parties—and must have the power to order an exchange of notes and decide how and in what manner payments should be made, and to order a title to be made, though there was no other payment than an exchange of notes, intended as a payment and so regarded by the court; and the purchaser would get a good title.

In our case there was no pretence of fraud or imposition. The transaction in regard to the exchange of notes was made at the instance of the guardian and was supposed by him as well as by the court to be an arrangement for the benefit of the infants. If the money had been paid into the office, the guardian would have received it and loaned it out at once to some one upon good security. He was willing the purchaser should have the money who offered good security. Where was the use of paying it to the clerk and master and the guardian receipting for it and paying it back to the purchaser? This arrangement was made by the express authority and sanction of the court as protecting the interests of the infants, and it was evidently in-

tended the new notes should be in satisfaction of those originally given.

This case is dintinguished from *Singeltary* v. *Whitaker*, Phil. Eq., 77, and *Lord's cases, supra,* for in those cases there was no order to make title, but in this case there was an order that title should be made. It was made. It passed the legal title, which the defendants now hold was purchased for value and without notice of any defect in the title. The plaintiffs have lost the proceeds of the sale, and their redress if they have any is against their guardian. They have no equity against the defendants.

Both proceedings, the petition and action, must be dismissed at the costs of the plaintiffs.

Error. Dismissed.

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*A. L. NEWLIN and others v. S. M. WHITE, Ex'r.

Construction of Will.

A testator, after making advancements to some of his children during his life time and disposing of his estate in such a manner as he declares will make them equal, directs his executor to divide the residue among his children to whom he had left property; *Held* that the intention of the testator was to and to each share an equal portion of the surplus after paying the money legacies.

(*Freeman* v. *Knight*, 2 Ired Eq., 72, cited and approved.)

CONTROVERSY submitted without action under C. C. P. § 315, and heard at Fall Term, 1880, of ALAMANCE Superior Court, before *Eure, J.*

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

The controversy presented for determination in this case arises upon the construction of the fourth clause, taken in connection with others, of the will of Seymour Puryear, which is in these words: 4th Item. "I give and bequeath unto my daughter Margaret Newlin household and kitchen furniture and stock, and one tract of land known as the "Robeson land," containing one hundred and seventeen acres, more or less, valued at two hundred and ninety dollars; also five hundred and sixty dollars, at different times, in cash. I also leave to Margaret's children, four hundred and forty dollars to make them equal with my other children." The testator's children were all daughters, to one of whom and the children of another, deceased, he gives no part of his estate for the assigned reason that they had been advanced to the full value of their shares. To another, he had conveyed land of the value of one thousand dollars mentioned in the sixth clause, and he adds: "If my other children get more than one thousand dollars apiece, then my daughter, Eliza, shall share equal with the other children." In the five preceding clauses, reciting the unestimated advances to those therein named, in household and kitchen furniture and stock and other advancements on which he puts a value, and in money, the testator makes pecuniary bequests of specific sums to the two living and the children of the three deceased daughters, in order, as he expressly declares, in four of those clauses "to make her" or "them" (the beneficiaries of his bounty) *equal with my other children*, and in the fifth, that the issue of his daughter, Sarah, "shall share equal with my other children after making them all equal."

The testator's own estimate of the value of his previous gifts, added to the legacies now given, distributes among his living and the children of his deceased daughters, including what had been advanced to the mothers, when living, as follows: To Adeline and Eliza, each, the sum of $1,000;

to Harriet and Sarah and their children, respectively, $1,000; to Nancy, $1160; to Margaret and her children A. L. and Julia J. Newlin, $1,290.

In the eleventh clause the testator disposes of the residue of his estate in these words: "It is my wish that my executor divide out among my children what property I may leave, equally among my children that I have left property to, and to have no sale of it."

Upon the hearing below, His Honor adjudged that the executor pay to the several legatees the sums bequeathed to each, and that the residue of the estate in the hands of the executor should be divided among those who have received only one thousand dollars until each has as much as the legatee, Nancy, and then among her and them until each has an equal amount with A. L. and Julia J. Newlin, the plaintiffs, to wit, $1290, and thereafter the distribution to be equal among them all, the issue of the deceased daughters to represent and take their mothers' shares. From this ruling the plaintiffs appealed.

Mr. John W. Graham, for plaintiffs.
Messrs. E. S. Parker and *J. E. Boyd*, for defendant.

SMITH, C. J., after stating the case. We concur in the ruling that the several legacies must be paid in full to each according to the directions of the will, if the fund is sufficient, regardless of the supposed effect in producing inequality in their value. The testator in explicit terms makes the apportionment and he declares that the sums thus given do in fact make, (and are so intended), each living daughter and the representatives of the deceased daughters for whom provision is made, "equal with his other daughters," in this distribution among them. There is no rule of construction and no principle of law which authorise the court to do direct violence to the testator's clear intentions in taking from what he has given one legatee and adding

to what he has given another, upon a supposed misconception of the results. The testator declares not only a general purpose to be impartial in bestowing his bounty, but that these several sums do produce equality among the recipients. This is the equality he intends and this division of the property must stand. We cannot undertake to say how far the excess in two of the shares may be due to the inferior value of the furniture and stock advanced to those daughters. The testator may have considered that inequality in determining the money bequests to them. The case cited in the plaintiffs' brief is decisive of this view of the case. *Freeman* v. *Knight*, 2 Ired. Eq., 72. There, the testator gave his son-in-law and wife "$2,700 and notes" adding "twenty-six hundred and seventy-six dollars of the money and notes embraced in this item have been paid to him—balance due, eighty four dollars, to be paid to him at my death." The actual difference between the full legacy and the sum already received was but $24, but it was held the sum declared to be the balance ($84) must be paid.

But we are unable to accept the interpretation that the excess in the hands of the executor must be first paid to the legacies of apparent inferior value until they reach those rated at a higher value, before they can share in the fund.

The testator has already established what he considers to be an absolute equality among them, and upon this basis he requires any surplus the executor may have after meeting the money legacies, to be distributed equally among the children to whom property has been left, plainly intending to add to each share an equal portion of such surplus.

While the latter point is not strictly embraced in the case, it has been considered and passed on by the court, and has been argued by counsel on either side before us, and we intimate our opinion to avoid the inference that the ruling is approved.

Error. Reversed.

ELIZABETH C. GALBREATH v. E. EVERETT, Adm'r.

Injunction—Jurisdiction.

1. Under the act of 1879, ch. 63, restraining orders must be made returnable before the judge in the district in which the action is pending. (The amendatory act of 1881, ch. 51, provides that the judge in an adjoining district shall be competent to hear the application under certain circumstances.)
2. An injunction against the sale of land for assets was properly granted on motion of the heirs of the decedent, where the land was advertised under a power contained in an instrument purporting to be a will which was admitted to probate without notice to the heirs and upon insufficient testimony, and the validity of which is in controversy.

APPEAL from an order granting an injunction made at Chambers, in Waynesville, on the 27th of July, 1880, in an action pending in SWAIN Superior Court, by *Gudger, J.*

The circumstances under which the injunction was granted are as follows: The plaintiff began her action on the 23rd of June, 1880, by summons returnable to fall term of said court, and on the 27th she moved for an injunction restraining the defendant from selling certain land, for the reasons set forth in an affidavit filed, the judge (Gudger) being the resident judge of the ninth judicial district, but assigned at the time to the second district. His Honor issued an order directing the defendant to appear before him at Raleigh, in Wake county, on the 14th of July, 1880, and show cause why the injunction asked for should not be granted, and in the meantime restraining him from selling the land. To the foot of this order was added a note to the effect that if the parties so agreed, the hearing of the motion for the injunction would be postponed until the 27th of July, when it would be heard at Waynesville, but if the parties did not so agree, then the papers were to be sent to the judge at Raleigh by the 14th, as first directed. And on

the 14th, as the case states, the affidavits of both plaintiff and defendant being before His Honor at chambers in Raleigh, "the matter was continued under advisement until the 27th day of July, 1880." And on the 27th it was considered at Waynesville, and the injunction of which the defendant complains, was then and there issued. The above statement is necessary to an understanding of the point raised by the defendant's counsel in this court as to the jurisdiction of the judge who made the orders.

As gathered from the affidavits of both parties, the following appear to be the facts of the case: On the 10th of May, 1861, one A. W. Coleman, being about to enter the Confederate army, executed the following instrument—"Know all men by these presents that I, A. W. Coleman, for and in consideration of the natural love and affection which I bear to Laura Jane Cooper, daughter of Winnie Cooper, do give, grant, convey and confirm unto the said Laura Jane Cooper two thousand dollars in cash, to be made out of my land and other properties at my death, in case I should be killed, or die, while in the service of the Confederate States. But if I should live until my time for which I have volunteered expires, and return home, then in that case, the above gift, grant and confirmation is to be null and void and of no effect." (Signed by A. W. Coleman, on May 10th, 1861.) Coleman died in 1862, before the expiration of his term of service, unmarried, leaving as his heirs at law a brother and three sisters, the plaintiff being one of the latter. He died seized of the land in controversy situate in Swain county; and in the year following, Mark Coleman, his father, qualified as his administrator, but taking no notice of the above instrument of May 10th, until February, 1876 when he offered the same for probate before the clerk as probate judge of said county, who made the following order: "It appearing to the satisfaction of the court from the testimony of Mark Coleman, J. A. Thompson, Charles Jenkins,

and Ute Sherrill, (said testimony being in writing and on file in this office) that the said paper writing purporting to be the last will and testament of A. W. Coleman, deceased, is in the proper handwriting of the said A. W. Coleman, deceased, it is therefore ordered that the said paper writing and every part thereof is the act and deed of the said A. W. Coleman and is his last will and testament." The administrator, Mark Coleman, died in 1879, when the defendant qualified as his administrator and also as the administrator with the will annexed of A. W. Coleman. Under the power supposed to be given in the above instrument of May 10th, the defendant has advertised the land of A. W. Coleman, deceased, for the purpose of raising money to pay his debts and the legacy of two thousand dollars to Laura Cooper. The plaintiff denies that said instrument is a will, or that she had any notice of its being offered for or admitted to probate, and insists that the land belongs to herself and her brother and sisters as the heirs of their deceased brother, and alleges that assets sufficient to pay all the decedent's debts and the two thousand dollars to Laura Cooper, provided it has to be paid, went into the hands of Mark Coleman, administrator and further, that soon after the death of her brother, an arrangement was entered into between all of the said heirs and their father (the administrator) to the effect that the said heirs should raise the amount directed to be paid to Laura Cooper, and thereby avoid a sale of the land; and that in pursuance thereof she paid to said administrator her ratable part of the amount, to wit, five hundred dollars, and immediately thereafter entered into possession of her part of the land which she has enjoyed for nearly seventeen years. The defendant denies that the assets which came to the hands of Mark Coleman, the administrator, were sufficient to pay the said debts, and much less to pay the sum directed to be paid to Laura Cooper. He insists that the instrument of May 10th is a will, and upon his right to sell the land

thereunder to raise the amount necessary to pay the said debts and legacy of two thousand dollars; and he further says that if any such arrangement was made between the administrator and his heirs, as alleged by plaintiff, it was a mere verbal one and therefore void, and that he has no information whether or not the plaintiff had notice of the propounding of said instrument for probate.

The plaintiff's motion was for an injunction to restrain the defendant from selling the land of A. W. Coleman until proper accounts might be taken of the assets which came into the hands of his two administrators and of the amounts paid by the heirs towards the legacy of Laura Cooper. The order as granted by His Honor enjoined the sale until the final hearing of the case, and from it the defendant appealed.

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

RUFFIN, J. By the act of 1879, ch. 63, entitled "an act defining the jurisdiction of judges of the superior courts as to granting injunctions and restraining orders, &c.," it is provided that all restraining orders granted by any of the judges shall be made returnable before the resident judge of the district, or the judge assigned to the district, or holding by exchange the courts of the district in which the action may be depending.

It is perfectly manifest that this statute, with a view to prevent the inconvenience of parties, intended to fix the place where rather than the persons before whom such orders should be made returnable, and that the judges were denominated in the order in which we find them because it was supposed that one or the other of them would at all times be within the district of the action.

As the inconvenience, resulting from an order requiring his attendance in Raleigh to the defendant living in the

ninth judicial district and having an action there pending against him, could be lessened by the consideration that the matter was to be heard by one who happened to be the judge of his district, it cannot be that an order so returnable is within the contemplation of the statute. If it turn out that neither one of the judges indicated is in place when the order should be returned, (as we can well see may sometimes happen owing to the inequality in the duration of terms of court in several of the districts, and as really did happen in this instance from that very cause) then it is simply a case not provided for under the statute, and such as no judge has within himself the power or right to provide for. It was an error therefore in His Honor to have made his first order, restraining the defendant, returnable at a point outside the district in which the action was pending; and if the defendant had relied on that circumstance and taken his exception in apt time, he would have been entitled to have the order set aside on that ground. But it was a case of mere irregularity, and not of any failure of jurisdiction in the court, and like every other irregularity could be waived; and we are of the opinion that by filing his counter-affidavits going fully so the merits of the case, and by allowing His Honor after full notice of the time and place to hear and determine the motion upon the merits as disclosed in the affidavits of the parties without once raising a question as to the regularity of the proceeding, the defendant in this case did waive all subsequent right of objection on that account. For this reason alone the defendant's motion made first in this court to vacate the order of injunction on the ground of irregularity, is denied, without our stopping to inquire whether, since the first order expired by force of its own terms on the 14th of July, the cause did not stand before His Honor on the 27th just as if no such order had ever been granted, or how far the power of the judges of the state to grant injunctions

without notice has been affected by the legislation since the Code.

Looking too to the facts as alleged and admitted by the parties in their affidavits, we think the defendant has no cause to complain of the action of the court in restraining the sale of the land until the rights of the parties could be fairly heard and passed upon. Apart from the questionable character of the instrument itself, claimed to be the will of the deceased, Coleman, it appears from the record to have been offered for probate wholly without notice to the heirs, and to have been admitted upon proof altogether insufficient for the purpose. It does not even appear that the witnesses who testified to its being in the handwriting of the deceased, qualified themselves to do so by showing that they had a previous acquaintance with his handwriting; nor do we know when or in whose hands the instrument was found after the death of the party, and being a holograph will, if a will at all, these all became matters of interest. It may be that in fact every demand of the law was complied with and the action of the clerk in admitting the instrument to probate as a will, fully justified by the evidence before him. If so, it was the folly of the defendant not to have made it clear to the court. There is no room for the maxim *omnia præsumuntur rite esse acta* in a case like this in which a paper after being so many years suppressed is offered and admitted to probate without notice to the parties interested. Again, there have been two administrators upon the estate of the deceased and the account of neither has been settled. It is admitted that some assets went into the hands of the first and the parties differ as to the amount. It is the right of the heirs to have this question settled before their land should be sold.

The order continuing the injunction until the trial of the action is affirmed. Let this be certified.

No error. Affirmed.

J. L. BROWN, Trustee v. P. S. BRITTAIN.

Counter-claim—Creditor under trust deed—Summary Judgment against sureties on appeal from justice's court.

1. A firm made a deed of trust conveying its estate and providing for the collection of assets and payment of creditors; the trustee sued the defendant upon claims due the firm, and defendant set up an account, as a counter-claim against the firm, assigned to him by one of its creditors after the registration of the deed; *Held*, that the counter-claim could not be allowed. The defendant assignee is affected with all the equities against the creditor, and is only entitled as the creditor would have been to share in the *pro rata* distribution of the assets when collected.

2. Under the act of 1879. ch. 68, a summary judgment may be given against sureties to an appeal bond for the amount of the judgment and costs awarded against the appellant in appeals from a justice's court, as an additional remedy to a suit on the same as a common law bond.

(*Moody* v. *Sitton*, 2 Ired. Eq., 382; *Tabor* v. *Ward*, 83 N. C., 291, cited and approved.)

CIVIL ACTION tried at June Special Term, 1880, of HENDERSON Superior Court, before *Schenck, J.*

The action was commenced before a justice of the peace and founded upon two notes under seal, both dated May 20th, 1875, due one day after date and payable to McMurray & Davis.

By a deed of trust bearing date the 5th of June, 1875, and registered on the 7th of the same month, McMurray & Davis assigned the said notes and all the property and effects owned by them as merchants and partners in the town of Charlotte, to John L. Brown, with power to sell the personal and real property conveyed, collect the notes and accounts, and after completing their collection and converting the property and effects into cash, to distribute the same among all the creditors who should come in and prove

their claims before him. On the trial before the justice, the defendant relied for his defence upon a setoff or counter-claim. There was judgment in favor of the plaintiff and the defendant appealed to the superior court, giving an appeal bond with P. S. Brittain and W. M. Whitaker as sureties.

On the trial in the superior court the defendant set up for his defence by way of setoff or counter-claim an open account due by McMurray & Davis to one Hastings, the proprietor of the *Henderson Advertiser*, for fifty dollars which had been transferred to him by said Hastings by a written assignment, dated the 22d November, 1875. Upon intimation of the opinion by His Honor that the setoff or counter-claim pleaded by the defendant could not avail him, he submitted to a verdict. Thereupon judgment was given in favor of the plaintiff and also against the sureties on the appeal bond for the amount of the plaintiff's debt and costs, from which judgment the defendant appealed.

No counsel for plaintiff.

Messrs. W. W. Fuller and *J. J. Osborne*, for defendant.

ASHE, J. The plaintiff, Brown, by the deed of trust became the owner of the notes in suit, and by its registration on the 7th of June, 1875, all creditors and subsequent purchasers became affected with notice; after that, Hastings as a creditor, was only entitled to a *pro rata* share in the distribution of the fund in the hands of Brown as trustee, provided he complied with the terms of the deed of trust, by proving his debt before the trustee; and by his assignment of the account against McMurray & Davis he could only transfer such interest as he had, nothing more. One who takes by assignment an unnegotiable instrument or a negotiable instrument past due, takes only the interest of the assignor, and is affected by all equities against him at

the time of the assignment. *Moody* v. *Sitton*, 2 Ired. Eq., 382. The assignee is never put in better condition than the assignor; he takes exactly the position of the assignor. Parsons on Contracts, 227.

The interest then which the defendant acquired by the assignment from Hastings was the right to receive from the plaintiff as trustee, whatever amount it should be found, on the final settlement of the trust, was due, as the *pro rata* share on the debt claimed by defendant by virtue of the assignment, provided he proved his claim before the trustee, as required by the terms of the deed. We therefore concur with His Honor that the defence of setoff or counter-claim set up by the defendant cannot avail him.

There is no error in the judgment rendered by His Honor on the appeal bond. It is correct, and expressly authorized by the act of 1879, ch. 68, § 1, which declares that in all appeals from judgments of justices of the peace, the appellate courts, when judgment shall be rendered against the appellant, may also give judgment against the sureties to the appeal for the amount of the judgment and the costs awarded against the appellant.

But it may be objected that this bond was given before the act of 1879 was passed and therefore it does not apply. We think differently. Prior to that act it is admitted, a summary judgment on such a bond could not be rendered against the sureties thereto. But it is a good common law bond in the usual form of appeal bonds under the old practice, upon which an action in nature of debt would now be commenced by summons and complaint. The act of 1879 gives the additional remedy of a summary judgment upon motion, which it is competent for the legislature to do, for it is now settled that the legislature may pass laws changing the remedies for the enforcement of contracts provided they do not impair the obligation of the contracts. Cooley, Const. Lim., 286; *Tabor* v. *Ward*, 83 N. C., 291.

As no error appears in the record the judgment of the superior court of Henderson is affirmed.

No error. Affirmed.

GOODMAN DURDEN v. JOHN SIMMONS.

Proceeding to Secure Drainage—Pleading—Jurisdiction—Commissioners.

1. In a proceeding to secure a right of drainage over the land of defendant, the complaint alleged title in plaintiff to the land to be drained and that the water thereon flowed through a natural drain over defendant's land until the defendant closed the same: the answer alleged that the defendant knew nothing of the plaintiff's title and denied the other allegations of the complaint; *Held*, that the answer raised no issue as to the title of either plaintiff or defendant.
2. The clerk of the superior court has jurisdiction of a proceeding to obtain a right of drainage over the land of an adjoining land-owner, and to assess damages, &c.
3. In such proceeding the law requires the appointment of *seven* disinterested freeholders as commissioners.

(*Collins* v. *Haughton*, 4 Ired., 420; *Bunting* v. *Stancill*, 79 N. C., 180, cited and approved.)

PROCEEDING to assess damages alleged to have resulted from drainage, heard at Spring Term, 1880, of MARTIN Superior court, before *Graves, J.*

The plaintiff instituted this proceeding, by summons returnable before the clerk, against the defendant as owner of a tract of land adjoining his own, and of a lower level, to obtain a right of drainage by cutting a canal through it. In his complaint he alleges title in himself to the land to be drained, the superabundant waters resting on which flowed through a natural drain or ditch over the land of the de-

fendant and relieved his own until August, 1879, when the outlet was closed by the defendant, and the outflow arrested. His application is for license to construct a ditch along the former course of the water, and re-open the drain. The defendant in his answer says: (1) "That he knows nothing of the title of the plaintiff's land, as alleged," and (2) "That the allegations in articles 2 and 3 of the complaint are untrue."

In this state of the pleadings the defendant contends that the controverted allegations raise issues as to the title of each to the contiguous tracts which should have been submitted to a jury, and passed on, before an appointment of commissioners could be properly made. The clerk held the objection untenable, and proceeded to appoint three commissioners, "who, after being duly sworn, shall examine the premises or land to be drained, and the land through or on which the drain is to pass, and shall determine and report whether the lands of the petitioner can be conveniently drained except through or on the lands of the defendant," * * * and if not, to "decide and determine the route of the ditch or canal, the width thereof, and the depth thereof or height, as the case may be, and the manner in which the same shall be cut," * * * "considering all the circumstances of the case, and providing, as far as possible, for the effectual drainage of the water, from the petitioner's land, and also securing the defendant's land from inundations and every other injury to which the same may be properly subjected, by such ditch or canal; and they shall assess for the defendant such damages as in their judgment will fully indemnify him for the use of his land, and to make report accordingly." Thus, in almost the very words following the requirements of section 2, chapter 40 of the Revised Code, prescribing the duties imposed upon the commissioners. From this judgment the defendant appealed to the superior court, and from affirmation thereof to this court.

Mr. Jas. E. Moore, for plaintiff.
Messrs. Gilliam & Gatling, for defendant.

SMITH, C. J., after stating the case. Undoubtedly a case should be constituted between proprietors of adjoining lands before the appointment of commissioners, and if the legal effect of the pleadings is to raise an issue as to the title of either party to their respective tracts, the controverted fact should be determined before any further action. If the plaintiff does not own the land to be relieved, he can proceed against no one; and if he is the owner, he cannot proceed against one who does not own the land to be rendered subservient to the proposed easement, and possesses no interest in the matter. But the plaintiff's allegations in this behalf are not legally denied or controverted, so as to raise either issue.

The first article of the answer denies the defendant's personal knowledge of the plaintiff's title, but does not that he has "information thereof sufficient to form a belief," as required by C. C. P., and is insufficient. § 100. Nor, according to a fair interpretation of its language, does the answer put in issue the defendant's title to the land alleged to be his.

The substance of the second article of the complaint denied in general terms is that the plaintiff's land can only be drained by means of a ditch to be cut through the defendant's lands, over which is the natural passway of the waters accumulating upon his own. Were an issue to be drawn up, it would be as to the situation of the contiguous tracts and the necessity of a drainage of the one by a ditch cut through and over the other; and it would not involve the title of the other. The title of each is incidentally averred in the allegation and the title of the one no more controverted than the title of the other. We give all the effect to which the answer is fairly entitled, in construing it as a

denial of the relations between the lands, and the necessity or propriety of burdening the one for the benefit of the other, and this under the statute is the appropriate function of the commissioners, as appears from the words of the act, and the construction given them before the substitution of commissioners for a jury, in *Collins* v. *Haughton*, 4 Ired., 420, wherein the court speaking through NASH, J., say: "The jury thus constituted is the special tribunal to whom by the act the power exclusively belongs *to say whether the land does need to be drained, and if so, how the ditches shall be dug, and the amount of the damages to be paid to the owners of the land* through which they may pass. Over these questions the county court has no control, except that of saying whether the report when made shall be recorded."

There was therefore no error committed in refusing the defendant's application for issues to be preliminarily disposed of, and in proceeding to appoint the commissioners.

Although the point was not made, we have had some difficulty in determining the question of jurisdiction, which the court is not at liberty to overlook.

In *Bunting* v. *Stancill*, 79 N. C., 180, the court was called on to determine the effect of the two enactments on the subject of drainage of low lands made at the same session of the general assembly, the one taking effect on the 27th day of February, 1877, the other on the 9th day of March following, and it was held that under the latter, the action must be begun by summons "returnable to the next term" of the superior court. These acts were both repealed by the act of February 20th, 1879, (ch. 51,) as well as chapter 39 of Battle's Revisal, and chapter 112 of the acts of 1874-'75, and the law contained in the Revised Code, chapter 40, as amended by the act of 1868-'69, ch. 164, re-instated in their stead. The amendment made by the last revised enactment provides for drainage on a large scale and the investment

of those whose lands are to be drained with corporate privileges, and in terms is additional to that amended.

It provides for proceedings before the superior court, "as prescribed in other cases of special proceedings," but is not intended to supersede the provisions for individual relief, contained in the Revised Code. But the Revised Code directs the party to apply by petition "to the county or superior court of law of the county in which the lands sought to be drained or embanked, or some part of such lands, lie;" and as neither such tribunal now exists, unless the jurisdiction is conferred upon the superior court, their successor by implication (for it is not in direct terms) this part of the enactment is inoperative.

Upon a full examination of the two statutes now in force, and acting upon a presumed legislative intent that both should be effective, we have come to the conclusion that the jurisdiction clearly defined in the latter, must be substituted in place of the extinct tribunals mentioned in the former, and is amendatory in this particular also. This construction gives force to both acts, and produces harmony and consistency in their application to the classes of cases for which each was intended. But the Revised Code requires the appointment of seven disinterested freeholders as commissioners, instead of the number prescribed in proceedings under the amendatory act, and these provisions may well consist together. There is, therefore, error in the order appointing three commissioners only, and it must be reformed in this respect, and it is, in all others, affirmed.

The objection that no statement of the case in the superior court comes up to this court is not tenable. The case made before the judge and sent up, on the appeal to him, is the case upon which we must act in reviewing his judgment and deciding upon its correctness. This will be certified.

PER CURIAM. Modified and affirmed.

*WILLIAM GRANT, Adm'r, v. SARAH E. BURGWYN, and others.

Practice—Non-Suit—Interpleader—Statute of Presumptions—Evidence—Insolvency of Obligor—Credits on Bond.

1. Where the plaintiff's complaint set out three causes of action, and on the trial the plaintiff entered a non-suit as to two of them, the non-suits will be treated as a *nolle prosequi* and the plaintiff permitted to prosecute his action as to the remaining cause of action.
2. It is not error to refuse a separate trial to a party who has interpleaded in an action, upon motion made at the trial.
3. Upon an issue as to the payment of a bond, where the defendant relied on the presumption of payment arising from the lapse of time, when the evidence is uncontradicted it is the duty of the court to pass upon its sufficiency and not to submit the issue to the jury.
4. In an action on a bond, in order to repel the presumption of payment arising from the lapse of time, such a state of insolvency on the part of the obligor must be shown during the entire ten years next after the maturity of the debt as to prove that he did not pay the debt because he *could not.*
5. Where certain credits endorsed on a bond are relied on to take the case out of the statute, it is necessary for the plaintiff to establish that they were put there at the dates specified, and an admission that they are in the handwriting of the obligee, is not sufficient for the purpose.

(*Hill* v. *Overton*, 81 N. C., 393; *Buie* v. *Buie*, 2 Ired., 87; *Walker* v. *Wright*, 2 Jones, 156; *Woodhouse* v. *Simmons*, 73 N. C., 30; *McKinder* v. *Littlejohn*, 4 Ired., 198; *Powell* v. *Brinkley*, Busb., 154, cited and approved.)

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

The plaintiff began his action against the defendant, Sarah Emily Burgwyn, on the 18th of June, 1877, and in his complaint alleged, as his first cause of action, that on the — day of December, 1857, one Thomas P. Burgwyn and the defendant, Sarah E. Burgwyn, executed their bond to the plain-

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

tiff's intestate for the sum of $3,059, upon which two partial payments had been made—one of $500 on the 6th of April, 1859, and the other of $600 on the 14th of January, 1860—and that no other payments had been made thereon; and, as his second cause of action, that, at fall term, 1866, of the superior court of Northampton county, said intestate recovered of said Thomas P. Burgwyn and said defendant a judgment for $2,313, and that no part thereof had been paid; and, as his third cause of action, that his intestate had another judgment in the same court, at spring term, 1866, and against the same parties for the sum of $2,313, and that no part of it had been paid.

The plaintiff likewise sued out warrants of attachment which were served on Jno. B. McRae and D. A. Barnes on the 18th of June and 8th of August, 1877, and were returned by the sheriff, as levied on the indebtedness of said McRae to the defendant Sarah E. Burgwyn—said indebtedness being evidenced by four notes, amounting in the aggregate to $4,500, and also upon the four bonds themselves, the same being in the hands of said Barnes. In her answer, the defendant, Sarah E. Burgwyn, admitted the execution of the bond sued on, denied the partial payments as alleged in the complaint, avers that the note has been paid in full, and denies that the plaintiff's intestate ever recovered any such judgments against her as those alleged in the second and third causes of action.

On the 23rd of November, 1877, John Welsh was allowed to interplead and filed his claim, wherein he averred that the bonds attached were his own and had been assigned to him before the levy and for valuable consideration, to which the plaintiff replied, denying his right to the same.

When the cause was called for trial, spring term, 1880, the defendant's counsel moved for a continuance, on the ground that he had prepared his case upon the supposition that his client had never been served with process in the

suits, in which judgments had been recovered by plaintiff's intestate against Thomas P. Burgwyn and the defendant Sarah E. Burgwyn, and that he was taken by surprise by the proof that she was so served; and thereupon the plaintiff's counsel said that rather than have a continuance, they would admit, for the purposes of the present action, that she had not been so served with process, and would enter a nonsuit as to the plaintiff's second and third causes of action. The defendant then moved to dismiss the action, insisting that the nonsuit for a part was a nonsuit for the whole of the complaint, which motion His Honor refused, and the defendants excepted.

The interpleader, Welsh, then insisted that the action between the plaintiff and the defendant, Sarah E. Burgwyn, was distinct from that between the plaintiff and himself upon his interplea, and therefore he asked a severance in their trials, which request His Honor declined, and the said Welsh excepted.

With a view to rebut the presumption of payment arising from the lapse of time, the plaintiff introduced, as a witness, W. W. Peebles, who stated that Thomas P. Burgwyn made a deed in trust of his property in the month of November, 1866, and after that was entirely insolvent, and that he died in July, 1867; that he was largely indebted at the close of the war, and a sale of his property in 1867, failed to pay his debts by a large amount; that witness had been his trustee and sold his property, and no part of the proceeds had been applied to plaintiff's claim. That in 1853, the said Thomas P. Burgwyn had given a mortgage to one C. F. McRae to secure to him a debt of $20,000, which was foreclosed in 1868, and the land sold for the exact amount of the debt secured; that this mortgage to McRae and the one to himself made in November, 1866, embraced all the property owned by said Burgwyn after the war. On his cross-examination this witness stated that before the war the said Bur-

gwyn was a man of large fortune—worth $150,000 in land, negroes, horses, mules, stock, &c.; that a judgment of $4,000 or $5,000 could have been collected out of him in 1859, 1860 or 1861, and but for the stay law could have been collected in 1866, prior to his making the mortgage in November of that year.

The plaintiff then introduced Samuel Calvert, who testified that he was the administrator of said Burgwyn, and that he had never paid anything on plaintiffs' claim. The defendant admitted the death of plaintiff's intestate in March, 1877; also that the endorsements on the bond of the alleged payments are in his handwriting, but denies that they were put there at the dates specified. To establish this, the plaintiff introduced one Odom, who testified that he became clerk of the superior court of Northampton county in 1868, when the papers of the office were turned over to him; that he saw the bond sued on for the first time, when this action was begun in 1877, and the endorsements were on it then; that he found it among the papers in the case of "*Jacobs* v. *Burgwyn*," which were marked and filed away in 1866. Also one Buxton, who stated that he was clerk of said court in 1866, and until the incoming of the present incumbent; that he saw the bond in suit in the spring of 1866, when it was brought to him by Jacobs, and he cancelled it and put it away with the papers in the case of "*Jacobs* v. *Burgwyn*." The plaintiff then offered to read the endorsements on the bond, to which the defendant Burgwyn objected, and upon her objection being overruled she excepted.

There were three issues submitted: the first of which was, "Has the bond sued on been paid?" and the other two related to the claim of the defendant, Welsh. Upon the first His Honor was requested by the defendants to charge the jury, "that the insolvency of T. P. Burgwyn from December, 1866, till his death was not sufficient to rebut the

presumption of payment," and also, "that the evidence was not sufficient to rebut that presumption," both of which requests His Honor declined; but instructed the jury that "it having been admitted that more than ten years, exclusive of the period between May 20th, 1861, and January 1st, 1870, had elapsed since the bond became due and the commencement of the action, there is a presumption that the bond has been paid; the burden of rebutting this presumption is on the plaintiff. If he has failed to rebut it, you will find the first issue in the affirmative. That in order to rebut the presumption of payment, arising under the statute, by the insolvency of the debtor, it is necessary to show that the debtors have been continually insolvent from the time the note fell due till the expiration of ten years from its maturity. That, in this case, it is necessary for the plaintiff to establish that T. P. Burgwyn and S. E. Burgwyn have been insolvent since the note fell due, January 20th, 1858." "That in order for the endorsements on the bond to rebut the presumption of payment it was necessary for the plaintiff to establish that they are in the hand-writing of Jacobs and were put there by him at the dates specified in the endorsement—the endorsement itself, although admitted to be in the hand-writing of Jacobs not being sufficient, unless there is other sufficient proof to establish the date."

Defendants excepted. Judgment for plaintiff, appeal by defendants.

Messrs. Mullen & Moore and *W. Bagley*, for plaintiff.
Messrs. Thos. N. Hill and *W. C. Bowen*, for defendants.

RUFFIN, J. We can perceive no error in the refusal of His Honor, either to dismiss the plaintiff's action, or to allow the defendant, Welsh, a separate trial.

As to the first: It was so clearly the purpose of counsel

to enter a *nolle prosequi* as to the 2nd and 3rd counts in his complaint and to pursue his action on the first, and this purpose was so unequivocally expressed that it was impossible for any one, either the court or the opposing counsel, to misapprehend it; and it would be a reproach to the law if it were to sacrifice the rights of a party upon a technicality, so strict and unimportant as the one insisted on here. In looking to the intention with which it was done, and being governed in his action thereby, His Honor did exactly what was done under similar circumstances by this court in the case of *Hill* v. *Overton*, 81 N. C., 393. There, a plaintiff in the superior court had taken a nonsuit as to one of two defendants, and gone to trial as to the other one, and, after judgment, appealed. In considering the case, Judge DILLARD takes note of the nonsuit, but says he shall treat it as a *nolle prosequi*, because he understood it to have been so intended by the party.

And as to the other: While it would have been perhaps more regular, when the defendant, Welsh, made his application to be allowed to come into the cause, to have framed a collateral and distinct issue between the plaintiff and himself, still, nothing of the sort was done; but at his own instance and solicitation he was made a party defendant in this action, and having thus voluntarily gotten into the same boat with the other defendant, he ought not now to complain that he has to share the perils of the voyage with her. And besides, we do not see that any harm could possibly come to him in the matter; for as it was, there were only three issues submitted for the consideration of the jury, and all of them so simple and easy to be comprehended that they could not produce any embarrassment in the minds of the jurors.

But after much consideration bestowed upon it, we have come to the conclusion that the defendants have a right to complain of the refusal of His Honor to charge, as requested

by them, in regard to the effect of the evidence upon the point of the insolvency of Thomas P. Burgwyn.

The presumption of payment, arising from the lapse of time under the statute, is one that the law itself makes; and it has such an artificial and technical weight that whenever the facts are admitted or established, the court must apply it as an inference or intendment of the law; and so too the question, whether that presumption has been rebutted, is one of law, which, when the facts are ascertained, the court must determine, and not leave to the discretion of the jury. As was said in *Buie* v. *Buie*, 2 Ired., 87, the law intends to give to the lapse of time such technical weight as to *require* a jury to presume a payment, unless the presumption is rebutted; and "it is a question of law for the court, what circumstances, if true, are sufficient to repel it." And the same principle is disinctly recognized in *Walker* v. *Wright*, 2 Jones, 156; in *Woodhouse* v. *Simmons*, 73 N. C., 30; and by the supreme court of the state of Pennsylvania, where they have a statute similar to our own, in the case of *Cope* v. *Humphreys*, 14 Sergt. & R., 15.

The statute, while not strictly one of limitation, is in the nature of such; and under it, the lapse of time creates, not a legal bar, but a presumption of payment, which, though not conclusive, is yet *prima facie* evidence of it; and this presumption is not to be subjected to the discretion of a jury; but the law holds them bound to it if the facts are such as to put it in operation.

If the facts relied on to repel this inference of the law are disputed, or if the testimony in regard to them is conflicting, then they must be left to the jury to be ascertained, with such instructions as to the law, given by the court, as will enable them to apply it for one side or the other accordingly as they may find the facts to be. But if the facts are admitted, or if they be established by uncontradicted testimony, then it is the duty of the judge to announce the conclusion

of the law upon them, and not submit the question of payment, as an open one, to the jury.

In the case before us, there were two circumstances relied upon to repel this presumption of payment: 1. The insolvency of the principal maker of the bond, Thomas P. Burgwyn; and 2. The payment as endorsed upon the paper. These two the plaintiff undertook to make good by proof. In regard to the first, he proved by Mr. Peebles that the said Burgwyn, in November, 1866, made a deed in trust, conveying all the property he had to witness as his trustee for the payment of his debts, and from that time until his death, in the year following, he was insolvent; that in the year 1853 he had given a mortgage for $20,000 upon certain of his lands, which was foreclosed and satisfied in full, by a sale of the land in 1868; that this mortgage and the deed in trust to witness embraced all the property left him by the result of the war, and that it failed, by a large amount, to pay his debts; but that, until the war, he was a rich man, owning in lands, negroes, stock, &c., $150,000 worth of property, and that a debt of $4,000 or $5,000 could have been made out of him in 1859, 1860 or 1861, and, but for the stay law, up to November, 1866. The plaintiff also proved by Mr. Calvert, who was the administrator of said Burgwyn, that his property had failed to pay his debts, and that no payment had been made by him, as administrator, on the claim of plaintiff. This was the whole of the evidence offered as to the insolvency of Thomas Burgwyn, and being uncontradicted, and the defendant's prayer for instructions being in the nature of a demurrer to it, it was the duty of His Honor to have determined, as a matter of law, its sufficiency to repel the presumption of payment springing out of the admitted lapse of time, and he should not have submitted the question of insolvency, at all, to the jury. That the evidence offered was wholly insufficient for the end in view becomes perfectly manifest, when it is subjected to that

test which this court has prescribed in many of its decisions. *McKinder* v. *Littlejohn*, 4 Ired., 198, and *Walker* v. *Wright*, *supra*, and the cases there referred to. There it is said that the only true rule, in such a case, is to require such a state of insolvency to be shown to have existed, during the entire ten years next after the maturity of the debt, as will prove that the debtor did not pay because he *could not*, and nothing short of this will the law permit to destroy its own inference arising from the lapse of time. Besides this, in a case like the present, the presumption of payment, unlike that which is raised of the death of a party from his being continually absent and unheard of for seven years, is, by law, referred to a particular period of time, and has relation to the day on which the debt became due. *Powell* v. *Brinkley*, Busb., 154. If that be done in this instance, it will be seen that when his debt matured in 1856, Mr. Burgwyn was a man of large fortune. So that we are of the opinion that when requested by the defendants to do so, His Honor should have instructed the jury that the evidence in regard to the insolvency of Thomas P. Burgwyn was, by the law, deemed insufficient to repel the presumption of payment arising under the statute, and he should have eliminated altogether the question of his insolvency out of the matters submitted for their consideration.

His Honor seems to have given right instructions to the jury as to the effect upon the rights of the parties, which the credits, as endorsed on the bond, should have, according to what the jury might find to be the truth in regard to them, and it may be that in coming to the conclusion they did, the jury were solely influenced by that portion of the charge and the evidence on that single point. But it cannot be certainly known that they were, and it is that uncertainty which entitles the defendants to a new trial. They have a right to have the question, as to the truth of those credits and their proper dates, considered of, freed from all connec-

tion with any question of insolvency, since of the latter, there is no legal evidence.

Except to clear the way for another hearing, by settling the point as to the legal right of the defendant, Welsh, to demand a separate trial, we have purposely forborne to allude to the matters in dispute between the plaintiff and him —deeming it just to all sides, that neither party should be prejudiced in another trial by an expression of any views which we may entertain.

Error. *Venire de novo.*

W. W. ROLLINS and others v. R. M. HENRY.

Evidence—Fraud—Construction of Contract—Practice—Judgment against Sureties in Action to Recover Land.

1. Where on the trial below, a transcript of proceedings instituted to set up a last will was admitted in evidence on behalf of the plaintiff, the purpose for which the evidence was offered being unexplained and its materiality and pertinency to the issues not being seen: *Held*, not to be error, even if irregularities appeared in the proceedings or if the court had no jurisdiction, as the defendant's case was not prejudiced by the evidence.
2. The admission in evidence of notes upon which a judgment had been rendered, and parol proof to identify the notes as those upon which the judgment was rendered is not error.
3. A judgment obtained by an executor cannot be collaterally impeached by evidence that the testator was not a citizen of the county where the will was probated.
4. In an action to recover land where plaintiff sought to invalidate a decree of a court of equity for fraud, it is competent to prove the declarations of one of the parties to the equity suit, not a party to the present action.
5. In such action it is competent to prove by the plaintiff a conversation between plaintiff and defendant (a party to the equity suit) which took place pending the equity suit.

6. Two brothers executed an agreement "that property, real or personal, that may be acquired from either of their parents, either in the name of one or both of them, shall be held jointly between them, and if the conveyance is made in the name of one, he is to convey an equal interest in common to the other at a convenient, suitable and reasonable, time": *Held*, that the subject matter of the agreement was confined to property acquired by gift, will or inheritance.

7. Where the court below held that a decree, rendered in a suit based on said agreement concerning property *purchased* by one of the brothers from their father, was fraudulent on its face, this court, while not fully assenting to the ruling, will not grant a new trial because the question of fraud was left as a fact to be found by the jury.

8. In an action to recover land where the plaintiffs sought to invalidate a decree of a court of equity for fraud, it appeared that the plaintiffs had obtained an injunction restraining the defendant (who was plaintiff in the equity suit) from proceeding under the decree and had applied to be made parties to said suit for the purpose of moving to set aside said decree for fraud, and that at the hearing the following order had been entered by consent, "ordered, adjudged and decreed that the restraining order heretofore made in this action be vacated and the injunction dissolved and the petition dismissed:" *Held*, that the question of fraud was not *res adjudicata* and that plaintiffs were not precluded from reopening the controversy.

9. Upon judgment being rendered against defendant in an action to recover land, it is not error to enter a summary judgment against the sureties on his bond.

(*Lassiter* v. *Davis*, 64 N. C., 498; *Bond* v. *McNider*, 3 Ired., 440; *Carter* v. *Wilson*, 2 Dev. & Bat., 276; *Plummer* v. *Wheeler*, Busb., 472; *Jenkins* v. *Johnston*, 4 Jones Eq., 149; *Smith* v. *Newbern*, 73 N. C., 303; *Swepson* v. *Harvey*, 69 N. C., 387, cited and approved.)

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

The defendant appealed from the judgment below.

Messrs. Merrimon & Fuller and *J. H. Merrimon*, for plaintiff.

Messrs. Battle & Mordecai, C. A. Moore and *F. A. Sondley*, for defendants.

SMITH, C. J. This cause has been several times before the court, and last, on the defendant's appeal for errors assigned

in its conduct at January term, 1878. The facts now set out in the record, essentially the same although differing in some particulars, so far as they are deemed conducive to a proper understanding of the exceptions, may be thus summarily stated:

On the 6th of September, 1850, the brothers, Robert M. and William L. Henry, in order to secure to each an equal share of the property which either might derive from father and mother, entered into a mutual agreement whereby it is provided, "that any property real or personal that may be acquired from either of their parents, either in the name of one or both of them, shall be held jointly between them, and if the conveyance is made in the name of one, he is to convey an equal interest in common to the other at a convenient, suitable and reasonable time; the said ..... are to answer equally for all improvements put on any of their joint property, and if one or the other shall superintend the improvements of property, he shall be paid for it out of the property, making due allowance, &c., or otherwise paid." By its terms the agreement was to be in force "as long as either of the parties to it shall wish it to continue, or until they shall ..... its being settled between them, at which time their joint property shall be divided between them."

On the 9th of December, 1859, Robert Henry, their father, of the age of ninety-seven years, and then owning "the Sulphur Spring tract of land," now in dispute, conveyed the same by deed to the said William L. Henry, reciting as the consideration therefor the payment of $1,500 to one Peter Mostelly, of $100 to himself, and the rendering of divers services to himself and family, subject to six notes amounting in all to $10,000 and payable in equal annual instalments with interest from the first day of January, 1860.

To enforce the specific performance of the agreement, suit was instituted in the court of equity of Buncombe in 1863,

by R. M. against W. L. Henry. The cause after many continuances was transferred to the superior court of Buncombe, and at spring term, 1869, by consent an order was entered referring "the matter in dispute in all its lawful and equitable bearings to J. G. Martin and W. D. Rankin to determine the same," according to the spirit of the paper writing specified in the bill and alleged to be executed by the said parties when established, and making the award a rule of court. At fall term, 1872, the referees made their report after hearing and considering the evidence adduced by the contestants, and award as follows:

1. The articles of agreement dated September 6th, 1850, are genuine and binding.

2. The agreement is applicable to the Sulphur Springs property after paying therefrom the just claims attaching thereto at the death of Robert Henry, and that subject thereto and to the costs of the reference the said property shall be equally divided between the parties.

To the report, exceptions were filed by both, and at spring term, 1873, by consent the cause was ordered to be removed to the county of Rutherford, subsequently changed by the parties to Graham county, and at spring term, 1874, a consent decree entered finally disposing of the controversy, whereby the complainant recovered the Sulphur Springs and various other tracts in fee, and was declared entitled to process to put him into possession, and a deed of conveyance from said William L., and the latter exonerated from all further obligations under the said agreement. Pursuant to this judgment, title to the several tracts was (by deed January 30th, 1876,) duly conveyed to said William L. by the said Robert M. This constitutes the defendant's claim and is the source of his title in the land.

The plaintiffs derive their title also under the said Robert M. as follows: Samuel B. Gudger, executor of Robert Henry, deceased, on the 8th of February, 1867, brought his action

against William L. in Buncombe superior court of law, and the same having been transferred to the superior court and then removed to Haywood county, at spring term, 1872, recovered judgment in the superior court of the last mentioned county upon the specialties filed for the sum $6,226.26 with interest on $3,569.14 principal money, and his costs, and this judgment was docketed in Buncombe county on the 25th of July following. On this judgment execution issued from the court in which it was rendered to the sheriff of Buncombe on July 3d, 1872, under which the Sulphur Springs land was sold to the plaintiffs and J. L. Henry on September 28th thereafter, for the sum of $6,475, and duly conveyed by the sheriff's deed of the same date to the said purchasers.

The plaintiffs also claimed title under a previous sale by virtue of several other executions issued on judgments against said William L. and the same sheriff's deed pursuant thereto, but as the executions were not produced and no sufficient proof of their loss offered to admit of secondary evidence of their existence and contents, this alleged source of title need not be considered.

As the plaintiffs claim under the execution exhibited, and the sheriff's deed last executed is posterior to the lien created by the filing of the bill in equity by the defendant, Robert M., the efficacy of the final decree in which suit, by relation to its commencement, is to transfer the estate in the land, then vested in William L., to the present defendant, and to remove all liens and encumbrances, intermediate attaching, even when consummated by a sale, it is obvious that unless the decree can be successfully impeached for fraud, and it is open to such evidence on the part of creditors, it must prevail over the plaintiffs' title and defeat their recovery. This the plaintiffs proposed to do; and upon issues submitted to the jury and the evidence produced in relation thereto, they find that, first, the plaintiffs are the owners of

the land and entitled to possession; and secondly, they are entitled to recover damages at the rate of $600 per annum for the four years admitted to be the period of the defendant's occupation of the premises. During the trial various exceptions were taken for the defendant, the validity of which we are required to examine:

Exc. 1. The plaintiffs offered in evidence a transcript of proceedings instituted in the superior court of Buncombe to set up the proved but last will of Robert Henry and the final decree therein establishing its contents, to which the defendant was a party. The defendant objected to the transcript for want of jurisdiction in the court and for irregularity in the proceeding, but it was admitted. The purpose for which the evidence was offered is unexplained, nor are its materiality and pertinency to the issues seen. If the object was to show the actual representative character of the suing executor, Gudger, and sustain the judgment recovered by him, the evidence was wholly needless, for the judgment is proof of itself and requires no support to validate the execution issuing thereon and the sale under it. The admission of the transcript, whether irregularities appear in the proceeding or there is a want of jurisdiction in the court to entertain it, could in no manner prejudice the defendant's case, and furnishes no ground of exception.

Exc. 2. The plaintiffs were allowed after objection to introduce four notes executed by W. Henry to Robert Henry his father, on December 9th, 1859, payable at different times, and the last becoming due January 1st, 1864, each in the sum of $1666.66, and to prove by the executor that the judgment was rendered upon them. If the record of the judgment identifies the notes as the subject matter of the suit set out in the writ and declaration supposed to follow it, under the former practice, the production of the papers and the proof were useless, and if the cause of action is not sufficiently identified, the evidence was clearly competent.

But in neither case is the proof important for any other purpose than to show when the cause of action accrued and the recognition in the deed of the deceased of the indebtedness as a charge upon the land. This exception for similar reasons must also be overruled.

Exc. 3. The defendant was not permitted to prove by the witness that the deceased was a citizen and resident of Clay and not of Buncombe county, and that in consequence the probate was a nullity and the witness was not a legal and qualified executor. This objection is met and disposed of in what has already been said, and further comment is needless. The judgment in Clay cannot be collaterally impeached, and must remain and be conclusive, until reversed or modified by the court in which it was rendered.

Exc. 4. This exception will be considered last.

Exc. 5. The plaintiffs in support of their allegation of collusion and fraud between the parties in entering the decree in the equity suit, proposed to show from declarations of William L., made just previous thereto, that himself and brother were going to court, that there was an agreement between them that Robert M. was to have half the profits of the Sulphur Springs until the Rollins suit was decided, and half the land if Robert M. gained it. This evidence was opposed on the ground that to invalidate the decree both parties must concur in the attempted fraud, and the separate intention of one, not participated in by the other, was insufficient, nor was the declaration competent against the defendant, Robert M. The proposition of law contained in the objection is correct and is supported by the case of *Lassiter* v. *Davis*, 64 N. C., 498, and the other references in the elaborate and well considered brief of the defendant's counsel. But proof of participation in the meditated fraud can usually only be made by showing the separate intent of each, of which their respective avowals would be deemed most satisfactory. The decree itself, the act of both, the

plaintiffs insist, contains intrinsic evidence of the fraudulent intent, and the declarations of the then owner of the land of such intent are used in corroboration of the other. The objection lies not to the *competency* of the evidence so much as to its sufficiency to establish the vitiating fraud, and it does not appear that the jury were not correctly informed of the force of the evidence and what was necessary to be proved for a successful impeachment of the *bona fides* of the transaction.

Exc. 6. The plaintiffs were allowed to prove a conversation between the plaintiff, Pinkney Rollins, and Robert M., wherein the latter urged the witness, Pinkney, to buy the Sulphur Springs land and declared that said Robert M. had no claim upon it; that on behalf of the plaintiffs, he then undertook to defend the suit against William L., and while preparing to do so the consent decree was entered without the knowledge of either of them. The objections to the declarations are: First, That they proceed from a party then hostile to the defendant, and were made before the conveyance under the decree; and because, Secondly, It was the province of the jury, not of the court, to determine where the fraud, if any, was conceived. What has been said in regard to the preceding exception applies with equal force to this. We do not understand the judge as withdrawing from the jury and passing himself upon the effect of this testimony. He allows it to be heard and acted upon by the jury, and its competency and relevancy he must of necessity determine before it can be heard. The evidence in connection with other facts tended strongly to indicate a fraudulent intent in the party by whom the subsequent conveyance was to be made, brought about by inducements afterwards operating on his mind, and assented to by the other, the defendant, in accepting such conveyance. In cases of fraud it has been repeatedly held that declarations of the intent of the grantor made just before his deed was

executed, accompany and affect the assigned estate, and may be shown by a creditor to impeach its validity.

Exc. 7. The court instructed the jury that the property "*acquired* from either of their parents," the subject matter of the agreement of September 6th, 1850, was confined to such as either might obtain "by gift, will or inheritance from their father or mother, and did not embrace property purchased *bona fide* and for full value from their father or mother," and directed the jury to enquire how the land in dispute has been obtained. We concur in this construction of the instrument, limiting its operation to such property or to such part of the value of it as is a gift or gratuity to the recipient. The will of the testator confirms his deed to his son William L. conveying the Sulphur Springs and adjacent land, thus apparently recognizing the inadequacy of the pecuniary consideration therein stated and the excess of its real value as a gratuity to him, the facts of which were properly left to the consideration of the jury.

Exc. 8. The court reserving the point until after verdict then ruled that the decree was upon its face fraudulent because it included property which the bill showed the complainant was not entitled to. The ruling seems to be countenanced by what is said in the opinion of RODMAN, J., in the former appeal. "A decree by consent binds the parties and their privies in estate, but it is open to these last to impeach it on the ground that it was fraudulent to their injury; and in the present case it would be fraudulent as to the plaintiffs, if it gave to the defendant, R. M. Henry, any greater estate in the property than he was equitably entitled to, and than would have been given him by the court on a hearing of the action." Without giving full assent to the legal proposition thus laid down, since it admits no qualification even in case of error in judgment, and in substance requires a consent decree in order to its validity to conform to a construction put upon the contract in another and dis-

tinct form, the ruling of the court was not required on the point, because the question of fraud was left as a fact to be found by the jury, and their verdict finds there was fraud in the transaction.

Exc. 4. The defendants preliminarily to the introduction of any evidence of fraud in the decree and to estop the plaintiffs from going into that enquiry, exhibited a transcript of the record of proceedings, instituted September 14th, 1874, in the superior court of Graham by the plaintiffs against the said R. M. Henry and W. L. Henry to impeach the said decree as having been obtained by collusion and fraud and with a special intent to defraud the complainants, and praying for an injunction to restrain the said Robert M. from proceeding under the decree to get possession of the land, and therein giving notice of a proposed motion to be allowed to become parties to the suit, to the end that the decree may be set aside and reversed. The order for the injunction was made and the defendant, Robert M., answered the complaint, denying the imputed fraud and collusion and averring that the decree was in pursuance of a compromise of conflicting claims of large amounts, and the consideration received by said William L. was a full exoneration from liabilities to the amount of many thousand dollars. The plaintiffs amended their complaint, setting out the particular circumstances attending the suit in equity, and the evidence of its fraudulent character and object developed during its progress and in its management, and charging a parol agreement between the parties that one-half of the land recovered should enure to the benefit of the children of William L., and a conveyance made thereof, and praying that the decree be declared void and the matter of the suit re-opened. To the amended complaint the defendant in his amended answer opposes a positive denial of the allegations of fraud,—explaining the nature and grounds of the proceeding in equity,—admitting the reference to the

arbitrators and the award declaring valid the original agreement and giving the defendant Robert M. one-half of the Sulphur Springs property, after discharging the liens for the remaining unpaid purchase money—the filing exceptions among which was the failure of the referees to take into account the other property claimed to be within the operation of the agreement, the allowance of which would have entitled the plaintiff to the whole of the property. At the hearing of the cause on December 23rd, 1874, and on agreements of counsel, His Honor ordered, adjudged and decreed that "the restraining order heretofore made in this action and petition be vacated and the injunction dissolved and the petition dismissed" at the cost of the petitioners. Upon this evidence the defendant contended that the question of fraud in the decree had become *res adjudicata* and the plaintiffs were precluded from re-opening the controversy in regard thereto. The court overruled the objection and admitted the evidence.

It does not appear that the merits of the dismissed proceeding were considered and passed on, and the mere dismissal of the case is not in our opinion followed by the consequences supposed. Such an entry has not that effect when applied to an action at law under the former practice, but is held to operate as a discontinuance only. The entry "dismissed at the defendant's costs does not show," says DANIEL, J., in *Bond* v. *McNider*, 3 Ired., 440, "that the merits of the cause passed *in rem judicatam*," nor does the order for payment of costs furnish "*prima facie* evidence to be left to the jury of an accord and satisfaction." See also *Carter* v. *Wilson*, 2 Dev. & Bat., 276; *Plummer* v. *Wheeler*, Busb., 472.

A different effect is ascribed to the unqualified dismissal of a suit in equity upon the hearing, and such decree is held to be a bar to another. This seems to follow from the practice in that court, when the decision is adverse to the

claim for relief, as a final adjudication to dismiss the bill. *Jenkins* v. *Johnston*, 4 Jones Eq., 149.

The judgment in this proceeding was in support of a motion to vacate a restraining order previously granted and to dissolve the injunction, not upon an examination of the merits of the case presented, or an inquiry into the alleged fraudulent and impeached decree, but, as we think may be inferred from the record, that the case made in the pleadings did not authorize the intervention of the plaintiffs in a proceeding to which they were not parties, to set aside a decree not binding on them, and open to proof of its fraudulent character. *Smith* v. *Newbern*, 73 N. C., 303. The judgment of dismissal, after the rescission of the preliminary order, ought to have no other force than a refusal to take jurisdiction, by this method of procedure, and pass upon the validity of the decree. The case does not strictly fall within the rule prevailing in equity by which, when a cause is finally heard upon its merits and dismissed, the decree is a bar to another suit. We may further suggest now that there is but one form of action admitting of but one construction of the entry of dismissal, whether that adopted in the courts of law is not more consonant with the presumed intent of the parties and better calculated to subserve the ends of justice, and protect the rights of litigants. The objection must be overruled. See *Swepson* v. *Harvey*, 69 N. C., 387.

The last and remaining exception is to the entering up a summary judgment against the sureties to the bonds given by the several defendants before being allowed to answer and defend the action, under the provisions of the act of March, 1870. Bat. Rev., ch. 17, § 382, a. b. c.

While there is no direct authority given to enter up such judgment, it is manifest such was the intent of the enactment, and for these reasons: First, the bond or undertaking is required of the defendant before he is permitted to plead,

answer or demur, just as the plaintiff is required to secure the defendant's costs upon bringing his action. They are both placed in this respect upon an equal footing. Secondly, the condition of the plaintiff's undertaking is to "pay the defendant all such costs as the defendant shall recover of him in the action," and that of the defendant's bond "to pay to the plaintiff all such costs and damages as the said plaintiff may recover in the action." The only difference is the additional word "damages" in the latter case, growing out of the different relations of the parties to the cause. Thirdly, the liability in each case is determined by the liability of the respective parties to the suit, and hence nothing is disputable by the sureties except a denial of their execution of the undertaking or bond, requiring a jury. For these reasons we think a summary judgment may be recovered as well upon the defendant's bond as upon the plaintiff's undertaking, and the same remedy was intended in both cases, as soon as the amount of the liability of the principal in either case is definitely ascertained and adjudged. The implication of such intent is scarcely less forcibly than if expressed in direct words.

We have thus carefully reviewed the points presented in the appeal in this protracted controversy, which we suppose must terminate in the present decision. We have not adverted to any equity growing out of the agreement, and as suggested by the court heretofore, because we find no amendment setting up an equitable defence, and the case in this regard is the same as that before presented.

There is no error and the judgment must be affimed.

No error. Affirmed.

PEOPLE'S NATIONAL BANK of Fayetteville v. A. A. MCKETHAN and others.

Evidence, immaterial, irrelevant.

Where in an action against sureties, the execution of a bond of a bank cashier and the reliance of the bank upon such security were in issue, the reception, after objection for inadmissibility, of immaterial or irrelevant evidence which is not calculated to mislead the jury, does not afford sufficient ground to set aside the verdict.

(*May* v. *Gentry*, 4 Dev. & Bat., 117, cited and approved.)

CIVIL ACTION tried at Fall Term, 1880, of CUMBERLAND Superior Court, before *Avery, J.*

The plaintiff appealed from the ruling below.

Messrs. McRae & Broadfoot, for plaintiff.
Messrs. Guthrie & Carr and *N. W. Ray*, for defendants.

SMITH, C. J. The defendants are sued as sureties on a bond alleged to have been executed by Archibald McLean as principal obligor, on his appointment as cashier to secure the faithful performance of his official duties, and the only question presented in the appeal is as to the admissibility of certain evidence offered by the defendants, and after objection, received by the court upon the trial of the issue of the validity of the bond.

The evidence introduced was an entry in the book of the bank containing the records of proceedings of the board of directors, in these words:

"At a meeting of the directors of the bank this day it was ordered that A. McLean, cashier, be suspended for fifteen days and that he have no connection with this bank for that time, and he is hereby requested to file in this bank, deeds

or mortgages or well endorsed notes to make good all of his liabilities in the bank.

It is further ordered by the directors that B. Fuller, Esq., fill the place of cashier of this bank until further orders, and that he enter at once on the discharge of its duties,"—with names of members of the board present, and dated November 24th, 1876. This entry of the action of the board of directors was introduced as tending to show:

1. That the bond had never been executed, and was not looked to as affording indemnity for the delinquencies of the removed incumbent, which the defendants if bound were abundantly able to make good.

2. That the indebtedness was personal and did not arise out of any breach or omission of official duty, and

3. That it was repugnant to the testimony of the principal witness examined for the plaintiff.

The exception is not to the competency of the record to prove any material fact, but to its relevancy for any of the purposes for which it was adduced.

The removal of a defaulting agent or officer and the effort to obtain from his property the means of security against loss, a plain fiduciary obligation resting upon the managing directors of the bank, afford but very slight evidence, if any, of the non-execution of a bond which a previous record shows to have been tendered and accepted from the cashier, and they are presumed to be cognizant of it. It was the duty of the board to seek and obtain from the debtor himself and from his resources, ample indemnity against loss to the bank if he would give it, and it is a strained inference drawn from an effort to get security from the principal which enures to the benefit of the sureties, that it is an admission that they are not liable at all. The evidence is more pertinent however for this, than for any other avowed purpose.

If the evidence were immaterial or irrelevant, unless it

was calculated to mislead the jury, it would not be sufficient to justify the setting aside their verdict. *May* v. *Gentry*, 4. Dev. & Bat., 117. We do not undertake to determine, however, that the record may not, in connection with other facts proved, have some, however slight, tendency to show a want of confidence in the means of indemnity already possessed, and thus contribute to the conviction that the bond had not been perfected according to law.

It must therefore be declared that there is no error, and the judgment is affirmed.

No error. Affirmed.

C. W. WIGGINS, Admr., and others v. SARAH M. McCORMAC and others.

Account and Settlement—Bill of Review—Fraud.

A former proceeding for account and settlement between an administrator and guardian, which was ended by a decree that the guardian had accounted and paid over in full, &c., cannot be reopened by the mere association of other persons as parties in a proceeding involving the same subject matter, upon an allegation that the guardian having made no annual returns ought to have been but was not charged with the full amount for which he was liable. This can only be done by an action in nature of a bill of review or to impeach the decree for fraud. The demurrer to the complaint in this case was properly sustained. (*Davis* v. *Hall*, 4 Jones Eq., 403, cited and approved.)

SPECIAL PROCEEDING heard on appeal at the December Special Term, 1880, of ROBESON Superior Court, before *Avery, J.*

The plaintiff, C. W. Wiggins, administrator of Neil C. McCormac, a lunatic, who died in 1874, and E. C. Wiggins, his

wife, one of the heirs at law of the intestate, bring their action against the defendant, Sarah M. McCormac, widow of the intestate and duly appointed his guardian upon the inquisition declaring the lunacy, and the other defendants, his other heirs at law, for an account and settlement of the trust estate in the guardian's hands. The complaint shows that a petition was filed on November 18th, 1874, in the probate court by the said administrator against the said guardian, alleging the death of the intestate on the 14th day of the same month, the issuing of the letters of administration to the plaintiff, the appointment of the defendant as guardian in 1857, her taking possession and control of the personal and real estate of the lunatic, the want of information as to her having returned annual accounts, and praying that process issue requiring her to appear and file her final administration account, and for further relief; that accordingly a summons issued of which she acknowledged service the same day and thereupon the following decree was rendered by the probate judge: This cause coming on to be heard on the petition and proofs, both parties being present, it appears to the satisfaction of the court that the defendant, who is the widow of the plaintiff's intestate used the estate entrusted to her hands with all the prudence and care, during her said guardianship, that the circumstances of the case admitted; and it further appearing that the said defendant has surrendered and delivered to the petitioner, C. W. Wiggins, administrator of her deceased husband's estate, the whole of the estate; It is therefore ordered, adjudged and decreed that the defendant has accounted and paid over in full to the said administrator in all respects in which she was liable by reason of her said guardianship; it is further adjudged that the petitioner pay the costs of his proceeding out of the funds of the estate whenever a sufficiency therefor shall come into his hands."

The plaintiffs further allege that the guardian under li-

cense sold a portion of the lunatic's land for $440, for which and rents of land and personal estate she has never accounted except for so much as is enumerated in an annexed schedule, and was delivered over in the suit aforesaid under the decree therein, and no account of her guardianship has heretofore been rendered; that the administrator commenced a second action against the guardian for the recovery of the trust fund remaining in her hands, but the decree aforesaid being set up as a defence, he submitted to a nonsuit; that suit has been brought by the heirs aforesaid against him to charge him with the whole estate which he ought, as it is asserted by them, to have received from the guardian and failed to get in his former action. To this complaint the defendants demur and specify as the grounds thereof:

1. The feme plaintiff is not a proper party.

2. The defendants, other than the guardian, are improperly joined with her in the action.

3. The former action and decree, described in the complaint and unimpeached for fraud, are a bar to the present action.

The demurrer was sustained by the court and judgment rendered accordingly, from which the plaintiffs appealed.

Messrs. W. F. French and *Walter Clark*, for plaintiffs.
Messrs. Rowland & McLean, for defendants.

SMITH, C. J. We agree with His Honor in ruling that the former terminated action between the administrator and guardian, involving the same subject matter, is an insuperable barrier to the prosecution of this, and this consequence is not averted by the association of the other persons as co-plaintiffs and co-defendants. Whatever can be recovered in this, could and ought to have been claimed and recovered in the other suit. The matter has become *res adjudicata* and further controversy closed by the previous decree unless

opened by a proceeding in the nature of a bill of review or the decree is impeached for fraud in its rendition. The complaint assigns no intrinsic error in the decree, alleges no newly discovered evidence, charges no fraud, but seeks to have the matters before decided re-opened and another administration account taken solely on the ground that the guardian, having made no annual returns, ought to have been and was not charged with the full amount for which she was liable in her administration of the trust. This is the purpose and scope of the present action. If the proceeds of the sale of the land retain the qualities and properties incident to real estate and could not be recovered by the administrator (to which proposition we do not wish to be understood as giving assent) for which reason the heirs have joined, then it is plain the administrator, as such, is not responsible therefor in the action against himself. He is only accountable for what he ought to have recovered and lost by the want of proper diligence and care. This neglect may be imputed in the management of the former suit, but this does not entitle him to the aid of the court in reversing what was then adjudged and neutralizing the results. That the objection may be taken by demurrer, when the substantial facts are set out in the complaint, is expressly decided in *Davis* v. *Hall*, 4 Jones Eq., 403, from the opinion in which, as appropriate to the present case, we quote an extract: "This is not a bill of review; not alleging any error of law or fact in the decree. Nor does the bill allege any fraud in obtaining the decree, nor otherwise impeach it, except in the single particular that the allegation in the former bill that the fund with which the slaves were purchased belonged entirely to Carter, and the consequence deduced therefrom that in the view of this court Carter was entitled to all the slaves. * * * * No reason indeed is given, why the question now made was not presented in the former suit, nor any allegation that it was not made and

proof taken on it. * * * Litigation would be interminable, if, after a decree founded on the allegations and proofs in that cause, the party could, upon an original bill, obtain a decree on the same matter in opposition to the first decree simply upon the ground that the titles of the parties were different from what they were before declared, at the same time not imputing any undue practices in obtaining the decree."

We therefore uphold the ruling of His Honor and sustain the demurrer. The action must be dismissed and it is so ordered.

No error. Affirmed.

ROBERT H LYON v. MATTHEW W. RUSS.

Execution Sale—Statute of Limitations—Judgment Lien—Notice.

1. A sale of land under execution issued more than ten years after the docketing of the judgment is invalid. The principle announced in *Pasour* v. *Rhyne*, 82 N. C., 149, affirmed. (C. C. P., § 254.)

2. A purchaser at such sale (the execution containing the date of docketing the judgment) is affected with notice of the expiration of the judgment lien, and stands in no better condition than the plaintiff in the action when he is the purchaser.

(*Pasour* v. *Rhyne*, 82 N. C., 149, cited and approved.)

CIVIL ACTION to recover land, tried at Fall Term, 1880, of BLADEN Superior Court, before *Avery, J.*

The plaintiff claimed title under a deed executed to him by W. G. Sutton, sheriff of Bladen county, dated September 1st, 1879. He was a purchaser at the sheriff's sale of the land in controversy, by virtue of an execution, issued July 3d, 1879. The judgment upon which said execution issued

and said sale was made was rendered by a justice of the peace of Bladen county in July, 1868, on an open account dated in the year 1865; and said judgment was received by the clerk of the superior court of said county and docketed by him in said court on the 1st of January, 1869.

An execution was issued on the judgment, January 1st, 1869, returnable to the ensuing spring term of said court; a second execution was issued on the 28th day of November, 1874, and no other execution was issued, except that on the 3d of July, 1879, by virtue of which the sale was made. It was also in evidence that the land described in the plaintiff's deed had been allotted to the defendant as a homestead in November, 1868, and the report of the commissioners alloting the same, was registered on December 14th, 1868.

His Honor having intimated that he would hold that the sale made under the execution, issued more than ten years after the docketing of the judgment, was not valid, the plaintiff submitted to a nonsuit, and appealed.

Messrs. C. C. Lyon and *W. A. Guthrie*, for plaintiff.
Messrs. Stedman & Latimer, for defendant.

ASHE, J. We concur with His Honor in the opinion intimated by him on the trial below, in regard to the validity of the sale, and it is therefore unnecessary to consider the other question presented on the appeal respecting the homestead.

It is provided by section 254 of the Code that a docketed judgment shall be, "a lien on the real property in the county where the same is docketed, of any person against whom any such judgment shall be rendered, and which he may have at the time of the docketing thereof in the county in which such real property is situated, or which he shall acquire at any time for *ten years* from the time of docketing the same in the county where the judgment roll was filed."

An interpretation has been given to this section, by this court, in the case of *Pasour* v. *Rhyne*, 82 N. C., 149, where it is held that it is the judgment alone which creates a lien on real property, and the office of the execution issued upon a docketed judgment is to enforce the lien by the sale of the land upon which it has attached, and that the lien of a judgment, docketed under this section, is lost by the lapse of ten years from the date of the docketing of the judgment; and this, notwithstanding execution has issued within the ten years. This authority is directly in point, and settles the question.

The sale of land under an execution is different under the present system from what it was formerly, so far as the rights of a purchaser under a dormant judgment are concerned; for now, as the execution contains the date of the docketing of the judgment, the purchaser is affected with notice and stands in no better condition than the plaintiff in the action when he is the purchaser.

There is no error. Let this be certified to the superior court of Bladen county, &c.

No error. Affirmed.

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*J. J. HASTY and wife v. ROBERT SIMPSON and others.

Execution, motion to set aside—Homestead.

It is not error to refuse to set aside an execution upon the allegation that exempted land has been levied on and sold thereunder.

(*Simpson* v. *Simpson*, 80 N. C., 332, cited and approved.)

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

HASTY *v.* SIMPSON.

MOTION to set aside an execution and sale thereunder, heard at Fall Term, 1880, of UNION Superior court, before *Seymour, J.*

The motion was refused and the defendant, Robert Simpson, appealed.

Messrs. Wilson & Son, for plaintiff.
Messrs. W. H. Bailey and *Clement Dowd,* for defendant.

SMITH, C. J. The feme plaintiff in the year 1870, as relator recovered judgment againt the defendant, Robert Simpson, and others, sureties to his guardian bond, executed for the security of the estate of herself and others, as did the other infant wards in separate actions, for the sums respectively due them, on all of which, executions were regularly and successively sued out until and including that which it is now proposed to set aside. In June, 1873, Robt. Simpson was declared a bankrupt, and in December following obtained his discharge. In that proceeding a certain tract of land specified in the schedule was set apart and allowed him as his homestead exemption, to which no exception was taken. These debts due by judgment were proved in the cause. In July, 1877, Robert Simpson and his wife conveyed the land by mortgage to one Wittkowski, to secure a debt due him, with power of sale in default of payment. Under this authority the mortgagee on February 3rd, 1879, sold and conveyed the premises to one Winchester, who the 21st day of the same month, reconveyed to Wittkowski, and the latter on the 10th day of March following, conveyed to the wife of Simpson. Thereafter executions issued on the several judgments under which the sheriff, in July of the same year, sold and executed his deed for the land to H. M. Houston, upon whom notice of the intended motion has also been served.

The present application is made by Simpson to set aside

the execution (and a similar motion is made in regard to the others) under which the land has been sold, and he appeals from the refusal of the court to grant it.

The debt being fiduciary was not discharged by the proceedings in the bankrupt court, notwithstanding the filing of proof therein in order to a participation in the distribution of his estate, and the plaintiffs were at liberty to sue out and enforce execution against the property of the debtors as before. *Simpson* v. *Simpson*, 80 N. C., 332. We are unable to find any just ground on which the proposed action can be supported. The argument before us was addressed mainly to the question of the exemption of the land from liability to the process under which the sale was made, and assuming such exemption the intervention of the court in this summary way is demanded to annul the act of sale by withdrawing the authority under which the sale was made. We know of no precedent for such a course. Executions are not set aside or quashed for such cause. If the writ of execution be *irregular* the defendant may move the court to set it aside, and if there has been an arrest, to discharge the party from custody; or if goods have been seized, to have them restored. 3 Bacon's Abr., Title *Execution*, 735; 2 Tidd's Prac., 1032. But the process should not be recalled upon the mere allegation that exempted land has been levied on and sold. It was not liable to be taken for the debt. The title is not divested by the attempted sale and no injury results to the debtor.

If it were liable, this was the appropriate means by which the property can be made available to the creditor, and he should not be denied the process by which it is to be thus applied. Whether this exemption has been lost by the successive transfers through which the title has passed and the judgment lien overreaches that vested in the wife, are questions not to be disposed of upon motion and affidavit, but they should be tested in an action between the contesting

claimants. We are not called upon, and do not undertake, to express an opinion as to the merits of such a controversy, but leave its solution to another and different proceeding which may hereafter be instituted.

We therefore uphold the ruling of the court and affirm the judgment.

No error. Affirmed.

ENOS SMITH v. R. MCMILLAN, Sheriff.

Execution—Duty of Sheriff—Amercement.

To facilitate the collection of money under execution, a sheriff is authorized by section 265 of the Code, to receive from debtors to the defendant in the execution in his hands the debts due him, but he is not thereby invested with the power to apply the proceeds of one execution in satisfaction of another. (This section construed in connection with the constitutional provision in reference to exemptions, and with section 15, chapter 106 of Battle's Revisal prescribing a penalty against a sheriff for neglecting to make due return of process.)

(*Curlee* v. *Thomas*, 74 N. C., 51; *Bryan* v. *Hubbs*, 69 N. C., 423, cited and approved.)

MOTION to amerce a sheriff heard at Spring Term, 1880, of ROBESON Superior Court, before *Eure, J.*

This was a motion to amerce the defendant as sheriff of Robeson county for not making due return of an execution.

The facts as found by His Honor are as follows: At spring term, 1878, of said court Enos Smith, the plaintiff in the case obtained a judgment against Benjamin Godwin for the sum of $97.68 and execution was duly issued upon said judgment and placed in the hands of the defendant. On the 24th of April, 1878, J. L. Inman obtained a judg-

ment against the plaintiff, Enos Smith, for the sum of $257 and costs, and on the 8th of June, 1878, execution was issued on this last judgment and placed in the hands of the defendant as sheriff. On the same day Benjamin Godwin, the defendant in the Smith execution paid to the said McMillan as sheriff the sum of $109.52, and the said sheriff entered his return on the execution of Inman against Smith as follows: "Received of B. Godwin the sum of $109.52 in part payment of this execution, the 8th of June, 1878.

(Signed,) R. MCMILLAN, Sheriff."

And McMillan gave Benjamin Godwin a receipt for the said amount. On the same day, (8th of June, 1878,) the said McMillan endorsed on the execution in favor of the plaintiff, Smith, against Benjamin Godwin as follows: "Satisfied by receiving from B. Godwin a receipt for the sum of $109.52, the amount paid by the said Godwin to me on the 8th day of June, 1878, in favor of J. L. Inman and against Enos Smith, the plaintiff, in this execution for the sum of $250 and interest on $171.95 from April 24th, 1878, until paid and $2.65 costs, June 8th, 1878."

(Signed,) R. MCMILLAN, Sheriff.

Both of the executions were returned by R. McMillan to the fall term, 1878, of the superior court of said county with the foregoing returns thereon. Smith was not notified by the sheriff that he had the execution against him until after the return was entered on the execution against him. Smith did not own at the time $500 worth of personal property, and that fact was known to McMillan. At fall term, 1878, a motion was made in behalf of plaintiff to amerce McMillan as sheriff in the sum of $100, *nisi*, for failure to make due return on the execution of Smith against Godwin. Upon notice to the said McMillan the judgment *nisi* was made absolute at spring term, 1880, of said court, for the sum of $100 and costs, from which judgment the defendant, McMillan, appealed.

Messrs. McNeill & McNeill and *Rowland & McLean*, for plaintiff.

Messrs. W. F. French and *W. Clark*, for defendant.

ASHE, J. The only question presented on this appeal for our determination is, whether the defendant, McMillan, has made due return of the execution in favor of the plaintiff, Enos Smith, against Benjamin Godwin. The defendant insists that he is not liable to the amercement, because his return is in strict compliance with the provisions of section 265, chapter 17 of Battle's Revisal. We do not think that act was intended to apply to cases where the sheriff has, for instance, two executions in his hands, as in this case—the one against a defendant and another in favor of that defendant against the plaintiff in the first or another. The act no doubt was intended to facilitate the collection of executions, by authorizing sheriffs to receive from debtors to the defendant in an execution in his hands the debts due to him but not to invest him with the jurisdiction of applying the proceeds of one execution in his hands to the satisfaction of another. Such a construction would give him, a mere ministerial officer, powers which the courts have held they have no right to exercise under the constitution. *Curlee* v. *Thomas*, 74 N. C., 51. There, Curlee obtained a judgment against Thomas and Thomas against Curlee, and in the superior court of Union county where both judgments were docketed, a motion was made to apply the judgment held by Curlee against Thomas in satisfaction *pro tanto* of the judgment held by the defendant against the plaintiff, and the motion was allowed by the court, and judgment given accordingly; but on appeal to this court, the judgment below was reversed upon the ground that the defendant's personal property exemption protected her judgment against the plaintiff from any such proceeding, as it was, in the

sense of article ten, section one of the constitution, final process.

It is not to be presumed the legislature intended by this act to give sheriffs greater powers in this respect, than to the courts of justice. The intention of the legislature may be found in the act itself, and from other acts *in pari materia.* Potter's Dwarris on Statutes. All statutes *in pari materia* are to be read and construed together, as if they formed parts of the same statute and were enacted at the same time. *Ib.* And in the construction of a statute every part of it must be viewed in connection with the whole, so as to make all its parts harmonize if practicable and give a sensible and intelligent effect to each. *Ib.*

Applying these rules to the act in question we must construe it in connection with section one, article ten of the constitution which secures to every resident of the state five hundred dollars worth of personal property exempt from sale under execution or other final process, and with section 15, chapter 106 of Battle's Revisal which makes it the duty of every sheriff to execute all writs and other process to him legally directed, and make due return thereof, under the penalty of forfeiting one hundred dollars for each neglect, &c. To give the act the construction contended for by the defendant, instead of producing harmony and consistency between these constitutional and legislative provisions, would give rise to irreconcilable conflicts, and invest sheriffs in cases like this with the power of depriving at pleasure any defendant of this constitutional right to exemptions, and at the same time give a protection to them in their neglect to discharge their official duties which the law enjoins upon them, in regard to the execution of final process. We cannot believe such a construction was intended by the legislature.

A sheriff is a ministerial officer, and when a writ from a court of competent jurisdiction is placed in his hands, he is

bound to execute it, according to its exigency without inquiring into the regularity of the proceedings upon which it is founded. Freeman on Executions, § 146. And in *Bryan* v. *Hubbs*, 69 N. C., 423, it is held, a sheriff is bound to obey every process, not void, which comes to his hand as far as he lawfully can. He is therefore bound to return such process with a statement of his action under it, and if he has not completely obeyed it, with a lawful reason for his omission.

It was the duty of the defendant in this case to make the money on the execution in favor of the plaintiff or assign some lawful excuse for the failure to do so. He has not done this and has thereby incurred the penalty prescribed by law for the neglect of his duty.

There is no error; the judgment of the court below must be affirmed.

No error. Affirmed.

JOHN S. REESE & CO. v. JAMES F. JONES.

Filing Answer—Discretion of Judge.

The refusal of a judge to allow an answer to be filed at the trial term is not reviewable; it is a matter addressed to his discretion.

(*Boddie* v. *Woodard*, 83 N. C., 2, cited and approved.)

CIVIL ACTION tried at Fall Term, 1880, of GREENE Superior Court, before *Gudger, J.*

The summons was issued on the 27th of January, 1880, returnable to spring term, 1880, at which term an entry was made on the docket as follows: "Time to file pleadings as of spring term, 1880." About three months prior to fall

term of same year, the trial term, the plaintiffs filed their complaint duly verified, in which they declared upon two writings obligatory under seal for the payment of money—one dated April 1st, 1879, for three hundred and fifty dollars, and the other dated May 1st, 1879, for four hundred and fifty dollars, both due on the first day of November following.

At the time of filing the complaint, the plaintiffs' counsel notified the defendant's counsel of the fact, and called his attention to the fact that his client, the defendant, was in Snow Hill, the county town of Greene county. On the fourth day of fall term, 1880, the case being called in regular order on the docket, the defendant offered his answer and asked leave to file the same, when on motion of plaintiffs' counsel, the court in the exercise of its discretion refused to allow the defendant to file it, and rendered judgment against him for the amount claimed by the plaintiffs, from which judgment the defendant appealed.

Messrs. Strong, Monroe and *Dortch*, for plaintiffs.
Messrs. Galloway & Albritton, for defendant.

ASHE, J. The case of *Boddie* v. *Woodard*, 83 N. C., 2, was very much like this. There, the entry was "complaint filed, time to demur or answer." At the ensuing term the defendant's counsel moved to file an answer, which the court refused and gave judgment for the plaintiff. This court on the appeal of defendant held that while it would not undertake definitely to fix the limits of the extension in such cases, they cannot be allowed to reach the trial term, and as the motion to put in the answer at that term was addressed to the discretion of His Honor, its exercise could not be reviewed and controlled in this court.

Ours is a somewhat stronger case than that, for here, the complaint was filed three months before the trial term, and

the defendant's counsel was notified, at the time, of the fact of the complaint being filed, and was also informed that his client was then in town. The defendant was guilty of laches. There is no excuse for the delay. The allowing the answer to be filed at the trial term was a pure matter of discretion, and is not reviewable in this court.

No error. Affirmed.

JOHN P. CORN v. CYNTHIA STEPP.

Notice of motion to dismiss Action—In forma Pauperis.

Where plaintiff is permitted to sue *in forma pauperis* and an answer is filed to the complaint and the case continued from term to term for three years, *it was held* error to allow defendant's motion to dismiss the action for insufficiency in the affidavit upon which the order to sue was granted, without a previous notice to the plaintiff. The court intimate that in this case the defendant has waived all exception to the affidavit. (*Brittain* v. *Howell*, 2 Dev. & Bat. 107, cited and approved.)

APPEAL from an order made at June Special Term, 1880, of HENDERSON Superior Court, by *Schenck, J.*

In 1877 the plaintiff made an affidavit before the clerk of the superior court of his inability to give the security required by law for the prosecution of his action against the defendant, and prayed to be allowed to sue without it. He did not state in his affidavit that he had a good cause of action; nor does the record show that he offered any proof to that effect; but it was accompanied with a statement of counsel setting forth that he had examined the case and was of the opinion that the plaintiff had a good cause of action. The clerk then made an order allowing the plaintiff to sue *in forma pauperis*, and the summons was issued returnable

to fall term, 1877, at which term the complaint was filed and the defendent answered to the merits of the case. The cause was continued from term to term, until spring term, 1880, when on motion of defendant's counsel, the plaintiff's suit was dismissed on the ground that "no evidence or proof was offered by the plaintiff that he had a good cause of action against the defendant in order to justify an order allowing him to sue *in forma pauperis*;" from which the plaintiff appealed.

No counsel for plaintiff.
Mr. James H. Merrimon, for defendant.

RUFFIN, J. In the view we take of this case, we have not thought it necessary to consider at all the propriety or impropriety of the action of the clerk in giving permission to the plaintiff to sue without giving a bond for the prosecution of his action; for admitting that to have been an error in him, we still think that the action of His Honor in so peremptorily dismissing the plaintiff's action is not in keeping with the spirit of the adjudications of this court.

Under the statute, as contained in the Revised Code, ch. 31, § 40, it was the duty of the clerks to take from plaintiffs bonds with proper security for the prosecution of their actions, and it was expressly provided that if "any writ or other leading process shall be issued without security, the same shall be dismissed by the court on motion of the defendant."

Under that stringent law, (far exceeding any that can be found in the C. C. P.) this court held, in the case of *Brittain* v. *Howell*, 2 Dev. & Bat., 107, that where the plaintiff had sued out his writ without giving the required bond, but the defendant had put in an answer, and several terms had been allowed to pass without any motion to dismiss on that ground, it was not proper in the court to make a preemptory order to dismiss the plaintiff's action for the want of a bond; and

there is a clear intimation that under such circumstances the defendant might be held to have waived it.

Now, it cannot be maintained, we presume, that the plaintiff, by reason of his having made an effort to procure the leave of the court to sue *in forma pauperis*, can be in a worse plight than if he had issued his summons without, even, seeming to comply with the requirements of the law. If no more, he certainly must be entitled to as much indulgence as was shown the plaintiff, in the case just cited, who made no show of giving any security whatever, or of any excuse for his failure to do so.

After the defendant had filed an answer and had allowed the cause to remain upon the docket for nearly three years without any objection whatever as to the insufficiency of the affidavit upon which the order was procured, or the lack of proof to support it, we would be much inclined to hold that he had waived all exception thereto; or if not so, then, that most clearly the plaintiff was entitled to have notice given him of the purpose to move for the dismissal of his action, to the end that he might either amend his affidavit or supply the requisite proof as to his action being a meritorious one; from all opportunity to do which he was cut off by the peremptory order made, (as we gather from the record) just as he supposed himself to be on the eve of a trial of his cause upon its merits.

This court therefore holds that it was an error in the court below to have so dismissed the plaintiff's action; and we direct that this opinion be certified to said court that the action may be proceeded with upon such terms in regard to security for its prosecution as to the court may seem just and right.

Error. Reversed.

JOHN HATCH v. WILLIAM COHEN.

Action for Malicious Prosecution—Nolle Prosequi, effect of.

In an action for malicious prosecution the plaintiff must allege and prove a legal determination of the original action. And where a *nolle prosequi* was entered of record, and the defendant discharged, it is such a conclusion of the original action as will entitle the plaintiff to sue.

(*Murray* v. *Lackey*, 2 Murp., 368; *Rice* v. *Ponder*, 7 Ired., 390, cited and approved.)

CIVIL ACTION for damages for a malicious prosecution tried at December Special Term, 1880, of LENOIR Superior Court, before *Seymour, J.*

Judgment for plaintiff, appeal by defendant.

Messrs. Manly, Simmons & Manly, for plaintiff.

Messrs. W. T. Dortch, W. E. Clarke and *Merrimon & Fuller,* for defendant.

RUFFIN, J. The plaintiff in this action sues the defendant for having maliciously prosecuted him on a charge of burglary, and on the trial below several exceptions were taken for the defendant who is the appellant, but as only one has been insisted on in this court it is needless to state more of the case than is sufficient to present the point.

In his complaint the plaintiff alleged that after a bill of indictment for burglary had been found against him on his oath and at the instance of the defendant, a *nolle prosequi* had been entered by the solicitor with the consent of the presiding judge and at the express request of the defendant, and thereupon he had been discharged out of custody—all of which was admitted in the answer.

When the case was called for trial, the defendant's counsel moved to dismiss the plaintiff's action upon the ground that a *nolle prosequi* was not such an end to the criminal

action against the plaintiff as would enable him to maintain his action against the defendant, which motion was denied by the presiding judge and the defendant excepted.

All the authorities agree in saying that in an action like the present one, the plaintiff must allege and prove a legal determination of the original action, but they differ as to whether the entry of a *nolle prosequi* in a criminal prosecution is such a determination of it as will justify the bringing of the other action. In this state that exact point has never been before this court; but, as it seems to us, a principle has been settled in some of its decisions, from which by analogy we are enabled to arrive at a conclusion in regard to it. In the case of *Murray* v. *Lackey*, 2 Murp., 368, the plaintiff had been arrested, at the instance of the defendant, upon a charge of perjury, and after a preliminary trial before a justice was recognized for his appearance at court where he attended during the term, but at its expiration was allowed to depart without further security for his appearance, no indictment having been preferred against him. It was held that under these circumstances an action for a malicious prosecution would lie, the failure of the state to send a bill and require other security of the party being equivalent, as it was said, to an order *for his discharge*. And so it was held in the case of *Rice* v. *Ponder*, 7 Ired., 390, in which the plaintiff had been arrested on the oath of the defendent upon a charge of larceny, and after examination by a justice was held to security for his appearance at court, where he appeared but was allowed to go without further security, no bill having been sent against him, but an entry made on the docket "that the solicitor was of the opinion that the charge could not be sustained," the court observing that it was clear from the memorandum on the docket that "the proceeding against the party was intended and considered to be at an end." From these two cases we learn that although a plaintiff in an action for a malicious prosecution may not have been

actually acquitted of the offense originally alleged against him, he may still maintain his action, provided he has been discharged and allowed to go without day in the original action, or if the order of the court has been such as to amount to a discharge.

But it is said that after a *nolle prosequi*, the original prosecution may be resumed and the plaintiff be yet convicted of the offence with which he was charged by the defendant. So it might have been done in both of the instances cited above, and therefore it does not appear that this court has (as some other courts have done) adopted that as the test to determine when an action for a malicious prosecution will lie; but rather the fact of the plaintiff's discharge and the intent with which it was allowed; whether or not it was intended to be final.

In the case before us, there can be no doubt as to the plaintiff's discharge from the indictment against him, for that was express, and as it seems to us there can be as little about the intent with which it was done. It is stated in the complaint that the solicitor "after examining all the facts connected with the charge or in any manner concerning the same, by leave of the presiding judge, entered a *nol. pros.* in the case, and it was then and there ordered by the judge, with the assent of the solicitor, that the plaintiff be *discharged out of custody*," and no part of this is denied in the defendant's answer. Indeed, so far from denying it, he expressly states that he himself "went frequently to the solicitor and requested *that the case against the plaintiff should be dismissed;* and that it was in consequence of such appeals that he was discharged."

Applying to these facts the principles deduced from the cases cited, we cannot see how His Honor could have done otherwise than he did, in refusing to dismiss the plaintiff's action. If the plaintiff's action will not lie now, when will it?

No error. Affirmed.

*T. H. STREET, Adm'r v. N. N. TUCK and others.

Complaint—Demurrer—Division of Action.

A complaint in which are joined two causes of action, the one upon a clerk's bond and the other upon a bond of an administrator, is demurrable. But in such case the court may order the action to be divided. C. C. P. §§ 126, 131.

(*Harris* v. *Harrison*, 78 N. C., 202; *Land Co.* v. *Beatty*, 69 N. C., 329; *Alexander* v. *Wolfe*, 83 N. C., 272; *Logan* v. *Wallis*, 76 N. C., 416, cited and approved.)

CIVIL ACTION tried upon complaint and demurrer at Fall Term, 1880, of PERSON Superior Court, before *Eure, J.*

Demurrer overruled and defendants appealed.

Messrs. Graham & Ruffin and *A. W. Graham*, for plaintiff.
Messrs. L. C. Edwards and *J. B. Batchelor*, for defendants.

SMITH, C. J. The complaint alleges that John and Nathaniel Baird, executors of William Baird, to whom they were indebted at the time of his decease, executed their note to G. D. Satterfield, executor of S. M. Dickens, who was a creditor of their testator, in payment of the debt and charged the estate of the said William with the amount thereof. This note was afterwards transferred to the next of kin of said Dickens and purchased from them at a nominal price by the defendant, N. N. Tuck, clerk of the superior court, with the fraudulent intent of collecting the same out of the estate of said William Baird. John Baird died, and the surviving executor, Nathaniel Baird, was removed from office by the said N. N. Tuck, acting as probate judge, and the defendant, C. A. Tuck, appointed public administrator, who became administrator *de bonis non cum testamento annexo* of

* Ruffin J., argued this case before his appointment as associate justice.

the testator, William Baird, who collected a fund in the clerk's office belonging to his testator, and allowed and paid to him therefrom the amount due on the aforesaid note executed by the said John and Nathaniel Baird, both of whom have since become insolvent, in exoneration *pro tanto* of their personal liability to the testator, as a just and valid demand against the testator's estate. Subsequently the said C. A. Tuck rendered his final administration account, wherein he credits himself with the sum so paid to the defendant, N. N. Tuck, who, acting as probate judge, confirms the same and allows full commissions to the administrator. The said C. A. Tuck has since ceased to act as such, and the plaintiff has been duly appointed administrator *de bonis non* in his stead, and he charges a fraudulent combination between these two defendants, whereby, acting each in their official capacity, the fund in the clerk's office has been misapplied to a false claim for which the testator's estate was in no manner liable, and a legal sanction sought in the recording and auditing in the office of the probate court. The action is brought on the several bonds of the clerk and that of the administrator, his appointee, and imputes the perversion and misuse of so much of the fund in the clerk's office as was applied in payment of the personal liability of the executors, with consequent loss to the testator's estate, to an act of official misconduct participated in by both. The defendants demur to the complaint for that a cause of action on the bonds of the clerk, founded upon his alleged official delinquency, is improperly joined with a cause of action on the bond of the administrator for his mal-administration, under the provisions of C. C. P., § 126, which causes of action are not such as may be united in one complaint.

The objection is in our opinion well taken, and the demurrer ought to have been sustained. The range of duties imposed upon the clerk is entirely distinct from those of an administrator, and the sureties of the bond of one are only

responsible for the proper discharge of the official duties of their own principal. These officers may become individually responsible for the same wrongful act committed by both, but official delinquencies covered by their respective bonds and reaching the sureties, are essentially separate, and redress against both must be sought in independent actions. The sureties to the bonds of the clerk undertake for the faithful performance of the duties imposed upon him as clerk, while the sureties to the bond of the administrator, in like manner undertake for his proper administration, and as the duties of each are distinct, so are their liabilities.

The cases cited for the plaintiff (*Harris* v. *Harrison*, 78 N. C., 202, and *Alexander* v. *Wolfe*, 83 N. C., 272) do not meet and remove the difficulties presented in this action; while those of the *N. C. Land Co.* v. *Beatty*, 69 N. C., 329, and *Logan* v. *Wallis*, 76 N. C., 416, seem to be decisive against the union of such causes in one complaint, and against separate sureties on bonds to secure different duties.

The objection, however, may not be fatal, for "the judge may, at his discretion, and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action mentioned in the complaint." C. C. P., § 131.

While therefore we reverse the judgment below overruling the demurrer, we remand the cause in order that the court may exercise its discretion in ordering the severance or disposing of the action; and it is so ordered.

Error. Reversed and Remanded.

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

Removal of Causes—Order Conclusive—Costs.

1. It is error for a court to which a cause has been removed for trial to send it back because the transcript of the record does not show "that it was transferred according to law." The order of removal itself is conclusive and the court should have proceeded with the case, unless it positively appeared that the order was made contrary to law.
2. The fees of the officers of such court and the pay of the witnesses attending in the case may properly be taxed in the bill of costs.

(*State* v. *Seaborn*, 4 Dev., 305; *State* v. *Barfield*, 8 Ired., 344, cited and approved.)

MOTION to retax costs, heard at Fall Term, 1880, of CABARRUS Superior Court, before *Seymour, J.*

Motion refused and defendant appealed.

Mr. John S. Henderson, for plaintiff.
Mr. J. M. McCorkle, for defendant.

RUFFIN, J. This was a motion of the defendant to reform a bill of costs that had been taxed against him in the above entitled cause. The action was begun in the superior court of Rowan county, and at spring term, 1875, thereof, the presiding judge made the following order: "Ordered by the court that this cause be removed to the superior court of Iredell county for trial." A transcript of the record was forwarded and the cause entered on the docket of the court in Iredell; but at fall term, 1875, thereof, the judge holding that court made the following order: "Ordered that the cause be removed to Rowan county for trial; it appearing from the record that it has not been transferred here according to law." The cause was then returned to Rowan superior court and thence was removed to Cabarrus superior court where it was tried and the plaintiff had a judgment

for relief and costs. The motion was to strike from the bill of costs all the items taxed in the court in Iredell, including the witnesses of both parties and the officers' fees. His Honor below overruled the defendant's motion and he appealed to this court.

The object of the defendant is to rid himself of the costs incurred while the cause was in Iredell, between the times of its transmission from and its return to the court of Rowan, upon the allegation that the jurisdiction of the court in Iredell never attached to it and that it was never effectually removed at all from Rowan.

As no transcript of the record in the cause accompanies the defendant's case, we are left entirely in the dark as to the grounds upon which the two courts proceeded—that of Rowan in undertaking to remove the action, and that of Iredell in refusing to take cognizance of it after it had been entered on its docket—except as to what may be gathered from the very general declaration contained in the order of the latter court, to the effect that the cause did not appear to have "been transferred according to law." The action of the courts seems to have been inconsistent and their orders to clash; but without knowing more of the history of the case than we do or can learn from the statement before us, it is impossible for us to determine certainly by which the error, if any, was committed. And since we are bound to assume that the order appealed from is correct until shown to be erroneous, we feel ourselves obliged to decide against the defendant's appeal. Nor do we see how we can avoid coming to a like conclusion even if we should consider the facts as supplied by the argument of counsel, and take for granted that the court in Iredell refused to entertain the action because transcript from Rowan did not show affirmatively that the order of removal was based upon such an affidavit of a party as justified its being made. To us it seems that the course pursued by the court in Iredell was

the very reverse of what it should have been; and that instead of rejecting the case, because it "did not appear to have been transferred according to law," it should have entertained and proceeded with it, because it did not positively appear that the order for its removal had been made contrary to law. It was a mistake to have supposed at all that the transcript should disclose the reasons why the removal was asked for or ordered, and still more that their sufficiency could be made the subject of inquiry in the court to which the cause was sent. These were all matters concluded by the order itself, and that they should be so concluded must be apparent to every one after slight reflection upon the inconvenience which might result from holding them to be otherwise.

Suppose the court in Rowan had declined to take back the action when the court in Iredell ordered it to be restored to it, we should then have had the singular spectacle of a cause suspended between two courts—both disclaiming it and refusing to take a single step towards its trial—and all the while the parties helpless, for until one or the other of the courts should take some action no appeal could be framed. Commenting upon the possibility of such an inconvenient state of things, in the case of *State* v. *Seaborn*, 4 Dev., 305, this court declared that it was indispensable that there should be some method for a court to which a cause is removed, to determine whether it has the power and is bound to try it, and that the only way to accomplish this with certainty, was to treat the order of removal as entered of record as conclusive, and the case of *Rex* v. *Harris*, 1 Bla. Rep., 375, is cited to show that such was the construction given by the courts in England to a statute similar to our own providing for the removal of causes in certain contingencies. And since *Seaborn's* case, as was said in the case of the *State* v. *Barfield*, 8 Ired., 344, it has been considered as settled that the assignment of the grounds for the removal

need not appear in the record but only the order of the court. We can see nothing in the case then to cause us to doubt that the cause was effectually removed to the court of Iredell county, and are at a loss to know why that court refused to entertain it.

The costs incurred in that court were properly taxed in the costs of the case, and the defendant's motion to strike them from the bill was rightfully overruled.

No error. Affirmed.

B. F. MORTON and another v. LEONARD RIPPY and another.

Judgment, vacation of.

A justice's judgment docketed in the superior court is for the purpose of execution there, and that court has no power to set it aside unless the *cause* be carried up by appeal or writ of *recordari*. A judgment can be vacated only by the court which rendered it.

(*Ledbetter* v. *Osborne*, 66 N, C., 379; *Birdsey* v. *Harris*, 68 N. C., 92; *Broyles* v. *Young*, 81 N. C., 315; *Cannon* v. *Parker*, *Ib.*, 320, cited and approved.)

MOTION for leave to issue execution heard at Fall Term, 1880, of ALAMANCE Superior Court, before *Eure, J.*

A judgment recovered by the plaintiffs against the defendants before a justice of the peace was docketed in the superior court of Alamance on March 1st, 1869, and execution issued thereon on the 22d. It does not appear that any other ever issued. On the 22d of March, 1879, on application of the plaintiffs a notice signed by the clerk was delivered to the sheriff and made known to the defendants the next day reciting the motion for leave to issue execution on the judgment and appointing April 3d as the time when at his office the motion will be passed on and leave given unlest cause be shown to the contrary. The motion was allow-

ed and upon the defendants' appeal the ruling of the clerk reversed. Upon the hearing before His Honor evidence was admitted to show the proceedings had before the justice and the irregularities and errors committed in rendering the judgment, the facts of which are found and set out in the transcript sent to this court, but not necessary to an understanding of the opinion. His Honor thereupon declared the justice's judgment to be "void and of no effect; that the transcript and docketing thereof does not constitute a proper judgment in the superior court," and adjudged that it be cancelled and the defendant recover his costs, and the plaintiffs appealed.

Mr. E. S. Parker, for plaintiffs.
Mr. James E. Boyd, for defendants.

SMITH, C. J. We do not concur in the ruling of the court that the judgment of the justice upon a matter within his general jurisdiction could be thus impeached, and the docketing thereof upon the transcript in regular form in the superior court assailed and avoided as a defence to an application for leave to enforce it. This is admissible only before the tribunal which tried the cause and gave the judgment. Such, it has been repeatedly held, is the orderly and only mode of procedure for relief against it. The judgment and the original papers in the cause remain in the court of the justice, notwithstanding the sending up the transcript and docketing in the superior court for the purpose of execution there. The cause itself can only be removed to that court by appeal or a writ of *recordari* as its substitute. *Ledbetter* v. *Osborne*, 66 N. C., 379. Speaking of this case in delivering the opinion in *Birdsey* v. *Harris*, 68 N. C., 92, SETTLE, J. says: "It is there held that when a judgment was obtained before a justice of the peace and docketed in the office of the superior court clerk, the court has no power upon motion to set aside said judgment and enter the cause upon the civil

issue docket. If a party has been aggrieved in a trial before a justice of the peace and has been denied the right of appeal he may obtain relief by a writ of *recordari.*" In a more recent case DILLARD, J. declares that the judgment of the justice, although docketed in the superior court, remains "in that court *with power only in the justice in certain cases to entertain motions in the cause looking to a vacation or modification of the judgment.*" *Broyles* v. *Young*, 81 N. C., 315. So in *Cannon* v. *Parker*, *Ib.*, 320, it is said that a justice's judgment "cannot be impeached, set aside or modified by proceedings before the superior court except by writ of *recordari* removing the cause to a higher jurisdiction." These references are sufficient to show the want of authority in the court to entertain the enquiry into the proceedings had before the justice for the purpose of vacating his judgment, or annulling the force and effect of the transcript upon which it was docketed for any of the reasons assigned.

But it was urged in the argument, that inasmuch as the aid of the court is asked to revive a dormant judgment it is competent to show its character and the circumstances attending its rendition, as a reason for refusing the order necessary for its enforcement. But the plaintiffs are demanding a legal right, not a relief which the court may allow or withhold in the exercise of a reasonable discretion, the removal of an impediment, interposed by the lapse of time to the suing out of process to compel payment.

As the transferred judgment cannot be attacked in the superior court, being but subsidiary and deriving its vitality from that rendered before the justice, so and upon the same grounds no defence will be heard in opposition, based upon its supposed invalidity, to the plaintiffs' application for reviving it.

We have confined ourselves to the only exception presented in the record and refrained from considering the effect of the lapse of time upon the lien created by docket-

ing the judgment in the superior court, and upon the operation of the statute of limitations upon the present motion.

These questions are not before us on the appeal and will arise only when the motion is to be acted on hereafter. C. C. P., Sections 254, 31 and 32.

There is error, and this will be certified.

Error. Reversed.

W. Y. WARREN and wife v. T. D. WARREN and wife.

Action upon a Judgment—Leave to bring.

Where leave is granted by the judge below to bring an action on a judgment under section 14 of the Code, his decision upon the question whether "good cause" is shown, is conclusive.

(*Carter* v. *Coleman*, 12 Ired., 274, cited and approved.)

MOTION for leave to bring an action on a judgment rendered and docketed in CHOWAN Superior Court on the 18th of April, 1870, heard at Chambers on the 15th of April, 1880, before *Graves, J.*

The motion was allowed and the plaintiffs appealed.

Mr. Walter Clark, for plaintiffs.

No counsel for defendants.

SMITH, C. J. Mary C. Badham, administratrix of William Badham, deceased, on April 10th, 1870, recovered judgment against Thomas D. Warren and wife, E. Alethia, on a debt contracted by her before marriage, for $1,876, with interest thereafter on $1,240.12 principal money and costs, which was at once docketed in the superior court of

Chowan. Mary C. Badham died in April, 1872, and administration *de bonis non* on the intestate's estate was thereupon committed to the plaintiff, Fannie R., wife of William Y. Warren, who has been substituted as a party plaintiff in the action. Thomas D. Warren died in 1878, insolvent. No execution was ever sued on the judgment until April 16th, 1880, when it was issued with leave of the clerk to the sheriff. On April 15th, 1880, the plaintiff, Fannie R., after notice to the surviving debtor, moves the presiding judge for leave to bring her action against the said E. Alethia Warren on the ground of continuous insolvency in both the judgment debtors, the recent discovery of property belonging to the survivor, and the near approach of the statutory bar. His Honor heard the evidence and granted the leave, from which judgment the defendants appeal.

Previous to the introduction of the new practice, a plaintiff recovering judgment could at once bring a new action and recover a new judgment thereon at his election. If the judgment had become dormant, the plaintiff was at liberty to sue out a *scire facias* to revive it and prosecute an action of debt at the same time and neither process was an obstruction to the other. *Carter* v. *Coleman*, 12 Ired., 274.

To protect the debtor against successive, needless and vexatious suits with their attendant expense it is provided in section 14 of the Code that "no action shall be brought upon a judgment rendered in any court of this state, which shall be rendered after the ratification of this act, except a court of a justice of the peace, between the same parties, without the leave of the judge of the court either in or out of term, for good cause shown on notice to the adverse party."

The plain intention of the statute is to withdraw the arbitrary right before vested in the plaintiff to renew and prosecute at his will unnecessary suits upon a judgment already rendered to the annoyance of the debtor and without

advantage to himself, and place it under the supervising control of the judge, to be exercised in a proper case with his permission. The leave is to be granted when "*good cause*" is shown, that is, when sufficient and satisfactory reasons are given. If then he is and must be the judge, his decision that good cause does exist is not reviewable in this court. What general rule can be prescribed to guide the judge in determining the application? or this court in revising the exercise of his discretion?

The granting of leave impairs no legal right of the debtor, and every just defence may still be set up when the action is brought as it may be in other cases where the plaintiff sues at his pleasure and requires the consent of no one. If this preliminary motion can become the subject of controversy involving issues of fact and law and admitting of an appeal, it would in effect be making two actions out of one for the benefit of neither party and to the inconvenience and expense of both.

We are therefore of opinion that the judgment of His Honor that *good cause* was shown is conclusive upon us. The judgment must be affirmed.

No error. Affirmed.

A. H. STUMP & SONS v. L. B. LONG.

Consent Judgment—Mistake—Fraud.

A judgment or order made in a cause by consent of parties or their attorneys is binding and cannot be set aside or modified, except upon the ground of a mistake of both parties, or for fraud; and this, by civil action and not by motion.

(*Bradford* v. *Coit*, 77 N. C., 72; *Wilson* v. *Land Co. Ib.*, 446; *Edney* v. *Edney*, 81 N. C., 1, cited and approved.)

STUMP *v.* LONG.

MOTION to set aside a judgment (under the Code, § 133) heard at Fall Term, 1880, of MECKLENBURG Superior Court, before *Seymour, J.*

The motion was allowed and the plaintiffs appealed.

Messrs. Wilson & Son, for plaintiffs.
Messrs. Shipp & Bailey, for defendant.

RUFFIN, J. This was a motion of the defendant, L. B. Long, made under section 133 of the Code to be relieved of so much of a judgment rendered in the cause as deprived him of his personal property exemption. The following are the facts, which we state, not that we can review His Honor's findings as to them, but that it may be seen whether his ruling upon the facts, as found, is correct.

The plaintiffs having recovered two justice's judgments against the defendants, Long and Johnston, partners under the firm name of L. B. Long & Co., caused them to be docketed in the superior court on the 13th of January, 1880; and after issuing executions which were returned unsatisfied, they commenced supplemental proceedings before the clerk, who on the 17th of January, 1880, issued an order to the two defendants, Long and Johnston, to appear before him on a day fixed and answer concerning their property, and to bring with them all their books of accounts and all books showing what amounts were due individually, as well as members of the firm, and in the mean time forbidding them to dispose of any part of their property. On the 22d of January the clerk made another order, which after reciting the steps previously taken in the matter, proceeds as follows: "I do hereby order, by consent of parties, that E. K. Osborne be appointed receiver of all the estate and property of every kind of L. B. Long & Co., and that said receiver be invested with all rights and powers as receiver according to law and that he proceed to collect the accounts due and owing the

defendant copartnership, and apply the same to plaintiffs' claims; and further that the said defendant turn over to said receiver all the estate, property and effects of the said firm."

On the 25th day of March following, after having given due notice to the plaintiffs, the defendant, Long, moved the clerk to so modify his last order as to provide for his personal property exemption out of the firm property, and he accompanies his motion with an affidavit in which he swears that so much of the order as either expressly or by implication purports to be a waiver of his right to have such exemption was unauthorized by him, and against his express desire that the same should be allowed him, that he was not present when the order was agreed to or signed, and if his counsel understood him as agreeing to it, while he imputed to him perfect good faith, he misunderstood him; that in anticipation of being allowed to have such exemption, he had the very day before the examination began procured his partner's written assent thereto; that he was advised by his counsel that the appointment of a receiver in the case could not affect his right to have it allowed, and therefore he assented that such appointment might be made; but that was as far as he intended to go, and that he did not authorize his counsel to waive his claim to his exemptions, and that he had no knowledge of the same being done for several days afterwards, when he and his counsel went to the clerk's office to look after his exemptions, when they discovered that the order had been so drawn as to exclude him; that he never did, and never intended to consent to any order by which he surrendered the right given him by law. To this the plaintiff filed the counter-affidavit of his attorney, in which it is stated that the defendant was present when the order was signed and that he was also represented by counsel; that the defendant, Long, had been examined by the clerk touching the property of the firm, and

that immediately thereafter the order as drawn was agreed on and was dictated by counsel on both sides, that it distinctly sets forth the agreement and understanding of the parties, and that no claim to any exemption was set up by the defendants, or either of them; and that if there had been, he would never have agreed to the order as made, but would further have pressed his investigations into the affairs of the firm and their assets. The clerk declined to allow the motion of the defendant to modify the order, and he thereupon appealed to the judge, who finding as a fact in the cause "that the defendant, Long, consented to the order appointing a receiver under a belief that he was not waiving his personal property exemption in the property therein specified," directed the order to be modified in that particular and from this order the plaintiffs appealed.

Conceding, as we do, that the finding of His Honor as to the intent with which the petitioner assented to the order for the appointment of the receiver, is conclusive as to that matter and cannot be appealed from, it still remains to be determined whether such a finding is legally sufficient to justify the judgment rendered. It is not denied that the defendant, either in person or by his attorney, consented to the order. Indeed we understand His Honor's finding to go to the extent of saying that the defendant himself consented to it. But supposing it to be otherwise and that he was only committed to it by the consent of his counsel, how then does his case stand? Every agreement of counsel entered on record and coming within the scope of his authority, must be binding on the client. To hold otherwise would lend to much uncertainty to many of the most important business transactions—so important and so solemnly disposed of that the parties are willing to have their agreements in regard to them enter into, and become a part of the judgments of the court, to be permanently recorded upon the dockets of the country. Neither the courts nor other

parties, can look behind such an act on the part of an attorney, to enquire into his authority or the extent and purport of the client's instructions. His acts and his admissions must be taken as those of him whom he represents. As said by Judge READE in *Bradford* v. *Coit*, 77 N. C., 72: "The negligence of counsel, or mismanagement of the case, or unfaithfulness, are all matters to be settled between client and counsel. No harm must be allowed to befall others on account of it." We are bound then to treat the case as if the petitioner had been actually present and given his assent to the order as drawn. He agreed to it because his attorney did. Can a party, after having given his assent to a judgment or order of the court, be afterwards heard to say that such assent had proceeded from a mistake, on his part, as to the effect thereof and for that reason have the same modified? If so, then, the court would be making a consent judgment for the parties, not according to the agreement of both, but according to the understanding of one of them. If this was a bill for the correction of a mistake in a deed, the plaintiff could get no relief upon the facts stated in his application, for in such a case one of two things must appear: either that the mistake was that of both the parties, or that of one with a fraudulent concealment on the part of the other. *Wilson* v. *Western N. C. Land Co.*, 77 N. C., 446. There is no pretense here of any fraud or mutuality of mistake, and we cannot see why the same principle does not apply. To modify the order will be to make a new and a different agreement for the parties, and to vacate it altogether cannot restore them to their original standpoint. A consent order may be set aside and declared void, if the consent be procured by fraud, just as any other contract may be, but this as said by Judge DILLARD in *Edney* v. *Edney*, 81 N. C., 1, must be done by a civil action on the ground of fraud and imposition and cannot be done on motion.

We are of the opinion, therefore, that His Honor erred in

directing any modification to be made in the order of the clerk appointing a receiver and that the defendant's motion should be overruled.

Error. Reversed.

W. F. DAVIDSON v. M. E. ALEXANDER.

Confessed Judgment—Corporations—Parol Evidence.

1. Judgment confessed under section 326 of the Code must contain a concise, verified statement of the facts, circumstances, business transaction and consideration out of which the indebtedness arose, to meet the requirements of the statute; and this, to give the court jurisdiction and enable other creditors to test the *bona fides* of the transaction by which a particular debt is preferred; *Hence* a judgment confessed upon the statement that defendant is indebted to plaintiff in a certain sum "arising from the acceptance of a draft," setting out a copy thereof, is irregular and void.
2. A judgment against one as president of a corporation does not affect the property of the corporation.
3. Where a judgment is confessed by one person against himself and so entered of record, parol evidence is not admissible to show that it was intended to have been entered against another.

(*Ins. Co.* v. *Hicks*, 3 Jones, 58; *Aycock* v. *R. R. Co.*, 6 Jones, 232, cited and approved.)

CIVIL ACTION tried at Fall Term, 1880, of MECKLENBURG Superior Court, before *Seymour, J.*

In this action, the plaintiff seeks to recover of the defendant, who is the sheriff of Mecklenburg county, for refusing to apply a sum of money, which he had realized by a sale of the lands of an incorporated company known as "The Empire Gold Mining Company," in satisfaction of a judgment in plaintiff's favor against the company.

In support of his allegations, the plaintiff offered in evidence a record of a judgment by confession, made before the clerk of the county on the 22nd day of August, 1871, of which the following is a copy:

"*W. F. Davidson* v. *J. A. Smith, President Empire Mining Company.* I, J. A. Smith, president of the Empire Mining Company, defendant, confess judgment in favor of W. F. Davidson, the plaintiff above named, for three thousand eight hundred and one dollars and sixty-four cents, with interest thereon from the 30th day of December, 1868, and authorize the entry of judgment therefor against said Empire mining company. This confession of judgment is for a debt now justly due said plaintiff by said defendant, arising from an acceptance of a draft, of which the following is a copy:

'CHARLOTTE, N. C., 1st October, 1868.

Exchange for $3,801.64.

Sixty days after date pay to the order of M. P. Pegram, cashier, thirty-eight hundred and one dollars and sixty-four cents, value received, and charge the same to account of

W. F. DAVIDSON.

To J. A. SMITH, ESQ.,

Charlotte, N. C.'

On the face of which was written:

'Accepted, payable at the First National Bank of Charlotte. J. A. SMITH.'

Witness my hand and seal, this the 22nd day of August, 1871.'" (Signed by J. A. Smith, president Empire mining company, and verified by his oath and witnessed by E. A. Osborne.)

Thereupon, the clerk entered judgment, in favor of the plaintiff, against J. A. Smith, President, &c., on the said 22nd of August.

He also showed, that an execution had issued under this judgment and gone into the hands of defendant's predeces-

sor, who had returned the same, as "levied on the lands of the defendant," it being the same land afterwards sold by the defendant, which execution was in the following words:

"Whereas, judgment was rendered on the 22nd day of August, 1871, in an action between W. F. Davidson, plaintiff, and J. A. Smith, Prest. Empire mining company, defendant, in favor of said W. F. Davidson against the said J. A. Smith, Prest., &c., for the sum of forty-two hundred and eighty-three dollars, and thirty cents, as appears to us by the judgment roll, filed in the office of said court, and whereas, the said judgment was docketed in said county on the 22nd day of August, 1871, and the sum of forty-two hundred and eighty-three dollars and thirty cents, is now actually due thereon, with interest on thirty-eight hundred and one dollars and sixty-four cents, from the 22nd day of August, 1871, and also the sum of eight dollars and seventy cents, for costs and charges in the said suit, and expenses allowed by law: You are therefore commanded, as often before commanded to satisfy the said judgment out of the personal property of the said defendant within your county, or if sufficient personal property cannot be found, then out of the real property in your county belonging to such defendant, on the day when the said judgment was so docketed in your county or at any time thereafter in whose hands soever the same may be, and further, to return this execution before the judge of our superior court, on the 8th Monday after the 4th Monday in September, 1871.

Witness E. A. Osborne, clerk of our said court, at office in Charlotte, on the 8th Monday, after the 4th Monday in March, 1871, and the 95th year of American Independence."

(Issued the 22nd day of August, 1871, and signed by the clerk.)

On the 12th day of February, 1873, the plaintiff caused another execution to issue, similar in all respects with the

above, except as to date, which went into the defendant's hands, and was returned by him, unsatisfied, and since then no other execution has issued under said judgment.

The plaintiff was then examined as a witness for himself, and testified that the debt for which the judgment was confessed was due him from the company as commissions for services rendered it in the purchase of the very land sold by the defendant, and that J. A. Smith was the president of the company. He also proved that the defendant sold the land as the property of the company on the 5th day of September, 1874, and that he had applied the proceeds to another judgment against the company, junior in point of date, but which was admitted to be regular.

The defendant, in his answer, admits the sale, and the application of the proceeds, as alleged, but defends the action upon the ground that the judgment confessed in favor of plaintiff was irregular, because not conducted according to the provisions of the statute, and that at most it was not a judgment against the "Empire Gold Mining Company," but against J. A. Smith individually. The court intimated the opinion that the judgment was not in law one against the said company, and in deference thereto, the plaintiff took a nonsuit and appealed.

Messrs. Shipp & Bailey, for plaintiff.
Messrs. Jones & Johnston, for defendant.

RUFFIN, J. As the case discloses the fact that there was no execution under the plaintiff's judgment in the defendant's hands at the time of his sale, he has a complete defence against the action, as his sale could only convey to the purchaser the land subject to the lien of plaintiff's judgment, provided it be a prior valid one. But as neither the counsel for plaintiff or defendant urged this point, notwithstanding their attention was called to it, we presume it is the wish

of the parties, in order to avoid further litigation, to have settled the points as to the validity and effect of the judgment confessed to the plaintiff before the clerk, and therefore we have given those matters our consideration.

The provisions of the Code of Civil Procedure, sections 325, 326, under which this proceeding was attempted, have seldom been before this court for consideration, and in no instance, so far as is known to us, have they been the subject of judicial construction by the court. That duty devolves upon us, and in its discharge we have endeavored fairly to ascertain the legislative will, being careful not by a too narrow construction to thwart it, or by a too liberal one to extend it beyond that which was intended.

Of the requirements of the statute, some are matters of form and possibly may be deemed merely directory; but there are others essentially matters of substance, a strict compliance with which is absolutely demanded, and without which, the proceeding is void. Amongst the latter, as it seems to us, is that contained in sub-division 2, of section 326, of the code, to the effect that the statement in writing, which the party confessing the judgment is required to sign and verify by his oath, *must state concisely the facts out of which it* (the indebtedness) *arose, and must show that the sum confessed therefor* is justly due.

The object of the statute in this is to protect the other creditors of the debtor; to enable them, not only to see the extent of his liabilities, but to test the *bona fides* of this particular debt to which he is giving a preference; and that they may have full opportunity to do this, the parties are commanded to spread upon the record specifically the circumstances and business transactions out of which it originated. A mere statement that the defendant is indebted to the plaintiff in a sum certain "arising from the acceptance of a draft, of which the following is a copy," &c., falls far short of the demands of the statute. What was the real

consideration of that draft? the time and the manner of its creation? is the information required to be given, and this, that others interested may be able to try the truth of the statement, by comparing it with their previous knowledge of the condition and conduct of the parties. It is not at all the shape of the demand, or its amount, at the time the judgment is confessed, that the law demands to know, but its previous history and its exact consideration.

Compared with these requirements, how meagre is the information, as to the consideration of the debt and the transaction out of which it grew, is the statement of the debtor when confessing the judgment under consideration? All the judgment roll discloses is that on the 1st of October, 1868, the creditor, W. F. Davidson, gave a sixty day draft on J. A. Smith, Esq., for the sum of $3,801.64, which the said J. A. Smith accepted, payable at bank, and that upon such a draft, judgment was confessed, on the 22nd of August, 1871, by Smith as "President of the Empire mining company," without explaining, or attempting to explain, what connection the company had with the transaction, or in what matter it became indebted to the party to whom the judgment was confessed. When the creditor after a lapse of ten years comes to be examined as a witness in his own behalf, he is able to say that the debt was due him from the company on account of services rendered it in effecting the purchase of a certain tract of land.

Why was this information not given at first, that others interested, and who might know the parties and their circumstances and business transactions and connections, might test its accuracy and good faith? Could there be any more striking illustration of the wisdom of the requirements of the statute than is afforded by this case? especially if we consider, in connection with it, the plaintiff's letter, written on the 7th of March, 1872, and made a part of the case, in which he declares that he has caused an execution to issue

under this judgment, so confessed to him, not because the amount of the judgment was truly due him from the company, but in order that he might purchase the very land, out of which this controversy has grown, for another party, at a nominal price, and as a means of curing a defective title to the land which that party had previously obtained.

So that our conclusion is that the judgment, confessed as it was, upon so defective a statement of the facts out of which the debt arose, is void, a proper statement being necessary to give the court jurisdiction.

But supposing this was not so, and that this was a valid judgment between the parties, and would, upon a direct proceeding to impeach it, be so declared to be, it still remains for us to enquire how far it affected the lands of the Empire gold mining company, and whether the same could be sold thereunder.

By reference to the record it will be seen that "J. A. Smith" is the party, declared, in the statement which makes part of the judgment-roll, to be the defendant. It is true he speaks of himself as "president of the Empire company," but the company, though judgment is authorized to be entered against it, is nowhere spoken of as the defendant, or as owing the debt for which the judgment is confessed; on the contrary, the statement acknowledging the debt, which the statute directs to be signed by *the defendant*, is signed by *J. A. Smith, president of Empire mining company*, and the draft, which is the only evidence of indebteness whatsoever, is one of J. A. Smith, simply, and is accepted by him in his individual capacity, and not as president of the company; and, above all, when the clerk comes to enter up judgment on the judgment docket, it is entered, not against the company, but against *J. A. Smith, Prest. Empire mining company;* and when executions are issued under the judgment, they are, in every instance, issued against J. A. Smith

as the defendant, and the sheriff is commanded to make the money out of his property.

In the case of the *Insurance Company* v. *Hicks*, 3 Jones, 58, the judgment was, like this, rendered against one "Jordan, president of the Mantio company," and under an execution, running in the same way, the sheriff seized the property of the company and sold it, and this court held that he could not justify under it, that the judgment was against Jordan individually, and not against the company.

The plaintiff's counsel assumed the further position that the judgment was intended to have been confessed by the Empire gold mining company, and that he should have been permitted to show this by parol, and he cited us to Freeman on Judgments, section 154, as authority for this. This author does say, that it sometimes happens that the name of a party to a judgment is incorrectly stated, and that when such is the case the party intended to be named in the judgment may be connected with it by proper averments, supported by proper proofs, and he refers us to many decided cases in support of his proposition. In looking to the cases, we find they all go just to the extent that when a party is sued by a wrong name, and the writ is actually served on the right person and he fails to appear and plead the matter in abatement, and judgment goes against him, though by the wrong name, he is concluded. So in this court, in the case of *Aycock* v. *R. R. Co.*, 6 Jones, 232, where the writ issued against an officer of the company and was served on him, but the declaration was against the company and the judgment was so entered against the company, it was held that the company was bound by the judgment, and the case was distinguished from the other case of *Insurance Company* v. *Hicks*, *supra*, on the very ground that the judgment had been entered, not against the officer but against the company. But no case goes to the extent of saying that, where a judgment is confessed by one person,

against himself, and it is so entered of record, it may be shown that it was intended to have been entered against another. And we take it, that under our new system there will be less liberality in such matters than under the old; for judgments have ceased to be merely the recorded conclusions of the law as to the rights of suitors in court, but have been made to perform some of the functions of a mortgage, and to act as securities for future and contingent liabilities; so that it is, now, of as much consequence that judgments should be truly docketed, as that mortgages and deeds in trust should be truly registered.

We concur with the rulings of His Honor and declare there is no error.

No error. Affirmed.

K. M. C. WILLIAMSON v. LOCK'S CREEK CANAL COMPANY.

Offer of Compromise.

An offer to compromise a suit under section 328 of the Code must be made by *all* the defendants or by their common attorney.

MOTION of defendant (in a case removed from Cumberland) to tax costs against the plaintiff, heard at December Special Term, 1880, of ROBESON Superior Court, before *Avery, J.*

Motion refused, appeal by defendant.

Mr. Geo. M. Rose, for plaintiff.

Messrs. Rowland & McLean and *W. A. Guthrie*, for defendant.

SMITH, C. J. The action is to recover damages for diverting the flow of water from its natural channel to the plaintiff's mill, and diminishing the former supply, in which a verdict for one penny was rendered. The case stood for trial on Wednesday of the second week of the term of Robeson superior court which began on October 25th, 1880, but was continued and tried at a special term held in December following. On October 26th, 1880, a proposition was made to the plaintiff in writing and in these words: In behalf of the defendants, I offer to allow judgment to be taken against the defendants in the above action (describing it by its title) for the sum of fifty dollars with costs. (Signed by A. A. McKeithan.)

The defendants proposed to show in support of their motion to tax the plaintiff with the costs accrued since his failure to accept the offer, that it was made by the authority of all the defendants, and that the defendant McKeithan was president of the corporation and in that capacity had retained the attorney who was defending the action. The evidence was rejected, and the court being of opinion that the offer was not a compliance with the provisions of section 328 of the Code, refused the motion and adjudged the costs against the defendants.

It is obvious the offer, to be sufficient under the statute, must be in a form that will enable the plaintiff, if he accepts it, to have judgment entered by the clerk conformably to the offer. It must consequently come from all the defendants, or their common attorney at law, since otherwise the clerk would not be authorized to enter judgment against all. It is equally plain that a verbal authority to be supported by intrinsic proof only, if indeed any such authority can be conferred upon one of several defendants by the others, to assent to such a record, will not warrant the entering up of judgment against all. The plaintiff's right is to have judgment upon the submitted offer in the pending ac-

tion and consequently against all whom he has sued, and unless the offer is commensurate with this right, it is unavailing under the act.

This seems to be the construction put upon the section by the courts of New York, so far as our limited facilities of access to their reports will permit an examination to be made, and in our opinion is a fair and reasonable interpretation of its requirements. *Burney* v. *LeGal*, 19 Barb., 594; *Schneider* v. *Jacobi*, 1 Duer., 694.

There is no error and the judgment must be affirmed.

No error. Affirmed.

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*R. W. GLENN and others v. THE FARMERS' BANK.

Proof of claim to share in fund—Laches.

A creditor of an insolvent bank whose assets are *in custodia legis* under decree of court, will be let in to prove his debt after the day fixed for proofs, if he is not guilty of laches; but if he fail to make application to do so until after the fund is distributed, having full knowledge of the proceeding, he will be barred of his right.

(*Glenn* v. *Bank*, 80 N. C., 97, cited and approved.)

PETITION for *certiorari* heard at January Term, 1881, of THE SUPREME COURT.

Messrs. Battle & Mordecai, for petitioner, Cowles.

Messrs. Thomas Ruffin and *Scott & Caldwell*, for defendant.

ASHE, J. This is a petition for a *certiorari* as a substitute

*Ruffin, J., appeared as counsel in this case before his appointment as associate justice.

for an appeal in this cause, which was a creditors' suit against the defendant bank, its trustees and stockholders, to have its property applied to its debts, and to have the latter assessed for any deficiency that might be found, according to their respective liabilities under the charter.

At spring term, 1876, of Guilford superior court, the plaintiff, Glenn, obtained a judgment subjecting all the effects of the bank to the payment of himself and such other creditors as should prove their debts within a certain time to be appointed under the direction of the court. At the same term, Peter Adams was appointed a receiver, and two commissioners were appointed to advertise for all creditors to prove their debts by a certain time, or be forever barred. Accordingly, the commissioners advertised in the *Greensboro Patriot* for all creditors to prove their debts by the 5th of August, 1876. Most of the creditors and bill-holders of the bank proved their claims within the time, and the commissioners made their report to spring term, 1877, and the court adjudged that all others were forever barred from any claim upon the funds in the hands of the receiver.

At December term the petitioner (Calvin J. Cowles) applied to the court to be allowed to become a co-plaintiff and to prove his claim, alleging that he knew of the pending suit, but the advertisement had escaped his attention. The application was denied. And again at December term, 1878, he made a similar application which was also refused upon the ground that he had not proved his claims within the time fixed in the advertisement, and that the matter had been adjudicated, from which ruling the petitioner appealed to this court, where at January term, 1879, it was held, no apportionment then having been made of the funds in the hands of the receiver, that if the petitioner had no information of the advertisement limiting the time for proofs and is not chargeable with negligence in bringing forward his claims, his application should have been granted, and

it was the duty of the judge to ascertain and determine these precedent facts before giving a peremptory refusal; and if the petitioner "was not guilty of wilful laches or unreasonable neglect, he ought not to be concluded by the decree from the assertion of his right as a creditor to share in the common fund." 80 N. C., 97.

At fall term, 1879, there was no motion made by the petitioner to be allowed to be made a party to the suit, and no other order in the cause, except that the plaintiff, Glenn, comes into court and in his own proper person files his *retraxit*, which was not opposed by those who had come in and proved their claims. The case being thus determined was put off the docket.

At spring term, 1880, before *Seymour, J.*, on Friday of the second week of the court, it being the 12th day of March, the petitioner through his counsel moved to restore the case to the docket, and be allowed to be made a plaintiff. His Honor refused the motion, and directed the clerk to enter the motion on his minutes and record its refusal, which was then and there done on his rough minutes, which were taken from the office of the clerk and have not since been found. The following order was then made and signed by Judge *Seymour:* "The above action having been dismissed from the docket at fall term, 1879, upon a *retraxit* entered therein by the plaintiff, Calvin J. Cowles at this term of the court moves that the case be restored to the docket and that he be allowed to make himself a party plaintiff and to carry on this suit; and the court upon consideration thereof refuses to restore the action to the docket and to make said Cowles a party, and dismisses the motion; and it is ordered that said Cowles pay the costs of said motion." Shortly after this term, the plaintiff's counsel called on the clerk for a transcript of the record of the proceedings in the case which were had on Friday, the 12th day of March, which the clerk was unable to furnish in consequence of the loss of his rough minutes. The counsel of petitioner on the 23d of

March served a notice of appeal on the plaintiff, Glenn, and a copy of a case on appeal upon the said plaintiff's attorney which was not accepted by him because it was not signed by the petitioner or any attorney, and because no bond had been filed in the case. The bond alleged by the petitioner to have been filed is blank and was not filed with the clerk until more than ten days after the adjournment of court and the rendition of the order of the judge.

After the fall term, 1879, when the *retraxit* was entered and the case put off the docket, and the following December term, 1879, had passed without any motion or order in the cause, the receiver proceeded to distribute the funds in his hands, and had paid out all of them prior to the date of the notice served on him that a motion would be made to restore the case of *Glenn* v. *Farmer's Bank* to the docket. When that case was decided at January term, 1879, of this court, the assets of the bank were still in the hands of the receiver, and unapportioned, and it was in view of that status of the fund, this court then held that the petitioner should have been allowed to come in and make himself a party plaintiff and prove his claim, if he could show that he had no information of the advertisement limiting the time for making proof of his demands, and was not guilty of any unreasonable negligence. But the case now presents quite a different aspect. For when the motion was made in behalf of the petitioner at spring term, 1880, the funds had all been distributed by the receiver, and there was nothing in his hands for the action of the court to operate upon. So long as the fund remained *in custodia legis*, in a proper case, where there is no negligence, the court will let in a creditor to prove his debt even after the time fixed for proofs. But if he fail to make application to be made a party and prove his debt until after the fund is distributed, he will be debarred of the benefit of the decree. Adams Eq., 262; 3 Eng. Chan. Rep., 326; *Glenn* v. *Bank*, 80 N. C., 97.

If the petitioner had moved in the matter at fall term, 1879, or at the December term of the same year, his motion would have been in apt time, for the fund was still remaining in the hands of the receiver. But he neglected to take any step at either of these terms to avail himself of the benefit of the decision of this court at January term, 1879, and delayed making application in the matter until the last day of the spring term, 1880, of the superior court, before which time all the assets had been distributed. The petitioner was clearly "guilty of wilful laches or unreasonable neglect," and has no right to partake of the common fund. The writ of *certiorari* must therefore be denied, and the petition dismissed at the costs of the petitioner.

PER CURIAM. Petition dismissed.

DAVID STRADLEY, Adm'r, v. H. W. KING and others.

Executors and Administrators—Order setting aside sale of land for assets.

Upon motion to vacate an order licensing the sale of land for assets, it appeared that the petition filed was not verified by administrator's oath and the guardian for infant defendant had not answered; the sale was confirmed on the day it was reported without notice to defendant; the price was not paid in money; the administrator bought at his own sale through an agent, and there were inaccuracies in his account; *Held* (1) that while the statute requiring verification is directory, yet there is no error in setting aside the order that the case may be reopened and defendant allowed to answer, and (2) that the motion may be treated in this case as an action to impeach the judgment.

(*Foard* v. *Blount*, 3 Ired., 576; *Brothers* v. *Brothers*, 7 Ired. Eq., 150; *Roberts* v. *Roberts*, 65 N. C., 27; *Shearin* v. *Hunter*, 72 N. C., 493; *Froneberger* v. *Lewis*, 79 N. C., 426; *Blue* v. *Blue*, *Ib.*, 69; *Keaton* v. *Banks*, 10 Ired., 381; *Cowles* v. *Hayes*, 69 N. C., 406; *Vick* v. *Pope*, 81 N. C., 22; *Hervey* v. *Edmunds*, 68 N. C., 243; *Wolfe* v. *Davis*, 74 N. C., 579; *Mabry* v. *Erwin*, 78 N. C., 46, cited and approved.)

STRADLEY v. KING.

MOTION by defendants to set aside a judgment confirming a sale of land for assets, heard at June Special Term, 1880, of HENDERSON Superior Court, before *Schenck, J.*

The plaintiff appealed from the judgment.

Messrs. J. H. Merrimon and *Merrimon & Fuller*, for plaintiff.
Messrs. W. W. and *Armistead Jones*, for defendants.

SMITH, C. J. The defendants, after due notice, apply to the probate court to vacate and set aside the judgment rendered therein on September 4th, 1871, whereby the sale of the tract of land before authorized for the payment of the debts of the intestate, then reported by the plaintiff, was confirmed and title directed to be made to the purchaser; and they assign as the grounds of the application inadequacy of price, false information conveyed in the report, fraud and collusion between the purchaser, (the attorney and adviser of the plaintiff) and the plaintiff, whereby the land was bought in for and secured to the latter, and irregularity and precipitancy in obtaining the judgment. An answer was put in by the plaintiff controverting these allegations and numerous affidavits filed by each party.

Upon the hearing before the judge of the superior court, to which the case was carried by appeal, he finds upon the evidence adduced the following facts:

1. The petition for the sale of the land is not verified by the oath of the administrator, nor was answer thereto made by the guardian of the infant defendants, as directed by law. Bat. Rev., ch. 45, §§ 62, 64.

2. The sale was confirmed on the day the report was made without notice to the defendants or to the guardian, and upon only such evidence of the fairness of the sale and the sufficiency of the sum bid as was furnished in the report, and it did not bring its market value.

3. The price was not paid in money but largely in claims

against the intestate, taken at less than their face value and surrendered and accepted at full value.

4. There was an antecedent agreement between the purchaser and the plaintiff that the land should be bid off by the former for the latter, although the purchaser, Osborn, did in fact buy for himself, and some months after getting title himself, sold and reconveyed for the same consideration to the plaintiff, and all these matters were well understood by him.

5. There are inaccuracies in the administration account rendering doubtful the alleged necessity for the sale.

Thereupon the court gave judgment setting aside the orders licensing the sale and confirming it as reported and directing title to be made, and allowing the defendants (who were then under age but have since attained majority) and the guardian of the infant defendant to put in answers to the plaintiff's complaint and contest the proposed sale, and the plaintiff appealed.

The case is not complicated by subsequent dispositions of the property to innocent purchasers and the disturbance of new interests thence arising, but the administrator still retains the land acquired in the manner stated, and claims it as his own. It is too well settled to need a reference that a personal representative, commissioner, or other person acting in a fiduciary capacity in the disposal of property, cannot buy directly or through the intermediate agency of another, and if he does so and acquires title by successive conveyances to and from such agent, he will be deemed to hold still upon the same trusts, as before, or the sale will be adjudged void at the election of those interested. The increased value imparted to the land by reason of improvements made in the reasonable expectation of acquiescence on the part of the latter, ought however in such case to be allowed out of the proceeds of sale or be repaid by those who reclaim the property, if there be a deficiency upon a

statement of the accounts. *Foard* v. *Blount*, 3 Ired., 576; *Brothers* v. *Brothers*, 7 Ired. Eq., 150; *Roberts* v. *Roberts*, 65 N. C., 27; *Shearin* v. *Hunter*, 72 N. C., 493; *Froneberger* v. *Lewis*, 77 N. C., 426.

While we consider the statutory requirement that the petition for an order of sale of the decedent's lands shall be supported by oath and that an answer be put in on behalf of infant defendants, directory, and its non-observance not fatal to the validity of the decree of sale made without, yet this departure from the statute followed by the precipitate action of the court in confirming the sale on the very day when it was reported and without opportunity afforded for objection, in our opinion, warrants the order which re-opens the case for such defences as the infant defendants may be able to set up. Bat. Rev., ch. 45, § 62, 64.

If the defendants were not entitled to previous notice of the intended motion to confirm before the probate judge, as intimated in *Blue* v. *Blue*, 79 N. C., 69, yet it was eminently proper to give it in the present case where the administrator had arranged for his own purchase of the property and was personally interested in the confirmation of his sale. While the lapse of time since, during which the defendants have slumbered upon their rights, may debar those who were then of full age, and perhaps such as have attained their majority more than three years before the commencement of this proceeding, one of them is still under age and is protected from the consequences of the delayed action.

The next point not free from difficulty is as to the mode of procedure adopted and the remedy sought through it. It is a well established rule that relief may and must be had by motion in the cause while it is pending and afterwards by a new and independent action. An irregular judgment is, as defined in the opinion in *Keaton* v. *Banks*, 10 Ired., 381, a judgment which has been signed upon the record and was not in fact the judgment of the court, which the

court ought not to have given and which the plaintiff or his attorney knew the court would not give or allow, may be corrected afterwards, if application be made within any reasonable time, having regard to the rights of third persons, as well as to those of the parties, as said in *Cowles* v. *Hayes*, 69 N. C., 406, and *Vick* v. *Pope*, 81 N. C., 22. See also *Hervey* v. *Edmunds*, 68 N. C., 243; *Wolfe* v. *Davis*, 74 N. C., 597; *Mabry* v. *Erwin*, 78 N. C., 46.

While the parties seem to regard the application as a motion in the cause, and as such it is admissible to correct the irregularly entered judgment, we see no reason why it may not be treated as an action to impeach the judgment complained of. The plaintiff is brought into court by notice, rendered unnecessary by the plaintiff's appearance, an impeaching complaint in the form of a petition is filed, and an answer thereto put in by the administrator, evidence is offered and heard, and without any demand for a jury or objection to the course of the judge in passing upon the facts, he finds them and thereon bases his judgment. All the substantial requirements of a new and independent action seem to meet in the course pursued to bring up the matter complained of for a re-hearing.

We think, therefore, His Honor properly took cognizance of the cause and proceeded to determine it, and we approve his ruling in the premises.

There is no error and the judgment is affirmed. This will be certified to the superior court of Henderson county and it is so ordered.

No error. Affirmed.

W. H. HUGHES v. J. H. and B. F. WHITAKER.

Executors and Administrators—Statute of Limitations.

Where an action was commenced in 1867 against an executor within three years after his qualification to recover a debt of his testator and the same is still pending, and the plaintiff brings another action in 1877 to secure the assets of the deceased debtor, alleging their fraudulent disposition by the executor and others; *Held*, that the latter action is in aid of and not a substitute for the former, and that the plea of the statute of limitations will not avail the defendants.

(*Blount* v. *Parker*, 78 N. C., 128; *Spruill* v. *Sanderson*, 79 N. C., 466, cited and approved.)

CIVIL ACTION tried at Fall Term, 1880, of HALIFAX Superior Court, before *Graves, J.*

The plaintiff appealed from the ruling of the judge below.

Mr. R. B. Peebles, for plaintiff.

Messrs. Thos. N. Hill, S. Whitaker and *Day & Zollicoffer*, for defendants.

SMITH, C. J. L. H. B. Whitaker died in the year 1865, indebted to John Summerell, the plaintiff's testator, in a large sum, and soon thereafter his will was proved and letters testamentary issued to the defendants, J. H. and B. F. Whitaker.

This action, commenced on January 9th, 1877, by said Summerell on behalf of himself and other creditors of the deceased debtor, against his executors and the other defendants, and prosecuted by the plaintiff since his death, seeks to secure the assets, personal and such as were derived from a sale of the devised lands, which, it is charged in the complaint, under a fraudulent combination among the defendants, have been illegally disposed of and appropriated to their own use. The prayer is that these pretended alien-

ations be declared void, and the property secured and placed in the hands of a receiver to meet the claims of the creditors. The defendants deny the allegations of fraud, averring that the property of the deceased debtor has been sold *bona fide*, for a fair price, and the proceeds paid over to the creditors in a due course of administration, and they rely upon the statutory bar for that the action was not commenced within seven years after the death of the debtor and the qualification of the executors. To this answer the plaintiff puts in a replication, intended to have the effect and which should have been in the form of a demurrer, insisting on the insufficiency of the defence under the statute, because the answer fails to show that the assets "have been paid over to the legatees of L. H. B. Whitaker or to the University of North Carolina," and that it is therefore unavailable to the executors. The plaintiff further says that an action was commenced in 1867 or 1868 in the suporior court of law of Northampton county, and within three years after the qualifications of the defendants, as executors, by the said Summerell, to recover the said indebtedness, and the same is still therein depending against them.

To the replication the defendants demur, assigning several grounds of demurrer based upon the additional fact introduced in the replication, that there is a prior action depending against the executors and affirming the sufficiency of the answer in setting up the statutory bar.

Associating the facts alleged in the complaint and in the replication, as the cause of action, the present suit aims to get hold of and secure funds belonging to the deceased debtor, which, by alleged fraudulent contrivances, have been passed into the hands of the other defendants, and which ought to be applicable to the recovery of the plaintiff, when his suit is favorably determined, and to such other debts as are recoverable. It is therefore in aid of, and not a substitute for, the preceding suit. If the plaintiff, upon obtaining

judgment in his first action and failing to make his debt out of the executors, can then pursue the fraudulently alienated estate, and no delay can be imputed to defeat him, why may he not now pursue and secure it to await the result of his other suit, so that it may not become fruitless? We think this remedy is open and is not obstructed by the lapse of time, since, until he recovers judgment, his claim as a creditor is not established. The proceeding may as well be commenced now, to prevent further loss, as after the determination of that action. We may remark further, we do not see how the defendants should be required to allege payment over to legatees or to the University, when the whole fund is alleged to have been used in payment of creditors, and none was, or in fact could be, paid over to them. The pleadings do not show when the fraudulent alienations were made, whether after the first action was commenced or before, nor when the fraud was first discovered, and the primary action for relief in cases where the courts of equity could alone afford it, as in the present case, is only barred after the lapse of the limited time from the discovery which alone puts the statute in operation. C. C. P., § 33, par. 9; *Blount* v. *Parker*, 78 N. C., 128; *Spruill* v. *Sanderson*, 79 N. C., 466.

The demurrer must therefore be overruled, and, under the agreement of counsel, the defendants have leave to put in an answer to the replication. To this end the cause must be remanded to the court below for further proceedings therein.

Error. Remanded.

JAMES A. OATES v. E. J. LILLY.

Executors and Administrators—Statute of Limitations.

Any defence open to a personal representative (here the statute of limitations) may be set up by one creditor of the decedent's estate against the claims of another. And where such claim is barred by lapse of time, the promise of the personal representative to pay it will not repel the statute, though when in writing founded on sufficient consideration and the possession of assets, it will bind the promisor personally.

(*Graham* v. *Tate*, 77 N. C., 120; *Wordsworth* v. *Davis*, 75 N. C., 159; *Williams* v. *Maitland*, 1 Ired. Eq., 92; *Billews* v. *Boggan*, 1 Hay., 13; *Sleighter* v. *Harrington*, N. C. Term Rep., 249, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of MOORE Superior Court, before *Eure, J.*

Judgment for plaintiff, appeal by defendant.

Messrs. Hinsdale & Devereux, for plaintiff.
Messrs. Gray & Stamps, for defendant.

SMITH, C. J. The controversy in this case is between the plaintiff who instituted the action on behalf of himself and the other creditors of the intestate, John McF. Baker, and E. J. Lilly whose claims he contests and alleges to be barred by the statute of limitations. Those claims as described in the complaint of said Lilly arise upon the transfer and endorsement to him of several notes and bonds executed by different debtors to the firm of McNeill & Baker, of which the intestate was a member, made many years before the intestate's death in 1870, and on account for goods sold and delivered to the intestate in November, 1869. The material facts in the case are contained in the special verdict of the jury who find the several notes and bonds set out in the complaint to be valid debts and the intestate to have become liable therefor by virtue of the endorsement of said firm, and

against the demand for goods sold and delivered for want of any evidence thereof; that the intestate died in August, 1870, and letters of administration on his estate issued in September following to George S. Cole; that within one month thereafter the bonds and notes were presented to the administrator as evidence of the intestate's indebtedness by said Lilly as endorsee, and the administrator did not then and does not now dispute their validity, but said he admitted them as debts due and owing by the intestate; that the notes without further demand were filed with the probate judge on October 25th, 1876; that less than three years, during which the statute was in operation, after the respective causes of action had accrued upon the endorsements when the claims were exhibited to the administrator, and more than that time had passed before they were filed in the probate court; and that the intestate's estate was insufficient to pay his debts and the costs and charges of administering it. Upon these facts the judge held that the statute was a bar and precluded the said Lilly from sharing with the other creditors in the distribution of the assets of the insolvent estate.

It is settled that this defence as well as other legal defences may be set up by one interested creditor against the claims of another, as the representative might himself do, since their rejection will enlarge the *pro rata* shares of such debts as are allowed. The complaint of each creditor is a distinct and direct proceeding against the intestate's estate. *Graham* v. *Tate*, 77 N. C., 120: *Wordsworth* v. *Davis*, 75 N. C., 159. This right of the creditor to oppose the claim preferred by another, grows out of his relations to the cause as a plaintiff with adversary interests in this respect against his associate plaintiffs, since in a separate action against the personal representative, he is not bound to interpose the statute to defeat a just claim, and the creditor's resistance when admissible is effectual only when it would have been if made by the

representative himself. *Williams* v. *Maitland*, 1 Ired. Eq. 92. It is in our opinion correctly maintained in the argument for the contesting plaintiff upon the weight of authority (although the contrary was held by a divided court in *Billews* v. *Boggan*, 1 Hay., 13) that the promise of the personal representative to pay the debt of the deceased, barred by the lapse of time, will not repel the statute and revive the original cause of action, although when in writing and founded on a sufficient consideration and the possession of assets, it will bind the promisor personally. *Sleighter* v. *Harrington*, Term Rep., 249.

Upon the hearing we were some what, inclined to bring the case within the proviso (Rev. Code, ch. 65, § 14,) which declares "that if any creditor after demanding his debt or claim shall delay to bring suit at the special request of the executor or administrator, the time of such indulgence shall not be reckoned in the time for bringing the action.' But we are not able to construe the finding of the jury that the debts were recognized and admitted to be just as equivalent to the "special request" for delay required in the proviso in order to such effect, and hence the running of the statute was not thereby suspended. Whether then the time be computed from January 1st, 1870, when the suspension of the statute of limitations in certain cases terminated, or from an alleged new promise of the administrator, the result is equally fatal to the claim.

There is no error. Let this be certified for further proceedings in the court below.

No error. Affirmed.

C. P. MENDENHALL v. D. W. C. BENBOW, Adm'r.

Executors and Administrators—Partnership.

1. An administrator who settles an estate under decree of court, is protected against the claims of creditors and relieved from personal liability, if no *mala fides* be shown in his conduct of the proceedings.
2. The claims of a surviving partner upon the proceeds of sale of deceased partner's half of real estate (here mill property) to reimburse him to the amount of half the expenditures incurred in the conduct of the joint business and improvements put upon the property, constitute a prior incumbrance and must be paid to the postponement of creditors of the deceased partner. See Bat. Rev., ch. 42, § 2.

(*Williams* v. *Maitland*, 1 Ired., Eq., 92; *Beal* v. *Darden*, 4 Ired., Eq., 76; *Deberry* v. *Ivey*, 2 Jones Eq., 370; *Baird* v. *Baird*, 1 Dev. & Bat. Eq., 524; *Ross* v. *Henderson*, 77 N. C., 170; *Patton* v. *Patton*, Winst. Eq., 20; *Summey* v. *Patton*, *Ib.*, 52; *McCaskill* v. *Lancashire*, 83 N. C., 393, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of GUILFORD Superior Court, before *Seymour, J.*

The plaintiff appealed from the judgment below.

Mr. John N. Staples, for plaintiff.
Mr. Jas. T. Morehead, for defendant.

SMITH, C. J. The plaintiff commenced his action, on January 26th, 1869, against L. D. Orrell to recover the moneys due on three several bonds executed by him at different dates during the year 1864, the scaled value of which principal is in the aggregate $559.32 Orrell died in April thereafter, and the defendant, having been appointed his administrator with the will annexed became a party in his stead, and at spring term, 1870, filed an additional answer in which he denies that he has any assets applicable to the plaintiff's demand.

The testator and one George W. Yarboro, partners under

the name of Orrell & Yarboro, were as such owners of a small tract of land on which had been erected a valuable mill which was run and operated for their joint benefit, and the testator also owned a small lot whereon he resided at the time of his death, which was afterwards assigned to his widow as part of her dower.

The estate being insolvent, proceedings were instituted in the names of the defendant, as administrator, the said Yarboro and Eliza Orrell, the widow, against the devisees for license to sell the testator's moiety in the mill property and the reversionary estate in the lot, under which both were sold, the former at the price of $1,895, and the latter for $50, whereof $141 was allowed for deficiency in the former allotment of dower.

Yarboro asserted a claim upon the funds for expenditures made by him in the reparation and improvement of the mill and machinery which under the covenant obligation of the deceased entered into October 7th, 1868, was to be a lien on the proceeds and profits of the mill and to be paid therefrom. To ascertain the amount of this claim and its validity and the resources of the firm, a reference was ordered and the referee reported that upon an adjustment of partnership matters the resultant indebtedness of the firm to Yarboro was $1,208.10, one-half whereof increased by the sum admitted in the said covenant to be also due him, and making in the aggregate $1,139.66, was a charge upon the fund derived from the sale of the testator's moiety of the mill property; and the court thereupon adjudged that the said Yarboro be paid his said claim, and that the residue after discharging the costs of the suit be retained by the defendant to be used in a due course of administration.

Upon the coming in of this report, His Honor ruled that the defendant was liable only for the moneys coming into his hands under the decree in that cause, and that it being unimpeached, it afforded the defendant full protection

against the claims of any creditor for so much of the fund as is therein appropriated to the widow in lieu of the residue of her dower and to the debt of the surviving partner.

To this ruling the plaintiff excepts and the grounds of his opposition are embodied in these propositions contended for in the argument of his counsel:

1. The claims allowed Yarboro were not sufficiently proved, nor resisted in good faith by the defendant as shown in the record.

2. The debts due the plaintiff were specialties and entitled to priority of payment over the debts due Yarboro by simple contract.

3. The issue as to the possession of assets refers to the time when the defense was set up and is not affected by payments made subsequently thereto.

These propositions in our opinion cannot be successfully sustained, and we concur in the rulings of His Honor upon them.

I. The disposition of the proceeds of sale of the testator's interest in the mill among the parties to that proceeding is at once binding on the defendant and a protection to him against creditors or others, as is every other judgment rendered against him *in invitum*, unless there is collusion or a culpable disregard of the interest committed to his keeping, when the exercise of a reasonable diligence would have prevented the loss. The rule of personal responsibility has thus been laid down: "It ought to be a plain case of neglect of duty which holds an executor responsible for a loss by holding on to property of this description, (stocks in a steamboat company) *bona fide* and in the exercise of his best judgment." GASTON, J., in *Williams* v. *Maitland*, 1 Ired., 92.

"An executor like other trustees is not to be held liable as insurers or for anything but *mala fides* or want of reasonable diligence." RUFFIN, C. J., in *Beall* v. *Darden*, 4 Ired. Eq., 76.

"He is answerable only for that *causa negligentia* or gross neglect which evidences *mala fides*." NASH, C. J., in *Deberry* v. *Ivey*, 2 Jones Eq., 370.

There are no facts shown to impeach the integrity of the defendant's conduct in the management of his suit to convert his testator's lands into assets, and to make him responsible for such as he was not permitted to receive, and which by the action of the court, when it does not appear that resistance would have availed anything on his part, were otherwise appropriated. It would be a hard measure of responsibility to hold trustees under such circumstances personally accountable although loss may have ensued.

II. But the proceeds of sale of the testator's half of the mill were properly chargeable with its share of the expenditures incurred by Yarboro in the conduct of the joint business and in the improvement put upon the common property enhancing its value; and the interest of the testator therein applicable to his individual debts, could be reached by his administrator only when they were discharged and that resultant interest ascertained. The act of assembly, (Bat. Rev., ch. 42, § 2) which destroys survivorship in joint estates whether real or personal, expressly provides that when such estates are held for purposes of trade, commerce or manufacture, and one tenant dies, the estate shall be "vested in the surviving partner in order to enable him to settle and adjust the partnership business or pay off the debts which may have been contracted in pursuit of the said joint business," and then he shall account to the parties entitled, as heirs, executors, administrators and assigns of the deceased partner. As each party has an equitable right, during the continuance of the partnership and until its business is settled, to have the partnership assets applied in extinguishment of the partnership liabilities for his own exoneration before any part can be taken for individual debts, so in case of death the surviving partner is vested

with the control of the joint property and may administer it in paying off the joint liabilities, and the representative of a deceased partner can only call on him for his share of what is left.

"There can be no division of partnership property" in the language of RUFFIN, C. J., in *Baird* v. *Baird*, 1 D. & B. Eq., 524, "until all the accounts of the partnership have been taken and the clear interest of each partner ascertained."

"When land is purchased with the money of a partnership and conveyed to partners by name" observes RODMAN, J., in the recent case of *Ross* v. *Henderson*, 77 N. C., 170, "the law considers the grantees as tenants in common and takes no notice of the equitable relations arising out of the partnership. In equity, however, it is held that the partnership agreement devotes the partnership property to partnership purposes and creates a trust in it for the security of the partnership debts. On the insolvency of the partnership, it is primarily applicable to the payment of the debts of the partnership to the postponement of the creditors of the several partners." See also *Patton* v. *Patton*, 1 Winst. Eq., 20; *Summey* v. *Patton*, *Ib.*, 52; *McCaskill* v. *Lancahsire*, 83 N. C., 393.

It is manifest then that if the claims of the surviving partner were truly due (and the objection is mainly directed to the insufficiency of the proof on which they were allowed) they constituted a prior incumbrance upon the fund and were properly discharged therefrom, and the adjudication in favor of their obligation cannot be assailed by the plaintiff in the absence of evidence of a fraudulent or collusive connivance of the defendant in bringing it about.

III. There is no *devastavit*, and no misapplication of assets can be imputed to the defendant so as to raise a question as to the dignity of the plaintiff's debts, since what was done

was by order of the court to which the defendant submitted.

IV. The issue raised by the answer is as to the possession of assets at that time; and as the defendants could not afterwards misapply any he then had to the plaintiff's injury, so he is not chargeable for any he may afterward have acquired.

It does not appear then that he had even such as were derived from the land sales. When those assets were received it does not appear. The land was sold in February, 1870, on a credit of six months, and while the payment was anticipated by the purchaser, it is hardly probable it was made when the answer was filed. But it is sufficient for the present purpose that it is not affirmatively shown that he then had the moneys, and until payment, they were not assets in his hands.

The plaintiff's exceptions are overruled and it must be declared there is no error in the record, and the judgment must be affirmed.

No error. Affirmed.

LEVI IVEY and others v. MARY McKINNON and others.

Guardian and Ward—Prochein Ami—Partition—Decree.

1. Where an infant sues or defends by guardian, the guardian must have a warrant, but a *prochein ami* need have none; and if in partition proceedings the interest of the latter is adverse to that of the infant, the decree therein will not on that account be disturbed unless fraud or collusion be established.

2. Where the decree in such case is impeached for error in law, by a proceeding in nature of a bill of review, it is not competent to introduce

other evidence to correct the statement of facts upon which the decree was made.

(*Latta* v. *Vickers*, 82 N. C., 501; *Stewart* v. *Mizell*, 8 Ired. Eq., 242 cited and approved.)

CIVIL ACTION tried at Fall Term, 1880, of CUMBERLAND Superior Court, before *Avery, J.*

Judgment for defendants, appeal by plaintiffs.

Messrs. Hinsdale & Devereux, for plaintiffs.
Messrs. McRae & Broadfoot, for defendants.

SMITH, C. J. At spring term, 1867, of the superior court of law of Cumberland, a petition was filed in the names of Duncan McKinnon, Archibald McKinnon (an infant appearing by his next friend, Stephen J. Cobb), and of Nancy, Sarah, James F. and John W. McKinnon (appearing by their next friend, the said Duncan McKinnon), in which they allege that they are tenants in common of certain lands therein described and which descended to them from Robert McKinnon, Senior, and Robert McKinnon, Junior, both deceased, and pray for partition and an assignment of their shares in severalty, to-wit: to the petitioners Duncan and Archibald each one-third and to the other petitioners the remaining one-third part. The order of partition was made and commissioners appointed to divide the lands, though no action in the premises was taken by them.

At fall term following, an amended petition, in the name of the same parties, was filed in which they represent that Duncan McKinnon, Senior, many years before by deed of gift, conveyed to his daughters, Catharine and Margaret, a tract of land in Cumberland county known as the "Ross place" and containing three hundred and ten acres, with a limitation over in case of their death without issue, to Robert McKinnon and his heirs; that the daughters both died

without issue and also the said Robert, intestate, leaving as his heirs at law the petitioners Duncan, a son, Archibald, a grandson representing his deceased father of the same name, and the other petitioners, grandchildren, representing the share of their deceased parent, John McKinnon; that in 1864, Robert McKinnon the elder, by deed of gift conveyed to his three sons, Andrew, Robert, and Archibald, three tracts of land, designated as the "Home place" and containing six hundred and sixteen acres, with a proviso that if either should die without issue, his share therein should go to the donor's other children; that John McKinnon died before the making of the deed, and Andrew and Robert afterwards, both without issue; that the other son, Archibald, died in 1865 intestate leaving an only child, the petitioner Archibald; that Robert McKinnon, Junior, the brother of the petitioner, Duncan, and uncle of the others, died intestate and without issue, seized in fee of an estate in a tract of one hundred and fifty-seven acres, and in like manner the said Andrew died seized of an estate in fee of a tract of two hundred and ten acres, to both of whom the petitioners are heirs at law and entitled to said lands in the proportion mentioned.

The petitioners ask for a division of these lands and the assignment of one-third part in severalty of the "Ross place," and the two tracts devised from Robert and Andrew to each of the petitioners, Duncan and Achibald, and to the others as a class representing their deceased father, and that the "Home place" be divided as the court "shall declare the rights of the parties" thereto.

The decree for partition was made and commissioners appointed and directed to allot one-third of the "Home place" to Duncan and two-thirds to Archibald, and to divide the other lands into three equal parts, assigning to each of them a share, and the other share to the other petitioners collectively. The lands were divided in accordance with the

order and report made to spring term, 1868, which was confirmed and ordered to be registered.

The present action begun May 5th, 1877, by the said infant children of John McKinnon, who were parties to the former proceeding and now appear by their next friend, Levi Ivey, since intermarried with their mother and co-plaintiffs in the action against the defendants, infant children of Duncan McKinnon, who has since died, and the widow and infant children of Archibald McKinnon also deceased, has for its object the setting aside the decree of partition which declares the rights of the parties and all subsequent proceedings pursuant thereto, to the end that there may be a re-division, allotting to the plaintiffs an equal share in all the lands, and they assign in their complaint the following grounds therefor:

1. That the former proceedings were without their knowledge.

2. That Duncan McKinnon who assumed to act as their next friend was not legally constituted such and could not bind them.

3. That the attorneys who conducted the proceeding had no authority to represent them.

4. That Robert McKinnon the donor was incompetent to make the deed and it was obtained by undue influence; and

5. That the decree is erroneous in law in that they are excluded in the division of the "home place," to which under the deed they were entitled to an equal share with the other tenants.

Answers were put in to the complaint and issues eliminated therefrom submitted to the jury, on the trial of which exceptions were taken by the appellants to the refusal of the court to admit certain testimony offered by them to give an instruction asked, and to the charge delivered, which are set out in the transcript. But a preliminary difficulty meets

the plaintiffs in the maintenance of their suit for the relief demanded which renders it needless to inquire into the sufficiency of the exceptions to the rulings of the court or the effect of the findings of the jury.

Infant plaintiffs in the absence of a guardian and with no legal capacity to act for themselves or to employ an attorney, pursue their remedies and assert their rights through the agency of a person, denominated their next friend, and acting in their behalf under the sanction of the court. He and not the infants is expected and required to protect their interests in the suit and to employ counsel; this is the practice in courts of equity. "When an infant claims a right or suffers an injury on account of which it is necessary to apply to a court of equity," says STORY, J., "his nearest relation is supposed to be the person who will take him under his protection and institute a suit to assert his rights or to vindicate his wrongs, and the person who institutes a suit in behalf of the infant is therefore termed his next friend." Story Eq. Plead., § 57. If an infant sues or defends by guardian, the guardian must have a warrant, but a *prochein ami* need have none. 6 Comyn Dig. Plead., 302.

It is objected, however, that the personal interest of the uncle in the subject matter was adverse to that of the infants whom as their next friend he undertook to represent and protect, and their rights in the premises not properly defended ought not to be concluded by the adjudication.

If this were true, he acted in this capacity for them with the permission and approval of the judge, and the results ought not to be less binding unless there was fraud or collusion in the matter, if the integrity of judicial action is to be upheld. But in fact there was no such opposition of interest between the infants and their next friend. Duncan is declared to be entitled to one-third part only of the "home place," the title to which is disputed in the complaint, and it is admitted that this is his rightful share in the land

upon the proper construction of the deed itself. The error assigned in the decree is that it gives to Archibald two-thirds of the tract and to the plaintiffs none, when they ought to have been allowed an equal share in that also. The antagonism is not between them and Duncan, but between them and Archibald, to whom, as they assert, their share has been wrongfully awarded. In *Latta* v. *Vickers*, 82 N. C., 501, the court in refusing to interfere in a case very similar to the present, use this language: "The proceedings were conducted in accordance with the established and regular practice, and the petitioner was represented by his next friend, in association with others whose interests were identical with his own. No imputation upon the integrity of the defendant's conduct is made, no suggestion of unfair means used to influence the action of the court, and no reason except the plaintiff's minority is now assigned for interference with the proceedings. * * *. If confidence is to be reposed in the action of the courts within the sphere of their jurisdiction and their judgments upheld, there is no basis upon which the plaintiff's claim can be enforced."

2. The decree itself is impeached for error in law in that it proceeds upon the idea of an estate in fee vesting in the sons under the deed of gift, with the contingent limitation over, whereas upon the proper interpretation of the instrument only a life estate is conveyed to them. The decision of the court upon the question of title rests upon the facts that are set out in the petition, and is now controverted only by the introduction of the deed itself as evidence to support the allegations of the complaint. The petition states the conveyance to be to the three sons of the donor with limitations over of the estates of such as should die without issue to his other children; that two of the sons, Andrew and Robert, did die without issue and Archibald left a son, the petitioner, bearing his name, and that the plaintiffs' father, under whom they claim, died before the execution of the

deed. Upon this statement the court correctly held that the plaintiffs, being *grandchildren*, were not within the terms of the contingent limitation to the donor's children, and that these shares vested equally in Duncan and Archibald and thereby the latter became the owner of two third parts thereof. If this ruling be correct upon the case made in the petition, it cannot be reversed upon well established principles, by a proceeding in the nature of a bill of review. Upon this point the case of *Stewart* v. *Mizell*, 8 Ired. Eq., 242, seems clear and conclusive. In that case the land had been sold for partition under a decree of the court of equity of Bertie upon the application of the living and the issue of the deceased children of one Henry Cobb, from whom the land descended, and the fund had been distributed, the shares of the infants and femes covert being secured for their benefit. The bill was filed by four of the children, or those representing such as were dead, against the other four children and their heirs, to obtain a reapportionment of the fund upon an allegation that advancements had been made to the defendants and their ancestors, equal in value to their share in the intestate's descended lands. The bill was dismissed, and RUFFIN, C. J., delivering the opinion and commenting on the conclusiveness of a judgment at law, founded on admissions in the pleadings, proceeds thus: "Not less so is the decree of the court of equity upon facts found and declared, and *a fortiori*, on those admitted by the parties. If it were not so, there would be no end to litigation in this court. Indeed the decree in this cause could be no more regarded as final than that which the present bill seeks to overturn upon the grounds merely that it was not in itself strictly right. This is not an attempt to review the decree, for it is just what it ought to have been and what the court was obliged to pronounce according to the concurring allegations of all the parties."

The rule is thus stated in clear and concise terms by Mr.

Justice STORY: "In regard to errors in law, apparent upon the face of the decree, the established doctrine is that you cannot look into the *evidence in the case in order to* show the decree to be erroneous in its statement of the facts. That is the proper office of the court upon an appeal. But *taking the facts to be as they are stated to be on the face of the decree*, you must show that the court have erred in point of law." Then referring to the variant forms of decrees as drawn in England and in the United States where the facts are not usually declared, he adds: "But for the purpose of examining all errors of law the bill, answers, and other proceedings are in our practice as much a part of the record before the court as the decree itself, for it is only by a comparison with the former that the correctness of the latter can be ascertained." Story's Eq. Plead., § 407.

In the case before us the error is proposed to be shown by the production of the deed which was not in evidence when the assailed decree was entered, and the construction of which is relied on to correct the statement of facts.

This, as the citations show, is not admissible. The judgment must therefore be affirmed, and it is so ordered.

No error. Affirmed.

J. E. TIMBERLAKE and others v. WILLIAM F. GREEN.

Guardian and Ward—Statute of Limitations.

Where the settlement of a guardian account has been sanctioned by the court and assented to by the wards, an action by the complaining party to re-open the same, if there be no allegation of fraud, must be brought within three years after his majority.

(*Becton* v. *Becton*, 3 Jones Eq., 419; *Whedbee* v. *Whedbee*, 5 Jones Eq., 392; *Barham* v. *Lomax*, 73 N. C., 76; *Spruill* v. *Sanderson*, 79 N. C., 466, cited and approved.)

TIMBERLAKE *v.* GREEN.

CIVIL ACTION tried at Spring Term, 1880, of FRANKLIN Superior Court, before *Seymour, J.*

Judgment for defendant, appeal by plaintiffs.

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

Messrs. J. J. Davis, J. B. Batchelor and *Gilliam & Gatling*, for defendant.

SMITH, C. J. The defendant, on December 10th, 1855, was appointed guardian to the infant children of Eppy Timberlake among whom were the plaintiffs, J. E. Timberlake and R. L. Timberlake, the intestate of the plaintiff, George S. Baker, and entered into bond with sureties for the discharge of his official duties. R. L. Timberlake attained his majority in November, 1868, and having died in 1872, administration on his estate was first committed to W. H. Spencer, and upon his death to the plaintiff, Baker. J. E. Timberlake became of full age on July 2d, 1874. The defendant failing to renew his bond, the solicitor of the district, at spring term, 1870, of the superior court of Franklin, instituted suit against the defendant for an account and settlement of the estate in his hands. An attorney was employed by such of the wards as were then of full age to represent the infants and protect their interests in the action. But they had no other guardian, nor did they appear by next friend. At the same term a reference was made to this attorney and the attorney for the defendant to state the guardian account, and the said Spencer was appointed receiver of the estate. The referees stated the account, which was not returned, and a compromise report was made at fall term, 1871, wherein the controversy between the parties as to the defendant's liability for investing the trust funds in confederate securities in 1863 was adjusted by charging him with one-half of the amount so invested. This adjustment was made with

the concurrence of the wards who were of age, and confirmed by the court. The sureties to the guardian bond were then insolvent and the defendant so embarrassed as to render the collection of what was owing by him doubtful. The sums adjudged to be due those now prosecuting this action were paid to the said Spencer, he then being both receiver and administrator of the intestate, R. L. Timberlake, during the years 1872, 1873 and 1874, the final payment in March, 1874. The receiver had paid over his share of the fund to the plaintiff, J. E. Timberlake.

Upon these facts His Honor was of opinion that, this action, being begun more than three years after the majority of J. E. Timberlake, was barred by the lapse of time and the plaintiffs not entitled to an account, and he gave judgment for the defendant from which the plaintiff appealed.

It is decided in *Becton* v. *Becton*, 3 Jones Eq., 419, under the then existing statute, substantially the same as that now in force (Bat. Rev., ch. 53, §§ 22, 23, 24,) that the purpose of the law directing this proceeding was to "have the interests of the infants attended to whenever there was reason to fear from the misconduct of the guardian that there was danger of loss to them," and that a decree obtained against him and his sureties is not a bar to another action instituted by them on their coming of age, and "will be allowed no other effect, than a *prima facie* presumption that the account and report upon which it was made were correct." As the intestate, represented by the plaintiff, Baker, was of full age when the action was begun and his first administrator has accepted the fruits of that recovery in his behalf, it is plain he cannot, in the absence of fraud, set aside the adjudication and re-open the account then adjusted and confirmed, so as to subject the defendant to further liabilities. The other plaintiff whose interests were under the protection of an officer of the law and against whom the decree is presumptive evidence of the correctness of the account and report in

which he manifests his acquiescence by accepting payment from the receiver, should if dissatisfied have instituted his action in a reasonable time after coming of age; and this, following the analogy of the case of *Whedbee* v. *Whedbee*, 5 Jones Eq., 392; and in consonance with the decision in *Spruill* v. *Sanderson*, 79 N. C., 466, and *Barham* v. *Lomax*, 73 N. C., 76, should be within three years thereafter. The right to re-open a settled account it is said in the first case, must be exercised within three years thereafter. The rule applies certainly with as much force to the facts of the present case, as to those.

The decree is not impeached for unfairness, it was assented to by those who were of age and were similarly interested. It was a compromise of conflicting claims adopted by counsel, submitted to and sanctioned by the court, and subsequently carried out by the party himself when capable of acting. Under these circumstances, we concur with His Honor that the delay is fatal to the conceded right of the infant, when *sui juris*, to bring a new action and have a new settlement.

We therefore affirm the ruling, and judgment will be here entered for the defendant.

No error. Affirmed.

JOSEPH H. HARDY and others v. AUGUSTUS HOLLY.

Marriage Settlement—Power of Feme—Mortgage.

Where a feme sole makes a deed of marriage settlement of her separate estate, whether real or personal, to a trustee for her sole and separate use, her power of disposition over the same during coverture is limited to the mode and manner prescribed by that instrument. And if she and her husband join in a mortgage conveying her estate without the

knowledge or consent of the trustee and outside of the powers conferred, such deed is invalid. (Review of the English doctrine and cases upon this subject by RUFFIN, J.)

(*Frazier* v. *Brownlow*, 3 Ired. Eq., 237; *Harris* v. *Harris*, 7 Ired. Eq., 111; *Knox* v. *Jordan*, 5 Jones Eq., 175, cited and approved.)

MOTION for an injunction, in an action pending in BERTIE Superior Court, heard at Chambers on the 24th of October, 1879, before *Avery, J.*

On the 19th of November, 1866, a deed was executed between Ella E. Hardy, John H. Hardy and Joseph H. Hardy, whereby, after reciting that a marriage was soon to be had between the said John H. and Ella E., and that it had been agreed between them that certain personal estate of the latter should be conveyed in trust to her sole and separate use and free from the control of her intended husband, the said Ella E. conveyed to the said Joseph H. certain bonds and notes belonging to her and then in her possession, "in trust for the sole and separate use of the said Ella E., after and during her coverture and subject to her exclusive control and disposition, as if she were a feme sole, by order or other writing under her hand and seal and directed to said trustee, as well principal money as interest; and to account with and pay over to her all accruing interest and profits arising therefrom, from time to time as collected, and for such payment her receipt shall be a full discharge, and her written order ample and sufficient authority for any disposition of the fund which she may direct; and in trust, in the event of the death of the said Ella E., the said John H. surviving, for such person or persons, in such estate and upon such limitations as she shall appoint, declare and direct by will or other writing in the nature of a last will, executed in her lifetime, and in form to pass such estate and funds as may then remain, and in default of such appointment, for such persons as would by law be entitled thereto as next of kin and heirs at law under the statute of distri-

butions and laws of descent, to the said Ella E., (excluding her intended husband) in like manner as if she were unmarried at the time of her death; and in further trust that at all times during her coverture, the said Ella E. shall have power, in writing, to direct, and when so directed it shall be the duty of said trustee to exchange and convert the whole or any part of the trust fund into other property, real or personal, and to invest and re-invest the same, and the proceeds thereof as she may require in the purchase of other and different estate and funds, and such substituted property shall become and shall be held charged with the same trusts as attached to that for which it was substituted; and it is agreed that said Ella E. shall have power to change the trustee, and upon her nomination in writing, it shall be the duty of said trustee to convey the trust property to the person nominated to be held upon the same trust, &c. Which deed was duly proved and registered in the register's office of Bertie county where the parties all lived.

Soon after the execution of the deed, the proposed marriage took place, and the said Joseph H. accepted the trust and has ever since continued to act as trustee. In 1870, the trustee, in pursuance of his powers, invested some four thousand dollars of the trust fund in a certain tract of land, situate in Bertie county, which was conveyed to him upon the trusts declared in the deed of settlement. In October, 1875, the husband, John H. Hardy, applied to the defendant, Holly, for a loan of $1,500, to be used in conducting a mercantile business, which the latter agreed to make provided the wife would join in a mortgage, conveying the said tract of land as a security for the amount advanced, to which she assented and the mortgage was duly executed by the husband and wife and regularly proved and registered and the money procured upon it—the trustee, Joseph H. Hardy, however, being no party to it or assenting thereto or having any notice thereof; and no request being made to

him by the wife in writing under seal or otherwise, to become a party to the mortgage deed or in any way to charge the land, or other part of the trust fund, with the debt intended to be secured.

The store intended to be conducted with the money borrowed was the property of the husband; but supplies for the family and farm were procured therefrom. The parties having failed to pay the amount borrowed, the defendant, according to the terms of his mortgage, has advertised for sale the lands mentioned and threatens to sell the same. The plaintiffs, who are the husband and wife and trustee before mentioned, seek to enjoin said sale and to have the said mortgage cancelled.

The case being before the judge of the superior court on motion for an injunction, after notice to defendant, he granted the same until the final hearing of the cause, and the defendant appealed.

Messrs. P. H. Winston, Sr., Pruden & Shaw, and *Hinsdale & Devereux,* for plaintiffs.

Messrs. W. A. Moore, and *Coke & Martin,* for defendant.

Was the consent of the trustee necessary to the validity of the conveyance from John H. and Ella Hardy?

1. The rules on this subject in England and America are different, and the courts of the states differ from each other. In North Carolina the rule formerly was that the consent of the trustee was necessary when personal property was conveyed for the sole and separate use of a feme covert, but no power to charge or dispose of it was given to the feme in the deed of settlement; but since the adoption of the constitution and enactment of the marriage act of 1871, the consent of the husband, in lieu of that of the trustee, is sufficient. But this rule has never been applied to similar conveyances of real estate. When that is the subject-matter

of the conveyance, the assent of the trustee is not necessary unless required by the donor of the power as a condition precedent to a valid charge, or sale, by the feme. Bell on Property, (Law Library, vol. 70, 494); 4 Ired. Eq., 312. In England the rule is, that the general engagements of the wife shall operate upon her personal property, and her trustee shall be obliged to apply personal estate to the satisfaction of her general engagements. White & Tudor's L. C., 399; *Huline* v. *Tenant;* Brown's C. C., 16.

The counsel then discussed the North Carolina cases which are cited in the opinion of this court, and insisted that the consent of the trustee in a conveyance of real estate was not necessary,—commenting also upon *State* v. *Ragland*, 75 N. C., 12; *Pippen* v. *Wesson*, 74 N. C., 437; *Etheridge* v. *Vernoy*, 71 N. C., 184; *Withers* v. *Sparrow*, 66 N. C., 129.

2. As to the doctrine of the defective execution of powers: Whenever the formalities required by the power are not strictly complied with, the appointment will at law be void; but in equity the rule is this: Whenever a man having power over an estate, in discharge of moral or natural obligations, *shows an intention* to execute such power, the court will operate upon the conscience of the *trustee* to make him perfect this intention. *Tollett* v. *Tollett*, 1 White & Tudor, 182, 191 and 192 and top of page 296, 3 Am. Ed. 1859; 3 Ohio, 527; 2 Ball & Beatty, 44. Lord St. Leonard says: "It is only necessary that the intention to execute the power should appear clearly in writing; whether the donee of the power only covenant to execute it, or by his will direct the remainderman to create the estate, or merely enter into a contract *not* under seal to execute his power, or by letters promise to grant an estate, which he can only do by an exercise of his power, equity will supply the defect. 2 Sugden on Powers, ch. X., sec. 2, paragraph 5, *et seq*, and 2 Ball & Beatty, 44. See also *Stead* v. *Nelson*, 2 Beavan (17 E. C. L.) 245.

3. As to distinction between powers and trusts: The former are never imperative, the latter always are, and are obligatory upon the conscience of the party entrusted. C. J. Wilmot, R., p. 23. Joseph Hardy has a mere naked trust. Ella E. has all the power. Suppose the consent of the trustee of real estate is generally required for its alienation by the feme covert, as in case of personal property, why require it here when by the deed itself all discretion is taken from him. She may dismiss him without giving any reason, and substitute another who would execute her commands. It is vain to require his consent. Power of appointment reserved by the feme (before passage of Revised Code) would have been extinguished or at least suspended until payment of Holly's debt. *Woodbourne* v. *Gorrell*, 66 N. C., 82. Now, its effect is as provided in Bat. Rev. ch. 35, § 1, which act has been considered in *Hogan* v. *Strayhorn*, 65 N. C., 279. It has the effect of a feoffment as held in *Riggan* v. *Green*, 80 N. C., 238. She is disabled on ground of fraud from interfering with Holly's right to secure his debt under the mortgage. No one can avoid his own deed by which an estate has passed on the ground of his own fraud in executing it. 2 Smith L. C., 457.

RUFFIN, J. The single question presented for consideration in this case is as to the validity of the mortgage given by Mr. and Mrs. Hardy to the defendant, Holly, embracing a portion of the wife's separate estate, and executed as it was, without the knowledge or consent of her trustee, and *outside* of the powers conferred upon her in the deed of marriage settlement.

By the terms of that deed her power of disposition over the property conveyed was limited to be exercised, either by an order for its conversion under sale and directed to her trustee, or by a regularly executed will; and in case of *her failure to dispose of it in one of these specified* modes,

the property at her death was to devolve upon those who would then be her heirs at law or next of kin.

Under the rule of the English chancery courts a married woman in respect to any separate property she may have, is considered as a feme sole, with power to convey and do every other act touching it, except as she may be restrained by some positive provision of the deed of settlement; and even if that instrument should prescribe some particular mode of disposition, she may resort to any other unprohibited mode, by reason of her general power and dominion over its subject.

In the courts of equity of a majority of the American states, an exactly opposite rule has prevailed; and a married woman, entitled to a separate estate, is regarded as a feme covert, and subject to every disability of the common law, except as she may have power conferred upon her under the deed of settlement in express and positive terms. When the point was first presented in this state, as it was in the case of *Frazier* v. *Brownlow*, 3 Ired. Eq., 237, this court followed the lead of the English chancellors and gave the fullest indulgence to the powers of the wife, and so again it was done in *Harris* v. *Harris*, 7 Ired. Eq., 111, though in this latter case, there was a division of opinion amongst the judges which caused the question to be much discussed. It can do no good, at this day, to revive that discussion, nor is it necessary. For when the question next arose in the case *Knox* v. *Jordan*, 5 Jones Eq., 175, the court, as then constituted, without division and without any sort of reservation repudiated the doctrine of the English courts and adopted that which prevailed in most of the courts of the states, and whether this was wisely done or not, that case has been too often approved and doubtless too often acted upon in matters intimately connected with the interests and comfort of families, to admit of its correctness be-

ing now called in question. We *must* take it to be the settled law of this state, at least, that a married woman, as to her separate property, is to be deemed a feme sole only to the extent of the power expressly given her in the deed of settlement. Her power of disposition is not absolute, but limited to the mode and manner pointed to in that instrument; and when that is silent, she is powerless.

The counsel for the defendant admit this to be so in the case of settlements of personal property; but insist that this rule of construction should not be permitted to embrace similar conveyances of real estate. Their argument proceeding upon the difference in the two kinds of property, is that the wife is indebted for her right to exert *any sort* of authority over her personalty, to the interposition of a court of equity; for, without that, all her property of that character would, immediately upon her marriage, vest absolutely and to the entire annihilation of all her interest or power in the husband—and that having thus *created* this new interest in her, the court assumes the right to regulate and mould it, as may best subserve the policy of the law and the interests of the parties. But as to her realty: They say the court has conferred no new estate or power on her; and none was needed to protect it from the dominion of the husband; for, by law, it remained hers after marriage, descended to her heirs, and could be parted with or not, only as she might consent; and since the court has given her no new right, it should not undertake to restrain that which by law she should enjoy.

We cannot adopt the view suggested by counsel. For we do not discover that the *jus mariti* to the wife's personalty had any thing to do with the construction put by the courts upon her powers, and most especially with the more modern rule which was not thought of until long after that right of the husband had been effectually destroyed by the introduction of trustees into deeds of settlement. This new principle

of construction has resulted from a disposition on the part of the courts to pay greater respect to the intention of the parties to the instrument, and from experience which taught that such intention was in constant danger of disappointment, so long as the wife was left exposed to the solicitations of the husband or allowed to indulge her own generous impulses. It was seen that such settlements, though entered upon at the instance of prudent and anxious friends, with a view to shield the wife and her children as far as possible from the consequences of the husband's misfortunes, or of his vicious or indolent habits of life, too often failed of their purposes through his practices or her delusions; and it was to remedy this evil that the courts restricted her powers over the property conveyed. This being so, it would seem that instead of relaxing its rule in the case of settlement of real estate to the separate use of the wife, the court, on account of the higher dignity of such estate and its infinitely greater consequence to the parties, should use extreme diligence and care to guard against such a misappropriation as would defeat the intention of the maker of the instrument. We cannot therefore admit any such distinction between the two species of property, *upon principle*. It is true that in all the cases occurring in the courts of this state, in which the question as to the powers of the wife has been discussed, personal property has been the subject of settlement and of litigation, but such has not been the case in other tribunals. In the case of *Williamson* v. *Beckham*, 8 Leigh, 20, the court of appeals of Virginia made an express application of the rule, acknowledged to be good here as to personalty, to real estate settled on the wife, Judge TUCKER, the president of that court, declaring, "that a feme covert holding separate property in real estate by deed of settlement which empowers her to dispose of it in a designated mode, cannot make a disposition in any other, though other modes are not expressly negatived in the deed." And so too, both kinds of property

were involved in the noted case of the *Methodist Church* v. *Jacques*, 3 Johnson's Chan. Rep., 78, in which the learned chancellor, KENT, without observing any distinction between the two, held the *true rule* to be, that a married woman, with respect to her separate estate, should be considered as a feme sole to the extent only of the power given her by her marriage settlement, and *must* exercise that power in the way prescribed in that instrument. Very true it is, he was subsequently overruled in this by the highest court of errors in the state of New York; but it was done because that court, being one of the very few that did so, adhered to the doctrine of the English courts, which doctrine this court has expressly repudiated and declared to be against reason and unsuited to the habits and customs of our people. Controlled by these authorities, and seeing that the danger to the wife's separate estate attending the exercise on her part of an unrestrained power of disposition, is as great in the case of real estate as of personalty, (of which we could have no fitter illustration than the very case now under consideration) we do not feel at liberty to remove any of the disabilities which the law, as administered in this country, has imposed upon her, not capriciously, but from the highest consideration for her best interest and the interest of those who are to come after her.

Nor can we admit, as is further suggested by counsel, that it is a case for the application of the "Doctrine of the Defective Execution of Powers." Since the power of the wife is altogether a *delegated* one, to be exerted according to the strict intention of the maker of the settlement, or not at all, there is no room in this case for the operation of any such doctrine.

In arranging such settlements, one great end most commonly aimed at is the employment of a prudent trustee, whose coöperation if not his actual assent shall be needed in any proposed disposition of the property settled, thereby at

all times, securing for the wife, if nothing more, the benefit of his counsel and advice. This furnishes another reason why the courts so scrupulously adhere to the terms of the instrument, and will not permit the property to be parted with or encumbered, without such coöperation, if required according to its terms. In any view therefore which we are able to take of this case, the mortgage given by Mr. and Mrs. Hardy to the defendant cannot be held to be good, and the injunction restraining the sale thereunder was properly granted in the court below.

No error. Affirmed.

S. WITTKOWSKI surviving partner v. G. L. SMITH and others.

Bills of Exchange, where payable—Demand.

The presentation of a draft for payment at the place of its date is a sufficient demand to charge the drawer or acceptor after notice of protest, where the place at which it was payable is not stated in the writing and no proof made that any particular place was agreed upon.

CIVIL ACTION commenced before a justice of the peace and tried on appeal at Fall Term, 1880, of MECKLENBURG Superior Court, before *Seymour, J.*

This action is against one of the drawers and the personal representative of the other, upon an inland bill in the following form:

CHARLOTTE, Oct. 30th, 1871.

Thirty days after date pay to the order of Wittkowski & Rintels one hundred and sixty-six dollars and fifteen cents, value received, and charge to the account of

GENTRY & SMITH.

To S. L. BILLINGS.

Across the face of the instrument were written these words: "Accepted Oct. 30th, 1871. S. L. Billings."

The bill was discounted by the Bank of Mecklenburg at Charlotte, and not being provided for, was at its maturity, on demand made, protested for non-payment by a notary public at the said bank, and notices thereof forwarded by mail, addressed to the drawers at Gap Civil in Alleghany county and to the acceptor at Sparta in said county in this State. The notices were directed to those places upon information derived from the plaintiff as to the residences of the respective parties. It was in proof that Billings then lived and had always lived in Grayson county, Virginia, and was amply solvent when the bill became due and for some time afterwards. He has since gone into bankruptcy.

Upon this evidence, it was contended for the defendant that no demand had been made on the acceptor, sufficient to charge them as drawers. A verdict for the plaintiff was taken, subject to the opinion of the court upon the question reserved by consent, as to the liability of the defendants upon the facts proved; and the court, being of opinion that no sufficient demand had been shown, ordered the verdict to be set aside and a nonsuit entered. From this judgment the plaintiff appealed.

Messrs. C. Dowd and *P. H. Walker*, for plaintiff.
Mr. W. H. Bailey, for defendant.

SMITH, C. J. No place of payment is mentioned in the bill and no agreement as to such place shown by parol, as it was competent to show if any such agreement existed, under the ruling of Chief Justice MARSHALL, in *Brent's Executor's* v. *Bank of Metropolis*, 1 Peters, 92, and we have no other guide than that furnished in the writing itself. It was drawn and accepted on the same day, and so far as appears, at the same place. The inference to be drawn from

an inspection of the instrument is that *funds were there* to be provided to meet the debt in the absence of evidence of any contrary understanding. Had it been intended that it should be paid elsewhere, it must be assumed it would be so expressed upon its face, or be the subject of agreement between the parties. "The place of date," remarks a recent author, speaking of promissory notes, made negotiable like bills of exchange and governed by the same rules when not controlled by statute, "is *prima facie* evidence that it is the place of the maker's residence and place of business, and it is sufficient, we should say, to charge an endorsee to have the note in that place at the time of maturity, and to make proper inquiry after the place of the maker's residence or place of business, provided that the holder does not know that his residence is elsewhere." 1 *Dan. Neg. Ins.*, § 640. Or, it may be added, when he does not know where it is.

"When the bill or note is made on terms payable in a city, without specification of a particular place, and the acceptor or maker has no residence or place of business there, it will certainly be sufficient to charge the drawer or endorser, if the holder have the bill or note in the city at maturity, ready to be presented and delivered up, if the maker or acceptor should appear." *Ibid.*

In *Meyer* v. *Hibscher*, 47 N. Y., 270, FOLGER, J., thus speaks of a note dated at a place and payable generally: "In such case the note must be presented and payment asked for at the place of business therein of the maker, if he has one, and if he has no place of business, then at his place of residence. *And if he neither have place of business, nor residence, then if the holder of the note is at the place where it is in general made payable, on the day of payment with the note, ready to receive payment, it is sufficient to constitute a presentment and demand.*"

As it was the undertaking of Billings, whose obligation was absolute, to provide and have in Charlotte the necessary

funds to take up his acceptance when it matured, in which he wholly failed, and the bill then went to protest, of which notice was given to the defendants who drew the bill, their liability became fixed and it was their duty to look out for protection against the impending insolvency of the principal debtor.

No point is made as to the sufficiency of the notice of the non-payment, and in our opinion His Honor erred in holding the demand, upon which the protest was made, insufficient, and in setting aside the verdict and directing a nonsuit. The judgment below must be reversed and judgment rendered upon the verdict for the plaintiff, and it is so ordered.

Error. Reversed.

D. M. PRINCE v. PETER MCRAE, Adm'r.

Contract—Implied Promise.

Where the plaintiff physician made no charge upon his books for professional services rendered the defendant who resisted an action to recover their value upon the ground they were intended to be and were gratuitous, and the jury found that defendant employed the plaintiff whose services were rendered without any express agreement to pay a definite sum; *Held*, that the law implies a promise on the part of the defendant to pay what they were reasonably worth.

(*Brunhild* v. *Freeman*, 77 N. C., 128; *Pendleton* v. *Jones*, 82 N. C., 249, cited and approved.)

CIVIL ACTION commenced before a justice of the peace and tried on appeal at Fall Term, 1880, of RICHMOND Superior Court, before *Avery, J.*

Verdict and judgment for plaintiff, appeal by defendant.

Messrs. Burwell & Walker, for plaintiff.
Messrs. Jno. D. Shaw and *W. A. Guthrie*, for defendant.

SMITH, C. J. The action is to recover for professional services rendered by the plaintiff, a physician, to the defendant's intestate, which is resisted on the ground that they were intended to be and were gratuitous.

The plaintiff admitted that he had made no entry of a charge upon his books; and the defendant testified that at the administration sale the plaintiff bought a horse and proposed to pay for him from his account, remarking that he had not intended to charge the intestate, but that seeing others present their accounts, he concluded to present his own.

The defendant's counsel requested His Honor to instruct the jury that if the plaintiff at the time the services were rendered did not intend to make a charge for them, he could not recover. This was refused and the jury were directed that if from the testimony they should find that the intestate employed the plaintiff, and the services were rendered without any express agreement to pay a definite sum, the law would imply a promise to pay what they were reasonably worth.

The exceptions to the instruction refused and to the instruction given are for review on the appeal.

The proposed instruction proceeds from a misconception of the nature and essential requisites of a contract and was rightfully refused. A contract, express or implied, executed or executory, results from the concurrence of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks but what both agree. *Brunhild* v. *Freeman*, 77 N. C., 128; *Pendleton* v. *Jones*, 82 N. C., 249.

Whether the plaintiff's services shall be deemed a gratuity

or constitute a claim for compensation, must be determined by the common understanding of both parties. If they were intended to be and were accepted as a gift or act of benevolence, they cannot at the election of the plaintiff create a legal obligation to pay. But their character is not controlled by the inexpressed and revocable intentions of the plaintiff, although his purposes subsequently asserted may aid in ascertaining it. The matter was properly left to the jury and their verdict finds that the intestate did employ the plaintiff and the services were rendered and they have also fixed their value.

There is no error in the charge, but there is error in the judgment so far as it allows interest from May 19th, 1880. The entire damages are assessed in the verdict at fall term, 1880, at $200, and interest is only allowable thereafter. Thus corrected the judgment must be affirmed and it is so ordered.

No error. Modified and affirmed.

THOMAS W. CARTER v. J. W. DUNCAN and another.

Surety and Principal—Agreement for Indulgence.

Plaintiff creditor made a parol contract with principal to extend the time of payment of bond beyond the date of the commencement of a suit thereon, without the knowledge or consent of the surety; *Held*, that such contract has the effect of suspending the plaintiff's right of action, and of exonerating the surety from liability.

(*Burnes* v. *Allen*, 9 Ired., 370; *Harshaw* v. *McKesson*, 65 N. C., 688; *Pipkin* v. *Bond*, 5 Ired. Eq., 91; *Scott* v. *Harris*, 76 N. C., 205, cited, commented on and approved, and *Bank* v. *Lineberger*, 83 N. C., 454, modified.)

CARTER *v.* DUNCAN.

CIVIL ACTION tried at Fall Term, 1880, of ALLEGHANY Superior Court, before *Gilmer, J.*

On the 18th of March, 1876, the defendant, J. W. Duncan, executed his note under seal and therein promised to pay to the defendant, H. F. Jones, for value received, the sum of $308.49 on or before September following, and the like sum on or before March 18th, 1877, with interest from date at the rate of eight per cent. per annum. On June 20th the payee, H. F. Jones, assigned the note to the plaintiff, and by the terms of said assignment he bound himself "for the payment of the same unto him, the said T. W. Carter, always, whether suit is brought for the collection of the same or not," signing and sealing his endorsement. On the same day the following covenant entered into at the instance of the plaintiff was also endorsed upon the transferred note: "For value in full received we do promise, obligate, and agree to pay the within note of principal, six hundred and sixteen dollars and ninety-eight cents, with eight per cent. per annum on the same from March 18th to T. W. Carter without abatement, plea or off-set, as witness our hands and seals this the 20th day of June, 1877.

(Signed and sealed by J. W. DUNCAN,
H. A. DUNCAN.)

The defendant, J. W. Duncan, in his answer sets up a contract between the plaintiff and himself for a valuable consideration in part paid and the residue tendered and refused, for forbearance during a period which had not expired when the action was brought, and the other defendants rely on said contract, made without the consent of either, and against the expressed will of one of them, that no indulgence should be given, and known to the plaintiff, as a discharge of their respective liabilities, as sureties for the debt. The plaintiff at the trial entered a discontinuance of the action against the defendant, H. A. Duncan, and thereupon the following issues, agreed upon between the re-

maining parties were prepared and submitted to the jury who find as follows:

1. Did the plaintiff contract with the defendant, J. W. Duncan, to extend the time of payment beyond the date of the commencement of the action? Ans. Yes.

2. Did the plaintiff enter into such contract with the defendant, J. W. Duncan, without the consent of the defendant, H. F. Jones, to extend the time of payment of the note sued on? Ans. Yes.

The evidence introduced tended to show that when the note was assigned a verbal agreement was entered into between the plaintiff and the principal debtor, that the latter should pay to the plaintiff, on or before June 22d, 1877, the sum of $27.67 in addition to the stipulated interest then due, and upon such payment should be allowed an indulgence of a year thereafter; and upon the payment of a like sum and interest due on June 22d, 1878, the time of payment should be extended for another year; that the first payment was made and the second payment tendered and refused, and that the defendant, H. F. Jones, never knew of or assented to the arrangement.

Upon the rendition of the verdict for the defendants, the plaintiff moved the court for judgment *non obstante veredicto*, which being refused, and judgment entered for the defendants, the plaintiff appealed.

Mr. George V. Strong, for plaintiff.
Messrs. Watson & Glenn, for defendants.

SMITH, C. J., after stating the case. It was formerly held under rules strictly technical, that a subsequent parol agreement between the parties to an instrument under seal varying its terms, or suspending its operation, or deferring an accrued right of action thereon, was inoperative by reason of its merger in the higher security; and the rule prevails

as to promises previous or subsequent alike, where the promise and covenant are the same. *Burnes* v. *Allen*, 9 Ired., 370. The effect of a parol agreement, sustained by a sufficient legal consideration, for further forbearance in enforcing the right of action which had arisen upon a covenant, is fully discussed and the authorities citied and commented on in the opinion of RODMAN, J., in the case of *Harshaw* v. *McKesson*, 65 N. C., 688. It is there held that an acceptance of a mortgage security for a debt due by bond and a contemporary contract on the part of the creditor, put in the form of a covenant by his agent, but for want of authority under seal, effective only as a parol undertaking to give indulgence for three, four and five years in consideration of the mortgage, had the legal effect of suspending the plaintiff's right of action. The principle there laid down quoted from note to *May* v. *Taylor*, 6 M. & G., 262, under the old system of practice, is thus expressed: "The distinction appears to be this: there can be no dispensation with a contract under seal except by a release under seal. Accord and satisfaction before breach is therefore a bad plea in covenant because it amounts to a dispensation. But accord and satisfation *after breach* is a good plea, because the subject matter of the payment and acceptance in satisfaction is not the covenant, which still remains entire, but the damages sustained by the particular breach of it for which the action is brought." "There is little use," remarks the court, "in holding on to a rule after it has been reduced to such a shadow," and the conclusion is reached and announced in these words: "If the matter can be pleaded as satisfaction, it *must be equally good when pleaded only in suspension of the action.*" To the same effect is the case of *Canal Co.* v. *Ray*, 101 U. S., 522. While the plaintiff refused to accept the stipulated sum for the second year's indulgence for the reason that the contract is entire and single, embracing both years as payment was offered and refused, the consequences are

the same as if the money had been received. The action has been therefore prematurely brought and in disregard of the plaintiff's contract.

While it may not be necessary to consider the effect upon the rights and liability of the endorser, resulting from the finding on the second issue, yet we are inclined to hold in accordance with the opinion of RUFFIN, J., in *Pipkin* v. *Bond*, 5 Ired. Eq., 91, and the ruling in *Scott* v. *Harris*, 76 N. C., 205, to which our attention was not called in the argument in *Bank* v. *Lineberger*, 83 N. C., 454, that he as surety is exonerated by reason of the plaintiff's agreement to forbear and his acceptance of the usurious consideration for doing so, and to modify the opinion in the last mentioned case accordingly. The cases outside of the state are conflicting as will be seen by the authorities there referred to, and the following others—the preponderance seeming to be with our former ruling—*Duncan* v. *Reed*, 8 B. Monc., 382; *Camp* v. *Howell*, 37 Ga., 312; *Draper* v. *Trescott*, 29 Barb., 401; 15 Ohio St. Rep., 57 and 295; 2 Danl. Neg. Inst., § 1317. We have deemed it safer for the stability of the law to adhere to our own adjudications upon the controverted point.

There is no error and the judgment is affirmed.

No error. Affirmed.

A. S. BRYSON v. H. S. LUCAS.

Agent and Principal—Bond, how executed to relieve agent of personal liability.

Where one act as agent of another in the execution of an instrument *under seal* and does not mean to bind himself personally, he must exe-

cute it in the name of his principal and state the name of the principal, only, in the body of the instrument; Therefore *it was held* that a bond in which "I promise to pay to the order, &c., witness my hand and seal, signed by H. S. L. (seal) for C., president of a company," imposed a personal liability upon L.

(*Delins* v. *Cawthorne*, 2 Dev., 90; *Potts* v. *Lazarus*, 2 C. L. Rep., 83; *Fronebarger* v. *Henry*, 6 Jones, 548; *Fisher* v. *Pender*, 7 Jones, 483; *Bank* v. *Wright*, 3 Jones, 376; *McCall* v. *Clayton*, Busb., 422; *Whitehead* v. *Reddick*, 12 Ired., 95; *Oliver* v. *Dix*, 1 Dev. & Bat. Eq., 158; *Redmond* v. *Coffin*, 2 Dev. Eq., 437, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of MACON Superior Court, before *Schenck, J.*

This action is brought against the defendant upon the following written instrument executed by him: On or before the first day of January, 1879, I promise to pay to the order of Albert S. Bryson one thousand dollars with interest from date, being part payment of a certain tract of land, for which bond has been given, bearing even date with this note. Witness my hand and seal this 2nd day of July, 1877. (Signed by H. S. Lucas. [seal] For Charles Callender, President of the Chester Mica and Porcelain Co.)

A similar note was given at the same time, falling due a year earlier, which was extinguished by the appropriation of partial payments sufficient for that purpose.

As a contemporary act and part of the same transaction, the plaintiff entered into the following covenant:

For and in consideration of one dollar paid to me, and also in consideration of the sum of four thousand dollars to be paid as follows, to wit: $500 by five days sight draft; $500 in ninety days from date; $1,000 1st January, 1878; and $1,000 1st January, 1879; I, Albert S. Bryson, will sell, assign, transfer and make over to Charles Callender, president of the Chester Mica and Porcelain Company, of New York, an undivided three-fourth interest in all that property, situate, lying and being in Macon county, state of

North Carolina, on the waters of Nantahala river, containing six hundred and eighty acres, more or less, deeded to me by the State of North Carolina, in two separate grants, bearing date 4th December, 1876; and I further agree, upon the payment to me of $500, specified, to execute to the said Charles Callender, president of the Chester Mica and Porcelain company, a bond for title to the above specified land, fully and freely, to be executed. The said title to the aforesaid land to be executed and delivered upon the fulfilment of the conditions of the bond. As witness my hand and seal this 29th day of June, 1877. Signed by Albert S. Bryson. [SEAL.]

The plaintiff avers his readiness and ability to make title according to the agreement on payment of the residue of the purchase money.

On the trial before the jury the court expressed the opinion that the action was misconceived and would not lie against the defendant, in submission to which the plaintiff suffered a nonsuit and appealed.

Messrs. Gray & Stamps, for plaintiff: The bond sued on is not the deed of the alleged principal; the instrument must purport on its face to be the contract of the principal and his name inserted in it and signed to it, and not merely the name of the agent. Story on Agency, § 147, *et seq.; Delins* v. *Cawthorn*, 2 Dev., 90. The seal affixed must be that of the principal and not that of the agent merely, 4 Hill, 351, and the cases on the same subject reviewed in the opinion of this court. By the intimation of opinion by the judge below that the action would not lie against the defendant, the plaintiff was deprived of the opportunity of showing that the credit was given to defendant alone, and not to a foreign corporation, and that defendant signed, sealed and delivered the instrument as *his* bond and deed. The plaintiff is therefore entitled to a new trial.

Messrs. Reade, Busbee & Busbee, for defendant: The notes and the agreement to make title are *in pari materia*, and are to be taken together. It is manifest that the contract was between the plaintiff and Charles Callender, president, &c. Whether this is so or not, must be determined by an inspection of the bond and the agreement. See opinion in *Delins* v. *Cawthorn*, 2 Dev., 90. The defendant relied on the cases of *Potts* v. *Lazarus*, 2 C. L. Rep., 83; *Whitehead* v. *Reddick*, 12 Ired., 95; *McCall* v. *Clayton*, Busb., 422; *Osborne* v. *High Shoals Co.*, 5 Jones, 177, and cases from other states bearing on the same question.

SMITH, C. J. The record presents the sole question, whether the instrument set out in the complaint is the bond of the defendant on which he is personally liable.

It is settled by adjudications in this state that a contract made in the name of another by one professing but not possessing authority to bind, is the contract of neither, yet the former may be liable upon the contract implied in receiving the consideration, and the latter in damages for the false and fraudulent representation of such agency. *Potts* v. *Lazarus*, 2 Car. Law Rep., 83; *Delins* v. *Cawthorne*, 2 Dev., 90. And the principle extends to a partnership, one of whose members without legal authority undertakes to execute a note under seal in the name of the firm. *Froneberger* v. *Henry*, 6 Jones, 548; *Fisher* v. *Pender*, 7 Jones, 483.

It is manifest that this is not the bond of the company, nor of its chief officer, not only for a defect of power in the agent to make it, but for the further reason that in form it does not undertake to impose an obligation on either unless that effect follows the use of the words superadded to the signature. Undoubtedly a promissory note without seal thus signed would be construed to create a direct contract with the party on whose behalf and for whose benefit it thus appears to have been made. It is so held in *Bank of*

Cape Fear v. *Wright*, 3 Jones, 376; *McCall* v. *Clayton*, Busb., 422, and numerous cases cited in Story on Agency, § 144. But it is otherwise when the contract is authenticated by seal, and it then becomes the deed of the party to whose name the seal is annexed, although described as agent, or is an absolute nullity, binding no one.

In our opinion this writing is in effect as well as in form the personal bond of the defendant, notwithstanding the mode of its execution and signature, and this proposition is fully supported by authority. No where in the body of the note is the name of any supposed principal mentioned or referred to. Its language is entirely personal—"I promise to pay Albert S. Bryson"—and it concludes with the words, "witness *my hand and seal*," and then the seal is affixed to the name of the promisor, the defendant. While the consideration recited is the sale of a tract of land of which this is a part of the purchase money, it is not stated to whom the sale was made, and this only appears from the plaintiff's covenant, referred to as of the same date, and which when produced bears an earlier date. But waiving the discrepancy in the bonds, there is no incongruity in the defendant's assuming a personal obligation for the payment of the purchase money for the land sold and to be conveyed to another, nor does this fact change or impair the individual liability incurred. To substantiate this construction of the covenant, we shall refer to some decided cases, called to our attention in the well considered brief of the plaintiff's counsel.

In *Combe's* case, 5 Coke, 135, it was resolved by the court, "that when any one has authority as attorney to do any act, he ought to do it in his name who gives the authority, for he appoints the attorney to be in his place, and to represent his person, and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority."

Quoting and approving the doctrine announced, SAVAGE, J., remarks: "All the subsequent cases agree in the law as thus laid down by COKE. There is no contradiction on the subject." *Stowe* v. *Wood*, 7 Cowen, 453. To the same purport is *Stackpole* v. *Arnold*, 2 Mass., 26.

"I accede to the doctrine in all the cases cited," is the language of GROSE, J., in *Wilkes* v. *Back*, 2 East., 142, "that an attorney must execute his power in the name of his principal, *and not in his own name.*"

In *Appleton* v. *Binks*, 5 East., 147, the defendant for himself, his heirs, executors, &c., on the part and behalf of the said LORD VISCOUNT ROKEBY, did thereby covenant, &c., and the consideration was received by LORD ROKEBY. The court held the covenant to be personal, and say: "It is impossible to contend that where one covenants for another he is not bound by it, the covenant being in his own name for himself and his heirs." See also *Dewitt* v. *Walton*, 5 Selden, 571.

In *Tippett* v. *Walker*, 10 Mass., 595, the agreement was entered into by the defendants, a committee appointed by the directors of the Middlesex Turnpike company, and the court say: "To the agreement the defendants have not (if they had legal authority) put the seals of the directors or the seal of the corporation. It is therefore their deed, and if it were not their covenant, it is not the covenant of any person or corporation, and the *apparent interest of the plaintiff to have his payments secured by a covenant will be defeated.*"

In *Duvall* v. *Craig*, 2 Wheat., 45, Judge STORY says: "An agent or executor who covenants in his own name and yet describes himself as agent or executor, is personally liable for the obvious reason that the one has no principal to bind, and the other substitutes himself for his principal." In the note to this case it is added: "When a person acts as agent for another, if he executes a deed for his principal *and does not mean to bind himself personally*, he should take care to

execute the *deed in the name of his principal, and state the name of his principal, only, in the body of the deed.*"

In the courts of New York the doctrine has been repeatedly and emphatically announced. In *Townsend* v. *Hubbard*, 4 Hill, 351, the articles of agreement were between Isaiah Townsend and certain others named, "by Harvey Baldwin their attorney of the first part, and the second party" and concluded: "In witness whereof the said Harvey Baldwin as attorney of the party of the first part, and the said parties of the second part, have hereunto set their hands and seals," and the name of the attorney was subscribed thereto with his seal, and the court declared the covenant to be personal, and say: "In the case of a sealed instrument executed by an attorney, duly authorized by a person, under seal, no particular form of words is necessary to render it valid and binding upon the principal, provided it appears upon the face of the instrument that it was intended to be executed as the deed of the principal, and that the seal affixed to the instrument is *his seal* and not *the seal of the attorney or agent merely.*"

So GARDINER, C. J., lays down the rule in similar words: "When a party is sought to be charged upon an express contract, it must at least appear upon the *face of the instrument* that the agent undertook to bind him as principal." *DeWitt* v. *Walton*, 5 Seld., 571. See also *Spencer* v. *Field*, 10 Wend., 87.

In *Quigley* v. *DeHaas*, 82 Penn. St. Rep., 267, the defendants in error entered into a contract describing themselves as "representing the Clinton and Potter County Navigation Company of the first part," with a concluding clause—"In witness whereof we have hereunto set our hands and seals," and affixing their individual names and seals. They were declared personally bound, and this language is used by the court: "The action was well brought against Quigley and Bailey. Though they contract as agents for the benefit

of the Navigation Company, yet they do so under their own individual seals and hence become individually liable." In harmony with these views is the doctrine laid down by Judge STORY and Chancellor KENT. Story on Agency, § 153, *et seq.*; 2 Kent Com., 931.

In *Whitehead* v. *Reddick*, 12 Ired., 95, the body of the contract as well as the mode of subscription shows that the covenant was that of the "Albermale Swamp Land Company," for whom the plaintiff was acting, and the subject of the contract was the making shingles on the land of the company. The language employed in describing the parties is: "William B. Whitehead, for and on behalf of the Albemarle Swamp Land Company of the one part, and Burwell Reddick and Willis S. Reddick on the other part, do enter into the following agreement, * * * and in conclusion —In witness whereof William B. Whitehead, for and on behalf of the party of the first part, *being the Albermarle Swamp Land Company*, &c.," thus pointing out the principal to be bound, and such was the construction of the contract.

In *Oliver* v. *Dix*, 1 Dev. & Bat. Eq., 158, the bond was under seal and signed, "Thomas Dix, acting for James Dix," and RUFFIN, C. J., declares that "it is unquestionably the bond of Thomas and not of James. The former seals it and he speaks in it throughout, and the latter not at all." The same eminent judge, referring to a deed similarly executed in *Redmond* v. *Coffin*, 2 Dev. Eq., 437, lays down the rule in determining the liability of the party: "It is not material in what form the deed be signed; whether A. B. by C. D., or C. D. for A. B., *provided it appear in the deed* and by the execution that it is the deed of the principal. But what must appear, and the cases cited put that beyond doubt"—citing many cases.

This review leads to the conclusion that the bond now in suit imposes a personal obligation on the defendant, and not on the company nor on its president, neither of whom

is named in the body of the instrument, to pay the money specified and due under it. There is therefore error in the ruling of the court and the judgment of nonsuit must be set aside and a new trial awarded. This will be certified.

Error. *Venire de novo.*

EMIL KATZENSTEIN v. RALEIGH & GASTON RAILROAD COMPANY.

Agency—Action against Railroad Co. for Penalty for Failure to Forward Freight—Application of Penalty—Jurisdiction.

1. In an action against a railroad company, where it was in evidence that S., the regular agent of the defendant at a certain depot, lived three miles from the depot and that T. lived at the depot for two years prior to the bringing of the action and discharged the duties of agent in receiving and forwarding freight, selling tickets, &c., all of which was done in the name of S. and with the knowledge and acquiescence of defendant; *It was held*, that T. was the agent of defendant and that defendant was bound by any act of his within the scope of the authority impliedly given.
2. The penalty against a railroad company for failure to forward freight under ch. 240, § 2, Laws 1874-5, is not given by article 9, § 5 of the constitution to the county school fund.
3. The said statute is not in violation of the Constitution of the United States. Art. 1, § 10.
4. An action to recover the penalty under the statute is an action *ex contractu*, and when the sum demanded does not exceed two hundred dollars a justice of the peace has jurisdiction.

(*Branch* v. *R. R. Co.*, 77 N. C., 347; *Lea* v. *Pearce*, 68 N. C., 76; *Parsley* v. *Nicholson*, 65 N. C., 207; *Wilmington* v. *Davis*, 63 N. C., 532; *Edenton* v. *Wool*, 65 N. C., 379, cited and approved.)

CIVIL ACTION tried on appeal from a justice's court at Fall Term, 1880, of WARREN Superior Court, before *Graves, J.*

The action was instituted by the plaintiff in the justice's court, to recover the sum of one hundred and fifty dollars, due by penalty given by the act of 1875, ch. 240, § 2, which reads as follows: "It shall be unlawful for any railroad company operating in this state, to allow any freight they may receive for shipment, to remain unshipped for more than five days, unless otherwise agreed between the railroad company and the shipper, and any company violating this section, shall forfeit and pay the sum of twenty-five dollars for each day said freight remains unshipped, to any person suing for the same."

The plaintiff complained, that on the 28th day of November, 1878, he delivered to the defendant company at their depot in Warren county (Warrenton), for shipment, the following described freight, to wit, one package containing hides and leather, weighing about five hundred and forty pounds, which was then received by them for shipment, and the defendant did unlawfully and negligently allow said freight to remain unshipped, at their said depot in said county from the said 28th day of November, 1878, until the 9th day of December, 1878, being more than five days from the day it was received by them for shipment, until it was shipped, to wit, eleven days; and demanded judgment against the defendant for the penalty thus incurred.

It was shown on the trial, that one O. P. Shell, was agent of the defendant company at Warrenton depot, that he lived at Warrenton, three miles from the depot, and ran a hack between the points.

The plaintiff offered in evidence, a receipt for the hides alleged to have been delivered to the defendant for shipment, which is as follows:

RALEIGH AND GASTON RAILROAD COMPANY,

November 28, 1878.

Received of E. Katzenstein, one bundle of hides, 540

pounds in apparent good order, marked Edwards & B., to be sent to Boston, Mass.

(Signed) O. P. SHELL, Agent.

The admission of the receipt was objected to, because it was not signed by Shell, but by one Terrel for him. It was shown that at the depot, for two years, Terrel had attended to the business of receiving and forwarding freight for Shell, and issuing passenger tickets, and all the business was done in the name of Shell, as agent, and at his request; that he received his compensation from the agent, Shell, who received his pay from the company; that he received the hides from the plaintiff on the day the receipt bears date; that he put them in defendant's warehouse, gave plaintiff the receipt offered in evidence, and afterwards shipped them on defendant's cars; that he was in the habit of telegraphing to the superintendent at Raleigh, in Shell's name for cars to carry off freight from that depot which were sent in answer to these telegrams; that the superintendent of the road was frequently at that depot while Terrel was attending to the duties of the office; that on one occasion on the cars, the superintendent requested the plaintiff to notify him if Terrel failed to ship off his goods promptly. The objection of the defendant was overruled and the receipt admitted in evidence, to which the defendant excepted.

It was also in evidence that the hides remained in the warehouse of the defendant eleven days from the date of this dealing, and there was no agreement that they should not be shipped immediately. It was not the custom of the company to receive freight in advance, and none was demanded in this case, but was paid at the point of destination.

There were several points of law raised and urged by the defendant's counsel on the trial:

I. That there was no evidence to go to the jury of the delivery of the bale of hides to the defendant; that it was not

shown that Terrel who signed the receipt was the agent of the company, or had any authority to bind it in any way; that Shell was the agent of the company, and had no authority to appoint a sub-agent; that Terrel was Shell's agent, and not the agent of the company and was not known or recognized by the company as its agent.

2. That under the constitution, (art. 9, § 5) all penalties, forfeitures, &c., are given to the county school fund, and it is provided therein, that they shall belong to, and remain in the several counties, and shall be faithfully appropriated to maintaining and establishing free public schools in the several counties in the state, and that the plaintiff could not recover in this action in his own name.

3. That the act of the general assembly giving this penalty, (laws of 1874–'75, ch. 240, § 2) under which this action was brought, was in violation of article one, section ten of the constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, and was therefore unconstitutional and void.

On the first point, the court charged the jury that there was evidence to be considered by them that Terrel was the agent of the defendant company, and if they should so find that he was the company's agent, they would find that plaintiff's goods were delivered to defendant company, at the date of the receipt for the purpose stated in it.

On the second point, the court charged the jury, the penalty did not go to the common school fund, and the plaintiff had the right to sue for and recover it, in his own name, if they found the other facts for the plaintiff. Defendant excepted.

On the third point, the court charged the jury that the act of 1874–'75, was not unconstitutional. Defendant excepted.

The jury found a verdict for the plaintiff, and from judgment thereon, the defendant appealed.

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

ASHE, J. As to the exception taken to the admission of the receipt given by Terrel in the name of Shell, we concur with the ruling of His Honor. There was abundant proof to go to the jury that Terrel was the agent of the defendant. An agent is one who is employed by another to do some act or transact some business on his account. Story on Agency, § 3; Parsons on Contracts, pp. 39 *et seq.* It is not necessary to show the appointment of an agent; his agency may be inferred from the relations of the parties, and the nature of the employment. Bouvier's Law Dict., 83.

It was in evidence that Shell was the regularly appointed agent of defendant company at their Warrenton depot, but that he lived three miles away from the depot, and was occupied in driving a hack from Warrenton to the depot. Terrel lived at the depot, and for two years before this action was commenced, had attended to the business of the office at that point, and had discharged the duties of agent in receiving and forwarding goods, selling tickets, sending telegrams to the superintendent, ordering cars to be sent, &c., all of which was done in the name of Shell, with the knowledge and acquiescence of the defendant, for it is impossible that he should have discharged all of these duties pertaining to the office of agent, for such a length of time, without their knowledge and approval. If he was not their agent, and had no right to bind them by his acts, then the defendant company had been shipping freight and doing other business as carriers for two years without responsibility. If he was not their agent, why did the superintendent tell the plaintiff to notify him if Terrel did not ship his goods promptly? It matters not whether Terrel signed the receipt with Shell's name, or that of the company, or whether he was paid for his services by the one or the other, if he

transacted the business of the company, and performed the duties of an agent on their account, with their knowledge, or with their acquiescence, he was their agent, and they were bound by any act of his within the scope of the authority impliedly given.

As to the second exception of the defendant, we think it was as groundless as that taken to the agency of Terrel. The action was properly brought in the name of the plaintiff. Article nine, section five of the constitution does give to the county school fund all monies, stocks, bonds, and other property belonging to a county, the nett proceeds of the sale of estrays, the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties, for any breach of the penal or military laws of the state; but there is a distinction between those penalties that accrue to the state, and those that are given to the person aggrieved, or such as may sue for the same, and no doubt this distinction was in the contemptation of the framers of the constitution when they adopted that section. There are many penalties given against officers and others whom no one is authorized to sue, and those when collected, belong to the state. It must be this class of penalties that is given to the county school fund. If it was intended by the constitution to give them all penalties, as well those that belong to the state as those that are given to the party aggrieved or common informer, then the statutes giving penalties in the both cases would become a "dead letter;" for there might be, now and then, found a person malicious enough, but none so patriotic and unselfish as to bring an action for a penalty and incur responsibility for costs, when he knew the fruits of his suit would fall into other hands. If the penalty sought to be recovered in this action belongs to the county school fund, then all penalties must go the same way, and hereafter, the plaintiff who amerces a sheriff in the sum of one hundred dollars for not serving his process, will collect it

for the benefit of the school fund of his county. That cannot be the meaning of the constitution.

As to the third exception, we need only refer to the case of *Branch* v. *Wilmington and Weldon R. R. Co.*, 77 N. C., 347, where this court expressly decided that the section in question of the act of 1874–'75 was not in violation of the constitution of the United States.

In this court the defendant, as he had the right to do, raised an objection to the jurisdiction of the justice's court, and insisted that even if the plaintiff had the right to maintain this action in his own name, the justice of the peace had no jurisdiction of the action; for the constitution defines and prescribes the jurisdiction of the justice of the peace by providing that "the several justices of the peace shall have jurisdiction of civil actions wherein the sum demanded shall not exceed the sum of two hundred dollars, and wherein the title to real estate shall not be in controversy, (Art. IV, § 27) that to give him jurisdiction it must not only be shown that it is a civil action, but that it was founded on contract. That is true; but then is a penalty a contract, or is it in the nature of a contract?

When this court has found itself "afloat" upon the "uncertain sea" of code interpretation, it has necessarily and very properly had recourse to the "old landmarks" established under the former system of pleading, as guides through the mist that but too frequently envelopes the practice under the provisions of the code. For although the distinction between actions at law, and suits in equity and the forms of actions are abolished, and there is in this state but one form of action, it is only the name and form of the action that are abolished; the essential principles are preserved. Under the present system when the plaintiff sets forth in his complaint, as he is required to do, a plain and concise statement of the facts constituting his cause of action, the principles that govern his cause of action under

the common law and equity pleadings are still applicable, as indicating the nature of the grievance, the evidence required, and the means of relief, and the action is just as much an action of trespass, detinue, or debt, as if it had been called so in the pleadings. Bliss on Code Pleading, 7 and 8; *Lee* v. *Pearce*, 68 N. C. 76; *Parsley* v. *Nicholson*, 65 N. C., 207.

In common law pleadings the action of debt was the remedy to recover a debt *eo nomine* and *in numero*; it was founded upon contract, and in this respect differed from *assumpsit*, which was always founded upon a promise. *Simonton* v. *Borrel*, 21 Wendell, 362.

The action of debt then, thus founded upon contract, was an appropriate remedy, upon all legal liabilities upon simple contracts, whether written or unwritten; upon notes, whether with or without seals; and *upon statutes by a party grieved* or by a *common informer*; whenever the demand was for a sum certain or was capable of being readily reduced to a certainty. 1 Chitty's Pleading, 123. As for example a penalty imposed by a statute, though the amount is uncertain, and is to be fixed by the court between five and fifty dollars. *Rockwell* v. *Ohio*, 11 Ohio, 130.

But why was debt an action sounding in contract the proper remedy for a penalty given by a state? The learned jurists whose cumulative wisdom formed the common law system of pleading, which has been characterized by some of its eulogists as the *perfection of reason*, must have had good grounds for classifying penalties among those subjects of action denominated *ex contractu* as distinguished from torts. The only explanation we have been able in our researches to meet with on this subject is to be found in 3 Blackstone's Commentaries, 160. That learned judge and commentator says: "There are some contracts implied by law. Of this nature are, first, such as are necessarily implied by the fundamental constitution of government, to

which every man is a contracting party. And thus it is, that every person is bound and hath agreed to pay such particular sums of money as are charged on him by the sentence or assessed by the interpretation of the law. For it is a part of the original contract entered into by all mankind, who partake the benefit of society, to submit in all points, to the municipal constitutions and local ordinances of that state, of which each individual is a member. Whatever, therefore, the law orders one to pay, that becomes instantly a debt which he hath beforehand *contracted* to discharge."

In the case of *Wilmington* v. *Davis*, 63 N. C., 582, Judge RODMAN held that a justice of the peace had jurisdiction of a penalty under two hundred dollars; but it is objected that that was a *dictum*: be it so, yet it was an authority from a very respectable source, which was afterwards cited and approved in the case of the town of *Edenton* v. *Wool*, 65 N. C., 379, where this court held that an action for a penalty for a breach of a town ordinance was technically a civil action arising out of *contract*.

There is no error. The judgment must be affirmed.

No error. Affirmed.

W. W. PEGRAM v. CHARLOTTE, COLUMBIA & AUGUSTA RAILROAD COMPANY.

Agent and Principal—Contract—Fiduciary Relation.

Plaintiff, station agent of a railroad company, sues the company in damages for breach of an alleged contract in failing to furnish a train for an excursion. Upon correspondence had the company supposed the train was intended for a third party and agreed to supply it on cer-

terms, but afterwards refused on discovering that plaintiff was attempting to procure it for his own benefit; *Held*, that plaintiff could not from his fiduciary relation towards the company enter into a binding contract with it for such purpose, unless it agreed thereto after being fully advised of all the circumstances.

(*Brunhild* v. *Freeman*, 77 N. C., 128; *Pendleton* v. *Jones*, 82 N. C., 249, cited and approved.)

CIVIL ACTION tried at Fall Term, 1880, of MECKLENBURG Superior Court, before *Seymour, J.*

Verdict and judgment for plaintiff, appeal by defendant.

Messrs. Shipp & Bailey, for plaintiff.
Messrs. Wilson & Son, for defendant.

SMITH, C. J. The action is for damages for breach of a contract alleged to have been entered into by the defendant for the hire of two excursion trains to be run over the railroad, one between Charlotte and Augusta, the other between Charlotte and Columbia, in the month of May, 1875. The answer explains the correspondence between the plaintiff and the general superintendent of the company, in whom was vested authority to contract for the running of trains over the road, denies the existence of the alleged contract, and insists that, if made, it was procured through circumvention and fraud practiced by the plaintiff and is void. No specific questions of fact, growing out of the opposing allegations, were framed, but the entire controversy was submitted to the jury who find "the issues in favor of the plaintiff and assess his damages at seven hundred and seventy-five dollars." On the trial the plaintiff, testifying for himself, stated that during the year 1875 he was station agent for the defendant company at Charlotte, and had the supervision of the depot and business at that place; that he addressed to the general passenger and freight agent of the

company at Columbia two letters of same date and in the following words:

[1] "C. C. & A. R. R., CHARLOTTE AGENCY,
March 1st, 1875.

A. Pope, Esq., G. F. A., Columbia:

Ferry Morehead, colored, wants to know price of an excursion train of five coaches and one baggage car, Augusta to Charlotte and back; leaving Augusta 19th May, and returning, leave Charlotte 9 a. m., 21st May, 1875.

Respectfully,

W. W. PEGRAM, Agent."

[2] "Please let me know the lowest price for engine, five coaches and baggage car, Columbia to Charlotte and back with privilege of running between Charlotte and the fair grounds during the day, leaving Columbia five or six o'clock a. m., 20th May, and returning, leave Charlotte 12:30 a. m., 21st of May." (Written at Charlotte Agency and signed by W. W. Pegram.)

That in reply the said Pope wrote to the plaintiff that the trains from Augusta to Charlotte could be forwarded for $400, and from Charlotte to Columbia for $250; that the plaintiff on March 18th sent a telegraphic message to Pope that he thought both trains would be taken, and asking him not to make any other arrangement until he should hear further, and soon after he wrote to Pope in the following terms, from the Charlotte Agency under date of March 25th, 1875:

"Both trains of which I wrote you, about 1st March, have been taken. You will please arrange accordingly. The one for Columbia should be made up of the very best cars, as it is intended for whites entirely." (Signed by W. W. Pegram, Agent.)

This was the evidence offered in support of the contract, and the plaintiff further testified that it was made in contemplation of the intended commemoration of the centennial

of the Mecklenburg declaration of May 20th, which was expected to attract and did in fact attract large numbers to Charlotte, and from the refusal to supply the trains the plaintiff suffered a large loss in profits. The testimony of the general superintendent, who had authority to enter into such arrangements, was in substance that he was wholly ignorant of the approaching celebration and of the increased travel in consequence about that date, and no information was given him by the plaintiff or others, and that as soon as he discovered that the plaintiff was attempting to procure trains for his own use, he promptly refused to let them go. A series of instructions was asked for the appellant, unnecessary to be set out in detail, but which are embodied in these propositions:

1. The plaintiff's agency and its consequent fiduciary obligations incapacitated him from making a contract with the company, creating adverse relations between them within the scope of such agency.

2. A contract thus obtained without a full disclosure of all matters affecting the interests of his principal and known to the agent would be fraudulent and void.

3. The plaintiff was bound to look after and promote the interests of the company, and could not without its full knowledge of all the material facts by means of the attempted contract advance his own at the expense and to the injury of his employer.

4. The burden of showing that the company possessed the necessary information and his own good faith devolved upon the plaintiff.

5. There was no evidence the company had such information.

6. The measure of damages in case of recovery is the excess above the contract price, of the earnings of the road in its ordinary runnings and not the extraordinary occasion to which the contract had reference.

The instructions were not given and in their place the following: The plaintiff was bound to communicate to the superior agent with whom he was dealing all the information he possessed which was material to the interests of their common principal in determining upon the proposed contract, and that he was acting for himself; and he must have acted with the utmost good faith of which proof must come from him. It was not necessary however for him to give information of facts which he might reasonably assume to be known to all and were known to his superior agent—as for illustration, that the 4th day of July is a national holiday. The Mecklenburg celebration is not of the kind of which notice is presumed. If this centennial celebration was of such general notoriety as to be known to Pope or the general agents of the company, having charge of such contracts, and was in fact so known to them, then the failure of the plaintiff to convey this information would not defeat his action. This he must show. The defendant, if uninformed by the plaintiff or otherwise of the contemplated proceedings in May and the plaintiff at the date of the contract was acting as its agent, could terminate it and would not become liable. The damages, if any, are such as may be reasonably supposed to have been contemplated by the parties at the time as the probable results of the breach of the contract.

The correspondence between the plaintiff, the subordinate, and Pope, the superior agent, both in the service of a common principal, furnishes the evidence of the contract on which the action is based. It does not show upon its face that the plaintiff was seeking to enter into a personal contract for his own individual advantage with his employer. His first letter is one of inquiry for Ferry Morehead who "wants to know price of excursion train," has the usual agency heading and is signed by himself as "*agent.*" The second, bearing the same date, and the same general im-

press, except that the signature is without the "*agency*," would reasonably be associated with the other in its purposes and be interpreted in the same way. In neither is there any indication of a direct personal interest in the subject of the inquiry on the part of the writer. They would both most naturally be understood as a communication between the two agents of the same company, the one asking and the other furnishing information for some outside party. The telegraphic message is in keeping with the letters—the plaintiff saying to his superior on the 18th of March that "he thought that both trains would be taken" and asking that no other arrangement be made until he heard further —language implying that the acceptance of the proposition depended on the will of another, not on that of the writer. The letter of acceptance is of similar import, declaring *that both trains have been taken*, as if the act had been consummated between himself and another, and he was now communicating the fact to the superior agent. No where does the plaintiff profess or appear to be acting for himself and for his personal benefit, and so the matter seems to have been understood by Pope, who testifies that as soon as it came to his knowledge that the centennial celebration was to come off and that the "plaintiff had procured a train for his own use and benefit * * * * he refused to allow the plaintiff to have the trains." The several inter-communications do not disclose any common understanding—that *aggregatio mentium*—the essential element in a valid agreement. Pope seems to have received the plaintiff's messages (and this interpretation is warranted by the terms used and their relations as employees in the same general service) as conveyed in the interest of the company, and not for the advancement of his own profit; and his undiscovered intention, even in the absence of any third party, cannot constitute a contract with his principal any more than with Pope himself. The existence of a contract depends upon a mutual agreement,

and its binding force results not from what either intended but what both concurred in. *Brunhild* v. *Freeman*, 77 N. C., 128; *Pendleton* v. *Jones*, 82 N. C. 249. The point is not distinctly presented in the instructions asked and refused, but it is in our opinion substantially involved in the first in connection with the others, that the plaintiff could not from his fiduciary relations towards the company enter into a binding contract with it. This was in effect a request that the judge charge the jury that no legal contract was created between the plaintiff and his employer, and there was error in refusing to so charge. The law in harmony with sound morals refuses its sanction to any measure, though assuming the form of contract, procured by a fiduciary from his principal in violation of the trusts reposed in him, and to the injury of the latter, at least unless such principal is fully advised of all the circumstances and knows at the time that he is dealing with one, then divested of his agency, and acting in an adversary and independent capacity. The cases and authorities cited for the appellant fully support this doctrine. *Story Ag.*, § 211 *et seq*; *Ringo* v. *Binns*, 10 Peters, 269; *Dunn* v. *English*, 10 Moak, 846. For the error pointed out there must be a new trial.

Error. *Venire de novo.*

BENJAMIN RUSH and others v. HALCYON STEAMBOAT COMPANY.

Corporations, service of process against.

1. Notice of a motion for leave to issue execution against a corporation, served upon its president or managing agent (or others named in section 82 of the code) is sufficient. The "personal notice" mentioned in

section 256 of the code is but in contra-distinction to that given by publication. And it is not a sufficient answer to such motion to show that the judgment against the corporation had been paid by a surety to an appeal bond, where it appeared the money was returned to the surety upon vacation of the judgment as to him.

2. A corporation cannot be allowed to deny its organization and existence after contracting a debt in its corporate capacity, or answering a complaint demanding payment.

MOTION by plaintiffs for leave to issue execution heard at January Term, 1881, of THE SUPREME COURT.

Messrs. Hinsdale & Devereux and *N. W. Ray*, for plaintiffs.
Mr. W. A. Guthrie, for defendant.

SMITH, C. J. At June term, 1872, of this court, judgment was recovered by the plaintiff against the defendant and the sureties to the undertaking given on the appeal from the judgment of the justice who first tried the cause, upon which execution issued, and was paid by one of the sureties and the sheriff returned the same satisfied. At January term, the judgment as against the sureties was vacated as improvidently granted under sections 541 and 542 of the Code, and the money paid into the office was returned to the surety from whom it had been collected. The motion is now made for leave to issue execution against the defendant, and it is opposed on several grounds:

1. For that personal notice has not been given to the defendant of the proposed motion.

2. For that the return of the sheriff and the docket show satisfaction of the judgment.

3. For that there has not been and is not now any corporate organization known as the "Halcyon Steamboat Company."

I. Notice was served upon R. M. Orrell, "the superintendent and general agent of the Halcyon Steamboat Com-

pany," as he styles himself in accepting service of the warrant issued in the original action, upon the recognition of the validity of which all subsequent proceedings in the cause were conducted, terminating in the final judgment now sought to be revived. Notice was also given to the attorney who is now contesting the application. The existence of the corporation is necessarily determined by the proceedings conducted against it; and as it can only act through its agents, process must be served on some of them, or it could not be served at all. The statute provides that service of the summon may be made upon "the president or other head of the corporation, secretary, treasurer, a director or *managing agent*" of the corporation; and the same method of serving notice of a motion to revive a dormant judgment must be sufficient under the Code. § § 82, 256. The "*personal notice*" mentioned in section 256, is but in contra-distinction to that given "by publication or in such other manner as the court may direct."

II. The docket shows the sheriff returned the execution issued to him satisfied and that the money was paid into the office, but it also shows that it has been returned to the surety; and as this was done after the judgment was set aside as to the sureties and a necessary consequence of the order, it affirmatively appears that the judgment has not been satisfied. It is as if no collection had been made.

III. As we have already observed, it is too late to deny the organization and existence of the corporation, after it has answered to the action and made an unsuccessful resistance to the plaintiff's demand. If it were an open question and proof was necessary to show the existence of a corporate body, the very act of contracting the debt in its corporate capacity would be an obstacle, if not an estoppel, in the way of escaping the obligations upon such ground. Abb. Trial Evi., 28. But this enquiry is concluded by the judgment.

The plaintiffs are entitled to their motion for leave to sue out execution, and it is so adjudged.

PER CURIAM. Motion allowed.

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*State *ex rel* ATTORNEY GENERAL v. ROANOKE NAVIGATION COMPANY.

Action for dissolution of Corporation—Creditors' Bill—Injunction.

In an action brought for the dissolution of the Roanoke Navigation Company under the act of 1875, ch. 198, the court after publication of summons, has full control of the franchise and property of the company and of all persons interested in its affairs, whether creditors or others, in like manner as in a "creditors' bill;" and the refusal to grant an injunction restraining a creditor of the company from selling its franchise and property under an execution in his favor, is error.

APPLICATION of plaintiff for an injunction heard at Chambers in Halifax on the 1st of October, 1880, before *Graves, J.*

This is a petition for an injunction to restrain John A. Moore from proceeding to sell the franchise and property of the Roanoke Navigation Company, under executions in his favor, which have been levied upon said franchise and property. An act was passed by the general assembly of North Carolina at its session in the year 1812, entitled "an act to improve the navigation of Roanoke river," and to that end provided that books should be opened for subscription; and when a certain amount of stock should be subscribed, the subscribers, their heirs and assigns should be a

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

corporation under the corporate name of "The Roanoke Navigation Company," with powers to sue and be sued, acquire real property for its uses, receive tolls and do other acts incident to a corporation. That the requisite amount of stock was taken and the company was duly organized, that the original charter was amended by several acts of the legislature, passed in the years 1816 and 1817, and under the act of 1816, the state of North Carolina became a stockholder to the extent of two hundred and fifty shares of stock. That the said company, in pursuance of its charter, did cut a canal from a point on said river near the present town of Weldon to a point near the town of Gaston, and erected thereon the usual locks, toll-houses, &c., and used the same for the purposes of navigation many years. The said company also became the owner of a large amount of real estate in Halifax county, for the purposes of said navigation, and now holds real estate of much value therein. On the 18th of March, 1875, the general assembly of this state passed an act, entitled "an act for the dissolution of the Roanoke Navigation Company." Acts 1874–'75, ch. 198. By the provisions of said act the attorney general was required, in the name of the state of North Carolina, to institute an action for the dissolution of said company; said action should be in the name of the state; the summons should be served on the officers and corporators of said company and others interested in the affairs of said company, by publishing a copy thereof as therein provided, and that before a judgment of dissolution of said corporation should be made, a receiver of the effects of said corporation should be appointed; and make the proper order for the settlement of its affairs as prescribed by chapter 36, section 39 of Battle's Revisal; that the judgment should be published in like manner as the summons is required to be, and upon such judgment the corporation should cease to exist, and all its works and property between the towns

of Weldon and Gaston, and at Weldon, including its canal or canals, should be sold by the receiver on such terms as the court shall adjudge, who shall convey by deed the same to the purchaser. That in pursuance of this act of assembly, this action was commenced by the attorney general for the state, at the spring term, 1875, of Halifax superior court, for a dissolution of the corporation, for a sale of its corporate effects and property, and the winding up and settlement of the affairs of the company, upon the ground that the said company had forfeited its charter, by reason of its neglect for more than seven years before the commencement of this action, to make use of any of its chartered powers or perform any of its duties enjoined by the acts of its incorporation, to wit: to keep in repair the said canal and to keep in navigable condition those parts of said river lying between Weldon and Gaston, to provide boats or other means of transportation of passengers or freight on either said canal or river; and by a disuse of its corporate rights and powers.

That at spring term, 1877, of said court, one B. W. Spillman, as trustee, recovered a judgment against said company for $160.50, of which $150 is principal; and at the same term, Fanny Bass, as executrix of B. W. Bass, recovered a judgment against said company for $154.50, of which $150 is principal. The said judgments were duly docketed in said county, and thereafter by assignment transferred to John A. Moore, who is prosecuting their collection, and that on the 12th of August, 1880, executions on said judgments were issued to the sheriff of Halifax county and he had levied the same on the franchise and real estate of said company, lying in Halifax county, and had advertised the same for sale on the 26th of September ensuing.

On the 24th of August, 1880, a petition was filed in the cause setting forth the above facts, and the further fact that the value of the property and franchise levied upon and ad-

vertised for sale was largely in excess of the amounts of said judgments, and if said sale was permitted to proceed the said property and franchise would probably be bought in by the judgment creditors or others at a sacrifice to the company and the state, and prayed that the said John A. Moore and the other creditors of said company be restrained and enjoined from selling said franchise and property, and that they be required forthwith to come in and be made parties to this action, to the end that said claims might be adjusted and equities ascertained and fixed. John A. Moore came in and demurred to all the petition, except that part which insisted that the said defendant and other creditors should be compelled to prosecute their claims in this suit and that their proceeding to sell the franchise and property of the company was illegal, and that part stating the value of the property; and to these he answered that he should not be compelled to prosecute his claim in this action, but had the right to prosecute the same in the usual course of law, and that he had no information as to the value of the property. Upon this petition and answer, His Honor, being of opinion that the creditors should pursue their remedies in this action, made an order restraining and enjoining the said John A. Moore from selling said land or franchise under said executions, and requiring him to appear at Warrenton on the 18th day of September, 1880, and show cause why the injunction should not be continued until the hearing. The hearing of the motion was continued until the 1st day of October, 1880, when His Honor, upon hearing the petition and answer at Halifax, adjudged that the application for an injunction be refused, from which judgment the state appealed.

Attorney General and *Thomas N. Hill*, for plaintiff.

Messrs. Day & Zollicoffer. Mullen & Moore and *J. B. Batchelor*, for defendant.

ATTORNEY GENERAL *v.* ROANOKE NAV. CO.

ASHE, J. The proceeding adopted in this case for the dissolution and winding up the affairs of the Roanoke Navigation Company is strictly in conformity to the provisions of the act of 1875—an act which seems to have been drawn up with much care and so intelligibly expresses its purpose and the proceedings prescribed for carrying it into execution, that its interpretation is rendered free from difficulty. We have no doubt it was the intention of the legislature to create a proceeding in nature of a "creditors' bill," but while they have had that remedy in view, in the provisions of the act, they have seen proper to vary somewhat from the established practice in such cases and make this a special proceeding, adapted to the particular circumstances of the case. It is the settled practice in bills filed by creditors in behalf of themselves and all other creditors, who may come in and make themselves parties, &c., that no injunction will be granted restraining creditors from instituting and prosecuting actions against the debtor before a decree to account is rendered in the cause, unless they have made themselves parties prior to that stage of the proceeding; in which case it is surmised the court would have the right to exercise that power. But prior to the decree, it is so regarded as the action of the plaintiff alone, that he has exclusive control over the case, and may dismiss or compromise the action at his option, which he cannot do after the decree. For then the cause and parties are under the absolute control of the court, and the property of the debtor is taken *in custodia legis*, and while the plaintiff still has the conduct of the suit, he ceases to have the absolute control, and cannot dismiss the action without the consent of the court, and in opposition to the wishes of the other creditors who may have made themselves parties.

But in the proceeding under the act of 1875, the publication of the copy of the summons, as prescribed therein, is deemed and held a sufficient service upon all the officers,

corporators and persons interested in the affairs of the company, and they are made thereby parties to the suit, subject to such rules and orders as the court may see proper to take in the progress of the action. And before judgment for dissolution, the court may appoint a receiver of its effects, and make the proper order for the settlement of its affairs, as prescribed in chapter 26, section 39, of Battle's Revisal, act of 1871-'2, ch. 199, § 39. By which act it is made the duty of the receiver, when appointed, to collect all debts owing to the company; to sell all its property and effects; to pay all persons having just claims against it; to distribute the surplus effects among the corporators, and pay all costs connected with the settlement.

We think the proper construction of the act of 1875 is, to give the court taking cognizance of the action full control after publication of the copy of the summons of the property and franchise of the company, and of persons interested in the affairs of the company, whether officers, corporators, or creditors, in like manner as the courts have and exercise in the ordinary "creditors' bill," after a decree to account, and sometimes under special circumstances, even before the decree. For if a judgment has been obtained against the debtor by a creditor before a decree, there may be special grounds to prohibit him from taking out execution, though such is not the ordinary rule. Adams Eq., 260. Aside from the general provisions of the act of 1875, which impliedly invest the court, taking cognizance of the case, with the power to interfere, to prevent a sale of the property and franchise of the company on execution, we think there are *special grounds* in this case for such an interference. For if a sale under the defendant's execution should be permitted to proceed, the purchaser would acquire not only the profits but the franchise, with the rights and privileges of receiving the fares and tolls, and recovering such penalties as might be imposed by law, for an injury to

the franchise, or for any other cause which such corporation might be entitled to recover, during the time limited in the said purchase of the franchise. Rev. Code, ch. 26, §§ 9, 10, 11 and 12. The property of the company, the rights of the corporators, and the interests of other creditors, would in all probability to a great extent be sacrificed by a forced sale, while the plaintiff in the execution would suffer no other inconvenience than that arising from delay. His debts would in no sense be imperilled or impaired by a postponement of their satisfaction. Such a sale would in a great measure thwart the purposes the legislature had in view in passing the act of 1875 for a dissolution, and winding up and settling the affairs of the company upon a fair and equitable basis.

We are of the opinion that considerations of equity and policy demand that the sale under the executions should be restrained. We are therefore constrained to hold there was error and that the injunction restraining John A. Moore from the further prosecution of his executions, should be continued to the hearing. Let this be certified to the superior court of Halifax county that proceedings may be there had in conformity to this opinion.

Error. Reversed.

SETH ABERNATHY and others v. GEORGE L. PHIFER and others, county commissioners.

Allowance of Claim against County—Confederate Money—Scale.

1. Allowance of a claim by the board of county commissioners is not conclusive but only *prima facie* evidence of its correctness, and the order making the same may be modified or annulled.

2. In 1860, the clerk and master in equity received a fund belonging to plaintiff distributees, and in 1863 paid the amount to the treasurer of the county (taking his receipt therefor as due the distributees) who expended it for county; *Held*, that the payment in 1863, in the absence of proof to the contrary, is presumed to have been made in confederate currency, and the county is liable for its scale value.

CONTROVERSY submitted without action at Fall Term, 1880, of LINCOLN Superior Court, before *Seymour, J.*

The plaintiffs claim that the county of Lincoln is indebted to them as follows:

To Seth Abernathy and wife, Elizabeth, in the sum of $116.06, to James Keeser and wife, Mary, in the sum of $216.06, to Henry Harris and wife in the sum of $216.06, and that the said several sums bear interest from the 24th of November, 1863.

The defendant commissioners resist these claims and say that the county is liable only for the scale value of the money at the date of its receipt by the county treasurer on November 18th, 1863, and that the payment of $140 in June, 1878, is a full discharge of all the liability of the county.

The facts agreed upon are as follows: That a short time prior to August, 1860, the clerk and master in equity for Lincoln county received into his hands a fund belonging to the estate of John Bradshaw, deceased, to be distributed among the persons entitled thereto; that of the persons so entitled the femes plaintiff form a part, to each of whom there was due the sum of $216.06; that on the 7th of January, 1861, Seth Abernathy and wife received from said clerk and master in equity the sum of $100; that on the 24th of November, 1863, the said clerk and master in equity paid over to W. H. Michal, treasurer of Lincoln county, the sum of $548.26 and entered his receipt therefor on the execution docket, and that this amount was due and payable as follows: To Mrs. Abernathy, $116.06; to Mrs. Keeser, $216.06; to Mrs. Harris, $216.06. That said sum of $548.26 so re-

ceived was expended by said treasurer for the benefit of said county; that on the 1st Monday in April, 1878, demand was made on B. H. Sumner and others, the then board of commissioners of said county, by Seth Abernathy and wife, James Keeser and wife, for the amounts claimed by them as aforesaid, and that the said board on the 4th of June, 1878, at a regular meeting issued an order to pay to James Keeser and wife $140 of said amount due to them which was paid by the treasurer in a few days thereafter, and the said board of commissioners at a regular meeting held on the 1st Monday in August, 1878, issued further orders to the treasurer to pay to James Keeser and wife $76.06 and to Seth Abernathy and wife $116.06.

That on the 7th of October, 1878, a demand was made on said board by Henry Harris and wife for the amount claimed by them as aforesaid, and on the same day the board ordered the amount of $216.06 to be paid them and the order was issued on the 11th of December, 1878, but a new board coming into office on the first of that month, made an order at a regular meeting of the board in January following in the following words: "Ordered by the board that notice be served on the county treasurer, J. C. Jenkins, not to pay any more money to the heirs of John Bradshaw, deceased, on orders issued by the late board." No notice of the same reached the plaintiffs or their counsel until after the said order was made.

Upon this state of facts the court below adjudged that Abernathy and wife and Harris and wife were entitled to receive the amounts claimed by them subject to the scale value, at the time the money was paid over to the board of of county commissioners, from which judgment the plaintiffs appealed.

No counsel for plaintiffs.

Mr. B. C. Cobb, for defendants.

ASHE, J. We do not see how the court below could have decided otherwise than it has, upon the facts in the case agreed. The plaintiffs seemed to have entertained the notion that the orders made by the board of county commissioners in their meetings held on the 4th of June, 1878, the 1st Monday in August, 1878, and the 7th of October, 1878, were *adjudications* upon the rights of the parties, and the orders of January, 1879, annulling these orders were *ultra vires* and void.

In this position we do not concur. The allowance of a claim by a county board of commissioners is not final and conclusive. Such an allowance is only *prima facie* evidence of the correctness of the claim. In the case of *Commissioners* v. *Keller*, 6 Kan., 510, it is held that the allowance of a claim by the county board is not final and conclusive. It may be re examined by the board itself, and on appeal may be examined or disallowed in whole or in part by the court, and it is error to instruct the jury that the allowance of a claim by the board is an adjudication as binding on the parties as the judgment of a court. If the decision of the county board was final and conclusive, then a party who once had a claim rejected for any cause could not again present it for allowance because it would be *res adjudicata*, yet this is constantly done and the practice has not been questioned.

We are therefore lead to the conclusion that an allowance made by a board may at any time be re-examined, modified or annulled, for reasons that may appear to them sufficient.

But it is conceded that the county commissioners received the money of the plaintiffs from the clerk and master and used it for county purposes. The county is therefore liable, but for what amount is the question.

There is no evidence as to the kind of money paid over by the clerk and master to the county commissioners—

whether gold, silver, bank bills, or confederate treasury notes. If the case had stated that the funds received by the clerk and master were of a particular kind, and he had paid over the identical funds to the board, there would be no doubt as to the amount of the liability of the county. But the case does not show that, nor what kind of money or funds were paid over. As it was a notorious fact that confederate treasury notes, about November, 1863, (when this fund was paid over) was the only circulating medium in the ordinary business transactions in this state, we must presume, in the absence of all proof to the contrary, that the fund paid over to the board of commissioners was confederate money. The defendants then are only liable for the value of that currency when received.

Under this view, Keeser and wife having received one hundred and forty dollars in June, 1878, in good money, have been paid more than is due to them. The judgment that Harris and wife and Abernathy and wife recover the amounts claimed by them, subject to the scale, must be affirmed with interest on the amount due Abernathy and wife from the 1st Monday in April, 1878, and on the amount due Harris and wife from the 1st of October, 1878.

There is no error.

No error. Affirmed.

McWILLIAM YOUNG and others v. J. O. GRIFFITH and others.

Deed—Contract to convey land—Judge's Charge—Ejectment.

1. Where land is described in a contract to convey, as "beginningon J 's line and T. and E. and W., and to the.....of a ridge joining said W's land, and running a parallel line with a course extended to the top of

said ridge, all the land within said boundaries," the inference that the language surrounds no definite space and gives a part only of the enclosing lines, is not so clear as to warrant a withdrawal from the jury of the inquiry whether sufficient proof may not be adduced to distinguish and set apart the territory; especially where a subsequent deed specifying the outlines corresponds with the contract in the number of acres and price of the land.

2. A suit which determines the obligation to pay for land under a contract of sale, also establishes the right of the vendee to have the land by a specific performance.

3. Where the jury are charged that if they are satisfied such contract covers land in possession of defendant the plaintiff is entitled to recover, a ruling that the contract is too vague and uncertain in describing the land to show authority in an executor to convey, cannot be sustained because calculated to mislead the jury.

4. *Semble*—Where an action is begun when the right to recover depends upon the possession of the legal title and retains until final judgment this feature of the former practice, it is doubtful if defendant can set up title by relation to a former decree in equity, if his deed was in fact subsequent to that of plaintiff.

(*Testerman* v. *Poe*, 2 Dev. & Bat., 103; *Richardson* v. *Thornton*, 7 Jones, 458; *Farmer* v. *Batts*, 83 N. C., 387; *Davis* v. *Evans*, 5 Ired., 525; *Presnall* v. *Ramsour*, 8 Ired., 505, cited and approved.)

CIVIL ACTION to recover land tried at Fall Term, 1879, of MADISON Superior Court, before *Graves, J.*

There was a verdict in favor of defendants, and from the judgment thereon the plaintiffs appealed.

Mr. W. H. Malone, for plaintiffs.

Messrs. McLoud, Davidson and *Battle & Mordecai,* for defendants.

SMITH, C. J. This action begun in the year 1861, is for the possession of a tract of land formerly belonging to Robert Love and James R. Love, under whom both parties claim, and must conform as far as practicable to the new rules of practice and procedure. C. C. P., § 8.

On the trial of the issue, the plaintiffs in support of their title exhibited an executory agreement executed on October 13th, 1841, with seals, by the said Robert and James R. Love to Wesley Young, the ancestor of plaintiffs, for the purchase by the latter, for the consideration and on the terms therein expressed, of a tract of land thus described: "Beginning on Jesse Young's line and Thomas Young and Edward Wilson and George Woody and to the ..... of a ridge joining said Woody land, and running a parallel line with a course extended to the top of said ridge, all the land within said bounds."

They also produced a deed bearing date September 29th, 1859, from said James R. Love in his own right, and himself and others named, executors of Robert Love, deceased, to Wesley Young, which, for the consideration $1,025, stated to have been paid on the 25th of October, 1842, conveys in fee "all that tract or parcel of land lying in the county of Yancey in the state of North Carolina," and particularly setting out its boundaries as containing 2050 acres, which it is conceded embraces the land in dispute. They also showed the transcript of a record of a suit instituted on January 1st, 1859, in the superior court of law of Haywood county by James R. Love, survivor of the partnership firm of which himself and the testator, Robert, were members, against Wesley Young to enforce his liability under the agreement for the residue of the purchase money unpaid, from which it appears that upon the finding of the jury, upon the contested issue raised, judgment was recovered at September term, 1859, by the plaintiff, James R. Love, for the sum of $1,417.86, whereof $797.50 is principal money, and that execution issuing thereon was returned satisfied to the succeeding term.

The defendants derive their title under a decree of the court of equity of Buncombe county entered on April 18th, 1857, by consent, in a suit at the instance of the heirs and

devisees of Robert Love against James R. Love, his executor, for a settlement of the testator's estate, by virtue of which all the undisposed of lands held by the deceased and his co-tenant, James R. in common, were sold to the defendants, and, after report, confirmation and order for title, on June 8th, 1862, conveyed to them by the clerk and master. The deed, conforming to the terms of the decree, gives the boundaries of the land and excludes from its operation in express words such parts thereof within those boundaries, as had by the owners been previously sold.

The principal matter in controversy seems to have been as to the sufficiency of the descriptive words used in the agreement to designate and identify the land, and its efficacy in creating an objection which the deed of September, 1859, recognizes and undertakes to fulfil. If it binds the *vendors*, as it was decided in the action for the purchase money it did bind the vendee, and the obligation is mutual, then an *equitable estate* was created by force of the contract, converted by the deed into a *legal estate* afterwards, which is outside of the authority conferred by the decree and of the terms of the deed made to carry it into effect. If it does not so bind, and the plaintiffs' right originated in the deed to their ancestor, the title of the defendants, although perhaps not affecting the issue in this possessory action, must ultimately prevail by reason of its relation to the date of the decree and its effect in sweeping away any intermediate voluntary conveyances, as in the case of sales under execution. *Testerman* v. *Poe*, 2 Dev. & Bat., 103; *Richardson* v. *Thornton*, 7 Jones, 458.

When the case was here on a former appeal, Judge RODMAN, in delivering the opinion and adverting to the agreement, remarks, that "the boundaries of the land to be conveyed appear on the face of the agreement to be indefinite, although perhaps they may be shown to be certain by a survey. The number of acres included in the boundaries

given was evidently unknown to the parties, and it must have been contemplated by the parties that it should be afterwards ascertained by a survey." 79 N. C., 201. The language employed in the instrument to describe the land would seem to surround no definite space and to give a part only of the enclosing lines. But the inference is not so clear as to warrant a withdrawal from the jury of the enquiry whether sufficient proof may not be adduced to distinguish and set apart the territory as described and understood. The deed in specifying its outlines and the number of acres it contains, corresponds with the contract of which it is in affirmance and discharge, in the price per acre to be paid and in the aggregate sum recited to have been paid in 1842, a coincidence strongly pointing to a common object. It is true that a description, manifestly so imperfect as not to admit of identification, cannot be aided by intrinsic evidence or intent, the sole office of such proof being to ascertain where are the objects called for, and thus to fit the description to the thing described. *Farmer* v. *Batts*, 83 N. C., 387. There is obscurity if not repugnance in the statements of the case upon this point. Testimony was heard by the jury for the purpose of locating the land, under the descriptive language of the agreement, and the jury were directed "if there was sufficient evidence to satisfy them that the paper writing of 1841 covered the land or any part of it in possession of defendants, they should find for the plaintiffs"—an instruction of which the appellants cannot complain. Yet when the agreement was offered to show legal authority in the executors to convey and thus connect it with the deed, an objection based on "its vagueness and want of certainty," (by which we understand to be meant its intrinsic and incurable defect, as a contract) was sustained by the court, and thus really nothing left for the jury to pass upon and determine.

There is another aspect of the case presented: The result

of the action at law, notwithstanding the resistance made, in charging Wesley Young with the balance of a specific sum due on his covenant, fixes necessarily also the quantity of the land bought, for the one measures and regulates the other, the sale being at the rate of a half dollar per acre; and as it conclusively determines the legal obligation of the vendee to pay, it equally establishes his right to have the land, by a specific performance of the contract. This adjudication, although made after the decree, decides the precedent liability incurred before any adversary interest had accrued under the proceedings in equity, and which follows the transfer to the defendants. This equitable estate in the plaintiffs' ancestor is saved alike from the operation of the decree and the subsequent deed, both of which are confined to unsold lands held by the tenants in common. There is consequently no conflict in the title derived by the opposing parties from a common source, and the charge of the court that the deed of James R. Love and the executors of Robert, being subordinated to the decree of 1857, passed no estate unless there was a pre-existent contract of sale, cannot be sustained, since if not itself erroneous it was calculated to mislead the jury in finding their verdict. The action at law supports the validity of the agreement as binding upon both parties, and its effect is to raise an equitable estate in a definite extent of territory ascertained by the sum to be paid, and if necessary its limits fixed by actual survey. This area if within the defendants' boundaries is excluded from them.

Again, the action was begun when the right to recover depended upon the possession of the legal title, and as we interpret the Code, retains until final judgment this feature of the former practice. The plaintiff cannot succeed unless his cause of action existed when he commenced his suit, and correlatively he ought not to fail if he then had a cause of action. The deed to Wesley Young is in time prior to

that of the defendants and vested the legal estate in him, unless the deed to the defendants by relation to the decree divested it as of that date and passed it to them. It admits of question whether the doctrine of relation extends so far as to allow an effective defence in the present suit. The rule governing a sheriff's deed seems to be equally applicable to a deed executed by a commissioner who acts under the mandate of a court. "Whatever relation to the time of the sale a conveyance may have for some purposes," says Chief Justice RUFFIN, referring to a sheriff's deed, in *Davis* v. *Evans*, 5 Ired., 525, "it cannot be carried to the unreasonable extreme of proving the title in an action that was brought before the deed was made." This remark was made in referring to an action of ejectment, and it is held to be equally applicable to an action of trespass, in the subsequent case of *Presnall* v. *Ramsour*, 8 Ired., 505. In both of them, as in that before us, the deed was executed after the commencement of the suit, and the difference between them consists in the fact that the deeds were there offered by the plaintiff to maintain his action, and here, by the defendants to defeat the action on by proof of title in themselves. Without directly deciding the point, it is suggested in order to direct the attention of counsel to the question upon another trial.

For the reasons given and the errors pointed out, there must be a new trial, and it is so adjudged. Let this be certified.

Error. *Venire de novo.*

STATE v. WILLIAM H. VANN.

Appeal—Insanity—Stay of Judgment and Execution.

1. No appeal lies from an order of continuance of a cause.
2. If a prisoner after conviction of a capital felony suggests insanity, the judgment must be suspended until the fact can be tried by a jury; if after judgment, execution must be likewise stayed.

(*State* v. *Hinson*, 82 N. C., 540; *State* v. *Pollard*, 83 N. C., 579; *State* v. *Lane*, 4 Ired., 434, cited and approved.)

PROCEEDING in a criminal action at Fall Term, 1880, of HERTFORD Superior Court, before *Schenck, J.*

The prisoner being brought to the bar of the court for judgment pursuant to the decision of this court, reported in 82 N. C., 631, was asked if he had anything further to say than he had already said why sentence of death should not be pronounced upon him, and in answer thereto (through his counsel) suggested that the prisoner since his conviction had become insane, and in support thereof produced affidavits. Thereupon he demanded a jury trial of the question of his insanity and asked for a continuance of the cause until the next term to prepare for trial. The court held that he was entitled to a jury to inquire into the fact, and if it should be found favorably to the prisoner, the judgment must be suspended until his sanity was restored, and thereupon remanded him to prison and continued the case that the issue might be tried by a jury. From this ruling the solicitor for the state appealed.

Attorney General, for the State submitted the case upon the rule laid down in 4 Blk. Com., 25, 395, 396.

No counsel for defendant.

SMITH, C. J. The order is strictly one of continuance

based upon an opinion hypothetical and dependent upon the finding of the jury. If that finding be adverse to the prisoner, the question will not arise. It is needless to cite authorities to show that an appeal in a criminal case lies to this court only after a final determination, and we simply refer to the recent case of *State* v. *Hinson*, 82 N. C., 540, and those therein cited, and its recognition in *State* v. *Pollard*, 83 N. C., 597.

It is true that in *State* v. *Lane*, 4 Ired., 434, the late chief justice then presiding in the superior court of law of Edgecombe, refused to proceed to judgment according to the mandate of this court, on the ground that one of its members having died during the argument, the two surviving judges were incompetent to proceed until the vacancy was supplied, and an appeal from this refusal was entertained and a peremptory mandate awarded. But this was in substance a final determination of the cause as then before the superior court, and furnishes no precedent for the present appeal.

As however the question intended to be presented will probably arise hereafter, and we have formed a definite opinion upon it, we will consider and dispose of this assigned error also. We concur entirely with the ruling of His Honor, that judgment must be suspended if the prisoner has become insane since his trial and is still insane, until he recovers his reason, and that an issue to be submitted to the jury is the proper mode of ascertaining the truth of his allegation. The principle is thus laid down by LORD HALE: "If a man in his sound memory commits a capital offence, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrensy, but be remitted to prison until that incapacity be removed. * * * And if such person after his plea and before his trial become of non-sane memory, he shall not be tried; *or if after his trial he become of non-sane memory, he shall not re-*

ceive judgment; or if after judgment he become of non-sane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution." Hale P. C., 34. The same language is used by BLACKSTONE, and he adds: "For as is observed by Sir EDWARD COKE, the execution of an offender is for example, *ut poena ad paucos, metus ad omnes perveniat;* but so it is not when a madman is executed, but should be a miserable spectacle, both against law and of extreme inhumanity and cruelty, and can be no example to others. But if there be any doubt whether the party be *compos* or not, this shall be tried by a jury." 4 Blk. Com., 25. The same rule is laid down by the elementary writers and may be found in adjudged cases. Shel. on Lunacy, 467; 1 Bish. Cr. L., § 487; *Freeman* v. *People*, 4 Denio, 9.

But for the reasons stated, the appeal was improvidently taken and must be dismissed.

PER CURIAM. Appeal dismissed.

STATE v. THOMAS M. MOORE.

Appeal by State—Refusal to mark one as prosecutor.

The right of the state to appeal in criminal actions has been recognized in but four cases: 1. Where judgment has been given for defendant upon a special verdict. 2. Upon a demurrer. 3. Motion to quash. 4. Arrest of judgment. The state therefore has no right of appeal from the refusal of the court to mark one as prosecutor of record.

(*State* v. *Swepson*, 82 N. C., 541; *State* v. *Padgett*, *Ib.*, 544; *State* v. *Lane*, 78 N. C., 547; *State* v *Bobbitt*, 70 N. C., 81, cited and approved.)

MOTION in a criminal action to make a prosecutor of rec-

ord, heard at Fall Term, 1880, of PENDER Superior Court, before *Gudger*, *J.*

The indictment which was found in the criminal court of New Hanover county charged the obtaining of certain money from one C. C. Stevens by false pretence. The case was removed to Pender for trial, and placed on the docket of the superior court of that county at spring term, 1878; and at fall term thereafter the following order was made by the presiding judge; "Defendant discharged, cause continued." At fall term, 1879, on motion of the solicitor the court ordered that a *capias* issue, and the defendant by virtue thereof was again arrested. At spring term, 1880, on motion, it was ordered by the court that said C. C. Stevens be notified to show cause at the ensuing term why he should not be made the prosecutor of record, and the respondent accordingly appeared by counsel and answered the rule. His Honor found that it was at the respondent's instance that the indictment was instituted, but said Stevens was not marked as prosecutor at the time of sending the bill to the grand jury, and being of opinion that the act of 1879, ch. 49, providing for ascertaining and marking a prosecutor *after bill found* could only be made to apply to indictments commenced after the passage of the act, refused to grant the motion, and discharged the rule to show cause, from which ruling the solicitor for the state appealed.

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

ASHE, J. We are not called upon to decide the question of law raised upon the ruling of His Honor in the court below, for the case is not properly constituted in this court. The state has no right of appeal in a case like this. Its right of appeal in a criminal action is not derived from the common law or any statute of this state, but has obtained

under the sanction of the courts by a long practice, and has been recognized in but four cases, to-wit: where judgment has been given for defendant upon a special verdict; upon a demurrer; a motion to quash; and arrest of judgment. *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.

The appeal must be dismissed. Let this be certified to the superior court of Pender county.

PER CURIAM. Appeal dismissed.

STATE v. WEBB MARSTELLER.

Assault and Battery.

Defendant intruded upon the premises of prosecutor who took hold of him to lead him off, when defendant put his hand in his pocket and partly drew out a knife, and thereupon the prosecutor desisted and went into the house, the defendant cursing him; *Held* an assault.

(*State* v. *Hampton*, 63 N. C., 13; *State* v. *Shipman*, 81 N. C., 513, cited and approved.)

INDICTMENT for an assault tried at Fall Term, 1880, of CLAY Superior Court, before *Gilmer, J.*

Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.

Messrs. Reade, Busbee & Busbee, for defendant.

RUFFIN, J. We think the defendant's case was fairly left to the jury and that he has no well founded cause of complaint against either the charge of His Honor or the action of the jury.

The indictment against him was for an assault upon one

J. S. Perry, who testified on the trial that, after being forbidden to do so, the defendant came into the enclosure around the dwelling of the prosecutor and where he was at work; when asked what he was doing there he cursed the prosecutor and said he was going where he pleased, and when ordered off, said he would go when he got ready. The prosecutor then took hold of defendant to lead him from the enclosure when the defendant put his hand in his coat pocket and partly drew out what prosecutor supposed to be a knife, and thereupon he desisted for a time from his efforts to remove him. The defendant still refusing to go the prosecutor again took hold of him and attempted to lead him away when the prosecutor again desisted, and on account, as he said, of this show of force by defendant, went into his house, the defendant cursing him as he went.

The defendant asked His Honor to charge the jury "that if they believed the prosecutor took hold of the defendant twice, and he then did not offer to strike the prosecutor, it was evidence to the jury that he was not there for the purpose of having a difficulty with him, and that if the defendant did not prevent the prosecutor from going where he wanted to go, and at the time he wanted to go, he would not be guilty."

The court declined to charge as requested, but instructed the jury that the question for them to consider was not whether the defendant was there for the purpose of stabbing the prosecutor, or having a difficulty with him, but whether he committed an assault upon the prosecutor, and that they were to consider all the circumstances of the case, and if they believed from the circumstances and the testimony that the defendant exhibited a knife, and that by reason of such demonstration of force, the prosecutor was made to desist from his effort to remove him from his premises and to return to his house, then the defendant was guilty of an assault.

We cannot see wherein this case differs in principle from that of *State* v. *Hampton*, 63 N. C., 13; or that of the *State* v. *Shipman*, 81 N. C., 513. The defendant's not quitting the yard of the prosecutor when ordered to do so, gave to the latter the right to put him out, and if he was made to desist from the exercise of that right, by such a show of force on the part of the defendant, as might reasonably effect a man of ordinary firmness, then the defendant was guilty.

No man has a right by a show of force to put another and an unoffending person in an immediate fear of bodily harm.

Suppose that under the influence of such a fear, the prosecutor in this instance had resorted to force and stricken the defendant, he would have been justified. That he forbore to do so and put in practice "the better part of valor" cannot affect the question of the defendant's guilt.

No error. Affirmed.

STATE v. WARREN SANDERS.

Confession—Judge's Charge.

1. Facts accompanying a prisoner's confession found by the court below are conclusive; but whether they are sufficient to warrant the admission of the evidence is a matter of law and reviewable.
2. In larceny, it was found by the court that the defendant was arrested, tied and carried by an officer to the house of the employer of defendant in another county, when a vest (one of the articles charged in the indictment) was exhibited by the said employer to defendant, and in reply to the question, "where did you get that vest," the defendant said, "from you sir," and the court admitted the declaration as voluntary, no improper influences being shown to exist; *Held*, no error.
3. Where on the trial of a criminal action, no evidence as to character being offered by defendant, the court told the jury that the state could

not introduce such evidence but it was the right of defendant to offer it if he chose, and that no unfavorable inference could be drawn from his failure to do so; and added, that they must find their verdict upon the facts proved; *Held*, that although the former part of the charge might by itself be objectionable, yet the error was cured by the latter.

(*State* v. *Andrew*, Phil., 205; *State* v. *Whitfield*, 70 N. C., 356; *State* v. *Stalcup*, 2 Ired., 50; *State* v. *Cruse*, 74 N. C., 491, cited and approved.)

INDICTMENT for larceny tried at Fall Term, 1880, of WAKE Superior Court, before *Graves, J.*

Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.

Messrs. Mason & Devereux, for defendant.

DILLARD, J. The defendant was charged in the bill of indictment with the larceny of divers articles, and among them a vest, and on the trial, he took two exceptions, one to the admission in evidence of a certain confession to Dr. Leach, and the other to the charge of the judge to the jury, and these constitute the only points for the determination of this court.

The state having offered evidence tending to show the larceny, and that, in a few days thereafter, the goods were found in an outhouse on the plantation of Dr. Leach, in Johnston county, on which the defendant was living as his hireling, and also tending to show that defendant very shortly after the larceny had sold the vest mentioned in the bill of indictment to a fellow-servant, then proposed to show by Dr. Leach the account given by the defendant on the night of his arrest as to how he came by the vest. The defendant objected on the ground that his declaration or admission had been procured by duress and the court having admitted the evidence, the defendant excepted. Verdict of guilty, judgment, appeal by defendant.

Under the objection made, the admissibility of the confession depended on the facts accompanying it and the legal inference therefrom, the facts being matter for the decision of the judge and conclusive, and the sufficiency or insufficiency thereof to warrant the admission or exclusion of the evidence being matter of law reviewable in this court. *State* v. *Andrew*, Phil., 205; *State* v. *Whitfield*, 70 N. C., 356. If from the facts the legal inference be that the confession was voluntary, then the evidence was receivable, otherwise, not.

The only facts found by His Honor and put upon the record as bearing upon the point of objection, are, that on the evening of the arrest on the plantation of Dr. Leach, in Johnston county, the defendant, formerly a slave, was carried, being tied at the time, by the officer in charge to the dwelling house of Dr. Leach, when the said Leach, in the presence of four or five white men at his house, no person of color being present, called the attention of the defendant to the vest claimed to be the one described in the bill of indictment, and which he then held in his hand and asked him, "where did you get that vest?" to which the defendant replied "from you, sir." Dr. Leach also testified that the defendant had on at the time a vest which he had sold him, and that when he asked the question he was not speaking of that, but of the vest which he held in his hand.

Upon these facts we concur in the legal inference of the judge below, that the answer of the defendant to Dr. Leach's question was voluntary and therefore admissible as evidence.

Confessions are to be taken as *prima facie* voluntary and admissible in evidence, unless the party against whom they are offered allege and show facts authorizing a legal inference to the contrary. Roscoe's Crim. Ev., 53. In this case it cannot be seen from the statement of the case of appeal, that the restraint of defendant's liberty at the time of the

confession was illegal, nor that he was accompanied to the house of Dr. Leach by any others than the officer; and it cannot be seen that any violence was done or threatened or fear excited by Dr. Leach and the white men at his house, or any or either of them. The fact of the admission being made in answer to a question put by Dr. Leach, in whose employment the defendant was, affords no inference of an influence to induce an untruthful statement, nor does the fact of the defendant's being tied at the time, operate to exclude the evidence proposed. An officer has the right to tie a prisoner if he thinks it necessary to prevent escape, and a confession made at such a time will be admitted as evidence, unless it appear it was done in such manner as to constitute an inducement to confess, in order to get rid of the pain of it. *State* v. *Stalcup*, 2 Ired., 50; *State* v. *Cruse*, 74 N. C., 491. Upon these views it seems to us there was no error in admitting evidence of the defendant's answer to the interrogatory of Dr. Leach.

2. The judge in his charge, no evidence as to character having been introduced, told the jury that the state could not introduce evidence as to the defendant's character, but that it was the right of the defendant to offer evidence as to his good character if he chose, and he had not done so, but that no unfavorable inference could be drawn from his failure to offer such evidence; and he added that the jury must find upon the facts proved, whether the defendant was guilty or not.

Good character, without doubt, in some prosecutions, is of much weight in favor of the accused, and he only may open the door to evidence as to that. But if he should omit to adduce evidence to that point he is still presumed by the law to be innocent; and it is inadmissible for the jury to consider, or be allowed to consider, an omission to make such proof as counteracting or displacing the presumption in the accused's favor.

The comment of His Honor on defendant's right and failure to offer evidence of his good character was unnecessary, and by itself would probably have been an error, but the jury were told in immediate connection therewith that no unfavorable inference was to be drawn from that failure of proof, and that they must find their verdict on the facts proved. This caution to the jury, we think, rendered it impossible that the jury should be misled, and so the error of the previous remarks of the court was cured.

There is no error, and this will be certified to the end that the court below may proceed to judgment.

PER CURIAM. No error.

STATE v. C. C. GARDNER and another.

Conspiracy, where one defendant is competent witness for the other.

On trial of an indictment for conspiracy, where the defendants are charged in the bill with conspiring with another who is not indicted, *it was held* that they were competent witnesses for each other under the act of 1866, ch. 43, § 3, and but for that charge (conspiring with the party not indicted) they would be incompetent.

(*State* v. *Tom*, 2 Dev., 569; *State* v. *Mainor*, 6 Ired., 340; *State* v. *Ludwick*, Phil., 401; *State* v. *Rose*, *Ib.*, 406; *State* v. *Parham*, 5 Jones, 416; *State* v. *Cox*, N. C. Term Rep., 155, cited and approved.)

INDICTMENT for conspiracy tried at Spring Term, 1880, of WAYNE Superior Court, before *Avery, J.*

The defendants, Gardner and Ellis, were indicted for conspiring together with one Joyner (who was not indicted) to commit an assault and battery upon one William J. Kerr.

The jury found them guilty, and from the judgment pronounced they appealed.

Attorney General, for the State.

Messrs. G. V. Strong, G. M. Smedes and *W. T. Faircloth*, for defendants.

ASHE, J. There were several exceptions taken in the course of the trial, only one of which we deem necessary to be considered for the determination of the appeal. It is whether the defendants were competent witnesses for each other. Out of the mass of unnecessary evidence sent up in the statement of the case, we extract the following portion of it as sufficient to show the application of the principle of law which is presented by the record and upon which the case turns:

One Joyner, a witness for the state, with whom the defendants are charged in the bill as having conspired, but not indicted, testified that about the 5th of September, 1879, after the defendant, Gardner, had supplied him with a couple of drinks at a grocery at Saul's Cross Roads in the county of Wayne, he took witness out in front of the store and said to him, "I have a little trick I want you to help me go through with. There is a d—d thief in this place and we want you to help us whip him and run him away from here." Defendant Ellis was standing with him at the time. Witness said that is something I never do. Defendant Gardner said there is no use of going backwards, I hired you and you will get your money and you must do as I tell you. A white man then came up wearing a straw hat and said, "boys, you have waylaid your time, he has gone up to his house." The defendant Ellis then said, "I'll tell you what do, your man is about the size of Peter Barnes. Let him go there and call himself Peter Barnes and ask for whiskey for his wife, and he will get up and come to the door." The defendants

Gardner and Ellis both told him to go to the house of Wm. J. Kerr and as soon as Kerr came out "to knock him out for dead, so he could not make a bit of fuss." When they said this, they had gone with witness and had gotten under the mill house shelter about twenty-five or thirty yards from Kerr's house; that he left them under the shelter, went to Kerr's house and called him out, representing himself as Peter Barnes, and told him he wanted some whiskey and the clerk would not let him have any. As Kerr came to the door witness caught him by the throat and choked him; they got out of the door, and about that time some one fired a pistol near him and he ran off; about the same time three or four shots were fired from the shelter; he ran to the shelter, and Gardner and Ellis were still there and they fired three or four shots towards Kerr's house after he got there.

During the trial the defendant Ellis was offered as a witness for his co-defendant, Gardner, and his counsel proposed to show by his testimony facts and circumstances tending to show that the defendant Gardner was not present at the difficulty. It was offered as substantive evidence and also to contradict the witness Joyner, and Gardner's counsel proposed especially to prove by witness, that immediately before the shooting he was with the defendant Gardner at such a distance from the shooting that it was impossible for defendant Gardner to have been present at the shooting. The solicitor for the state objected. The objection was sustained and the defendant excepted.

We are of the opinion the exception was well taken.

Conspiracy is a crime which requires the guilty co-operation of two at least to constitute the offence, and upon the trial of an indictment of two for such an offence, the acquittal of one necessarily acquits the other. *State* v. *Tom*, 2 Dev., 569; *State* v. *Mainor*, 6 Ired., 340.

And it is contended on the part of the state that if Ellis is admitted as a witness to prove the innocence of Gardner,

the legal effect of it will be to acquit himself, for he will be giving evidence for himself, which the law did not permit at the time this indictment was tried. That would be true if the indictment charged the defendants with conspiring between themselves alone, for in that case the acquittal of one would necessarily amount to the acquittal of the other, and the testimony of the witness would be incompetent as falling within the exception in the third section of the act of 1866, ch. 43, which provides that nothing contained in the second section of the act shall render any person competent or compellable in a criminal proceeding, to give evidence for or against himself, &c. It was upon this construction of that section that in the case of *State* v. *Ludwick*, Phil. 401, the husband was held to be incompetent to testify in behalf of the prisoner where the wife of the witness was indicted as an accessory to the principal felon. The construction given that section of the act in that case was founded upon the distinction taken between those offences where the acquittal of one is in legal effect the acquittal of the other, as in cases of principal and accessory before the fact, conspiracy, fornication and adultery, and those cases where one may be innocent and the other guilty, as assault and battery, larceny, &c. *State* v. *Rose*, Phil. 406. But the principle involved in that construction does not apply to this case; for here, the two defendants are charged with a conspiracy between themselves and one Joyner who is not included in the indictment, and it has been held as settled law that one man may be indicted for a conspiracy with another to the jurors unknown. *State* v. *Tom, supra;* Bish. Cr. L., § 186; Whar. Cr. L., § 2338. In New York, in the case of *People* v. *Malten*, 4 Wend., 229, it was held that an indictment for conspiracy was good, though the other conspirators were actually known to the grand jury and their names might have been actually set forth, for there was no legal necessity for making mention of their names. "In a

charge of conspiracy," said the court, "it seems no more necessary to specify the names of the defendants' coadjutors than in an indictment for an assault and battery to name others besides the accused who are concerned in the trespass, if the fact were really so." 1 Bish. Crim. Pro., § 186. It is also settled that in conspiracies, riots, fornication and adultery, and such like offences, where the concurrence of two or more is necessary to their commission, one party may be tried, convicted and punished before the other is tried. 3 Burr Rep., 1263; 1 Lord Raym, 484; 2 Salk., 593; *State* v. *Parham*, 5 Jones, 416. In the case of *State* v. *Cox*, N. C. T. Rep., 155 (597) it was decided that a man may be separately indicted for fornication and adultery. The charge there against the defendant was for bedding and cohabiting with a woman named Hawkins. A motion was made to quash the indictment because the woman was not joined with the defendant in the charge. The court sustained the indictment and the case is cited with approval in *State* v. *Parham, supra.* The principle upon which the decision was made in that case was that the defendant may be tried by himself and convicted, and judgment may be given against him, because *as to him* the guilt of the other party is found as well as his own; though the guilt of the woman is not found *as to her*, for that remains to be ascertained upon the trial which is subsequently to be had, though if the woman had been first tried and acquitted or had been tried jointly with the defendant and acquitted, the defendant must likewise have been acquitted. *State* v. *Tom, supra.*

Upon the authorities cited we are of the opinion the defendants were competent witnesses for each other under the act of 1866, ch. 43, inasmuch as they are charged with conspiring with another who is not indicted, and but for that charge would be incompetent for the reasons given.

As to the *matter* of their evidence after being introduced, that is another question to be considered by the court when

it arises on their examination, as for instance, it was competent for Ellis to testify as to the innocence of his co-defendant, but not that he himself was not guilty. Should it be objected that if the defendants should be examined in behalf of each other, the effect might be to acquit both, notwithstanding the charge that they conspired with another not joined in the indictment, the answer to that is, that the same objection would lie against the competency of the defendants, as witnesses for each other in every case.

There is error. Let this be certified to the superior court of Wayne county that further proceedings may be had in conformity to this opinion and the law.

Error. *Venire de novo.*

STATE v. JAMES G. KING.

Different Counts—Mismarking—Evidence—Trial.

1. Several counts for different offences may be joined in the same indictment, where the judgment on conviction of either is the same; and in such case it is usual to require the solicitor to elect upon which count he will try before the accused commences the examination of his witnesses. A refusal to quash for such alleged misjoinder is no ground for arrest of judgment.
2. On trial of an indictment for mismarking a hog, parol evidence is admissible to prove the "mark" of the prosecutor. (Section one, chapter 16 of Battle's Revisal has no application to this case). And any circumstance tending to show the guilt of the defendant is also admissible.
3. The judge presiding may in his discretion allow the examination of witnesses at any stage of a trial, in furtherance of justice.

(*State* v. *Bryson*, Winst., 86, cited and approved.)

STATE v. KING.

INDICTMENT for a misdemeanor tried at Fall Term, 1879, of STANLY Superior Court, before *Buxton, J.*

The defendant was charged with a violation of section 56, chapter 32 of Battle's Revisal, in mismarking a hog. The case originated in Union county and was removed to Stanly for trial. The indictment contained three counts; (1) for altering the mark of one hog, the property of C. L. Helms; (2) for defacing the mark of one hog, the property of said Helms; and (3) for mismarking one hog, the property of said Helms.

The defendant moved to quash the indictment for misjoinder of counts for distinct and separate offences. Motion overruled, and defendant excepted. He then moved to require the solicitor to elect upon which count to try the defendant, and the judge refused to require the solicitor to do so until after the evidence was gone through, and at the close of the evidence he elected to rely on the third count, being the one for mismarking.

The prosecutor, Helms, during his examination was asked if he had any mark for his hogs, and if so, what was it. The defendant's counsel interposed and asked if his mark had been recorded, and on the witness' answering, "no," objected to the evidence on the ground that the mark could only be proved by the record—citing Bat. Rev., ch. 16, § 1. His Honor overruled the objection and the witness proceeded to describe his mark, to which the defendant excepted.

The solicitor asked the witness if he had ever heard the defendant say what was his mark. The question was objected to on the same ground as the preceding exception, but it was overruled by the court and the testimony admitted. There was no conflict of evidence as to the respective marks of the prosecutor and defendant.

The state introduced evidence tending to show that the prosecutor was the owner in October, 1877, of an unmarked sow eighteen months old, of a very wild nature, which had

made her bed in the woods and had had a litter of five pigs, then unknown to the prosecutor, and that defendant had put the sow and pigs in his mark; that in December following, on one Saturday afternoon, the prosecutor, defendant, and one Richardson and one Tindell met at a spot some three hundred and fifty yards from the bed of the sow for the purpose of hunting her, the location of the bed being unknown to all but the defendant. The prosecutor testified that while at the place of meeting, the defendant proposed to him to go down the branch in search of the sow. They went down the branch and did not find her; but on the next Monday morning on their way to the place of meeting, by agreement, for another hunt, they found the bed. The prosecutor asked one of the witnesses in what direction from the bed did the prosecutor and defendant go in search of the hog on the Saturday before, when they started down the branch together. The question was objected to by defendant's counsel, as calculated to prejudice the jury. Objection overruled, and the witness stated, they went in a direction nearly opposite to the hog-bed. Defendant excepted.

Tindell was then introduced as a witness for the state, after the defendant had closed his examination, and asked as to the conversation between the prosecutor and defendant when they met in an old field on the said Monday morning to hunt for the hog, according to appointment. This evidence was objected to on the ground that it was not in reply or responsive to any evidence offered by the defendant. Objection overruled, and the witness testified that defendant offered to call up the hog, and the prosecutor told him if he would do so and show the hog, the difficulty would be settled; but the defendant refused to call it up.

The jury rendered a verdict of guilty, motion in arrest overruled, judgment, appeal by defendant.

Attorney General, for the State.
No counsel *contra*.

ASHE, J. The defendant's counsel, before pleading, moved to quash the bill of indictment on the ground that there were three counts in the bill, each for a separate and distinct offence. But each offence charged was a misdemeanor, and the judgment upon conviction was the same in each case; and when that is so, several counts for different offences may be joined in the same bill. Whether for such a joinder of counts the courts will quash an indictment, is a matter entirely within their discretion. They may do so, when it is likely to embarrass the prisoner in his defence, but it is never a ground for arrest of judgment. The most usual course of the courts in such cases, is, to require the solicitor to make an election upon which count he will proceed to try. He should be put to this election before the defendant commences the examination of his witnesses, as was done in this case. Roscoe Cr. Ev., 190; Arch. Cr. L., 61.

There were several exceptions taken by the defendant in the course of the trial:

The first was to the admission of parol evidence in regard to the "marks" of the prosecutor and the defendant, the defendant's counsel insisting that section one, chapter 16 of Battle's Revisal, made it the duty of every one to brand his cattle, &c., and have it recorded, and as there was a record of the mark, it was the only evidence that could be admitted to prove it. It is true that act, passed in 1741, and now generally fallen into disuse, does provide that if any dispute shall arise about any ear-mark or brand, the same shall be decided by the record thereof. But in this case there was no dispute about the marks; no conflict of testimony in regard to them; and it was perfectly immaterial what was the mark of the prosecutor, for this hog was not marked,

until mismarked by the defendant. If the position taken by defendant's counsel should be adopted by the courts, the law against mismarking, &c., would be a "dead letter" on the statute book; for there are very few persons who have their "marks" recorded. And then, as to the evidence of the defendant's mark, it was clearly admissible as his declaration or admission, which when pertinent to the issue may in all cases, civil or criminal, be given in evidence against a party to the suit. *State* v. *Bryson*, Winst., 86.

As to the exception to the admission of the evidence with regard to the direction in which the defendant and the prosecutor had gone from the hog-bed, when in search for the sow, we think it was admissible as a circumstance tending to show the guilt of the defendant, and was proper to be submitted to the jury that they might consider whether it was done in good faith or was a device adopted by him to elude the discovery.

The last exception, as to the examination of Tindell after the defendant's testimony was closed, with regard to the conversation between the prosecutor and defendant about "calling up the hog," was upon the ground that it was not in reply or responsive to any evidence offered by the defence. There is nothing in the exception. The court, to attain the ends of justice, may in its discretion allow the examination of witnesses at any stage of the trial.

There is no error. Let this be certified to the superior court of Stanly county that further proceedings may be had agreeably to this opinion and the law.

PER CURIAM. No error.

STATE v. WILLIAM MURPHY.

Evidence—Larceny—Collateral Offenee.

1. Evidence of a "collateral offence" of the same character and connected with that charged in an indictment and tending to prove the *guilty knowledge* of the defendant, when that is an essential element of the crime, is admissible; *Therefore* on the trial of an indictment for the larceny of a hog, where the prosecutor testified that he identified the property, as his, in an enclosure of the defendant and demanded its delivery to him, *it was held* competent for the state to prove by the testimony of another witness that at the same time and place and in presence of prosecutor and defendant, such witness said, that the other hog therein was his and he then and there claimed and demanded it of defendant.

2. Remarks of ASHE, J., upon the *quo animo*, intent, design, guilty knowledge and *scienter*.

INDICTMENT for larceny tried at Fall Term, 1879, of PENDER Superior Court, before *Eure, J.*

The prosecutor testified on the trial, that shortly after losing one of his hogs, in the month of October or November, he went to the house of defendant to inquire after his lost hog; that he described the hog to the defendant and he said he had not seen any hog of that description; that in two or three days afterwards he went to the defendant's house to look after some hogs in a pen which he did not see on a former visit; that he found two hogs in a pen; one of them was his hog; the pen was on the defendant's premises, about thirty yards from the road, and near the workshop of the defendant. He informed the defendant that one of the hogs was his; the defendant claimed the hog, and gave as a reason for not delivering it to the witness that some other person would claim it; the hog was not marked.

One Register was introduced for the state and testified that he went with the prosecutor to the house of the de-

fendant, and was present when Jones, the prosecutor, claimed one of the hogs in the pen as his, and demanded it. This witness also testified that the other hog in the pen was his, and he then and there claimed it, and demanded of the defendant to deliver it to him. This testimony was objected to by the defendant, but the objection was overruled and defendant excepted. There was a verdict of guilty and from the judgment thereon the defendant appealed.

Attorney General, for the State.
Mr. D. J. Devane, for defendant.

ASHE, J. The only question presented by the appeal for our determination is, whether the court below committed an error in admitting the testimony of the witness Register, "that the other hog in the pen of the defendant was his hog, and he then and there claimed it and demanded the defendant to deliver it to him."

It is a fundamental principle of law, that evidence of one offence cannot be given in evidence against a defendant to prove that he was guilty of another. We have been unable to find any exception to this well established rule; except in those cases where evidence of independent offences have been admitted to explain or illustrate the facts upon which certain indictments are founded, as where in the investigation of an offence, it becomes necessary to prove the *quo animo*, the intent, design, or guilty knowledge, &c. In such cases, it has been held admissible to prove other offences of like character, as for instance, in indictments for passing counterfeit money, the fact that the defendant, about the same time, had passed other counterfeit money of like kind, has been uniformly held to be admissible to show the *scienter* or guilty knowledge. So on a charge for sending a threatening letter, prior and subsequent letters from the defendant to the person threatened, have been received in

evidence, explanatory of the meaning and *intent* of the particular letter, upon which the indictment is found. *Rex* v. *Boucher*, 4 C. & P., 562.

It the case of *Rex* v. *York*, R. & R. C. C., 531, it was held by the twelve judges, that if upon an indictment for malicious shooting it be questionable whether the shooting was by accident or design, evidence may be given that the prisoner at another time intentionally shot at the same person.

In Alabama it has been decided that "where the question of identity or intent is involved, or where it is necessary to show a guilty knowledge on the part of the prisoner, evidence may be received of other criminal acts than those charged in the indictment." *Yarborough* v. *State*, 41 Ala., 405; *Thorp* v. *State*, 15 Ala., 749.

On indictments for receiving stolen goods knowing them to be stolen, the prosecutor has been allowed to prove several acts of like character, with the view of showing therefrom a guilty knowledge on the part of the defendant. Whar. Cr. Law, § 639. But as was suggested by the author, there should be some evidence showing a link or connection between them.

In *Rex* v. *Davis*, 6 Car. & P., 117, on the trial of an indictment for receiving stolen goods, for the purpose of showing guilty knowledge of the defendant, evidence was admitted that other goods found at the same time in the house of the defendant, were stolen, although they were the subject of an indictment then pending. The judge before whom it was tried, said: "A particular line is now fixed upon. All is evidence with a view to the *scienter*. There is no excluding the other articles found. But I do not think you should go further." That is, that the evidence was admissible to show the *guilty knowledge* of the defendant, but for no other purpose. "It is important not to confound the principles upon which the two classes of cases rest. On the one hand it is admissible to produce evidence of a distinct

crime to prove *scienter*, or make out the *res gestæ*, or to exhibit a chain of circumstantial evidence of guilt in respect to the act charged. On the other, it is necessary strictly to limit the evidence to these exceptions, and to exclude it when it does not legitimately fall within their scope." Whar. Cr. Law, § 650.

From the investigation we have given the subject in reference to the case before us, we are led to the conclusion that where the "collateral offence" is of the same character and connected with that charged and tends to prove the *guilty knowledge* of the defendant, when that is an essential element of the crime, and especially when the evidence adduced to establish it constitutes a part of the *res gestæ*, as in this case, proof of it is admissible. There is no error. Let this be certified to the superior court of Pender county, &c.

PER CURIAM. No error.

STATE v. JOHN W. ALPHIN.

False Pretence—Evidence—Judge's Charge.

The defendant was charged with obtaining goods by falsely representing that he owned a certain cow which he mortgaged to the prosecutor to obtain credit, and afterwards refused to surrender the same, alleging it to be the property of his wife. It was in evidence that she sold the cow to a witness (but retained possession) who told her she might keep it by repaying the price; and said witness in a subsequent transaction with the defendant husband received payment for the cow out of his own funds, and surrendered an unregistered bill of sale which was destroyed by defendant who thereafter exercised control over the property. Thereupon the court charged the jury that the mortgage conveyed the legal title in the property to the prosecutor who had the right to call for possession before the same was due, and that the transaction

between the witness and defendant had the effect of putting the title back with the wife, and that defendant acquired no title thereby and the jury rendered a verdict of guilty; *Held* that the charge was not warranted by the evidence, and the defendant is entitled to a new trial.

(*Adams* v. *Reeves*, 68 N. C., 134; *Isley* v. *Stewart*, 4 Dev. & Bat., 160; *Young* v. *Jeffries*, *Ib.*, 216, cited and approved.)

INDICTMENT for false pretence tried at Fall Term, 1878, of WAYNE Superior Court, before *McKoy*, *J.*

Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.

Mr. H. R. Kornegay, for defendant.

SMITH, C. J. The defendant is charged with obtaining the goods of one H. T. Ham, upon the false pretence and fraudulent representation of his ownership of a cow and a calf, then conveyed by mortgage to secure the price thereof. The defendant, after expiration of the credit, refused on demand, to surrender the property to the mortgagee, alleging that the cow and calf belonged to his wife, and not to himself. Several exceptions were taken during the trial, to the admission of declarations of the defendant, which we do not deem it necessary to notice, nor the objection made to the permission given to the solicitor to introduce other testimony, not strictly in rebuttal of that offered by the defendant. The evidence does not seem obnoxious to any just objection, and the admission of other evidence, was clearly within the discretion of the presiding judge, according to the well established practice.

It was in proof on the trial, that the wife of the defendant owned several cows, and among them, the one described in the mortgage, which, in March, 1872, she sold and conveyed to one Kornegay, and they were allowed to remain in her possession and care, for their use, until the 1st day of September following, the said Kornegay telling her, she could keep

them if she desired, by repaying him the purchase money, with interest from that date. Nothing further transpired between them on the subject.

Kornegay was introduced as a witness for the defendant, and testified, that in the month of November following, the defendant, who had then become the husband of the former owner, came to witness, and sold him turpentine, remarking, that he would take the cows, if the witness would allow him to do so; that witness assented thereto, received payment, and surrendered the unregistered bill of sale, which defendant tore in pieces.

A son of the defendant's wife, on behalf of his step-father, testified, that the cattle were paid for, out of the defendant's own funds, the fruit of his labor, and that he had possession and control of them, since 1872, and had sold one, and killed others for beef, treating the stock as his own, and without complaint, as far as appears, from his wife. The other evidence, it is needless to recite.

The court charged the jury, "that as Ham had the legal title, he had a right to call for the possession of the property before the mortgage was due; that the transaction between Kornegay and the defendant, as detailed by his witness, had the effect in law, of putting the title of the cattle back with defendant's wife, and that he acquired no title by the transaction."

It is further stated that the charge in full was given "upon the law to which there was no exception, save as above." From this we understand an exception to have been made to so much of the instruction as is set out, and to present the exception as it is set out.

We are of opinion that the evidence did not warrant the judge in ascribing to the transaction in which the stock was re-sold by Kornegay, the legal effect of re-vesting the property in the wife. As the funds used in the purchase belonged to the defendant, exclusive of any interest in the

wife, and he did not profess to be acting in her behalf, nor have any authority from her, a reasonable inference might be drawn from the facts, if such was not, unexplained, their logical force, that the defendant bought for himself. The destruction of the bill of sale would be but evidence bearing upon the question, whether he was acting in the matter for himself or as an agent of his wife. At least the evidence should have been left to the jury, under proper directions, to guide them in determining the contract, and to whom it was intended to convey the title. Where the provisions of a contract are ascertained, its effect is a question of law, to be declared by the court.

"Although, generally, the meaning of words in a contract, whether written or oral," says RODMAN, J., delivering the opinion in *Adams* v. *Reeves*, 68 N. C., 134, is for the court; yet, where the proof of words is not clear, and their meaning is uncertain, and may be affected by the attending circumstances, it must necessarily be left to the jury to find it." To the same effect are *Isley* v. *Stewart*, 4 Dev. & Bat., 160. *Young* v. *Jeffries*, *Ibid.*, 216.

If the cattle belong to the defendant there was no false pretence, and if they do not, and yet the defendant believed them to be his, there would be no criminal intent. The subsequent declarations of the defendant that the cow was his wife's property, and his refusal to surrender, have no retroactive force in making an act criminal, which was not so before, and were circumstances tending to show the *scienter* merely, proper for the consideration of the jury, if the cattle were not in fact his own. We think the case has not been fairly left to the jury, and in assuming to decide the question of title upon the vague evidence offered, the judge committed an error, which entitles the defendant to a new trial, and it is so adjudged.

Error. *Venire de novo.*

STATE v. MALLOY ALLRED.

False Pretence—Indictment.

Defendant was indicted under Bat. Rev. ch. 32, § 66, and the facts found by a special verdict were that he sold to prosecutor a pair of shoes at $1.40, received therefor $1.50, and paid him the ten cents change in counterfeit coin; *Held*, not guilty of obtaining money by false token.

(*State* v. *Reese*, 83 N. C., 637, cited and approved.)

INDICTMENT for cheating by false tokens, tried at Spring Term, 1880, of RANDOLPH Superior Court, before *Seymour, J.*

The state appealed from the ruling of the judge upon the special verdict.

Attorney General, for the State.
Mr. Jas. T. Morehead, for the defendant.

SMITH, C. J. The defendant is charged with obtaining from one David J. Staley, by means of a counterfeit half-dime which the defendant knew to be such, good and lawful money of the United States of the value of sixpence, with intent to cheat and defraud the said Staley. On the trial, the jury rendered a special verdict in which they find that the defendant sold a pair of shoes to the prosecutor at the price of one dollar and forty cents, and received in payment one and a half dollars in two pieces of silver coin. The defendant paid the difference in two spurious half-dimes to the prosecutor, knowing that they were spurious and worthless. Upon these facts, His Honor being of opinion that they do not constitute the offence designated in Battle's Bevisal, ch. 32, § 66, directed a verdict of not guilty to be entered, and from the judgment thereon the solicitor appeals.

The essence of the offence imputed to the defendant con-

sists in his obtaining the money of the prosecutor by means of and through the false and fraudulent pretence involved in passing two spurious as and for genuine half-dimes of the coinage of the United States, and in this aspect bears an analogy to those forms of larceny where (under pretence of hiring) a person with felonious intent gets possession of and converts the property of another to his own use. In such case, there is no legal assent to the change of possession in consequence of the vitiating effect of the fraud by which it was brought about.

The money of the prosecutor was not obtained by any fraudulent representation or practice by which he was induced to part with it, nor does it appear that any intent to cheat or defraud entered the mind of the defendant before he received it, and the criminality of his conduct is in paying over the change due, in counterfeit coin, that is, in passing counterfeit money with a knowledge of its character, and this is not the crime with which he is charged.

While we are not called upon to determine the sufficiency of the bill of indictment in form to warrant judgment had it been authorized by the verdict, yet to avoid an inference of our approval we suggest whether there is definitely described the property alleged to have been obtained from the prosecutor under the opinion in the recent case of *State* v. *Reese*, 83, N. C., 637.

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

PER CURIAM. No error.

STATE v. G. A. HEFNER.

False Pretense—Horse Trading.

To sustain an indictment under the statute for obtaining goods by false pretence, there must be a false representation of a subsisting fact, &c. *State* v. *Phifer*, 65 N. C., 321. The statement of an opinion even if false will not sustain such an indictment. To say that the eyes of a horse are sound is merely the expression of an *opinion*, but to say "that there never has been anything the matter with the eyes of the horse," is the statement of a *fact*, which if false is within the statute and indictable.

(*State* v. *Phifer*, 65 N. C., 321, cited and approved.)

INDICTMENT for false pretence, tried at Fall Term, 1880, of TRANSYLVANIA Superior Court, before *Gilmer, J.*

The defendant was tried upon two bills of indictment the one found at the spring term, 1880, and the other at the fall term, of said court, for obtaining a mule, the property of one Joseph Kemp, by false pretences.

The assignments of the false pretences in the first bill were that a mare which the defendant exchanged for the mule was sound, that there had never been anything the matter with the said mare, and that there had never been anything the matter with the eyes of the said mare, which assignments were negatived by the averments that the eyes of the mare were weak, diseased and unsound, and that the mare was wind-broken, and was then and there subject to a certain disease known as cholic.

The assignments in the second bill were that the mare was sound, and had sound eyes, which were negatived by the averments that the said mare was not sound, and the eyes of the said mare were not sound, but that she was diseased, and then and there was subject to a certain disease,

commonly known as wind-sucking, and other diseases, to the jurors unknown.

There was evidence tending to show that the mare had weak eyes, and had been treated for the "hooks," that she was also what is called a wind-sucker, that the defendant represented to the prosecuting witness that her eyes were sound, and that nothing had ever been done in the way of doctoring her for diseased eyes. That the prosecutor, relying upon these statements of the defendant, exchanged his mule for the mare, and she afterwards became worthless and died.

There was a verdict of guilty and a motion in arrest of judgment, upon the ground that the bill of indictment charged no offence against the criminal law. Motion sustained, and the state appealed.

Attorney General, for the State.
Mr. J. H. Merrimon, for the defendant.

ASHE, J. The line of distinction between the cases of false representations that come within the statute and those that do not, is so very narrow and the cases bordering thereon so shadow into each other, that it is often difficult to decide upon which side they fall.

There have been but few of such indictments in this state previous to the year 1871, when the case of *State* v. *Phifer*, 65 N. C., 321, came here on appeal. The court in that case laid down the rule which has been since followed, "that a false representation of a subsisting fact, calculated to deceive and which does deceive, and is intended to deceive, whether the representation be in writing, or in words, or in acts, by which one man obtains value from another, without compensation, is a false pretence, indictable under our statute," but with the qualification that it did not extend to the mere "tricks of trade," as they are familiarly called, by which a

man puffs his wares, and deceives no one—as this is an excellent piece of cloth, or this is the best horse in the world. To illustrate further: if one, in selling a tract of land, makes false and exaggerated representations of its fertility, &c., that will not be indictable; but if he falsely states that there is a house on the land, that is a false pretence, because it is a false statement of a subsisting or specific fact. So in the sale of a horse, if the seller should say he is first class, all right, that would not come within the statute; but if he said it is the celebrated horse, "Charlie," and it is not, that is indictable, for it is the false representation of a subsisting fact.

Bishop, in his treatise on Criminal Law, (vol. 2, p. 431), says: "Now an opinion, a mere opinion, is not a false pretence, but any statement of a present or past fact is one if it is false. When two men are negotiating a bargain they may express opinions about their wares to any extent they will, answering, if they lie about the opinions, only to God and to the civil department of the law of the country." So in a New Jersey case, *State* v. *Tomlin*, 5 Dutcher, 13, referred to by Bishop, on page 434, where a man was induced to part with a note held upon a debtor, at a sacrifice, by the false statement that he was of small means, and unable to pay the debt in full, which he knew to be false; it was insisted in his behalf that whether this debtor was insolvent or not, and was unable to pay in full or not, were matters of opinion, but the majority of the court held they were matters of fact, in distinction from opinion; therefore the indictment could be sustained. This is like our case. The defendant falsely stated "that there never had been anything the matter with the eyes of the mare." If he had simply stated that the eyes of the mare were sound, this would have been nothing more than the expression of an opinion, which we think would not have come within the statute; but when he says there never has been anything the

matter with them, this is a fact, and when it is negatived and proved that her eyes were diseased, and had been operated upon for "the hooks," within the knowledge of the defendant, it is the false representation of a *fact*, and is a false pretence within the statute.

There is error. The judgment of the court below must be reversed. Let this be certified to the superior court of Transylvania county, that further proceedings may be had according to this opinion and the law.

Error. Reversed.

STATE v. THOMAS LASHLEY.

Fornication and Adultery—Indictment.

In fornication and adultery, where the indictment charged that the defendants "did unlawfully and adulterously bed and cohabit together," without averring that they were male and female and not married; *Held* to be sufficient.

(*State* v. *Aldridge*, 3 Dev., 331; *State* v. *Dickinson*, 1 Dev. & Bat., 349; *State* v. *Cowell*, 4 Ired., 231, cited and approved.)

INDICTMENT for fornication and adultery tried at Fall Term, 1880, of ROBESON Superior Court, before *Avery, J.*

After the jury returned a verdict of guilty, the defendants, Thomas Lashley and Narcissa Monroe, moved in arrest of judgment on the ground that it did not sufficiently appear from the bill that the defendants were of different sexes. The solicitor for the state insisted, that although the defendants were not described as "male" and "female," yet the averment that they "did unlawfully and adulterously bed and cohabit together" was sufficient to negative the marriage, and by necessary implication included the allegation

that they were male and female; and that no more specific averment was needed to inform the defendants of the nature of the charge against them. The motion was overruled and the defendants appealed.

Attorney General, for the State.
Messrs. Rowland & McLean, for defendants.

SMITH, C. J. In *State* v. *Aldridge*, 3 Dev., 331, the bill of indictment was held to be defective, and the judgment was arrested for want of an averment that the parties were unmarried; and delivering the opinion, RUFFIN, J., says: "The charge then is one of a man and woman bedding and cohabiting together in his house without an allegation that they had not intermarried, and without applying the epithet *adulterously* or concluding that *thereby they committed the crime of adultery.*" To make the intercourse criminal under the statute, there should be, he adds, "an express negative affirmation that they thus cohabited, not being husband and wife, or not being joined together in matrimony, or perhaps by the application of the epithet *adulterously* to it."

In *State* v. *Dickinson*, 1 Dev. & Bat., 349, there was a similar omission, and the charge was that the defendant did commit fornication with the woman, without stating the act which constituted the criminal offence, and the bill was held to be insufficient.

The present indictment does not in express terms declare the sex of the parties, but it does negative the marriage relation and charge that they did unlawfully and adulterously bed and cohabit together, and did then and there commit fornication and adultery. If the averment of an adulterous intercourse implies the absence of the marriage relation and is equivalent to a negative of it, more forcibly does it imply that the parties to it are of different sexes, and dispense of an allegation of that fact.

The bill is also free from the defect held to be fatal in *State* v. *Dickinson, supra,* since it does charge the commission of the acts forbidden by the statute and characterize them as making the offence of fornication and adultery. The statute does not now use the words "fornication and adultery," formerly contained in it, the distinction between which is pointed out by RUFFIN, J., in *State* v. *Cowell,* 4 Ired., 231, but simply prohibits the sexual intercourse, or lewd and lascivious associating and bedding and cohabiting between persons not married to each other; and we think the offence sufficiently set out in the bill.

There is no error. This will be certified that judgment may be pronounced upon the verdict.

PER CURIAM. No error.

STATE v. JOHN MORRIS.

Homicide—Circumstantial Evidence—Tracks—Expert—Record Evidence—Trial.

1. On a trial for murder, where the prosecution relies upon circumstantial evidence, it is competent to prove that certain tracks were measured and on comparison corresponded with the boot of the prisoner in size and shape; and this, where the measurement and comparison are made without the presence of the prisoner or previous notice to him. It is not necessary that a witness should be an expert to entitle him to testify as to the identification of tracks. *State* v. *Reitz,* 83 N. C., 634.
2. In such case, to show the motive of the prisoner, the state was allowed to introduce a record of an indictment pending against the prisoner and others charging them with larceny, and to prove that the deceased was implicated in the same, but having turned state's witness was omitted from the indictment; *Held* no error.
3. Discussion by RUFFIN, J., of the admissibility of records as evidence of their existence, and of parol testimony to show the applicability of

a particular part thereof to prove a particular fact; and of the principle governing the rule *res inter alios acta*.

4. The conduct of a trial is left to the discretion of the judge presiding; so, where on a trial for murder the prisoner objected to further examination of witnesses on account of a supposed informality in the oath taken by them, and the solicitor was permitted to recall and re-examine the state's witnesses after the administration of the oath prescribed by statute, and where the said witnesses were not separated when recalled for their second examination, the prisoner not renewing his request therefor; *Held*, that these and like exceptions are addressed to the discretion of the court, the exercise of which will not be reviewed.

5. On such trial, the prisoner alleged misconduct of the jury in allowing their officer to be present at their deliberations, and in respect to which the court found the facts to be: (1) The officer, mistaking his duty, communicated to counsel his belief as to how the jury were divided. (2) He slept in the room with the jury, but was not present at any time when they were discussing the case. (3) No improper communications were made to or by the jury; and the court refused a motion for a new trial; *Held* in such case that the circumstances being such as to put a suspicion on the verdict by showing, not that there was, but might have been undue influence on the jury, the granting of a new trial was matter of discretion; but if the fact had been that undue influence *was brought* to bear on them, this court would direct a new trial to be had.

(*State* v. *Shepherd*, 8 Ired., 195; *State* v. *Tilghman*, 11 Ired., 513, cited and approved.)

INDICTMENT for murder, tried at Fall Term, 1880, of CLEAVELAND Superior Court, before *Seymour, J.*

The opinion contains the facts. The jury rendered a verdict of guilty, judgment, appeal by prisoner.

Attorney General, for the State.
Messrs. Bynum & Grier, for the prisoner.

RUFFIN, *J.* The prisoner was indicted at fall term, 1880, of Lincoln superior court, for the murder of one Joe Roark, and having procured his cause to be removed, was tried at fall term of Cleaveland court.

The killing occurred on the 10th of August last, about 9 o'clock at night, in a street of the town of Lincolnton.

The state introduced the sister of the deceased, who testified that her brother was shot in front of her house; that hearing him cry out she went to her door, and there saw some one over her brother beating him on the head; whereupon she made an outcry and the person fled, going across the "church lot," and towards the railroad.

The deceased made a declaration before his death, to the effect that two men met and passed him on the street, when one turned and shot him, and then ran across the "church lot." The state then offered evidence to show that there were the tracks of some one leading from near the spot where the shooting occurred, and across the church lot, and thence down the railroad for some distance and up a street when the impressions ceased, but their direction was towards a quarter of the town where a number of colored people, including the prisoner, lived.

The state then offered to prove by a number of persons that they had measured these tracks and applied the measurement to the boots of the prisoner, to which the prisoner objected, on the ground that the measurement and comparison had been made in his absence, and that he was entitled to notice, and to have been present or represented at such comparison. The court overruled the objection, and the witness deposed to taking the measurement of the tracks, and to its correspondence with the prisoner's boot in size, shape and other particulars.

The theory of the state was that the prisoner had a motive to kill the deceased arising out of a desire to rid himself of the evidence he apprehended the deceased would give against him in a prosecution for larceny then pending against him; and in support of this, the state offered in evidence the record of an indictment for larceny, found at spring term, 1880, of Lincoln superior court, against the

prisoner and five others, and upon which the deceased was the only witness endorsed as having been before the grand jury; and to show by the clerk of that court, who produced the record, and by the record itself, that the deceased had been originally implicated in the same charge of larceny, but having turned state's witness against the prisoner and others indicted with him, he was omitted from the indictment. To all of which evidence the prisoner objected upon the ground that it was irrelevant, but the court overruled the objection and admitted the evidence.

The trial lasted through two days, and some of the state's witnesses were examined the first day and some the second; after the state had rested its case on the second day, the prisoner called to the stand a witness that had been sworn but not examined by the state, and during his examination it was discovered that the oath which had been administered to him and all the witnesses that had been previously examined, differed from the oath prescribed by the statute, and thereupon the prisoner objected to his further examination and insisted that all the testimony previously taken was incompetent, because it had not been given under the sanction of the proper oath. The solicitor then asked and was allowed to recall all the witnesses and after having the prescribed oath administered to examine them anew, to which the prisoner excepted.

When the trial was about to begin on the first day, the judge, at the instance of the counsel for the accused, directed the state's witnesses to be separated, and the same was done during their first examination; but when they were recalled and examined the second time (after the discovery about the oath) the prisoner made no such request, and the court no such order, so that some of those witnesses were in the court room during the examination of the others; to which the prisoner excepted.

One of the state's witnesses, after his examination on the

first day, went to his home in the country, so that he was not present when the other witnesses were recalled and examined on the second day, but arrived while the prisoner was examining his witnesses, and after he closed his case the solicitor was allowed by the court to examine him, to which the prisoner excepted.

After the verdict the prisoner moved for a new trial upon the ground that the officer in whose charge the jury were placed was in the room with them during the whole of one night, when the jury were considering of their verdict; and that during the time he made frequent communications to the solicitor and others of the progress of their deliberations, and how, and upon what points they differed.

The court heard the affidavits of the prisoner and other persons, and from them, made the following findings:

1. That the officer, under a mistaken view of his duty, did communicate to the counsel for the state and one of the attorneys for the prisoner, his belief as to how the jury were divided.

2. That he slept in the room with the jury, but was not present with them, at any time, when they were deliberating upon, or discussing the case.

3. That no improper communications were made to or by the jury. And thereupon the court overruled the prisoner's motion to which he excepted.

We know of no principle of law, or rule of evidence, under which the testimony offered by the state in regard to the examination of the tracks and boots of the prisoner, should have been excluded, because made in the absence of the prisoner, or without notice to him, to be present. The counsel who argued the case here for the prisoner, cited us to no authority in support of the position, and it is difficult to conceive that any such could be found; as to admit it, is to put an end to all inquiry into the commission of offences depending upon the introduction of circumstantial evidence.

In such cases, the very effort is to ascertain the offender, and until facts and circumstances are established, which seem to indicate with reasonable certainty, who he is, there can be no one to whom notice could be given at the different stages during the progress of the investigation. When the guilty one is thought to be discovered, and he is put upon his trial, then, the law and the constitution declare it to be his right to be informed of the accusation against him, and to confront with opposing witnesses, those that may be brought against him; but not until then; and every such right was conceded to the prisoner in this case. The prisoner's counsel did not strenuously urge this point upon the court, but laid the stress of his argument upon the incompetency of the evidence in relation to the tracks, and their correspondence with the prisoner's boots, because, it did not appear that the witnesses who testified to those matters, were experts, or were acquainted with the tracks of the prisoner. In regard to which, it might be sufficient to say, that no such point was taken in the court below, and therefore, could not be taken here for the first time; but being a case involving the life of the accused, we should hesitate to deny him the advantage of the point, upon any such technical ground, if we felt that there was any force in it. But it has been so frequently, and so recently decided by this court, and so clearly taught in all the elementary authors, that it is not necessary that a witness should be an expert to entitle him to testify as to the identification of tracks, and their correspondence with the shoes that may be worn by parties on trial, as to leave it no longer an open question.

As to the introduction of the record of the indictment for larceny, against the prisoner and others, which the state offered to fix the prisoner with a motive for the commission of the crime, it certainly was not subject to the objection of irrelevancy urged in the court below; for being a case, turning upon circumstantial evidence, and the state having, as

it alleged, made proof of the *corpus delicti*, and having shown, by the tracks, that the prisoner was in such a situation as gave him the opportunity to commit the act, it then became incumbent upon it, to fix him, if possible, with the motive, and surely nothing could have a stronger tendency, or be more relevant, than to prove just what the state proposed, to wit: that the prisoner was then under an indictment for so grave an offence, and that the deceased was mainly, if not entirely, relied upon for his conviction; and to show that he was thus indicted, there could be no higher or better proof than the record of the indictment itself. The prisoner's counsel, seemingly yielded this point too, as he did not urge it before us, but assumed the position that the record came within the principle of *res inter alios acta*, and was therefore incompetent. We do not think it subject to this objection either, as we understand the rule of evidence to be that a record is evidence of its existence (and this was all that the state sought to establish by it) against all the world. When offered to conclude or estop as to their subject matter, records are admissible only as to parties and privies, but when offered merely to prove their existence, and that a certain thing was done by the court, they are admissible against strangers, in any matter of controversy, in which they may be material; and not only are records competent in such cases, but particular parts of records, when offered to show a particular fact, and their applicability to the subject may be shown by parol testimony. "A judgment," says Greenleaf, in section 527 of his treatise on Evidence, "when used by way of inducement, or to establish a collateral fact, may be admitted, though the parties are not the same." And again in section 575 he says, "a verdict and judgment in any case, are always admissible to prove the fact that the judgment was rendered or the verdict given; for there is a material difference between proving the existence of the record, and its tenor, and using the record as the medium of proof of

matters of fact recited in it." In this particular, it stands upon the same footing with a deed, which is evidence of its own existence against all the world; but of the truth of the matters recited therein, it is evidence against parties and privies only. So in the case of *State* v. *Shepherd*, 8 Ired., 195, which, in many particulars, resembles the present case, the state, having shown that the deceased had bought the land of the prisoner at sheriff's sale, and that the prisoner had threatened to slay him whenever he took a deed for it, offered in evidence a deed which the sheriff had given him a short time previous to the killing, which was objected to, upon the ground taken here, of its being *res inter alios acta*, but the court, trying the prisoner, ruled it to be competent, and upon an appeal to this court, the ruling was approved. In the light of these authorities, this court feels constrained to overrule the exception of the prisoner in this particular, and to say that the record was competent evidence for the purpose for which it was offered by the state.

As to the alleged irregularity in the conduct of the case, consisting in the court's having allowed the solicitor after the discovery of the supposed error in the oath which was at first administered to the witnesses, to recall and re-examine all the state's witnesses, we cannot see that the judge below could have proceeded under the circumstances otherwise than he did. If he had made a mistrial, it would have raised a serious question as to whether the prisoner having once been in jeopardy could again be put upon his trial. It was upon an objection urged by the prisoner himself, that he determined to proceed no further in the trial until the witnesses were re-sworn, so that their testimony should go to the jury under the sanction of the proper oath. It is impossible for the law to foresee and provide for all the contingencies that may arise unexpectedly in the course of trials on the circuits, and something must be left to the discretion and sound judgment of the judge, and this court

will not undertake to review the exercise of that discretion. It is true that if it should appear that this discretion had been so exercised as that the prisoner had been deprived of a fair trial, this court, as said by the late Chief Justice in the case of *State* v. *Tilghman*, 11 Ired. 513, would assert the right to grant a new trial. But we cannot perceive that this prisoner's rights were in any way impaired by the action of His Honor in the premises.

All trials proceed upon the idea that some confidence is due to human testimony, and that this confidence grows and becomes more steadfast in proportion as the witness has been subjected to a close and searching cross-examination; and this, because it is supposed that such an examination will expose any fallacy that may exist in the statement of the witness, or any bias that might operate to make him conceal the truth, and trials are appreciated in proportion as they furnish the opportunities for such critical examinations. To those who are accustomed to participate in trials at the bar, it is well understood to be an inestimable advantage to be able to enter upon a cross examination of an adversary's witnesses with a knowledge of what their answers would be to questions propounded, and of their bias and prejudices. So that, in the opinion of this court, the prisoner, so far from being prejudiced by the action of the court below, had afforded him in the fact that his counsel had two opportunities to cross-examine the witnesses of the state, an advantage that rarely falls to the lot of parties situated like himself.

In regard to the failure of the judge to direct a separation of the witnesses when recalled for their second examination, it is sufficient to say that no request for their separation was made by the prisoner. It was at his instance that the first order was made, and if repeated, it is impossible to suppose that his request would have been disregarded. Until

requested, the judge had no means of knowing that in the changed condition of the case it was still desired.

The counsel did not press the exception growing out of the fact that the court permitted the solicitor to call a witness after the prisoner's case had been concluded, conceding it to be a matter addressed to the discretion of the presiding judge, the exercise of which could not be reviewed here.

The last ground of exception taken for the prisoner was the alleged misconduct of the jury in allowing their officer to be present at their deliberations. After a careful consideration of the statements contained in the record and the affidavits which accompany it, we cannot say certainly that any undue influence was brought to bear on the jury. Indeed we concur with His Honor in thinking there was none, and that the most that can possibly be said, is, that there *might have been* as there was the opportunity for it. Such being the case, it was a matter wholly in the discretion of the presiding judge to determine what should be done in the premises. "If," says the late Chief Justice in *Tilghman's* case, "the circumstances are such as merely to put a suspicion on the verdict by showing, not that there was, but that there might have been undue influence brought to bear on the jury, it is a matter within the discretion of the judge presiding; but if the fact be that undue influence was brought to bear on them, this court as a matter of law will direct a trial to be had, for in contemplation of law there was no trial."

There is no error. Let this be certified that the court below may proceed to judgment.

PER CURIAM. No error.

STATE v. WILEY BRANTLEY.

Homicide—Circumstantial Evidence—Motive.

On trial for murder where the prosecution relies upon circumstantial evidence to convict the prisoner, the inquiry as to collateral facts, which must be established by direct evidence, is restricted to those having a reasonable connection with the main fact at issue—not such a connection as will show that the collateral and main fact often go together, but such as will show that they most usually do so. This rule applied to the facts of this case entitles the prisoner to a new trial for error committed by the court in not withdrawing from the jury the testimony relating to the motive of the prisoner in killing the deceased.

(*Bottoms* v. *Kent*, 3 Jones, 134; *State* v. *Vinson*, 63 N. C., 335, cited and approved.)

INDICTMENT for murder, tried at Fall Term, 1880, of NASH Superior Court, before *Gudger, J.*

The prisoner was charged with the killing of Crawford Eatman on the 23d day of November, 1878. The jury rendered a verdict of guilty, and from the judgment pronounced he appealed to this court.

Attorney General, for the State.
Messrs. Connor & Woodard, for the prisoner.

RUFFIN, J. Of the several exceptions taken for the prisoner on the trial below, it is necessary that we should consider those only which go to the incompetency and insufficiency of the evidence admitted and relied on for his conviction, as we are of the opinion that these were well taken and entitle him to another trial.

We understand from the case as stated that there was no direct evidence to connect the prisoner with the homicide, but that the state for this purpose relied wholly upon the inferences to be deduced from the evidence stated in the

case, and no other, as constituting a chain of circumstances sufficiently strong to warrant a conviction. That evidence was as follows:

After establishing the fact that on a certain Saturday morning the prisoner and the deceased, the latter being a lad of eleven years of age, carried about a hundred pounds of cotton to the town of Wilson and there sold it, that on their way home in the evening, the two had some disagreement about a small sum of money which the deceased alleged the prisoner owed him, and that the killing was done on that same Saturday night, the state offered to show by one Jones, and after exception on the part of the prisoner, was allowed to show, that on the same night about midnight the witness was aroused by the barking of his dog, and immediately went to his cotton house where he found that about one hundred pounds of cotton had been stolen; very early the next morning he went again to the cotton house where he found tracks of two persons, which, being familiar with the tracks of the deceased and of the wife of the prisoner, he recognized as theirs; and about twenty-five yards from the cotton house in the jam of a fence he found the tracks of another person, which seemed to be those of a man, but whose he could not tell; that the tracks after leaving the cotton house went through a lane and turned into a path leading towards the house of the prisoner, but could be traced no further; that until the Saturday night in question witness had not visited his cotton house since the preceding Thursday, but there had been no rain in the meantime: And by one Locust, that on the Monday morning next after the homicide he had examined the prisoner's cotton crop as it stood in the field, and found that not more than ten pounds of it had been picked out.

The theory suggested by the state, and which the solicitor argued was supported by the foregoing facts, was, that the prisoner and the deceased had been associated in the larceny

of the cotton taken from the cotton-house and sold in Wilson, and that the prisoner's motive to slay the deceased was to prevent his being a witness against himself in the event he should be charged with that offence.

After the evidence was closed, the prisoner through his counsel moved the court to withdraw from the consideration of the jury the testimony of the two witnesses, Jones and Locust, for the reason that if taken to be altogether true, it could raise but a bare suspicion of the motive ascribed to the prisoner on the part of the state, which the court declined to do, and the prisoner excepted.

In considering the competency of the testimony excepted to, we will not stop to inquire whether any part of it comes within the rule of *res inter alios acta*, though we are not by any means sure that much of it might not have been excluded under the principle of that rule.

As many crimes, and especially those most dangerous in their consequences, were perpetrated with such secrecy that no direct proof could be adduced to establish the guilt of the offenders, it early became necessary for the protection of society that the courts should countenance a resort to circumstantial testimony, that is, should permit certain collateral facts to be established by direct evidence, from which facts inferences might reasonably be drawn as to the existence of other facts inconsistent with the innocence of the accused. But it was soon discovered that such a practice, while it afforded to society the needed protection, might, if unrestrained, be attended with consequences dangerous to the accused, and thereupon the courts sat to work to frame certain rules for its use, which were from time to time modified as experience taught to be necessary. Amongst other hazards and inconveniences, it was found that to allow evidence to be given touching every collateral matter that could be supposed, however remotely, to throw any light upon the main fact sought to be established, had the effect

to render trials too complicated, and to confuse and mislead rather than enlighten the juries, and at the same time to surprise the party on trial, who could not come prepared to disprove every possible circumstance, but only such as he might suppose to be germane and material. And therefore the main rule was adopted of restricting the inquiry to such facts as, though collateral to the matter at issue, had a *visible, reasonable* connection with it—not such a connection as would go to show that the two facts, the collateral one and the main one, sometimes or indeed often go together, but such as will show that they *most usually* do so. This rule taken, as he says, from Best on the Principles of Evidence, the late Chief Justice PEARSON thus expressed in the case of *Bottoms* v. *Kent*, 3 Jones, 154: "The rule that evidence which is too remote is inadmissible may be thus stated: that as a condition precedent to the admissibility of evidence, the law requires an *open and visible* connection between the principles and the evidentiary facts; this does not mean a *necessary* connection which would exclude all presumptive evidence, but such as is *reasonable* and not latent or conjectural."

Considered in the light of this rule, was the evidence objected to competent? Concede to it full efficacy in establishing the facts that the prisoner was in complicity with his wife and the deceased in stealing Jones' cotton, that it was the same cotton which the two carried to Wilson and sold, and that the prisoner knew that Jones had discovered the loss of his cotton on Saturday night, still, were these facts such as might be expected to create a reasonable, natural inference of the existence of the main fact, to wit, a motive on the part of the prisoner for slaying the deceased? It is not sufficient that the two *may* coexist, or that the chances of their mutual existence are even. The inference must be that the one fact *most usually* attends the other. As said by Judge RODMAN in *State* v. *Vinson*, 63 N. C., 335, "if

the fact offered to be proved be equally consistent with the existence or non-existence of the fact sought to be inferred from it, then the evidence can raise no presumption either way and should not be admitted."

Is it not clear that the conviction of the prisoner was the result, not of a legitimate and natural deduction from the facts as established by the evidence, but of a conjecture based upon facts existing only in the supposition of the jury? or in other words, did not the jury guess, first, at the fact that the deceased had learned of the discovery of the loss of the cotton by Jones; secondly, that in order to screen himself he had formed the purpose to betray his companion; and thirdly, that the prisoner had become conscious of such his intention, and therefrom infer the motive of the prisoner to commit the crime with which he is charged? If these facts had been proved, then the conclusion of the jury might be seen to bear a natural and apparent relationship to them; at all events, it would then have been a matter strictly within their province and of which they were to be the sole judges, as decided in *State* v. *Morris, ante*, 756. But juries are not allowed to act upon mere conjecture, nor is evidence admissible before them which can only furnish grounds for a conjecture.

We fully recognize the difficulty which a judge presiding on the circuit must experience when called hastily to determine between that which amounts to slight evidence and that which constitutes no evidence, and especially when the efficacy of that which is offered, and indeed its very competency, may somewhat depend upon the order in which it is brought forward on the trial. But if on the spur of the moment evidence should be admitted as to the existence of a fact bearing no relation to the main fact, or such a relation as could only afford grounds for a conjecture on the part of the jury, it should be withdrawn entirely from their consideration, as the court below was requested to do in the

case of the prisoner, and in the refusal of which we hold there is error.

Error. *Venire de novo.*

STATE v. R. M. COHEN.

Indictment under Revenue Act.

The revenue act of 1877 making it indictable to practice any trade without license, is constitutional; and this law has been continued in force by subsequent enactments.

(*Albertson* v. *Wallace*, 81 N. C., 479.)

INDICTMENT for a misdemeanor under the revenue act of 1877, ch. 156, found in the inferior court, and tried on appeal at Fall Term, 1880, of WAYNE Superior Court, before *Gudger, J.*

The defendant was indicted at a term of the inferior court held for the county of Wayne in the month of December, 1879, for practicing the trade of a merchant without having obtained a license so to do; and at the following March term he was convicted and appealed to the superior court. At the fall term, 1880, of the latter court he was tried and again convicted; and after making a motion in arrest of the judgment, which was overruled by the court, he appealed to this court.

The case states that the defendant assigned two grounds in support of his motion in arrest: 1. That the law under which the indictment against him is brought is unconstitutional. 2. That since the indictment was found and before the trial, the statute creating the offence charged against him has been repealed.

Attorney General, for the State.

Messrs. W. T. Faircloth and *W. E. Clarke*, for the defendant, cited *State* v. *Long*, 78 N. C., 571; *State* v. *Nutt*, Phil., 20; *State* v. *Wise*, 66 N. C., 120.

RUFFIN, J. The indictment against the defendant is brought under the law of 1877, ch. 156, § 31, entitled "an act to raise revenue." The 12th section of the statute provided that every merchant, &c., who should carry on his trade, should, in addition to his *ad valorem* tax, pay as a privilege tax five dollars and one-tenth of one per centum on the total amount of his purchases, &c. The 27th section provided that no person should follow certain enumerated trades without first obtaining a license from the sheriff of his county; and the 31st section made it a misdemeanor in any one to practice such trades without having first paid the tax and procured the license. Amongst the trades enumerated as forbidden to be followed without such license is that of a merchant.

The question as to the constitutionality of this very statute was brought before this court, in the case of *Albertson* v. *Wallace*, 81 N. C., 479, and was decided in favor of the law; and we can add nothing to what is said in that case.

We do not find, on reference to the subsequent statutes, that this one, so far as the defendant's case is concerned, has been repealed. It is true that by chapter two of the acts of 1879 the tax of five dollars imposed by the 12th section of the former statute, has been repealed, but this leaves the per centage on the amount of purchases still to be paid; and the charge alleged against the defendant is not the failure to pay any particular tax, but his failure to take out license to follow his trade as a merchant. A modification of the tax designated in the 12th section cannot be held to be an abrogation of the duty imposed by the 27th section, a neglect of which duty is the subject of this prosecution.

We have examined all the subsequent revenue laws, thinking they might possibly contain a repeal of all former laws on the subject; and if so, under the authorities referred to in the brief of the defendant's counsel, we should feel bound to give him the benefit thereof. But as we construe them, instead of repealing this law, they expressly continue it in force for all purposes, so far as relates to taxes which were or should have been listed or paid under it.

There was no error therefore in refusing to arrest the judgment, and this opinion will be certified to the end that the superior court may proceed to judgment.

PER CURIAM. No error.

STATE v. L. D. TAYLOR.

Jurisdiction—Criminal Procedure—Nolle Prosequi.

1. The ruling in *State* v. *Moore*, 82 N. C., 659, affirmed.
2. The court *intimate* that a count in an indictment in containing a charge which the court may be incompetent to try for want of jurisdiction, will not disable it from trying an offence charged in another count of which the court has jurisdiction.
3. A *nolle prosequi* as to one count in an indictment ought, in strictness, only to be entered before the jury are empaneled or after rendition of verdict against defendant; but if entered upon the conclusion of the evidence, the prosecution is deemed to have assented to a verdict of acquittal on that, and to have elected to proceed on the other counts.
4. *Held, further*, That where the jury find a defendant guilty on one count, and say nothing in their verdict concerning other counts, it will be equivalent to a verdict of acquittal as to them.

(*State* v. *Moore*, 82 N. C., 659; *State* v. *Taylor*, 83 N. C., 601; *State* v. *Thornton*, 13 Ired., 256, cited and approved.)

STATE v. TAYLOR.

INDICTMENT for assault and battery tried at June Special Term, 1880, of WAKE Superior Court, before *Gudger, J.*

The defendant is charged in several counts of the indictment with an assault and battery upon Madison Hodge and using a deadly weapon, or inflicting serious injury upon his person in all, except the last count which alleges no aggravating circumstances. Previous to empaneling the jury, the defendant's counsel submitted a motion to quash which was denied. After the conclusion of the evidence, the solicitor was permitted to enter a *nolle prosequi* to the last count and to proceed on the others. The jury rendered a verdict of guilty. To these rulings the defendant excepted and appealed from the judgment.

Attorney General, for the State.
Mr. T. M. Argo, for the defendant.

SMITH, C. J. The motion to quash is sustained in the argument of defendant's counsel, upon the ground that a simple assault and battery under the act of 1879, ch. 92, is exclusively cognizable before a justice of the peace, and thus a conflict of jurisdiction arises, which is fatal to the prosecution. This position is at variance with the decision in *State* v. *Moore*, 82 N. C., 659; and in *State* v. *Taylor*, 83 N. C., 601, recognizing and approving it.

The act of 1879 contains provisions which we find it difficult to harmonize, and as the result of a careful examination and to give effect to the legislative will, we put upon the enactment what we deemed a fair and reasonable construction in the case first cited. It is there held that when the assault and battery are with intent to kill, or commit rape, or a deadly weapon has been used, or serious damage done, the offence is committed to the exclusive cognizance of the superior court; that the jurisdiction is concurrent with that of a justice of the peace in regard to the offences

specified in the eleventh section; and that "in framing bills of indictment for such offences, (those in that section) it is not necessary to aver that the offence was committed more than six months before the finding of the bill, and that no justice of the peace has taken official cognizance of it." The last count does not then disclose a case outside the jurisdiction of the court, although it might so appear upon the trial. But we do not concede, if it were otherwise, that the presence of a count containing a charge which the court may be incompetent to try for want of jurisdiction will disable the court from proceeding with the trial of an offence charged in a count of which it has jurisdiction, although they are parts of the same bill. We do not undertake, as it unnecessary, to decide the point.

The second exception is equally without support. As we understand the record, the effect of the entry was to withdraw the last count from the consideration of the jury, and have them to pass upon the others. Strictly, a *nolle prosequi* can only be entered by the prosecuting officer, before the jury are impaneled, or after the rendition of a verdict against the defendant. During the trial it can only be done with his consent. While then, in strictness, a *nol. pros.* could not be entered, and the count thus reserved for a future prosecution of the defendant, which is its effect when properly entered, (*State* v. *Thornton*, 13 Ired., 256,) the action of the solicitor must be deemed an election to proceed on the other counts and an assent to a verdict of acquittal on that. The same result follows the failure of the jury to pass upon the count on which a conviction is asked. For this, ample authority is found. "If the jury find the defendant guilty on one count," says Mr. WHARTON, "and say nothing in their verdict concerning other counts, it will be equivalent to a verdict of not guilty as to them." 1 Whar. Cr. L., § 421. This proposition rests upon numerous adjudications, to some few of which we propose to refer.

In *Werngopper* v. *State*, 7 Black., (Ind.) 186, the defendant was found guilty on four counts, and the jury did not pass on the first. With leave of the court a *nol. pros.* was entered as to this and judgment rendered on the verdict. It was held that the entry of a *nol. pros.* was a nullity, and that the failure to find on one of the counts was "equivalent to an express verdict of not guilty."

The same principle is declared with equal explicitness in *Morris* v. *State*, 8 S. and M., (Miss.) 762; *Stotz* v. *People*, 4 Scam., (Ill.) 168; *Guenther* v. *People*, 24 Smith, (N. Y.) 100; *Kish* v. *Commonwealth*, 9 Leigh, (Va.) 627; and in *State* v. *Phinney*, 42 Maine, 384.

In the last case the subject is discussed and the rule fully vindicated. Referring to the old doctrine that a failure to find on all the issues vitiated the verdict, the court proceed in these words: "The tendency of modern decisions however has been to relax the severity of the rule and sustain the verdict when the intention of the jury can be ascertained. What is the reasonable view to be drawn from this verdict? The people prefer two charges of criminal offences against the defendant. He is arraigned on them, and the question of his guilt submitted to the jury for their determination. They hear the testimony adduced to substantiate both charges and find affirmatively that he is guilty of one. Is not the inference inevitable that the prosecution failed to establish his guilt on the other charge, and therefore the jury find negatively on it? We are of the opinion that the verdict should be regarded as an acquittal of the defendant on the second count. If such be the effect of the verdict, he certainly has no right to complain. He can never again be put on trial for the same offence."

In the case reported in 9 Leigh, 627, the general court say that a verdict of acquittal should be entered. Concurring in these views we pursue the subject no further.

There is no error. This will be certified, that judgment may be entered on the verdict.

PER CURIAM. No error.

STATE v. W. P. WILSON.

Justices of the Peace—Jurisdiction.

Justices of the peace have exclusive jurisdiction of the offence of carrying a pistol on the Sabbath, being off one's premises. Bat. Rev., ch. 117, and acts amendatory thereof.

INDICTMENT for a misdemeanor tried at Spring Term, 1879, of TRANSYLVANIA Superior Court, before *Gudger, J.*

The defendant was indicted for violating the provisions of section 117, chapter 32, of Battle's Revisal, in carrying a pistol on the Sabbath, being off his premises. When called to answer, he moved the court to quash the indictment upon two grounds:

1. That the court had no jurisdiction of the subject matter thereof.

2. For formal defects in the bill.

The motion was overruled and the defendant excepted. Upon the trial the jury rendered a verdict of guilty, and from the judgment pronounced the defendant appealed.

Attorney General, for the State.

No counsel for defendant.

RUFFIN, J. As in our opinion the ground first assigned was well taken and disposed of the case, our attention will be confined to it.

It is much to be regretted that any of our statutes, and especially those which define offences, denounce punishments, and limit the jurisdiction of the several tribunals of the state, should be so uncertainly written as to leave any doubt as to their intent and purport. Such, however, we find to be the case in regard to the jurisdiction over the offence charged upon the defendant in this case; and so much obscured has it been by the several acts passed in relation to it that we are not surprised that His Honor who tried the case found difficulty in arriving at a right conclusion. Indeed we must confess that our decision is more the result of an inference than of certain knowledge derived from the statutes themselves.

The 117th section referred to defines the offence and provides that upon conviction the offender shall pay a fine not to exceed fifty dollars, two-thirds of which shall enure to the benefit of the free schools of the county, and the remainder to the informant.

The 118th section being a distinct and independent one, provides that upon failure to pay the fine imposed by the previous section the convict shall be imprisoned at hard labor for a period not to exceed three months.

The act of 1873-'74, ch. 176, § 9, provides that section 117 of chapter 32 of Battle's Revisal, being the statute under which the defendant is indicted, shall be so amended as that the punishment for the offence shall not exceed a fine of fifty dollars, or imprisonment for one month; and section 13 undertakes to confer the jurisdiction over the offence upon the courts of justices of the peace.

The act of 1879, ch. 92, § 1, again amends section 117 and also the act of 1873-'74 and fixes the punishment so that it cannot exceed a fine of fifty dollars or imprisonment for thirty days, and gives the justices exclusive jurisdiction of the offence.

It will be noticed that no statute attempts or professes to

repeal, amend, or in any wise affect the 118th section except as its repeal may be inferred because of its being in conflict with the provisions of the acts of 1873–'74 and 1879.

If that section is still operative, then inasmuch as this defendant may, in the event of his failure to pay the fine imposed on him upon conviction for the offence, be subjected to an imprisonment at hard labor for three months, the statutes giving jurisdiction to the justices would be unconstitutional, and the action of His Honor in maintaining the jurisdiction of the superior court would be correct.

We have, however, arrived at the conclusion that, though not in express words, the 118th section is repealed, and therefore there was no obstacle in the way of the jurisdiction of the justice.

The purpose of the legislature to accomplish this object has been twice expressed—once in the act of 1873–'74 and again in the act of 1879. So that but little room is left to doubt as to what was the real intent of those who framed the statutes; and as the last act declares that the jurisdiction of the justices shall be *exclusive*, and as the punishment therein denounced squares exactly with the limitation imposed by the constitution on that jurisdiction, we feel justified in saying that the legislature must have intended to repeal that section which would otherwise have defeated the object it had in view.

We are, therefore, of the opinion that the superior court had no jurisdiction of the offence charged against the defendant, and that treating his motion to quash as a plea to the jurisdiction it should have been sustained.

Error. Reversed.

STATE v. EDWARD BRYSON.

Magistrate's Warrant, sufficiency and amendment of.

The affidavit of a complainant in a criminal action before a magistrate, does not constitute an essential part of the warrant issued thereon, but if the warrant charges a criminal offence, it will be sustained. Suggestion of the court upon the power of amendment of such warrant.

(*Welch* v. *Scott*, 5 Ired., 72, cited and approved.)

CRIMINAL ACTION tried on appeal at November Term, 1880, of NEW HANOVER Criminal Court, before *Meares, J.*

This prosecution commenced in the court of a justice of the peace, where the defendant was tried for a misdemeanor in violating the second section of chapter 219 of the laws of 1879, which section is as follows: "Any person or persons who shall secrete or harbor any such seaman who has deserted from any domestic or foreign vessel in the localities above named *knowing* that such seaman or seamen have deserted," &c. When the case was called for trial in the criminal court, it was discovered that both the warrant and the affidavit omitted to charge any offence, that is to say, that the word "knowing" was omitted in both of them. The solicitor moved to amend the warrant by inserting the word "knowing," the justice of the peace being present in court, and the court granted the motion. The counsel for defendant then submitted a motion to quash upon the ground that the word "knowing" was omitted in the affidavit and that no offence was charged in the affidavit; insisting that the prosecution was of course based on the affidavit and even if the court possessed the power to order an amendment of the warrant, still in this case it could not be done because the person who made this affidavit is beyond the seas, and is not within the jurisdiction of the court.

The motion to quash was allowed, the case dismissed, and from this ruling the state solicitor appealed.

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

ASHE, J. The only question presented by the record for our determination, is, whether the warrant is defective because the word *knowing* is omitted in the affidavit upon which it is based.

A magistrate, without information upon oath, may issue a warrant *super visum*. But except in that case, it is his duty before issuing the warrant to require evidence upon oath of the guilt, or at least of circumstances affording a reasonable suspicion of the accused. Before the passage of the act of 1868–'69, although it was necessary that every warrant, except for offences committed in the presence of the magistrate, should be founded upon information on oath, it was not essential to its validity that the evidence upon which it was issued should be set out in it. In England it was usual for magistrates to take written affidavits of the charge separate from any statement of the oath in the warrant, so that they might have at all times in their own power evidence in justification of issuing the warrant; and it was not necessary to recite in the warrant the information upon which it was founded. *Welch* v. *Scott*, 5 Ired., 72. But the law is now changed in this respect. By the act of 1869, Bat. Rev., ch. 33, § § 10, 11, it is provided that when complaint shall be made to a magistrate that a criminal offence has been committed, it shall be his duty to examine on oath the complainant and any witnesses who may be produced by him, and if it shall appear from such examination that any criminal offence has been committed, the magistrate shall issue a proper warrant *reciting* the accusation, &c.

What we understand is meant by "reciting the accusa-

tion," is not a verbatim recital of the words of the affidavit or the evidence, but a plain brief narrative of the facts disclosed by the evidence, showing a violation of the criminal law. The act does not require that the evidence should be adduced in the form of a written affidavit, nor that the testimony of the witnesses should be reduced to writing, but it would be safest for the magistrate in every case, for the purpose of his own protection, to take and preserve a written memorial of the evidence, whether of the prosecutor or his witnesses. Where a magistrate is taking cognizance of a criminal action within his jurisdiction, more certainty is required than in a case where he acts only ministerially, in binding the accused to court; for in criminal actions before magistrate the warrant is to be treated as the complaint of the prosecutor under oath. In other words, it is the "indictment," and must set out the facts constituting the offence with such certainty that the accused may be enabled to judge whether they constitute an indictable offence or not, and that he may be enabled to determine the species of offence with which he is charged. If the warrant does this, it is sufficient, notwithstanding there may not be the same degree of certainty in the affidavit or evidence taken, as the ground of application for the warrant. The evidence not being required to be put in writing, the affidavit of the complainant does not constitute an essential part of the indictment, any more than does the presentment of a grand jury form a part of the bill of indictment which is predicated upon it. An appellate court in reviewing the judgment of a justice's court in a criminal action, can only look at the warrant which is the complaint, and if that sufficiently sets out a criminal offence within its jurisdiction, it must be sustained. It cannot look behind the warrant for objections lying in the defects or irregularities of the preliminary evidence.

The power of the criminal court to allow an amendment

of the warrant in this case, is not presented for our consideration by the appeal, and we therefore express no opinion upon that point. But we take this occasion to suggest, that as justices of the peace are clothed with a large jurisdiction in criminal matters, and are almost universally men who are unlearned in the law, very liberal powers of amendment should be accorded them in the administration of the criminal laws, that offenders may not escape the just penalties of their crimes by opposing technical objections.

There is error. Let this be certified to the criminal court of New Hanover county, that further proceedings may be had according to law.

Error. Reversed.

STATE v. F. BREWINGTON.

Nuisance—Sufficiency of Indictment.

An indictment charging the use of profane and vulgar language, on a certain day and on divers other days in a public street and in the presence and hearing of divers persons then and there assembled, and then and there repeating the same to the evil example and common nuisance, &c., is sufficient. (Review of cases upon this subject by RUFFIN, J.)

(*State* v. *Baldwin*, 1 Dev. & Bat., 195; *State* v. *Ellar*, 1 Dev., 267; *State* v. *Jones*, 9 Ired., 38; *State* v. *Pepper*, 68 N. C., 259; *State* v. *Barham*, 79 N. C., 646, cited and approved.)

INDICTMENT for a Nuisance, tried at August Term, 1880, of NEW HANOVER Criminal Court, before *Meares, J.*

The case is brought here by an appeal on the part of the state from an order of the judge below, quashing an indictment preferred against the defendant for a nuisance committed by the use of profane and vulgar language in a public place.

The indictment charged that defendant, being an evil disposed person, &c., on the first day of January, 1880, and

on divers other days and times, both before and since that day, in a certain public street and highway in said county, and in the presence and hearing of divers persons then and there and on the said other days and times assembled, did use vulgar and obscene language in substance, &c., and did then and there and on said other days and times in the presence and hearing of the said divers persons being then and there assembled, repeat said language, &c., to the evil example of all others in like case offending, to the common nuisance of all the good citizens then and there and on the said other days and times assembled, against the statute, &c.

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

RUFFIN, J. The use of profane and vulgar language does not *per se* constitute an indictable offence, but only when so publicly indulged in and so long continued or often repeated, as to become annoying and hurtful to the community. And not only must the person charged with such an offence have indulged in its use to this extent, but the indictment preferred against him must specifically set forth all the facts and circumstances which go to make up the offence.

Conceding these principles and admitting that the grossly indecent and profane language, set forth in the indictment as having been uttered by this defendant, would not have been sufficient to constitute an indictable nuisance, if used but once, and in the hearing of the persons who happened on that single occasion to be present, (as was decided in *Baldwin's* case, 1 Dev. & Bat., 195) it remains to be inquired, whether its frequent use in a public street on many days, and in the hearing and to the hurt and annoyance of many persons present on all the several occasions, does not in itself constitute such an offence as is punishable under the criminal law of the state. If it does, then the offence is

sufficiently charged in the bill under consideration, for all these facts and circumstances are specifically set forth therein.

In the very early case of *State* v. *Ellar*, 1 Dev. 267, it was decided that where the acts are repeated and so public as to become offensive and inconvenient to the citizens at large, they are indictable; and in *Baldwin's* case, *supra*, it was held that profane and loud cursing at a public meeting-house *on a single occasion* whereby the members of a singing school were disturbed, did not amount to an indictable offence, but Judge GASTON in delivering the opinion distinctly declares that such conduct may become a public nuisance, if so often repeated or so long continued as to affect the citizens of the state, who may successively come within the reach of its consequences, and be thereby annoyed and inconvenienced.

So in *State* v. *Jones*, 9 Ired., 38, (in which case, through some singular misapprehension, *Ellar's* case is quoted as one in which a judgment was arrested because the indictment did not sufficiently charge the offence, whereas the very opposite was held and the judgment of the superior court was reversed because it had arrested the judgment on that ground), it was said by the court that while single acts of profanity and the use of vulgar language are not punishable by indictment, yet if repeated and publicly perpetrated in the hearing of many of the citizens and to their annoyance and inconvenience, it will become a nuisance and as such be punishable.

And in *State* v. *Pepper*, 68 N. C., 259, Judge RODMAN says that in order to make profane swearing a nuisance, the profanity must be uttered in the hearing of divers persons, and must be charged in the bill to have been so uttered. And he gives as the most approved form for so charging it, the simple and direct averment of its having been so done "in the presence and hearing of divers persons then and there assembled."

The same distinction between profanity as a private inconvenience and as an indictable offence, runs through all the decisions of this court, and there are a number of them, including that one in the case of *State* v. *Barham*, 79 N. C., 646, in which an effort is made to formulate the several averments necessary to be made in an indictment of this kind, and which in substance, are, first; An allegation that "the offence was committed in the presence and hearing of divers persons then and there assembled," which requisite is not supplied by an averment that "it was done to the common nuisance of the good citizens of the state then and there assembled." And secondly; An allegation that the language was "so repeated in public as to have become an annoyance and inconvenience to the public." We do not understand from this, as His Honor below seems to have done, that these averments must be expressed in the very words there used by the judge in delivering the opinion, but that it will suffice if they in substance amount to the same; and testing this indictment by the rules prescribed in that case, we cannot see that it lacks a single averment necessary to constitute the offence. It certainly charges the offence to have been committed in the presence and hearing of divers persons then and there assembled; that it was committed in a public street and highway; that it was there *repeated*, that is to say, uttered on divers days and times; and thus it became an annoyance to the public, "a common nuisance to all the good citizens of the state there assembled," that is, to the *divers persons* present on the *divers* days and times all of whom are alleged to have heard the offensive words spoken.

The indictment seems to us to be in conformity to approved precedents, and to have met all the requirements of the decisions of our court on the subject, and therefore we hold it was error in the court below to have quashed it.

Error. Reversed.

STATE v. JOHN WEBB DAVIS.

Perjury—Insufficiency of Indictment.

An indictment for perjury which does not aver that the false oath was taken *wilfully* and *corruptly* is defective. These terms must be applied to the act of swearing to express the wicked purpose with which such oath is taken.

(*State* v. *Carland*, 3 Dev., 114, cited and approved.)

INDICTMENT for perjury tried at Spring Term, 1880, of HALIFAX Superior Court, before *Gudger, J.*

The indictment is substantially as follows: The jurors, &c., present that defendant, &c., on the 15th day of September, 1879, in said county, before William H. Shields, J. P., deputy assessor to John B. Neal, assessor for Caledonia township, Halifax county, duly appointed by the board of county commissioners of said county, on the 21st day of April, 1879, to list and assess all the lands and personal property of said township for the year 1879; whereas upon the examination of said John Webb Davis this day taken before William H. Shields, J. P., deputy assessor to John B. Neal, assessor for Caledonia township, &c., the said defendant listed his property for taxation, to wit, twenty-five acres of land, one cow, no hogs, one horse, valued at twenty-five dollars, and the defendant was then and there sworn upon the Holy Evangelist, &c., by W. H. Shields, J. P., deputy assessor to John B. Neal, assessor, &c., then and there examined upon his oath by said Shields; and he, the said defendant, declared upon his oath, to wit: I, John Webb Davis, do solemnly swear that the list furnished by me contains a true and accurate list of property I am required to list for taxation, and that the value fixed thereon by me is a fair valuation of the same according to my best knowledge, information and belief, so help me God. (Signed by defendant,

and "sworn to and subscribed before me, this 17th day of June, 1879. John B. Neal, assessor, pr. W. H. Shields.") And the jurors, &c., do say that defendant when he declared upon his oath before Shields, J. P., that the list furnished by him contained a true and accurate list of his property which by law he was required to list for taxation, and the value fixed thereon by him was a fair valuation of the same, which was not true; that he did unlawfully and wilfully commit wilful and corrupt perjury, contrary, &c.

The jury rendered a verdict of guilty. Motion in arrest overruled, and judgment pronounced, from which the defendant appealed.

Attorney General, for the State.
Messrs. Reade, Busbee & Busbee, for defendant.

ASHE, J. The indictment is radically defective in many particulars, and scarcely contains a single requisite of a good bill of indictment for perjury. It shows the danger of a draughtsman's undertaking the task of simplifying and not adhering to established precedents.

It is unnecessary to notice more than one of the many defects in the indictment. It is defective in that it does not aver that the defendant *wilfully* and *corruptly* took the false oath. There is nothing in the indictment to exclude the idea of the false oath having been taken by inadvertence or mistake. The epithets of *wilful* and *corrupt* are indispensable in an indictment for perjury to express the wicked purpose with which the false oath was taken. In the case of *State* v. *Carland*, 3 Dev., 114, which was an indictment for perjury, the judgment was arrested for the omission of these very words to express the evil intent with which the false oath was taken. Chief Justice RUFFIN, who delivered the opinion in that case, says, "Whatever evil intent may be alleged in the indictment as moving the defendant to take

the false oath, the very taking of it must have been stated to have been done deliberately and with a wicked purpose, at that moment existing. This has been expressed by applying the terms, *wilful* and *corrupt*, to the act of swearing. *Cox's case* established that one of these might be supplied by the word *maliciously*. That has been doubted and never followed, though I suppose it might be in a case precisely in point. But in no instance hath the omission of both been allowed. And in a very late case in the King's Bench, in 1826, (*Rex* v. *Stephens*) this very point came directly before the court, when the indictment was held bad, in arrest of judgment. This is of more authority because the statute of 23 Geo. II., ch. 11, provides in that country for simplifying indictments, as our own does here;" and our act of 1842 (Bat. Rev., ch. 32, § 62) is a literal copy of the act of Geo. II.

There is error. This will be certified to the superior court of Halifax county that the judgment in this case may be arrested.

PER CURIAM. Error.

STATE v. JOSEPH KNIGHT.

Perjury—Quashing—Coroner's Inquest—Administration of Oath.

1. Indictments for the higher offences, such as treason, felony, perjury, forgery, &c., should not be quashed. But in cases where it puts an end to the prosecution altogether, as where there is no jurisdiction or the matter charged is not indictable, it is advisable to allow a motion to quash.

2. In perjury, an indictment was held to be defective, where it charged that upon a coroner's inquest the oath in which the perjury is assigned

was administered by a justice of the peace in the presence and by the direction of the coroner. In such case the justice had no jurisdiction, but the inquest is the court of the coroner, and the bill should have charged that the oath was taken before the coroner with an averment that he had competent authority to administer the same.

3. The administration of an oath is a ministerial act, and may be done by any one in the presence and by the direction of the court, but is the act of the court.

4. Proceedings in coroner's inquest discussed by Mr. Justice ASHE.

(*State* v. *Colbert*, 75 N. C., 368; *State* v. *Alexander*, 4 Hawks, 182; *Rowland* v. *Thompson*, 65 N. C., 110, cited and approved.)

INDICTMENT for perjury tried at Fall Term, 1880, of MARTIN Superior Court, before *Schenck, J.*

The substance of the charge in the bill of indictment is set out in the opinion of this court. The counsel for defendant first moved to quash the bill on several grounds, which motion was overruled. The defendant then entered his plea of "not guilty," but upon the trial the jury convicted him. He then moved in arrest of judgment, for that, the justice of the peace who administered the oath in which the perjury was assigned had no authority so to do. Upon overruling this motion, the court pronounced judgment and the defendant appealed.

Attorney General, for the State.
Mr. J. W. Albertson, Jr., for the defendant.

ASHE, J. In this case the defendant before plea moved the court upon several grounds to quash the indictment, but the motion was disallowed, in which ruling we hold there was no error; for where the application is made on the part of the defendant, the courts have almost uniformly refused to quash an indictment when it appeared to be for some enormous crime, such as treason or felony, perjury, forgery, &c. Arch. Cr. Pl., 66. And in *State* v. *Colbert*, 75 N. C., 368, READE, J., delivering the opinion of the court,

says: "Quashing indictments is not favored. It releases recognizances and sets the defendant at large, when it may be he ought to be held to answer upon a better indictment. It is however allowable, and in cases where it puts an end to the prosecution altogether, it is advisable; as when it appears the court has not jurisdiction, or where the matter charged is not indictable in any form. Mr. Chitty in his Criminal Law (p. 300) says, 'the courts usually refuse to quash on the application of the defendant, where the indictment is for a serious offence, unless upon the plainest and clearest grounds, but will drive the party to a demurrer, or motion in arrest of judgment, or writ of error.' It is therefore a general rule that no indictment which charges the higher offences, as treason or felony, or those crimes which immediately affect the public at large, as perjury, forgery, &c., will be thus summarily dealt with."

In the view we take of this case, it is unnecessary to consider any of the grounds of the motion to quash. For after verdict the defendant moved to arrest judgment on the ground that the justice had no authority to administer the oath to the witness examined by the coroner on the inquest. This presents a question worthy of consideration.

The bill of indictment charges that the defendant "came before J. H. Ellison, coroner of the county of Martin, and a jury of good and lawful men duly summoned and sworn to make inquiry, when and how and by what means one Henry Skiles came to his death; and the said Joseph Knight being then and there duly sworn upon the Holy Evangelist of Almighty God by one J. L. Ewell, a justice of the peace in and for the county of Martin, then and there having sufficient power and authority to administer the said oath to the said Joseph Knight, in that behalf, touching and concerning the manner and cause of which the said Henry Skiles came to his death, the said J. L. Ewell, justice of the peace as aforesaid, then and there administered said oath to

Joseph Knight, in the immediate presence and at the request and direction of the said J. H. Ellison, coroner as aforesaid, did then and there upon his oath charge one William A. Weathersbee, before the said Ellison, coroner as aforesaid and the said jury of good and lawful men, duly summoned and sworn, with having assaulted and cut with a knife the said Henry Skiles," &c.

A justice of the peace has no authority to hold an inquisition *super visum corporis*. *Shultz, ex parte*, 6 Whar., 269. With the inquisition, J. L. Ewell had and could have no official connection. In his official capacity as justice of the peace, he had no power or authority to administer an oath in that case. And where on an indictment for perjury it appears the accused was sworn only by a justice of the peace who had no jurisdiction of the case before him, and therefore had no authority to administer the oath, such an indictment is bad, and on demurrer will be quashed. *State* v. *Furlong*, 26 Me., 69; *State* v. *Alexander*, 4 Hawk, 182.

The inquest was the court of the coroner, and BLACKSTONE says, "the court of the coroner is also a court of record to inquire when any one dies in prison, or comes to violent or sudden death, by what manner he came to his end." 4 Blk., 274. Its being a court of record however has been disputed. But be that as it may, according to the authorities his inquest is a judicial proceeding, and while sitting, is a court.

Where a coroner has notice of a sudden or unnatural death, it is his duty to summon a jury, and the jury appearing are to be *sworn* and *charged* by the coroner to inquire upon the view of the coroner how the party came to his death. 2 Hale, 60. And to make a valid inquest, the coroner and jury must have a view of the body, and the latter must be *sworn* by the former in the presence of the body. These two conditions are indispensable. *Rex* v. *Ferrand*, 3 B. & A., 260. After that he may adjourn to a convenient place to take testimony and make up the report, but in the examina-

tion of witnesses "he must hear evidence on all hands if offered to him, and that upon oath." 2 Hale, 157; 1 Leach, 43.

The jury are to be *sworn* and *charged* by him, and the witnesses are to be examined by him upon *oath*. He then has the power to administer an oath. The inquest held by him and the jury while sitting is a court, and he is the judge thereof. It must then follow, that he and he alone has the power and authority to administer the oaths to the witnesses examined before him on the inquisition.

The administration of the oath however is a ministerial act, *Rowland* v. *Thompson*, 65 N. C., 110, and it may be administered by any one in the presence and by the direction of the court; and the person acting in behalf of the court in such case is a mere instrument, the mouthpiece of the court, but the administration of the oath is the act of the court, and is so regarded and must be so alleged in all legal proceedings. It was just as competent for the coroner to have called upon any unofficial bystander to administer the oath for him, as upon a justice of the peace. It was therefore immaterial whether in this case the justice had the authority to administer the oath or not.

The indictment should have charged that the oath was taken before the coroner and followed by the averment that he had competent authority to administer the same; but there is no such averment in the bill. It has been the practice sometimes for the judges in our superior courts to call on members of the bar, or the solicitor, to swear parties in the presence of the court, and we believe it is the almost universal practice where gentlemen have taken the oaths of attorneys, for the judge to request some member of the bar to administer the oaths. In all such cases, no matter by whom the oath is read, it is taken before the court, and is the act of the court.

But it is said in this case that it sufficiently appears that the administration of the oath was the act of the coroner,

because it is charged that it was administered by J. L. Ewell in the presence and by the direction of the court, and was therefore administered by the court. But this will not do, for every fact and circumstance stated in an indictment must be laid positively; stating a matter by way of argument or inference will render an indictment bad. Arch. Cr. Pl., 55. But aside from that, the indictment is most clearly defective in the particular that it contains no averment that the coroner had competent authority to administer the oath. Arch. Cr. Pr. & Pl., 594, note 2; Bat. Rev., ch. 33, § 62.

There is error. The judgment must be arrested. Let this be certified to the superior court of Martin county.

PER CURIAM. Error.

STATE v. JACOB NORWOOD.

Prosecutor—Notice—Costs.

1. A notice to mark one as prosecutor under the act of 1879, ch. 49, need not be in writing. Where it was announced in open court upon the calling and continuance of a state case that a motion would be made at the next term to mark a witness as prosecutor, (all the witnesses being present) and on the argument of the motion it was announced that all the parties were present; *Held* to be sufficient evidence that such notice was given, and warranted the court in ordering the witness to be marked as prosecutor.
2. The act was intended to enlarge the power of the courts over the question of costs in criminal actions, in providing that the court shall be of *opinion* there was no reasonable ground for the prosecution, *or* it was not required by the public interest.
3. Remarks of Mr. Justice ASHE upon the act of 1875, ch. 247, and the substitution of the word "opinion" for "certify," and "or" for "and," by the act of 1879.

STATE *v.* NORWOOD.

MOTION by defendant to endorse the name of the prosecutor on the bill of indictment, under the act of 1879, ch. 49, heard at June Special Term, 1880, of WAKE Superior Court, before *Gudger, J.*

The defendant, Jacob Norwood, was indicted for slandering Annie L. Hunter, (under the act of 1879, ch. 156,) and was tried and acquitted at said term. On the trial, Annie Hunter and others were examined as witnesses for the prosecution, and at the same term, the said Annie was, by order of the court, marked as prosecutrix in the case, and ordered to pay the costs of the prosecution, including all witnesses actually examined on the part of the defendant. After this order had been made by the judge, the said Annie asked leave of the court to file an affidavit, in which she stated that she had not been served with a notice in the case of *State* v. *Norwood,* calling on her to show cause why she should not be marked as prosecutrix. The order of the court, upon hearing this affidavit, was not reversed, and the said Annie appealed. The opinion contains the additional facts.

The case was argued by the *Attorney General* in support of the ruling below, and by *Mr. D. G. Fowle, contra.*

ASHE, J. There are two points made by the record, first, the want of notice, and secondly, that the court below committed an error in its construction of the act of 1879, and according to the statement of the case as made by His Honor, he had no power to make the order in question.

As to the question of notice, we concur with the judge that there was sufficient evidence of notice to warrant the order. It appears that at the preceding term of the court, the defendant's counsel gave notice in open court, when the case of the *State* v. *Norwood* was called and continued, the witnesses being present and Annie Hunter being one of them, that at the next term (June term, 1880,) a motion would be

made to mark her and others as prosecutors in the case. The clerk of the court testified that shortly before said June term, he had seen a notice, said to be lost, issued by the counsel of the defendant, Norwood, to the appellant and others, on the back of which were the endorsements, "Received," "Served," but he could not state by whom the return was made, nor whether it was served upon the parties or only upon a portion of them. The return purported to be signed, "J. J. Nowell, sheriff," by one of his deputies, but he could not recollect or know in whose handwriting, except it was not in sheriff Nowell's. When the motion was argued, it does not appear whether she was present at the time or not, but she was present in court during the day on which the motion was argued, and one of the counsel for the prosecution, on that day, announced that all the parties were present. And the appellant was represented by counsel.

We are of opinion that the fact of the notice of the motion having been announced in open court, at the time when *Norwood's* case was called and continued, (in which she was a witness) that a motion would be made at the next term to mark her as prosecutrix, with the testimony of the clerk, and with the further fact, that on the day of the argument of the motion it was publicly announced that all the parties were present, and that she was then and there represented by counsel, was sufficient evidence that the notice had been given to warrant the judge in making the order. The act of 1879 does not require the notice to be in writing. The object of the notice is to give the witness an opportunity to show cause. On the argument of the motion, counsel appeared in her behalf, and we must presume, represented her with her knowledge and consent. She then has had, what it was the object of the legislature to give her by requiring notice to be given, her "day in court."

As to the other point, that His Honor committed an error in his construction of the act of 1879, we think the excep-

tion equally untenable. The act of 1875, ch. 247, provides that in certain cases the costs of the prosecutor's and the defendant's witnesses, "shall be paid by the prosecutor, if any be marked on the bill, whenever the judge or justice of the peace shall *certify* that there was not reasonable ground for the prosecution *and* that the public interest did not require it." But this act was followed by the act of 1879, ch. 49, which, not purporting to be an amendment of the act of 1875, provides that the costs in like cases as in the former act, "shall be paid by the prosecutor, whether marked on the bill or not, whenever the judge or justice shall be of *opinion* that there was not reasonable ground for the prosecution *or* that it was not required by the public interest. The counsel for the appellant insisted in this court that the substitution of the word "or" for "and" in the last act, was an act of inadvertence, that the legislature never intended to make the change, and that as the copulative conjunction was used in the act of 1875, the court should construe "or" to mean "and"; and if that was the proper construction, then there was error in the order of the judge in having the appellant marked as prosecutrix and taxing her with the costs, for he had based his order upon the *opinion* only, that the prosecution "was not required by the public interest," when he should have founded it upon the opinion "that there was not reasonable ground for the prosecution *and* that it was not required by the public interest." We cannot concur with the learned counsel in this view of the case. It was evidently the intention of the legislature by the act of 1879 to discourage frivolous and malicious prosecutions, by enlarging the power of the courts over the question of costs in criminal actions.

Several changes were made in the act of 1879 from the act of 1875, besides that referred to. By the former, the courts had no power to mark any one as prosecutor without his consent; in the latter, they have, upon notice. By the

former, the court was required to *certify* that there was not reasonable ground, &c.; in the latter, no such certificate is required, but the court must simply entertain and express the *opinion* that there is no reasonable ground, &c.

To construe "or" to mean "and" in this case, would be a reflection upon the philological intelligence of the legislature, and would be an act of disrespect of which this court is incapable. We must therefore take it that they meant what they said, and whatever opinions we as individuals may entertain as to the wisdom or policy of the change, we must administer the law as we find it written.

There is no error. Let this be certified to the superior court of Wake that further proceedings may be had according to this opinion and the law.

PER CURIAM. No error.

STATE v. W. W. MCDOWELL and others.

Roads, indictment for failure to repair—Demurrer to Indictment—Appeal.

1. Where a particular class of persons (here the president, &c., of the Buncombe turnpike company) other than overseers of roads are indicted for not keeping a road in order, the indictment should contain not only an averment "that it was their duty and of right they ought to have kept the said road in repair," (*Patton's* case, 4 Ired., 16) but also an averment of the *particular* duty or duties alleged to have been omitted.

2. An appeal does not lie from the overruling of the defendant's demurrer to an indictment (this being an interlocutory judgment), but in such case the court should require him to plead to the indictment and proceed with the trial, and upon a verdict of guilty the question as to the sufficiency of the indictment can be raised on a motion in arrest of judgment. This rule applies to all criminal actions. But where such demurrer is sustained, the judgment is final and the state can appeal.

STATE *v.* MCDOWELL.

(*State* v. *Patton*, 4 Ired., 16; *State* v. *Com'rs*, 4 Dev., 345; *State* v. *Fishblate*, 83 N. C., 654; *State* v. *Bailey*, 65 N. C., 426; *State* v. *Pollard*, 83 N. C., 597; *Com'rs* v. *Magnin*, 78 N. C., 181, cited and approved.)

INDICTMENT tried at Fall Term, 1880, of HENDERSON Superior Court, before *Gilmer, J.*

The defendants demurred to the indictment, and from the judgment overruling the same, they appealed.

Attorney General, for the State.

Messrs. C. A. Moore and *J. J. Osborne*, for defendants.

RUFFIN, J. This was an indictment against the defendants as president and directors of the Buncombe Turnpike Company for not keeping in repair so much of the road belonging to the company as lies between the Buncombe line and the South Carolina line in Henderson county. The defendants demurred to the indictment and upon the overruling of the demurrer appealed to this court. The indictment is in the following words:

"The jurors, &c., present that W. W. DcDowell, president, and V. Ripley, Mont. Patton, directors of the Buncombe Turnpike road, late of Henderson county, on the 8th day of September, 1879, and on divers days, &c., being president and directors, &c., that part of the Buncombe Turnpike road which lies between, &c., negligently did permit to become ruinous, &c., for want of due reparation thereof, when it was the duty of the said W. W. McDowell, V. Ripley, Mont. Patton, president and directors, &c., to have kept the same in good and lawful repair, and by law and of right they ought to so have done. But they, as president and directors of said public road unlawfully and negligently did permit and still do permit said public road to become ruinous, &c., contrary to the form of the statute, &c."

The indictment is so defective as not to warrant any judg-

ment against the defendants, in case of their conviction by a jury, and therefore their demurrer should have been sustained in the court below.

The charge which it makes against them is the general one, that they, as president and directors of the Buncombe Turnpike Company, did permit a certain section of the road of the company to become ruinous and broken, so that unless there be some public general statute which imposes upon the defendants the duty of keeping the road in repair, it is impossible for the court to see that any offence has been committed.

Were it the case of a common public highway, and the defendants were the overseers thereof, the indictment in its present shape would have been sufficient, for there is a statute which makes it the duty of every such overseer to keep the road allotted to him in good repair; and another, which declares that he shall be guilty of a misdemeanor if he neglect any duty required of him; but there is no law known to this court which imposes upon the defendants, as individuals, any such duty in regard to the road of the Buncombe Turnpike Company.

The statute under which the company was incorporated imposes upon the president and directors certain specific duties, and confers upon them certain specific powers, and requires them to take an oath of office, and there can be no doubt that under the statute which makes every officer indictable for a neglect of duty, and indeed without any such statute, these defendants may be proceeded against in case they have failed to perform any part of their duty, or to exercise any one of the powers conferred upon them. Among the powers given, the president and directors are authorized to demand and receive certain tolls, and to contract with parties for construction and improvement of the road, and to require the road hands living along the line of the road to bestow upon it six days labor in each and every year,

Now if it be that they have done all things which they ought to have done, and all which they were empowered to do, and in spite thereof the road should be in a ruinous condition, the fault would not be theirs, but the company's, for which *it* should be indicted. And on the other hand, if it were the purpose of the state to charge the defendants with a dereliction of any particular duty or duties, the indictment should have been specific in its averments, in order that the defendants might know with certainty what they had to answer, and the court could see from the record that some law of the land had been violated.

As we understand, it was just the distinction between the duty and the liability of the company and the duties and the liabilities of its officers, that was made by the court in the case of the *State* v. *Patton*, 4 Ired., 16, which was a prosecution against the president and directors of this same Buncombe Turnpike Company, and on a similar charge of permitting the road to fall into decay. Judge DANIEL speaking for the court, after declaring it to be the duty of the company to keep up its road, and that therefore the *corporation* was liable to indictment if the road be suffered to become ruinous, proceeds to say: "We also think that the individuals who have been indicted were bound by virtue of their offices, faithfully to exert all their powers and apply all their means, as such officers, to the keeping of the road in order, and that for a default in this public duty they were liable to indictment. But as they were not *absolutely to keep up the road*, they cannot be charged *merely because the road has become ruinous*." At the same time he pointed out another particular, in which the indictment then under consideration would have been defective even if there had been a statute making it the general duty of the defendants as individuals to keep the company's road in good order, viz: its failure to charge in form that it was "their duty and of right they ought to have kept the said road in repair," &c.

This last defect has been remedied in the indictment now before us, but still the other remains; the indictment fails to give that notice to the defendants and the court, which they are entitled to have of the particular duty or duties alleged to have been omitted. The cases of the *State* v. *Commissioners of Halifax*, 4 Dev., 345, and *State* v. *Fishblate*, 83 N. C., 654, referred to in the brief of defendants' counsel, are all on a line with *Patton's case, supra.*

If, therefore, the cause was properly before us, we should have no hesitancy in sustaining the defendants' demurrer, and it is with some regret we feel ourselves precluded from doing so, by the fact that their appeal was prematurely taken.

The right of appeal to this court is wholly regulated by statute and there is none which gives to a defendant in a criminal action, the right to appeal from an interlocutory judgment. *State* v. *Bailey*, 65 N. C., 426; *State* v. *Pollard*, 83 N. C, 597. If a demurrer to an indictment be sustained, that disposes of the action finally and therefore an appeal for the state will lie, and it is one of the few cases in which the state can appeal. But a judgment overruling a demurrer is purely interlocutory and really so little affects the rights of parties that in the case of the *Commissioners of Wake* v. *Magnin*, 78 N. C., 181, a doubt was expressed as to whether an appeal would lie from it, even in a civil action, and notwithstanding the provisions of the C. C. P., § 299. And it was yielded in that case more because such a practice had grown up than from any sure conviction of its being a right.

After overruling the demurrer, the court should have required the defendants to plead to the indictment and proceed with the trial to verdict and judgment, and then by motion in arrest of judgment the defendants might have raised every objection to the indictment which furnished the grounds for their demurrer, and if denied their motion,

could then have appealed. It is because of this right to present every objection to an indictment by such motion in arrest, that demurrers in criminal actions have been so unusual, and it may be the reason too why the right to appeal from an overruling judgment has been withheld. In allowing defendants in all cases to plead to the indictment after demurrer, the practice of the courts in this state differs somewhat from that of the courts of England, for there, in misdemeanors the judgment upon demurrer is final, and it is only in certain felonies that the right to plead ever obtains. Our constitution declares that "no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court."

There being error in allowing the appeal, it must be dismissed.

PER CURIAM. Appeal dismissed.

STATE v. ALEXANDER MCDANIEL.

Slander of Women—Burden of Proof.

On trial of an indictment for slander under the act of 1879, ch. 156, the admission of the defendant that he spoke the words charged does not shift the burden of proof upon him to show he had not slandered an innocent woman. Her innocence is a question for the jury upon the evidence, and no presumption of her innocence should be allowed to weigh against the defendant.

(*State* v. *Woodly*, 2 Jones, 276; *State* v. *Evans*, 5 Jones, 250, approved, and *State* v. *Morrison*, 3 Dev. 299, commented on.)

INDICTMENT for slander tried at Fall Term, 1880, of JONES Superior Court, before *Gudger, J.*

Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.
Messrs. Manly, Simmons, & Manly, for defendant.

RUFFIN, J. The defendant was indicted, under the act of 1879, ch. 156, for slandering Laura Whaley, *an innocent woman*, by speaking words concerning her, which amounted to a charge of incontinency; and on the trial in the superior court he admitted having spoken the words charged, and insisted that the same were true. The prosecutrix was introduced as a witness for the state, and declared that she was innocent of the misconduct imputed to her, not only so far as the defendant was concerned, but all other men; and other evidence was given as to her good character. The defendant offered evidence which tended to support the words spoken concerning her.

The judge then charged the jury that in order to convict the defendant, they must find that the prosecutrix was *an innocent woman*, that is to say, a pure, chaste woman; and that the general rule of law was that all persons are presumed to be innocent until the contrary is shown; so that the defendant having admitted that he used the words which amounted to a charge of incontinency, or if the state had proved the use of such words by the defendant, the burden of proof was upon him *to show that he had not slandered an innocent woman*. The defendant complains of this charge because he says, it shifted the burden of proof from the state to himself, and withal required him to prove a negative.

The statute under which the defendant is indicted, is in these words: "Any person who may attempt in a wanton and malicious manner to destroy the reputation of an innocent woman by words written or spoken which amount to a charge of incontinency, shall be guilty," &c. As we construe it, the offence defined consists, not in the slander of a woman by falsely charging her with incontinency, but in the *attempt to destroy the reputation of an innocent woman* by

such means; and by an "innocent woman" is meant a pure woman—one whose *character*, to use the language of the preamble of the statute, is "*unsullied.*"

The innocency then of the woman who is the subject of the attempt, lies at the very foundation of the offence, and constitutes its most essential element—its very *sine qua non*, and must of necessity be distinctly averred in the indictment.

If necessary to be averred, then, under the principle declared in the cases of the *State* v. *Woodly*, 2 Jones 276, and the *State* v. *Evans*, 5 Jones, 250, the burden of proof devolved upon the state even though it involved the necessity of its proving a negative.

It is true that in the case of the *State* v. *Morrison*, 3 Dev., 299, an exception to the general rule which requires the state to prove every material averment against the defendant, was admitted by this court; but it is perfectly manifest from what is said in the two cases just cited, that it soon became dissatisfied with that decision and took such great pains to limit and restrict it as virtually amounted to overruling it.

His Honor below by his instruction to the jury that "in order to convict the defendant they must find that the prosecutrix was an innocent woman," seemed to have recognized the general rule as a true one; but the error complained of by defendant is that he further charged them that because of the rule of law by which all persons are *presumed* to be innocent until the contrary is shown, they were to infer her innocence without any proof being offered to establish it; and that this presumption of law in her favor lasted until the defendant proved the contrary; and this seems to us to be a well founded exception to the charge.

We take it that no effect should be given to the admission by the defendant of his having spoken the words charged beyond that which ought to have been given to convincing

proof of his having spoken them. So that the question is to be considered exactly as if the state had closed its case immediately upon making proof of the words spoken and nothing more.

Now while it may be that the law does raise a presumption in favor of the integrity of the conduct of men generally, which each individual may call to his aid when necessary for his protection, still we are not aware that it ever allows the weight of that presumption to be thrown into the scales against a defendant on trial. Indeed, how could it do so without raising conflicting presumptions which must necessarily destroy one another or else fail to do even and exact justice to all? Why should the law presume the prosecutrix in this case to be innocent of a delinquency in morals, if thereby it should raise another presumption that the defendant was guilty of a *crime* which subjected him to punishment? In a case like this the law raises but a single presumption—the same which it raises for every defendant on his trial for a criminal violation of the law of his country, of holding him to be innocent until *proved* to be guilty; and to this presumption there is no limit, but it goes to the whole scope of the charge against him and embraces every averment necessary to constitute the alleged offence.

This presumption in favor of defendants on trial is too important, and has been found too useful in the protection of innocence to be sacrificed to a mere sentiment; nor indeed is it seen that there is any necessity for so doing in order to secure the protection of the statute for all such females as it was intended to protect. Every woman, when traduced, is a competent witness for the state against her traducer, and if her life has been pure, she will find no difficulty in getting the juries of the country to listen to her protestations of her innocency. And when added to this, is the privilege of calling in her sympathizing neighbors to speak to her

good general character, she needs not that any further concession should be made to her which might be inconsistent with the safety of an innocent defendant.

We think, therefore, His Honor below erred in holding that the law raised any presumption as to the innocence of the prosecutrix, but that he should have submitted that question to the jury to be determined by them upon the evidence as any other question of fact would be, and that the verdict and judgment should be set aside and a *venire de novo* awarded the defendant.

Error. *Venire de novo.*

STATE v. BENJAMIN BLUE.

Special Verdict—Criminal Intent.

In a special verdict in a criminal prosecution, all the facts necessary to constitute the offence charged must be fully and explicitly stated; *therefore* a special verdict which fails to find the *criminal intent* is fatally defective, and will be set aside and a new trial granted.

(*State* v. *Curtis*, 71 N. C., 56; *State* v. *Moore*, 7 Ired., 228; *State* v. *Wallace*, 3 Ired., 195; *State* v. *Lowry*, 74 N. C., 121, cited and approved.)

INDICTMENT for False Pretence, tried at Fall Term, 1880, of CUMBERLAND Superior Court, before *Avery, J.*

The defendant was charged with obtaining goods by a false pretence. The jury returned the following special verdict: "The defendant entered into an agreement with the prosecutor, Worrell, last spring to chip a crop of turpentine boxes. A crop of turpentine boxes consists of from ten thousand to twelve thousand trees. At the end of the week after the agreement was made, the defendant represented to said Worrell that he had chipped a crop of boxes, and by

means of that representation obtained rations of meat and molasses worth two dollars. A crop of boxes is the usual task of a laborer for a week, and the prosecutor had agreed to pay two dollars in rations as each crop was finished. On inspection the next week by the prosecutor, it was found that in fact the defendant had not chipped a crop of boxes, and that his representation that he had was false. And one Broadfoot, agent of the prosecutor, also ascertained on examination the next week after the rations were furnished, that the defendant had chipped some trees along two roads well, and had chipped others situated off the public roads badly and imperfectly, and had not chipped altogether a crop of trees. The prosecutor could have inspected a crop of boxes in two hours. He had other laborers employed who were chipping in the aggregate fifteen thousand boxes every week, and the turpentine trees chipped were scattered over a space of ten miles. The prosecutor had one agent, (Broadfoot) who could have inspected the boxes, and who did inspect those chipped by the defendant after he obtained the meat, &c. Either the prosecutor or his agent could have ascertained by examining the trees that the said representations by the defendant were false."

"If upon the foregoing statement of facts the court be of opinion that defendant is guilty, then the jury say he is guilty, but if upon said statement the court holds that defendant is not guilty, then the jury find he is not guilty."

The court held that defendant was not guilty, and from this ruling, *McIver*, solicitor for the state, appealed.

Attorney General, for the State.
Messrs. Z. B. Newton and *W. A. Guthrie*, for defendant.

ASHE, J. The special verdict found in this case is defective, and the facts found by the jury are not sufficient to warrant any judgment thereon. The judgment therefore

pronounced by the court that the defendant was not guilty is erroneous.

In judging upon a special verdict the court is confined to the facts expressly found, and cannot supply the want thereof as to any material part, by an agreement or implication from what is expressly found. And when the facts are of an equivocal character which may mean one thing or another, the court cannot determine as a question of law the guilt or innocence of the defendant. 2 Hawkins P. C., 622; *State* v. *Curtis*, 71 N. C., 56.

The verdict simply finds that the representation made by the defendant that he had chipped a "crop of boxes was false," but does not find the *intent* with which the statement was made. That was a material inquiry and a question of fact that should have been found by the jury. The *intent* to cheat and defraud the prosecutor is an essential ingredient in the crime of false pretence. The verdict should have found that fact distinctly, the one way or the other; either that defendant made the false representation with intent to cheat, or that he made the statement under an honest conviction of its truth. If it had done so, then the judge could have pronounced judgment of guilty or not guilty according to the finding. "A special verdict is in itself a verdict of guilty or not guilty as the facts found in it do or do not constitute in law the offence charged. There is nothing to do but to write a judgment thereon for or against the accused." *State* v. *Moore*, 7 Ired., 228. Therefore in finding a special verdict the facts should be stated fully and explicitly, and the omission of any fact necessary to constitute the offence is fatal. The practice is, when the verdict is insufficient, insensible, or in violent antagonism to the evidence, to set it aside and grant a new trial. 3 Whar. Cr. L., § 3188; *State* v. *Curtis, supra; State* v. *Wallace*, 3 Ired., 195; *State* v. *Lowry*, 74 N. C., 121.

There is error. Let this be certified to the superior court of Cumberland county that a *venire de novo* may be awarded.

Error. *Venire de novo.*

STATE v. WILLIAM HINES.

Swearing witness before Grand Jury—Quashing.

The act of 1879, ch. 12, providing that the foreman of the grand jury shall mark on the indictment the names of the witnesses sworn and examined before the jury, is *directory* merely; and the omission of the foreman to comply therewith is no ground for quashing the bill, where the proof is that the witnesses were sworn.

(*State* v. *Roberts*, 2 Dev. & Bat., 540; *State* v. *Cain*, 1 Hawks, 355, cited and approved.)

INDICTMENT for larceny tried at Fall Term, 1880, of WILSON Superior Court, before *Gudger, J.*

Upon calling this case for trial, the defendant moved to quash the indictment for the reasons following: On the back of the bill under the word "witnesses" the names of two persons were written, one of whom was R. A. Johnston; and immediately below these names the following certificate was endorsed, to-wit: "Those marked + sworn by the foreman and examined before the grand jury:" "A true bill." This certificate was signed officially by the foreman of the grand jury, but neither of the names of the witnesses endorsed on the bill had the "cross mark" or other designation of such witness having been sworn. From the oral testimony of said Johnston it did appear, and the court accordingly found as a fact, that he had been sworn as a wit-

ness on said bill by the foreman and examined before the grand jury. Upon the evidence of the clerk of the court, His Honor further found as a fact that the indictment had been duly returned by the foreman into open court, as a "a true bill," and that the names of said witnesses appeared thereon endorsed when it was returned.

The court being of opinion that under the act of 1879, ch. 12, § 1, the certificate of the foreman must show what witnesses were sworn, by marking their names, sustained the motion to quash, and thereupon, *Galloway*, solicitor for the state, appealed.

Attorney General, for the State.
Messrs. Murray & Woodard, for defendant.

ASHE, J. Before the act of 1879, if an indictment was found without evidence or upon illegal evidence, as upon the testimony of witnesses not sworn, upon proof of the fact the bill might be quashed or the matter might have been pleaded in abatement, but could not have been taken advantage of by motion in arrest of judgment; for the endorsements on the bill have been held to be no part of the record. But the omission to designate the witnesess who may have been sworn, by a + mark, was not sufficient to quash the bill. The fact that they were not sworn must have been established by proof offered by the defendant. The motion to quash could not be sustained when it was made to appear that the witnesses had been sworn, although there was no endorsement on the bill to that effect. *State* v. *Roberts*, 2 Dev. & Bat., 540; *State* v. *Cain*, 1 Hawks, 352.

This principle we think has not been changed by the act of 1879, ch. 12, § 1, which empowers the foremen of grand juries to administer oaths to persons to be examined before grand juries, and provides that the foreman should mark on the bill the names of the witnesses sworn and examined

before the grand jury. We hold that this provision is merely directory, and that it is competent for the state, when the foreman has omitted to mark the witnesses sworn, to show by proof that they were sworn.

In Massachusetts, they have an act of assembly (Rev. Statutes, ch. 136, § 9), which provides "that a list of all witnesses sworn before the grand jury during the term shall be returned to the court under the hand of the foreman; and it has been there held that it is directory merely, and a noncompliance therewith is no ground for quashing an indictment." *Com.* v. *Edwards*, 4 Gray, (Mass.) 1.

In our case there was proof that the witnesses examined before the grand jury were sworn. The indictment therefore should not have been quashed. There is error. Let this be certified to the superior court of Wilson that further proceedings may be had in conformity to this opinion and the law.

PER CURIAM. Error.

STATE v. NICHOLAS JENKINS.

Trial—Criminal Procedure—Presence of Prisoner cannot be waived by Counsel.

A jury charged in a case of felony (not capital) went of their own accord to the judge's room at eleven o'clock at night, and there, in presence and with the assent of prisoner's counsel, delivered their verdict to the judge in the absence of the prisoner, and were allowed to separate. At the sitting of the court on the following day, the prisoner moved for his discharge on the ground that the verdict as given was not valid and the jury had separated; *Held*, that he is not entitled to his discharge, there was a mistrial, the verdict must be set aside and a *venire de novo* awarded.

STATE *v.* JENKINS.

Held further; In the prosecution of all felonies, the prisoner has the right to be present throughout the trial; and this right cannot be waived in capital felonies; the prisoner must be *actually* present. Whether the prisoner can waive it, in those not capital—*quœre;* his counsel cannot.

(*State* v. *Blackwelder*, Phil., 38; *State* v. *Craton*, 6 Ired., 164; *State* v. *Bray*, 67 N. C., 283; *State* v. *Bullock*, 63 N. C., 570; *State* v. *Johnson*, 75 N. C., 123; *State* v. *Bass*, 82 N. C., 570, cited and approved.)

INDICTMENT against the prisoner and others for burning a mill (under chapter 228, acts 1874–'75,) removed from Caldwell and tried at Spring Term, 1880, of CATAWBA Superior Court, before *Gilmer, J.*

The act of assembly makes the offence a felony punishable by imprisonment in the penitentiary. The case is sufficiently stated in the opinion. Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.
Mr. G. N. Folk, for the defendant.

RUFFIN, J. There were many exceptions taken by the prisoner on the trial below, but it is necessary that we should notice but one, which is decisive of his case, and clearly entitles him to a new trial.

The judge below after finishing his charge late in the afternoon, committed the case to the jury, and being about to leave the court room, inquired of the prisoner's counsel if the clerk of the court might receive the verdict, and the counsel not assenting, no instructions to that effect were given. About eleven o'clock at night the jury having agreed upon their verdict, of their own head and without any such direction from any one, came to the judge's room, and there in the presence of the prisoner's counsel and with their assent, delivered their verdict of guilty to the judge in the absence of the prisoner, which verdict the judge

caused to be immediately recorded upon the proper docket and read to the jury, who assented thereto and were allowed to separate. At the meeting of the court on the next morning, one of the prisoner's counsel objected to the manner in which the verdict had been rendered in the absence of the prisoner, and moved for his discharge upon the ground that the verdict so taken could have no validity, and that after such a separation of the jury as had occurred, the prisoner could not be again put upon trial for the same offence.

In every criminal prosecution it is the *right* of the accused to be informed of the accusation against him and to confront his accusers. In capital trials this *right* cannot be waived by the prisoner, but it is the duty of the court to see that he is actually present at each and every step taken in the progress of the trial. *State* v. *Blackwelder*, Phil., 38; *State* v. *Craton*, 6 Ired. 164. In prosecutions for lesser felonies, the accused has exactly the same rights; *State* v. *Bray*, 67 N. C., 283; whether the right can be waived in such cases is a point about which the authorities seem to be still divided—some holding his actual presence to be necessary during the entire trial; and others, that being a right personal to the accused and established for his benefit, it might be waived by him.

It is not necessary that we should decide the point in this case, as we hold that the prisoner was deprived of this right, or rather of the opportunity to exercise it, by the manner in which the verdict was allowed to be taken.

The record does not disclose the condition of the prisoner during the time the jury were deliberating upon their verdict—whether committed to jail or not—but it is perfectly manifest that the action of the jury in coming to his room for the purpose of delivering their verdict, was a surprise to the judge himself; that it was their own act done of their own accord. As then it is not to be supposed that any communications had passed between the jury and the prisoner,

we are forced to conclude that, like the judge, he was not informed of this purpose of the jury, and therefore could not if he wished have attended the room of the judge; and therein he lost that right which the law and constitution intended he should enjoy.

The fact that the counsel for the accused were present and assented to the rendition of the verdict at that place, was well calculated, though we presume not so intended, to throw His Honor off his guard and cause him to forget for the moment that this right of the prisoner to be present at all the stages of his trial, was one that counsel could not waive. Doubtless the counsel themselves, for the time, overlooked it, and were thereby led to yield an assent beyond their power to bind the prisoner.

In the notes to the case of *Sperry* v. *Commonwealth*, 1 Bennett & Heard L. C. C., 433, it is declared that this right of a prisoner to be present throughout his trial is inalienable, and one that cannot be waived by counsel, and a number of cases are cited in support of the position. And as we concur therein, we hold that the proceedings in the court below resulted in a mistrial to the prisoner. We cannot, however, grant the prisoner's discharge as prayed for, being of the opinion that the facts as set out by the court in the record do not work a bar to his being tried again. It does not follow, say Bennett & Heard, 438, that because a verdict is rendered in the absence of a prisoner, he is entitled to his discharge; it is merely a mistrial, and the verdict should be set aside and the prisoner tried again.

In *State* v. *Bullock*, 63 N. C., 570, this court say it was never supposed that the rule that a jury sworn and charged cannot be discharged without the consent of the prisoner, was ever applied to any but a capital case. In *Johnson's* case, 75 N. C., 123, it was held that in the trials for offences less than capital, the presiding judge should assume the responsibility of ordering a mistrial whenever he believes it

proper to do so in furtherance of justice, and that his discretion in such particulars was not the subject of review. And in the very recent case of *State* v. *Bass*, 82 N. C., 570, Judge DILLARD very justly remarks that while many of our judges, in delivering their opinions in capital cases upon the discretion allowed to be exercised by the presiding judge in regard to discharging juries, have used language sufficiently broad to include lesser felonies within the same restricted rule, but that a more careful examination of the cases would disclose the fact that they stood upon the same level with misdemeanors in this particular; and he refers to a number of cases in which it had been held that the exercise of such a discretion was not the subject of review here. In *Bray's* case, *supra*, the prisoner was ordered to be tried again.

We therefore overrule the motion of the prisoner to be discharged, and direct that this be certified to the superior court of Catawba county to the end that further proceedings may be had according to law.

Error. *Venire de novo.*

STATE v. WILLIAM M. SNEED.

Witness—Justices of the Peace, when liable criminally—Judge's Charge.

1. It is not error to refuse to compel a witness to answer a question which tends to self-crimination.
2. The functions of a justice of the peace are ministerial, in preserving the peace, hearing charges against offenders and issuing warrants thereon, examining the parties and bailing or committing them for

trial; and in the exercise of such functions, if he act corruptly, oppressively, or from any other bad motive, he is liable to indictment.

3. Where a justice of the peace, upon the affidavit of a party in February, 1879, stating that B. and others had committed a forcible trespass on his property and an assault and battery on his person, issued a warrant for the arrest of the parties complained against, who were tried before two justices, and B. bound over to the superior court in which the said justice, (defendant in this case) was marked as prosecutor and witness upon the two bills found by the grand jury in that court; and the defendant in August, 1879, subsequently to the term of said superior court, upon the same affidavit issued another warrant against the same parties for the same offence; *It was held*, that when the two justices took cognizance thereof the defendant had no authority over the subject, and was *functus officio* as to all matters contained in the affidavit, and is amenable to the law as in cases where he issues his warrant without a previous oath.

4. *Held further*, no error to refuse to charge, that the evidence of one witness offered by the state to prove that he did not make a certain affidavit, was not sufficient to contradict the fact recited in the justice's warrant issued upon such affidavit.

5. *Held further*, no error to refuse to charge, that as the party swore to four distinct offences in his affidavit of February and the indictments in the superior court only covered two of them, the act of the defendant in issuing the second warrant was lawful.

INDICTMENT for malfeasance in office, tried at Spring Term, 1880, of GRANVILLE Superior Court, before *Seymour, J.*

The bill charged that the defendant had unlawfully, maliciously and corruptly issued his warrant as a justice of the peace against one Henry H. Burwell, Sen., Lee Parham, Nathan Johnson, John Brown and Ransom Frazier, for forcible trespass upon the property of one Nelson Sneed, and is in substance as follows:

The jurors, &c., present that on the 23d of August, 1879, the defendant, late of the county of Granville, was one of the justices of the peace, &c., and has continued to be such from the said 23d of August up to the taking of this inquisition. And the jurors, &c., do further present, that at the spring term of the superior court of Granville, held, &c., a bill of

indictment was found by the grand jury against Burwell (and the others above-named) for forcible trespass on the property of one Nelson Sneed, and that the said defendant (in this case) procured himself to be marked as prosecutor and did act as prosecutor on said bill, and also procured himself to be endorsed as witness on said bill, and at the said term, there was another bill of indictment found by the grand jury against said Burwell and "others to the jurors unknown" for a misdemeanor, upon which the said defendant procured himself to be marked as prosecutor and did act as such, and also procured himself to be marked as witness and is the only witness marked on said bill. And the jurors, &c., do further present that pending the said indictment as aforesaid in said superior court, the said defendant being a justice of the peace as aforesaid, with force and arms at and in the county aforesaid, on the said 23d of August, 1879, unlawfully, maliciously and corruptly did issue his warrant as a justice of the peace against the said Burwell, and the others, for forcible trespass on the property of said Nelson Sneed. And the jurors, &c., do further present, that the offence against the criminal law as set forth in said warrant so issued as aforesaid by the said William M. Sneed, was the same offence, based upon the same facts as those upon which the indictments pending in said superior court against the said Burwell and others were found by the grand jury; and that on the said 23d of August, 1879, the defendant well knew the matters set forth by him in his said warrant issued on that day against said Burwell and others, were the basis of the indictments in said superior court, upon which he was endorsed and acted as prosecutor and witness, and that the same were still pending in said court. And the jurors, &c., further present that defendant when he issued said warrant, falsely and corruptly stated in said warrant that the same was issued on the oath of one Nelson Sneed, whereas, the defendant well knew there was no oath,

or affidavit, or complaint made by Nelson Sneed or any other person for the issuance of said warrant. And the jurors, &c., do further present, that the defendant acting as a justice aforesaid, and under and by virtue of his office, and under the said warrant, did unlawfully, corruptly and maliciously cause the said Burwell and the others to be arrested and brought before him, as justice of the peace, on the 27th of August, 1879, and compelled them to give security for their appearance at the October term of the inferior court of said county, with the intent to harass and to the great damage and wrong of said Burwell and others, and against the peace and dignity of the state.

It appeared in evidence that a controversy had arisen between the defendant and the said Burwell with regard to the ownership and possession of a tract of land in Granville county, and also, that said Nelson Sneed was in possession of the same as tenant of the defendant; and that prior to spring term, 1879, of said court, Burwell in company with Parham, Johnson, Brown and Frazier forcibly ejected Nelson from said land, and at the same time committed a forcible trespass on the personalty of Nelson, an assault and battery upon his body, and unroofed the house in which Nelson was living. And prior to said spring term, 1879, Nelson made complaint of these acts, before the defendant as a justice of the peace, in an affidavit in which he stated in substance, "that on or about the 3d of February, Henry Burwell came to my house and demanded possession of my premises. I told him that I rented the place from William Sneed and had lived on it last year, and had rented it again this year, and intended to live there until christmas and pay the rent to William Sneed. He then ordered me to get out of the door and let him come in. I told him he could come in, but not to interfere with my things. He then called his negroes, above-named, to come in and take my things and throw them out. I then remarked that they could all

come in, upon their good behavior, but I would be d—d if they interfered with my things, if I didn't knock them in the head. I was then speaking to the negroes. Mr. Burwell was in the house, and I with the others, above named, in the yard. Burwell struck me a heavy blow with a large stick. I then told them I forbade their interfering with any of my things, and walked off. I found my life was in danger, and I concluded to go to a magistrate and claim the protection of the law. I got back about night, found every thing I had thrown out into the yard, the top of my house torn off, and my wife and two little children sitting in the yard." Upon this affidavit a warrant was issued (it is presumed by the defendant as the affidavit was made before him) against Burwell and the others, and tried before two justices of the peace, and Burwell was bound over to the superior court, and at spring term thereof two indictments were found, one against said Burwell, Parham, Johnson, Brown and Frazier, for a forcible trespass in carrying off the personal property of Nelson Sneed, and the other against the said Burwell and others, to the jurors unknown, for a forcible trespass into a dwelling house of Nelson, and expelling him therefrom. The defendant was marked as prosecutor upon both of these bills, and sworn and sent as a witness to the grand jury.

On the 23d of August, 1879, a warrant was issued by the defendant, as a justice of the peace, as follows: "Whereas Nelson Sneed has made oath before W. M. Sneed, a justice of the peace for the county aforesaid, that Henry H. Burwell (and the others above named) late of the county aforesaid, did on or about the 3d day of February last with force and arms enter into the said Nelson Sneed's house and eject therefrom all the house furniture, provisions, and other private property therein contained, which said articles of furniture and provisions were piled in the yard, and tore off the top of his house, and he, said plaintiff, further swears

that his wife was in a critical condition and fears serious results from the fright she sustained from the cause thus described, all without his consent, and against the peace and dignity of the state."

"These are therefore to command you forthwith to arrest the said Burwell (and the others) and them safely keep so as you have them before me at my office in Townsville on the 27th day of August, 1879, to answer said complaint, and be further dealt with according to law. Herein fail not," &c." (Signed by W. M. Sneed, J. P.)

There was a trial of the defendants upon the charge in this warrant before the defendant, William M. Sneed, J. P., and they were required by him to find sureties for their appearance to the inferior court of the county; and to this judgment of the defendant there was appended the following memorandum: "Since giving the above judgment, I have heard there is a case pending in the superior court against the defendants for this offence. The solicitor will please ascertain the facts." (Signed by W. M. Sneed, J. P.)

On the trial of this case, the defendant asked Burwell (who was prosecutor and witness) whether the other parties in the indictment against him and others did not do the trespass mentioned in the indictment against him and them; he replied that he could not answer without criminating himself, and the court held he need not do so, to which the defendant excepted.

The several instructions prayed by defendant which the court declined to give, are set out in the opinion of this court.

The judge charged the jury that if they believed the defendant made use of his official position to carry on his private controversy with Burwell, and for purposes of wrong and oppression, he was guilty; and the jury rendered a verdict of guilty. A motion for a new trial being over-

ruled, the court pronounced judgment, and the defendant appealed.

Attorney General, for the State.
Messrs. Merrimon & Fuller, for defendant.

ASHE, J. On the trial only one question of evidence arose. The defendant's counsel asked Burwell, who was both prosecutor and witness, whether the other parties in the indictment against him and them did not do the trespasses mentioned in the indictment, to which he replied, he could not answer without criminating himself; and the court held he need not answer the question. In this ruling there was no error, for it is well settled that a witness is not bound to answer a question which tends to his own crimination, and we think the case of the witness falls within the rule.

There were several exceptions taken to the refusal of His Honor to give certain instructions prayed:

1. To his refusal to charge the jury that as the magistrate's warrant recited that it was made on the oath of Nelson Sneed who was offered by the state, and was the only witness to the point, to prove that he made no affidavit before the defendant, and did not ask him to bind over the defendants in August, 1879, his evidence was not sufficient to warrant the jury in finding against the truth of the magistrate's recital; that the same was under oath and that the same evidence was necessary to controvert it, as would be required in an indictment for perjury. The court assigned as reasons for declining to give the instruction, that there was no such rule in law, and further that the evidence of the witness did not contradict the magistrate's statement in his warrant, it appearing that Nelson Sneed had made oath to the same facts in February, 1879. The ruling on this instruction we hold was not erroneous, for admitting

there was such a rule of evidence as that contended for, the evidence of Nelson Sneed did not contradict the recital in the warrant. The warrant is dated the 23d of August, 1879, and it is fair to presume, was founded on the affidavit of February, 1879, for it does not state that the information was made before the defendant on that or any other day, the recital being, "Nelson Sneed has made oath before me, W. M. Sneed, a justice of the peace for the county aforesaid, that Henry H. Burwell," &c. If the recital had been in the usual form, and stated, "Whereas Nelson Sneed *this* day made oath before me," &c., then there would have been a contradiction between the evidence of Nelson and the recital, but as it stands, there is none; and it is reasonable to conclude that the date in the recital was purposely omitted because the warrant was based upon the affidavit made on the 3d of February, 1879. Such was evidently the understanding of the defendant's counsel who argued before this court, that the act of the defendant was lawful, because the affidavit made in February was still in force when the second warrant issued, and that the defendant was warranted in issuing that warrant because there were four offences charged in the affidavit, and the parties were only indicted for two.

2. To his refusal to charge the jury that as the facts sworn to by Nelson constituted four distinct offences, and as the indictment in the superior court only covered two of these offences, the case at the most only constituted the meritorious performance of a lawful act. His Honor very properly refused this instruction because it was not warranted by the facts of the case. The affidavit of the 3rd of February, 1879, does charge the prosecutor, Burwell, besides several forcible trespasses upon the land and personal property of Nelson Sneed, with an assault and battery upon his person with a heavy stick. He was not indicted for that in the superior court, but only for the forcible trespasses, and yet there is

no mention of the assault and battery in the warrant of the 23d of August, but the accused were bound over to the inferior court to answer the complaint recited in said warrant, which is, that the defendants with force and arms entered into Nelson's dwelling house, tore off the top of his house and threw into the yard all the furniture, provisions and other private property therein contained. If the warrant of the 23d of August had been issued, charging the commission of the assault and battery, there might have been the semblance of *bona fides* in the act. But the offences with which the accused are charged and bound over to the inferior court to answer, were identically the same offences for which they had been theretofore indicted in the superior court; and it is to be presumed the defendant knew of those indictments and the offences for which they were preferred, notwithstanding the memorandum appended to his judgment on the warrant, which is relied upon by his counsel as evidence of his candor and *bona fides*, for he was both prosecutor and witness in each of the indictments which were still pending. The memorandum looks very like an after-thought, a sort of *quia timet* affixture to the illegal proceedings, to guard, it may be, against an indefinite apprehension of responsibility.

3. To his refusal to charge that as it did not appear that the cases in the inferior court had ever been finally disposed of, this indictment could not be maintained. There is nothing in this exception and the judge committed no error in refusing it.

The last exception taken by the defendant was to the charge given by His Honor to the jury, and in this we hold there was no error.

The functions of a justice of the peace are either ministerial or judicial: They are ministerial, in preserving the peace, hearing charges against offenders, issuing sommons or warrants thereon, examining the informant and his wit-

nesses and in taking those examinations, binding over the parties and witnesses to prosecute, bailing the offenders or committing them for trial, &c. They are judicial, as when he convicts for an offence; and his conviction drawn up in due form and unappealed against, is conclusive, and cannot be disputed in a civil action. 1 Blk. 354 and note 33.

In Bacon's Abridgment (Am. Ed. by Bouvier,) p. 426, it is laid down that a magistrate "is not punishable at the suit of a party, but only at the suit of the King for what he doth as judge, in matters which he hath power by law to hear and determine without the concurrence of any other; for regularly no man is liable to an action for what he doth as judge; but in cases wherein he proceeds ministerially rather than judicially, if he act corruptly, he is liable to an action at the suit of the party, as well as to an information at the suit of the King. But he must have acted corruptly to subject himself to punishment by information; for though he should even act illegally, yet if he acted honestly and candidly, without oppression, malice, revenge, or any bad view or intention, an information will not be granted against him, but the party complaining will be left to his ordinary remedy by action or indictment." In addition to these authorities, see 1 Brod. & Bing., 432; *Gregory* v. *Brown*, 4 Bibb 28; 1 Burr., 556; 2 Burr., 683; 3 Burr., 1317; *Rex* v. *Cozens*, 2 Doug., 426.

From these authorities the principle is clearly deducible that where a magistrate is acting ministerially, if he act corruptly or oppressively, or from any other bad motive, he is answerable to the criminal law. And the examination and binding over of Burwell and the others, was a ministerial act. 1 Blk., 354, *supra*. We are not called upon in this case to decide when he is liable to a civil action. We are dealing with the law in its criminal aspect. The jury have found the defendant guilty in manner and form as charged in the bill of indictment, and the bill charges that he un-

lawfully, maliciously and corruptly did issue his warrant as a justice of the peace against the said Henry H. Burwell (and the others named) for forcible trespass on the property of Nelson Sneed.

But it is contended before this court that His Honor should have charged the jury that the evidence was not sufficient to warrant the jury in finding the defendant guilty, because he acted lawfully in binding over the prosecutor and the others in August, for the affidavit made by Nelson Sneed in February preceding was still in force, and as there were several offences charged in the affidavit and as they had been indicted in the inferior court only on two of them, he had the right to issue his warrant upon that affidavit, in August afterwards, for the offences contained therein for which no indictments had been found by the grand jury in the superior court. In this we do not concur. We hold that when the two magistrates took cognizance of the matters contained in the affidavit of February and bound over the parties to the superior court, the justice had no further authority over the subject and was *functus officio* as to all matters contained in the affidavit, and is as amenable to the law as in cases where he issues his warrant without a previous oath.

There is no error. Let this be certified to the superior court of Granville that further proceedings may be had according to law.

PER CURIAM. No error.

In *State* v. *Swepson*, from Wake: See 83 N. C., 584.

ASHE, J. At the August term, 1879, of the superior court for the county of Wake, a motion was made in behalf of the state 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 the want of power; and from that judgment the solicitor for the state appealed to this court. The appeal was dismissed for the reasons set forth in the opinion of this court in the case of the *State* v. *Swepson*, 82 N. C., 541.

The solicitor for the state then, in consequence of that decision, made application for a writ of *certiorari* to remove the said record and proceedings, on the motion to amend, into this court. The petition for the *certiorari* was heard at the June term, 1880, of this court; and, after argument, the writ was ordered, which has brought the record and proceedings in the case upon the said motion before this court, which we now proceed to consider.

Judge DILLARD, on the petition for the writ in the case of *State* v. *Swepson*, 83 N. C., 584, delivered an able and elaborate opinion, in which he concluded that the court below did possess the power to make the amendment. In speaking for the majority of the court, he said: "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 the

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, 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*, 2 Dev. & Bat., 9; *Anders* v. *Meredeth*, 4 Dev. & Dev., 199; and *Freeman* v. *Morris*, Busb., 287. If, however, the judge refused to entertain a motion to amend and to hear the evidence on the ground of the want of power, then he fails to exercise his discretion; and therein a question of law is made which is reviewable on appeal, when that is allowed; and in state cases when 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 the *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 the want of power, to entertain the motion of the state to amend the record.*"

This opinion of Judge DILLARD, in reference to the power of the court on the subject of amendment, has anticipated that of the court at this stage of the case; and on the principle of "*stare decisis*," we adhere to that decision. The

judge of the superior court has entire discretion over the question.. He may hear or refuse testimony and grant or disallow the motion, as he may deem proper. With the exercise of his discretionary powers in this respect we have nothing to do. But we would take this occasion to suggest that when a defendant has been acquitted by the verdict of a jury, it is a power that should be exercised with extreme caution. Being one of those questions of fact which does not necessarily require the intervention of a jury, the judge, in hearing the motion to amend under such circumstances, should be careful to weigh the facts and consider the question in all its legal bearings; for while there is no danger to be apprehended so long as the judicial power rests with such worthy and trusted men as now adorn our superior court bench, we can well conceive how, under the sanction of a hasty and ill-advised precedent, the exercise of such a power in the hands of bad men might be turned to purposes of injustice and oppression.

We hold there is error in the ruling of His Honor in the court below. Let this be certified to the superior court of Wake county, to the end that that court may proceed to exercise its discretion in the matter of the amendment.

Error. Reversed.

In *Leach* v. *Commissioners of Fayetteville*, from Cumberland.

SMITH, C. J. The action is to recover the amount due on three bonds issued by the municipal authorities of the town of Fayetteville in payment for stock subscribed in the Western railroad company, and to compel their payment by the levy of the necessary tax. Demand was made upon

the treasurer of the town just previous to the institution of the suit. The defences set up are:

1. That no sufficient demand was made before the action.

2. That the omission to present the bonds within two years after their maturity to the chief officer of the town, as required by the act of March 22nd, 1875, ch. 243, is a bar to the recovery.

3. That the finance committee, without whose approval under the act of March 10th, 1879, no tax can be levied, are a necessary party to the action. These objections will be considered in their proper order.

I. The plaintiff alleges and proves that he made a demand of payment on the treasurer of the town, the official custodian of its funds, and this was sufficient to put the defendant in fault. "If the plaintiff had alleged in his complaint," says BYNUM, J., "that he had presented his claim to the board of commissioners to be audited and allowed, and that they had refused to act, or had disallowed it, he would have had a cause of action; or had he alleged that he presented to the treasurer a claim so allowed and that he had refused payment, he would have had a cause of action." *Jones* v. *Commissioners of Bladen*, 73 N. C., 182. The same rule applies with equal force to the relation of the defendant with their treasurer, and a valid county or town obligation to pay a definite sum at a fixed period on presentation, imposes the duty of providing the means and placing them with the treasurer to meet the obligation when it arises. While a municipal bond transferable by delivery should be presented by the holder (or notice given to the corporate body in order that the owner may be known) to whom payment is to be made, the failure to provide the funds to discharge it at maturity when demand is made, constitutes a cause of action. While unadjusted claims are required to be audited and ordered to be paid, absolute and unconditional obligations already ascertained and audited are in

themselves and upon their face an order and authority in the financial officer, possessing the means not otherwise appropriated, to pay on presentation. The record of the action of the corporate authorities produced in evidence shows that they were fully cognizant of the existence and amount of this outstanding indebtedness, inasmuch as in a preamble to a resolution adopted by them on January 5th, 1876, but a few days after it matured, it is declared, "whereas the *bonded railroad debt of the town* ($97,000) *is now due and parties holding said bonds are demanding payment of same*, therefore, resolved, &c." The committee appointed under the resolution then adopted recommended the retirement of the bonds by the issue of others on time and the levy of a tax adequate to meet the obligations to be incurred. This distinct recognition of the debt, and the uncontradicted averments in the complaint that the coupons for interest had been paid, and that the treasurer when required to pay the principal refused only because of the want of means to discharge the debt, in connection with the absence of any book of registry of municipal claims, clearly, in our opinion, dispense with a further demand precedent to the suit.

II. For the same reasons the act of March 22nd, 1875, is unavailing as a bar to the action as is decided in *Wharton* v. *Commissioners of Currituck*, 82 N. C., 11.

III. The last objection predicated upon the required concurrence of the finance committee to any tax levy under the act of March 10th, 1879, has been expressly declared to be invalid for the reasons fully set out in the case of *Hawley* v. *Commissioners of Fayetteville*, 82 N. C., 22. A *mandamus* is the appropriate remedy to enforce payment of the demand against a municipal body when only resources to meet its obligations are to be found in the exercise of the taxing power conferred. *McLendon* v. *Commissioners of Anson*, 71 N. C., 38. *Fry* v. *Commissioners of Montgomery*, 82 N. C., 304.

There is no error. This will be certified for further proceedings in the court below.

No error. Affirmed.

In *Adrian* v. *Shaw*, from Cumberland.

SMITH, C. J. When this cause was before us at January term, 1880, (82 N. C., 474,) it received the careful consideration of the court, and its members were unanimous in the conclusion announced in the opinion. We have, after another exhaustive argument upon the re-hearing, reconsidered the point then decided, with a desire to correct any error into which we may have then fallen when pointed out, and our convictions remain unchanged. The cases called to our attention are from states in which the homestead is deemed to be land occupied as a place of residence or dwelling, and losing its exemption from liability to forced sale as soon as it ceases to be so occupied. The adjudications upon the provisions contained in the constitution of this state proceed upon the idea of an exemption of land of limited value, that not only now is, but may become the home of the insolvent debtor, and that it may be improved as a permanent residence; hence, the pre-existent homestead right may attach to land wholly unoccupied. *Martin* v. *Hughes*, 67 N. C., 293; *Mayho* v. *Cotton*, 69 N. C., 289. Even a fraudulent conveyance, void as to creditors, is void also as to the homestead right. *Crummen* v. *Bennett*, 68 N. C., 494. In the former opinion, Mr. Justice ASHE says: "The law, when it authorizes one to sell his homestead, would be untrue to itself and the obligations of justice, if it were to allow the owner to sell it, receive a full and fair price, and then leave it subject, in the hands of his vendee, to the satisfaction of

his debts. We cannot believe that to be the law." Again, in *Watkins* v. *Overby*, 83 N. C., 165, it is declared that "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 his family," etc. The decisions in other states (the scope of whose statutory provisions on this subject are not altogether like our own, as heretofore interpreted,) are unsafe guides in determining the present question. We must adhere to our own exposition of the constitution and laws enacted to subserve its policy, unless clearly erroneous; for the unsettling of prior adjudications is often more fruitful of mischief than the error proposed to be corrected. We must, therefore, adhere to our former ruling on this point. The *case* sent up states that a jury trial was waived and the facts found by His Honor, and is directly repugnant to the record, which shows a verdict to have been rendered by the jury, subject to the opinion of the court upon the point reserved, the facts of which are set out in the case; and if the court should be of opinion with the plaintiff, judgment was to be entered on the verdict: otherwise the verdict to be set aside and a nonsuit entered. As the record must prevail in this conflict, and we must render such judgment as ought to have been rendered in the court below, the verdict must be set aside and a nonsuit entered, and it is so adjudged. The former judgment wherein it differs from this must be reversed.

PER CURIAM. Judgment accordingly.

In *Holmes* v. *Holmes*, from New Hanover:

RUFFIN, J. The petitioners, who are the defendants in the above entitled action, make application for a writ of

certiorari and assign the following reasons: That at a trial of the action had at June term, 1880, of the superior court of New Hanover, there was a verdict and judgment in favor of the plaintiffs, from which the petitioners appealed, giving due notice of their appeal and executing a bond. That no statement of the case on appeal was prepared and served within the time; but their attorney had an understanding with the plaintiffs' attorneys that it would be satisfactory to all parties if such statement was prepared in time for the present term of this court; which understanding was frequently recurred to and recognized by the attorneys of both parties. That about the 8th of January, 1881, petitioners' attorney prepared their case on appeal and submitted it to plaintiffs' attorneys, who received it, and after an examination, returned it with a statement of their objections. That the petitioners' attorney admitted the exception of the plaintiffs, but afterwards discovered that there was an admission in the statement which he had prepared, as to the effect of a certain deed, which he did not design making; and thereupon he prepared another statement of the case, making the deed a part thereof, and omitting what was said about its effects in the former statement. That on presenting this last statement to plaintiff's attorneys, it was assented to without being read, but such assent was afterwards withdrawn. That the attorneys of both parties then had a meeting and attempted to reconcile their differences, but failing to agree, no statement of the case was made, and thereby the petitioners have lost their appeal. The petition is supported by the affidavit of *Mr. Ricaud*, who was of counsel for the defendants in the action.

The plaintiffs file a counter-affidavit of their attorney, *Mr. Bellamy*, who states the facts to be that after having returned with his exceptions, the statement first presented to him about the 8th of January, he was accosted on the streets by *Mr. Ricaud*—the latter having in his hand a roll of

papers which affiant supposed to be the case originally presented and returned with exceptions. That *Mr. Ricaud*, pointing to a certain sentence in the paper he held in his hand, said he would like to add the words, "a copy of which deed is hereto annexed, marked 'A'," to which affiant, still thinking that it was the original case, replied that he had no objection, but thinks he added that he would see his associate counsel about it; and that no case was ever presented to him for examination, or agreed to by him, in which the statement as to the effect of the deed was omitted, or to which a copy of the deed was attached as a part.

Adhering strictly, as this court feels bound to do, to the rule laid down in *Walton* v. *Pearson*, 82 N. C., 464, and the cases there cited, we can look only to the affidavit filed by the appellees to ascertain whether there was any understanding between the parties or their attorneys, that a strict compliance with the rules of the code, in regard to the manner of taking the appeal, would not be insisted on.

Mr. Bellamy, the attorney for the plaintiffs and the appellees in the case, files an affidavit in which he makes no denial of the allegation of the petitioners that there was such an understanding between counsel; but on the contrary, concedes that so late as January—nearly six months after the trial—he received from the attorney of the petitioners the statement of their case, which, after considering, he returned with his exceptions, but without any objection on the score of time; and that even after that, when approached on the street, he gave his assent to, what he supposed was, an alteration in it.

We cannot doubt, there was, if not an express agreement to waive a strict compliance with the requirements of the statute, a tacit consent to that effect acted on by the attorneys in the cause. Indeed the counsel who argued the motion here for the appellees, frankly stated that he did not deny that there was such an understanding, and that

he was willing still to carry it out; but that he could not agree to the case as prepared by the petitioners. From this it seems that the controversy between the petitioners is, at last, not so much over the petitioners' right to have their appeal, as over the manner of stating their case. As to the last matter, this court is powerless to help either of the parties, but they must settle it amongst themselves, or, if unable to do so, must invoke the aid of His Honor who presided at the trial. All we can do is to see that no one is improperly deprived of the right of appeal; and this we do in this case by directing the *certiorari* to be issued as prayed for by the petitioners.

PER CURIAM. Motion allowed

In *Wilson* v. *Lineberger*, from Gaston:

SMITH, C. J. The plaintiff's counsel moves upon her affidavit of facts proved before the referee and annexing a copy of her own testimony, for a writ of *certiorari* to perfect the incomplete record before us at the last term, when the cause was argued and decided, with the intention, as is suggested, to ask for a re-hearing. We adverted in the opinion to the absence of the evidence before the referee and upon which his report was based, so that we were confined to his rulings upon the facts reported and the review of them by the court. 83 N. C., 524. The motion is a novel one and without precedent in the practice of the court. If the evidence shall change the aspect of the case and make it materially different from what it was when heard, we should be required *not to rehear and correct an error of law, but to try a new case.* If there is an error in the former decision it must be discovered in the case, then presented, without modification of facts. If the evidence desired does

not have the effect, it would be of no practical benefit to have the record completed as proposed.

It was the duty of counsel to suggest the diminution before the cause was heard and then ask for this remedial process: not to wait till the decision and then demand it. It would be productive of much mischief to relax the salutary rule which requires counsel to see that their cause is properly before the court in the record, and to abide the consequences if it is not. The writ must be denied.

PER CURIAM. Motion denied.

In *Smith* v. *Lynn*, from Wake:

ASHE, J. Petition for *certiorari* heard at June term, 1880. The plaintiff in his petition for a writ of *certiorari* in the above entitled action, alleges that at spring (February) term, 1879, of the superior court for Wake county, a judgment was rendered against him in behalf of the defendant, from which he prayed and obtained an appeal to this court; that an appeal bond was given within ten days after the rendition of the judgment and a case on appeal was duly made out and executed according to law. That in consequence of his failure to comply with the demand of the clerk of the superior court of Wake, to pay him as fees for his services the sum of ten dollars, he failed to send up a transcript of the said cause, until January term, 1880, of this court.

This question has been settled in *Andrews* v. *Whisnant*, 83 N. C., 446, where it was held, that a *certiorari* will not be granted when 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 when 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 in said term.

In this case the appeal was taken at February term, 1879, of the superior court of Wake, and the transcript not filed until January term, 1880. The defendant has lost his appeal by his laches. The *certiorari* cannot be granted.

PER CURIAM. Petition denied.

In *Hoskins* v. *Mechanics' Building and Loan Association*, from Guilford :

SMITH, C. J. We have carefully considered the well prepared argument of counsel in defence of the general plan of operations of the class of organizations lately introduced into the state to which this, seemingly least obnoxious to hostile animadversion, belongs; and whatever might be our conclusions if the question were still open, we feel bound by the repeated adjudications heretofore made, and, that the law should be settled, to uphold the ruling of the court below. Indeed the very questions now presented have been passed upon and decided in reference to this association, and we must adhere to our former ruling. We will only refer to some of the cases. *Smith* v. *B. & L. A.*, 73 N. C., 372; *Mills' case*, 75 N. C., 292; *Overby's case*, 81 N. C., 56; *Hanner's case*, 78 N. C., 188.

The decision in *James* v. *Martin*, from Alexander, and in *Rhyne* v. *Mason*, from Gaston, is the same as that in *England* v. *Garner*, *ante*, 212.

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