NORTH CAROLINA REPORTS

VOLUME 85

This book is an exact photo-reproduction of the original Volume 85 of North Carolina Reports that was published in 1882.

Published by
THE STATE OF NORTH CAROLINA
RALEIGH
1971

Reprinted by
COMMERCIAL PRINTING COMPANY
RALEIGH, NORTH CAROLINA

NORTH CAROLINA REPORTS.

VOL. LXXXV.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA,

OCTOBER TERM, 1881.

REPORTED BY

THOMAS S. KENAN.

(VOL. 10.)

RALEIGH:

ASHE & GATLING, State Printers and Binders.

Presses of EDWARDS, BROUGHTON & Co.

1882.

JUSTICES OF THE SUPREME COURT,

October Term, 1881.

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ASSOCIATE JUSTICES:

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CLERK OF THE SUPREME COURT:

WILLIAM H. BAGLEY.

ATTORNEY GENERAL:

THOMAS S. KENAN.

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JUDGE OF THE CRIMINAL COURT:

OLIVER P. MEARES, Wilmington.

SOLICITOR:

BENJAMIN R. MOORE, Wilmington.

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ERRATA.

Page	41,	line	2, for "read," read "to be."
"	80,	"	10, for "in," read "on."
"	93,	"	2 of syllabus, read "no real property," &c.
"	173,	"	2, for "the" read "that."
"	201,	"	16, for "lay on" read "inured to."
"	239,	"	19, strike out "be."
"	282,	"	5, read "not a member," &c.
"	321,	"	16, for "sufficient," read "insufficient."
"	337,	"	8 from bottom, for "a person's" read "his."
"	369,	"	7, read "are" for "is."

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

OCTOBER TERM, 1881.

CATHARINE POOL v. MOSES A. BLEDSOE.

Statute of Limitations—New Promise.

The endorsee of a note given in 1862 cannot rely upon a verbal promise to pay the same, made to the agent of such endorsee in 1879, in order to repel the statute of limitations.

(*Fleming* v. *Staton*, 74 N. C., 203, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1881, of WAKE Superior Court, before *Gilmer, J.*

The plaintiff declared upon a promissory note, without seal, made by the defendant on January 1st, 1862, to the firm of Silas Burns & Co., for $470.13, and soon thereafter endorsed to plaintiff. The summons is dated December 18, 1879. The defendant pleaded the statute of limitations, and the plaintiff replied a new promise made in 1879, a short time before this suit was brought. The evidence of the plaintiff to sustain the allegation of new promise was as follows: David Lewis testified that he was the agent of

plaintiff, and attended to her business affairs, and that during the year 1879, before this suit was brought, he presented the said note to the defendant, who looked at it, acknowledged it, and promised him to pay it; that this was a verbal promise, and there was no evidence of a written promise. Thereupon the court held that plaintiff could not recover. Judgment for defendant for costs, appeal by plaintiff.

Mr. A. M. Lewis, for plaintiff.
Mr. Armistead Jones, for defendant.

RUFFIN, J. We find it impossible to distinguish between this case and that of *Fleming* v. *Staton*, 74 N. C., 203. It is there held, that if to an action on an unsealed note the defendant pleads the statute of limitations, it may be repelled by proof of a promise within the period prescribed by the statute, but in order to do so, the promise must be identical and between the original parties—*by the same man to the same man.* And further, that when the original contract is made with one, and the promise relied on to repel the statute is made with another, who is the plaintiff in the action, *the cause of action is the new promise* and it must be declared on. And that if this new promise be made after the adoption of the Code of Civil Procedure, it must be in writing, or else it can not be " received as evidence of a new or a continuing contract, whereby to take a case out by the operation of the statute."

Applying the principle thus established to the case before us, it is perfectly manifest that the plaintiff can not maintain her action. The unsealed note sued on was given by the defendant to Silas Burns & Co. on the first day of January, 1862, and by them endorsed to the plaintiff, who commenced her action in 1879. The new promise relied on to repel the statute was made in 1879 by the defendant to the *plaintiff* and was not *in writing.* There was no *continuing*

promise, such as will enable the plaintiff to sue on the original contract; and no promise in writing, such as is required by the statute to create a new contract. C. C. P., § 51.

No error. Affirmed.

O. P. WHITE v. JOHN R. BEAMAN.

Statute of Presumptions—Credits on Bonds—Evidence.

Where credits endorsed on a bond are relied on to repel the statutory presumption of payment, it is necessary for the plaintiff to establish by proof, *aliunde* the entry of payment, that the same was made before the presumption arose.

(*Williams* v. *Alexander*, 6 Jones, 137; *Woodhouse* v. *Simmons*, 73 N. C., 30; *Grant* v. *Burgwyn*, 84 N. C., 560; *Johnson* v. *Parker*, 79 N. C., 475; *Blue* v. *Gilchrist*, 84 N. C., 239, cited and approved.)

CIVIL ACTION, tried on appeal from a justice's court, at January Special Term, 1881, of SAMPSON Superior Court, before *McKoy, J.*

The action was brought on May 12th, 1877, by the plaintiff and others, as administrators of James White, deceased, against the defendant and others, upon a promissory note under seal in these words:

$209.99. One day after February 3rd, 1852, I promise to pay to Malcom Monroe, or order, two hundred and nine 99–100 dollars for value received.

DANIEL MELNIN, [Seal.]

The defendants allege payment and rely upon the statutory presumption arising out of the lapse of time since the

note became due to the institution of the suit. To rebut this defence, the plaintiffs read in evidence two endorsements of partial payments upon the note, and proved that the first was not, and the second was, in the handwriting of the plaintiffs' intestate.

The endorsements are as follows; Received of the within note two hundred and fifty dollars by Aaron Simmons for D. Melvin, this 3rd day of February, 1857. Received of the within note five dollars in whiskey, this 6th day of August, 1865.

No proof of any actual payment was offered, and none to fix the dates of the respective endorsements, or to show that either was put upon the note before the expiration of the time which raises the presumption, other than such as the endorsements themselves furnish. The court was asked to charge the jury that the last entered credit, written by the plaintiffs' intestate, and alone available in time for the purpose, was insufficient to prove the recited payment and remove the presumption, unless it was upon the note before the presumption arose and when it was against the interest of the holder, and this fact to render the evidence competent must be proved *aliunde*, and further, that none such had been adduced. The court instructed the jury that a partial payment would rebut the presumption, but to have such effect, an endorsed credit, as evidence of such payment, must have been entered before the presumption of full payment arose, and when it was adverse to the interests of the holder; and left it to the jury to determine when the credit was entered in fact. Verdict for plaintiffs, judgment, appeal by defendants.

Mr. E. W. Kerr, for plaintiffs.
Mr. J. L. Stewart, for defendants.

SMITH, C. J., after stating the case. The defendants were

in our opinion entitled to the instruction asked, that there was no evidence upon which the jury could find the credit entered before the presumption, and thus render it competent proof of actual part payment then made, and there was error in refusing it. The law governing the case is well settled in this state by the adjudications in *Williams* v. *Alexander*, 6 Jones, 137, and *Woodhouse* v. *Simmons*, 73 N. C., 30, cited in the argument for the plaintiffs, and in *Grant* v. *Burgwyn*, 84 N. C., 560.

It is equally well settled that it is controlled by the former statute of limitations and is not affected by any provisions of the new. C. C. P., § 16. *Johnson* v. *Parker*, 79 N. C., 475; *Blue* v. *Gilchrist*, 84 N. C., 239, and numerous references in the notes to section 16 in Tourgee's Code and his Statutory Adjudications.

There is error and must be a new trial, and it is so ordered. Let this be certified.

Error. *Venire de novo.*

THOS. L. LOVE v. J. G. DICKERSON and wife.

Practice—Right to Open and Conclude.

The party who asserts the affirmative of an issue has the right to open and conclude the argument, hence a defendant who pleads payment of the note sued on (admitting its execution) being the affirmant, the *onus* is upon him to show payment, and he is entitled to open and conclude.

CIVIL ACTION to foreclose a mortgage, tried at Spring Term, 1881, of WAKE Superior Court, before *Schenck, J.*

The plaintiff in his complaint alleged the execution of

the mortgage and the making by defendant of the promissory note secured therein, the advertisement of the sale of the property conveyed, the payment of twelve dollars, the expense incurred by reason thereof, and the failure to sell on the day appointed in consequence of the want of a bidder, the defendant being present and forbidding the sale. The plaintiff demanded judgment that the mortgage be foreclosed, the premises sold, and the proceeds applied to payment of the debt and said twelve dollars for advertisement as aforesaid.

The defendent in his answer admitted the making of the note, the execution of the mortgage and the advertisement of the sale, but insisted that the debt secured in the mortgage had been paid, and that the advertisement of sale had been made for the purpose of securing a debt other than that secured in the mortgage, which plaintiff pretended was due and owing from defendant to him, but which defendant denied.

Upon the opening of the case, the plaintiff introduced testimony to prove the advertisement of the sale of the land described in the mortgage deed, under the provisions of said mortgage as alleged in the complaint, and that the plaintiff had paid twelve dollars as the costs of the advertisement. The proof was offered without objection, and the plaintiff rested. The defendant then introduced a witness to prove payment of the mortgage note, and his counsel stated to the court that he rested. Upon inquiry by plaintiff's counsel, the defendant's counsel insisted that he had the right to open and conclude the evidence and the argument to the jury. To this the plaintiff's counsel objected, insisting that the affirmative of the issue raised by the pleadings as to the advertisement under the mortgage deed in dispute, and the right to recover the costs of the action, was upon the plaintiff, and further, the claim of the defendant to open and conclude was not made in apt time. His Honor ruled that the only issue raised by the pleadings was as

to the payment of the mortgage note, and that the defendant might open and conclude, to which the plaintiff excepted.

Verdict and judgment for the defendant, appeal by plaintiff.

Messrs. Reade, Busbee & Busbee, for plaintiff.
Messrs. Merrimon, Fuller & Fuller, for defendant.

ASHE, J. It is a familiar rule of practice that the party who substantially asserts the affirmative of the issue, has the right to open and conclude. "*Ei incumbit probatio qui dicit, non qui negat.*" There are to be sure exceptions to this rule; as for instance, where the affirmative allegation is supported by a legal presumption, or the truth of the negative averments is peculiarly within the knowledge of the party who relies on them. But this case does not fall within any of these exceptions. The question here is, upon whom is the burden of proof thrown by the issue arising on the pleadings? The decisions on the subject are very numerous and conflicting, but upon examination of the authorities we are disposed to adopt the rule laid down by Taylor in his work on Evidence (Vol. I, §338), where he says: "The best tests that can be devised for ascertaining on whom the burthen of proof lies, are, first, to consider which party would succeed if no evidence were given on either side; and, secondly, to examine what would be the effect of striking out of the record the allegation to be proved, bearing in mind, the *onus* must lie on which ever party would fail, if either of these steps were pursued."

Now to apply these tests to our case—The only issue raised by the pleadings is, whether the note secured by the mortgage has been paid. The plaintiff opened the case, without any inquiry as to his right to do so, by proving the payment of the twelve dollars as the expense of the advertisement. But it was not necessary to do so, for the allegation that he

had paid it was not denied in the answer, and under our present practice where an allegation in the complaint is not denied in the answer, it is taken as admitted. The defendant pleaded payment of the note and insisted that the plaintiff had advertised the sale of the property conveyed in the mortgage, not to secure the mortgage debt, but some other claim which the defendant did not owe. So that, the only issue to be submitted to the jury was the payment of the note. On that issue the defendant was the affirmant, and the *onus* was upon him to show the payment, and that it was paid before the advertisement was made; otherwise the plaintiff would have the right to recover the twelve dollars. If no evidence had been offered on either side, the plaintiff would have had the right to recover, not only the twelve dollars, but the amount of the note, because the making of the note by defendant is admitted in his answer and the payment of the twelve dollars not denied. And further, the payment of the note being the only allegation in the case to be proved, if that were stricken out, the defendant would fail in his defence. So that, according to either of the tests, the *onus* was on the defendant and he would have right to open and conclude.

The objection made by the plaintiff to the motion not being made in apt time, applies as well to himself as to the defendant. We suppose the real controversy in this case was as to who should have the reply in the argument.

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

No error. Affirmed.

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

Evidence—Conversation.

Where a part of the conversation between a witness and one deceased is called out by the defendant on cross-examination, the plaintiff is entitled to all that was said in that conversation pertaining to the same subject matter of inquiry.

(*Bridgers* v. *Bridgers*, 69 N. C., 451; *Straus* v. *Beardsley*, 79 N. C., 59; *Cabiness* v. *Martin*, 4 Dev., 106; *Overman* v. *Coble*, 13 Ired., 1, cited and approved.)

SPECIAL PROCEEDING for dower commenced in the probate court of Chowan county, and removed to and tried at Spring Term, 1880, of WASHINGTON Superior Court, before *Graves, J.*

The plaintiff, Mary E. Roberts, widow of John Roberts, deceased, instituted this proceeding for dower against the defendants, the heirs at law of said deceased. The following issue was raised by the pleadings—Was John Roberts seized in fee simple of the "Long Lane farm" during his coverture with Mary E. Roberts? and was duly certified to the superior court for trial by a jury, and by consent the case was removed to Washington county for trial.

The defendants claimed title to the land in dispute as heirs of Mills Roberts, deceased, from whom the plaintiff claimed that John Roberts had received it by deed of gift in fee simple. No deed from Mills Roberts to John Roberts was found at his death or offered in evidence, and upon proof of loss, secondary evidence of its contents was admitted.

On the trial of the issue, H. A. Gilliam, an attorney of long standing, was introduced as a witness for the plaintiff, and testified that after the death of Mills Robert, John Roberts exhibited to him a deed from Mills for the said

farm; that he was indistinct in his recollection as to the date of the deed, but thought it was 1867, and that it conveyed by apt words of conveyance the said land to John Roberts in fee simple, the words being to have and to hold the Long Lane farm unto him John Roberts, his heirs and assigns forever. On cross-examination, witness said that he was consulted by John Roberts as to whether he could claim any interest in his father's estate without surrendering his interest in the said farm, already received from his father, and that he examined the deed in order that he might properly advise on that point, and finding that the deed was for love and affection and one dollar, he advised John Roberts that he could claim no interest in his father's estate, unless he surrendered his interest in said farm and other property which his father had given him. The witness proceeded to say, without any other question asked him by defendants, that he knew nothing of the value of the property received by said John from his father, but that John said "he had more than a child's part and should claim no interest in the estate." It was in evidence that John had received other property by gift from his father, and that he claimed and received no interest in said estate. Upon the re-direct examination, this question was asked the witness by the plaintiff—"In estimating his interest in the Long Lane farm relative to his interest and right in his father's estate, upon what did John Roberts base his calculation?" The question was objected to, objection sustained, and the plaintiff excepted. There were several other questions asked bearing on the same point, all of which upon objection by defendants were ruled out. The question was then asked the witness—"what was said by John Roberts in your conversation with him?"—objected to by defendants, ruled out by the court, and plaintiff excepted, upon the ground that the witness having stated part of the conversation between him and John Roberts, the plaintiff was

entitled to the whole conversation. The evidence of this conversation was offered to corroborate the testimony of the witness in regard to the question whether the deed conveyed a fee simple or not. Another witness testified that he had seen the deed and that it conveyed only an estate for the natural life of John Roberts.

Verdict and judgment for defendants, appeal by plaintiff.

No counsel for plaintiff.

Messrs. E. G. Haywood and *Oct. Coke*, for defendants.

ASHE, J., after stating the case. The main exception taken in the court below which it becomes necessary for us to consider on the appeal, is, whether there was error in the ruling of His Honor in excluding the question propounded by the plaintiff—"what was said by John Roberts in your conversation with him"? The objection taken to this evidence was, that the proposition of the plaintiff was too broad, and should have set out what was proposed to be proved that the court might see its relevancy. This no doubt as a general proposition is correct. *Bridgers* v. *Bridgers*, 69 N. C., 451; *Straus* v. *Beardsley*, 79 N. C., 59; *Overman* v. *Coble*, 13 Ired. 1.

But this case is distinguished from those. Here, a part of the conversation between the witness and John Roberts was called out by the defendants on the cross-examination. The plaintiff was entitled to all that was said in that conversation pertaining to the subject of inquiry. 1 Tay. Ev. §685; Greenl. Ev. §201, 205; *Cabiness* v. *Martin*, 4 Dev., 106. The matter brought out on the cross-examination was "that John said he had more than a child's part and should claim no interest in his father's estate". It was then a pertinent inquiry in this connection, what was said by John, if anything, in regard to the value of the land given him by his father; and if anything was said by him in this conversa-

tion with the witness, the plaintiff was entitled to it. The question it is true is very broad, and standing by itself would have been inadmissible. But its object and bearing upon the subject of inquiry are clearly shown by the questions propounded by the plaintiff, which had just preceded and were rejected by the court. In getting at the meaning and relevancy of the question, it must be construed in connection with them; and by doing so, we think the matter sought to be proved by calling out the whole of the conversation, is sufficiently suggestive for this court to be able to judge of the propriety of its rejection.

We are of the opinion the evidence should have been received. There is error. Let this be certified to the superior court of Washington county that a *venire de novo* may be awarded.

Error. *Venire de novo.*

CLARISSA E. WARREN v. METRAH MAKELY.

Evidence—Description in Deed for Land.

1. Evidence of the value of a tract of land adjoining that retained by the donor in a deed of gift, is incompetent to show that the donor did not retain property fully sufficient and available to satisfy existing debts.

2. One hundred acres "lying in Currituck township near the head of Smith Creek, it being the eastermost portion of the farm purchased from my brother and known as the Russell land," is sufficiently described to identify the part cut off, as a distinct tract.

(*Black* v. *Sanders*, 1 Jones 67; *Credle* v. *Carrawan*, 64 N. C., 422; *Bell* v. *Herrington*, 3 Jones 320; *Wellons* v. *Jordan*, 83 N. C., 371; *Stewart* v. *Salmonds*, 74 N. C., 518, cited and approved.)

WARREN *v.* MAKELY.

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

Judgment for plaintiff, appeal by defendant.

Messrs. Gilliam & Gatling, for plaintiff.
Mr. Jas. E. Moore, for defendant.

SMITH, C. J. The plaintiff asserts title to and seeks to recover from the defendant the possession of a tract of land, designated in her complaint as "lying in Currituck township and on Smith creek adjoining the lands of L. P. Fortescue, Zacheus Gibbs and John B. Fortescue, containing one hundred acres, more or less." In the answer the defendant admits that "he is in possession of the *land described in the complaint,*" and avers that "he is the owner of *said land* in fee."

Upon the trial of the issue involving the plaintiff's title and right to recover, she introduced in evidence a deed of gift executed on April 26, 1870, by C. E. Slade, her aunt, conveying to her (subject to the reservation of the donor's life estate) for her natural life and with limitations in remainder to her child or children, a tract of land therein described in these words: "A piece or parcel of land lying and being in Currituck township and near the head of Smith Creek, it being the eastermost portion of the farm I purchased from my brother, John E. Fortescue, known as the Russell land, containing one hundred acres, including the buildings and the cleared land, bounded on the east by the land I purchased from Lewis B. Fortescue."

The defendant also derived title from the said C. E. Slade under a judgment rendered against her in 1864, and a sale under execution by the sheriff and his deed made in 1872 to the defendant for the premises, and he insisted that the voluntary conveyance to the plaintiff was fraudulent and void, for that, the donor did not at the execution thereof

retain property fully sufficient and available for the satisfaction of her then creditors, as required by the act of 1840.

Upon this inquiry and as a means of arriving at the value of the retained land, the defendant proposed to ask a witness the following question: What did the Porter Fortesque land, adjoining the lands of Mrs. Slade (the donor) sell for at execution sale a year or so before this sale? On objection the question was disallowed and the defendant excepts to the ruling.

The existence of the debt reduced to judgment before the making the deed of gift and subsequent insolvency of the donor, renders her deed *prima facie* fraudulent and void against the creditor seeking to subject the land to the payment of his debt, and equally so against the defendant purchasing under the execution issued to enforce it, unless at the time the debtor retained property, in the words of the act, "fully sufficient and available" for the satisfaction of her creditors, and the duty of proving this fact to sustain the conveyance devolved upon the plaintiff. *Black* v. *Sanders*, 1 Jones, 67; *Credle* v. *Carrawan*, 64 N. C., 422; Bump on Fraud. Conv., 286, and note citing numerous decisions in other states.

It must be then assumed that this necessary supporting proof had been offered by the plaintiff, and the rejected inquiry was intended in rebuttal and to reduce the estimated value of the retained land. The question is simple and absolute, unaccompanied with any suggestion that the two tracts possessed the same or similar qualities in soil, culture, location, or improvement, or possessed in common the elements that enter into the estimate of their respective values, or that supplementary proof would be produced that the price bid for one could in any degree measure the value of the other, or aid in putting an estimate upon it. As presented to us in the record and without any explanatory circumstances, the question was properly excluded as irrelevant and misleading.

It has been held in the court of appeals of New York, where the inquiry was as to the value of an ice-house, that proof of what another ice-house which the witness had caused to be built, cost him, was inadmissible. And again, that in ascertaining the value of a steamboat sunk by collision with the defendant's steamer, it was incompetent to show what another steamer like that of the plaintiff was worth. *Blanchard* v. *Steamboat Co.*, 59 N. Y., 300; *Gouge* v. *Roberts*, 53 N. Y., 619.

In *Bell* v. *Herrington*, 3 Jones, 320, the plaintiff sued for breach of a covenant to teach certain of his slaves "the ship-carpenter's and caulker's trade," and it was held to be incompetent for defendants to show that the slaves had been employed in their shipyard as other apprentices of the same experience and no distinction made between them, inasmuch as there was no proof, nor any offer to prove, that the other apprentices were properly instructed in the trade which the defendants covenanted to teach.

The objection to such testimony is obvious. It tends to raise a collateral issue and divert attention from the proper subject of inquiry before the jury. If the price at which one contiguous tract sold may be shown, so may the price or value of any others adjoining, and these may severally become the subject of contention and obscure the real point to be determined. The exception must be overruled.

The second exception is to the refusal of the court to declare, and so instruct the jury, that the deed to the plaintiff is upon its face too indefinite to convey title to the land in controversy. The objection is not directed, as we understand, to the sufficiency of the terms of description of the entire tract out of which is carved the one hundred acres awarded by the jury to the plaintiff, but to the part thus cut off, and to the inability of identifying it by the descriptive words of the deed. The court rightfully declined to decide, and to tell the jury, that from a simple inspection of

the instrument it was manifest that the one hundred acres could not be ascertained, as a distinct tract, from the terms used in describing it and therefore no title passed under the deed. The entire land is designated by its boundary lines as well as by a name, and for aught that can be seen is identified and well defined. The answer shows the defendant's knowledge of the land, claimed in the complaint, under a description much less definite than that contained in the deed, the sufficiency of which he lawfully recognizes in the defence set up. *Wellons* v. *Jordan*, 83 N. C., 371; 1 Tay. on Ev., § 292. If the larger tract be defined, it is apparent the area of one hundred acres can be cut off from its eastern part by a line running due north and south and intersecting its boundaries. Every part of this section will be more eastern than any part of the residue, and hence fulfills the requirement in the deed, that it shall be "the eastermost portion of the farm." This proposition is established in *Stewart* v. *Salmonds*, 74 N. C., 518, where language not dissimilar was employed in defining the separate section.

The objection to the form of the verdict as wanting in certainty in designating the recovered land, rests upon the same ground and must be disposed of in the same way. The defendant was not entitled to judgment upon the verdict, and his exception to the refusal of the court to render it is equally untenable. There is no error and judgment must be affirmed.

No error. Affirmed.

ROBERT & T. L. KNIGHT v. E. B. HOUGHTALLING and others.

Evidence—Address of Counsel—Abuse of Privilege—Fraud—Rescission—Statute of Limitations—Judgment under Code.

1. Where the charge is that the execution of a written contract to purchase land was procured by fraudulent representations it is competent to show, in a court administering both law and equity, the accompanying acts and declarations of the parties *deñors* the writing, as illustrating and forming a part of the transaction.

2. Where such instrument and declarations are duly in evidence, it is competent to ask a witness to the transaction who was to pay the expenses of giving possession of the land; his answer will not be necessarily the statement of an opinion, or conclusion of fact.

3. It is also competent to show that other articles were sold at the same time with the land, and the price thereof included in the same consideration, as bearing on the question of fraud and indicating the inducements held out by the vendors to effect the trade.

4. It being alleged by the defendants that they were inveigled by the plaintiffs into the purchase of said land by false and fraudulent representation as to its area, advantages of situation, &c., it is competent to show that a hand-bill was exhibited by the agent of the plaintiffs' under their directions, containing such misrepresentations; and it is also competent to put such hand-bill in evidence.

5. Declarations of a joint contractor, shortly after the agreement was made, are evidence of its terms against his co-contractors.

6. An admission in writing, under section 331 of the code of civil procedure, that a letter is genuine does not preclude comments by counsel as to the truth of its contents, suggested by its appearance, the fact of its being written by an amanuensis, &c.; but if such comments were improper, exception thereto, in order to be available, on appeal, must be made before the court has given the case to the jury.

7. False representations, reasonably relied on, and inducing a contract, vitiate the agreement so effected.

8. An expenditure by the defendants of their own means, to put themselves in the condition in which the plaintiffs should have placed them, will not condone the fraud of the plaintiffs, so as to disentitle the defendants to relief; nor will *all* relief be denied because the plaintiffs have made payments in part performance of their contract after the discovery of the fraud.

9. A party entitled to rescind a contract for the purchase of land on the ground of fraud must declare his intention as soon as fraud is discovered; and when sued by the other party, after a number of years, for the foreclosure of a mortgage to secure the purchase-money, he cannot for the first time ask to rescind, but can only ask to deduct from his debt an amount sufficient to repair the consequences of such fraud.

10. The defendants' right to such reimbursement is not barred by the statute of limitations applicable to an ordinary action for *deceit*, as their remedy is affected by *retaining* part of the money due by an unexecuted contract, the consideration for which has failed *pro tanto*.

11. Under the Code practice a party is not restricted to the specific relief demanded by him, but may have any additional and different relief which the pleadings and facts proved show to be just and proper.

(*Hill* v. *Brower*, 76 N. C., 124; *Nance* v. *Elliott*, 3 Ired. Eq., 408; *Ransom* v. *Shuler*, 8 Ired. Eq., 304; *Pettijohn* v. *Williams*, 1 Jones, 145; *McDowell* v. *Sims*, 6 Ired. Eq., 278; *Tomlinson* v. *Savage*, *Ib.*, 430; *Alexander* v. *Utley*, 7 Ired. Eq., 242; *Earl* v. *Bryan*, Phil. Eq., 278; *Whitfield* v. *Cates*, 6 Jones Eq., 136, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1880, of GRANVILLE Superior Court, before *Eure, J.*

This is an action to foreclose a mortgage, and in their complaint the plaintiffs allege that on the 14th day of February, 1870, at Yonkers in the state of New York, the plaintiff Robert Knight and W. K. Couzens and the defendants entered into a contract under seal, whereby the two former covenanted to sell, and the latter to buy, a tract of land situate in Granville county, North Carolina, known as "The Locust Grove Plantation," together with the crop of corn growing thereon, and the corn and oats of the previous year's crop, at the price of $8,000.00, whereof $100 was paid in cash; $1,900, to be paid upon delivery of the deed, and the residue of $6,000 to be secured by a mortgage on the premises, payable $1,000 in one year and $5,000 in six years, with interest, &c. That in pursuance of said contract, the plaintiffs, on the 15th day of February, executed a deed to the land to the defendants, who paid them the $2,000 as agreed and gave their bonds for the $6,000, se-

cured by a mortgage upon the premises—the said deed and mortgage describing the tract as containing seven hundred and fifty acres. That the defendants took immediate possession of the land and have continued the same from that time, receiving the entire profits therefrom. That they have made payments towards the purchase money as follows: $800 in January, 1871; $560 in July, 1871; $300 in March, 1872; and $200 in August, 1873, and failing to pay any more and their bonds all being past due, the plaintiffs, to whom Couzens has assigned his whole interest, ask for a sale of the land and the payment of their claims.

In their answer, the defendants admit the execution of the deed to them, and the mortgage by them on the 15th February, 1870, but disclaim all recollection of having executed any contract for purchase on the 14th. That they signed a paper without reading it, which they were told, and believed, was a guaranty for their peaceable and immediate possession of the land and for the purchase of the plaintiffs' shares in the crops, and if they signed any other paper, then its execution was obtained by fraud and imposition. That they fully explained to the plaintiff, Robert Knight, and Couzens that their purpose was to sell their homes in the state of New York and to move to the land purchased, and hence it was absolutely necessary that they should have the possession at once, and that they would not purchase any tract that did not contain at least 800 acres and so be capable of a division into two suitable tracts. That in response to their inquiry as to the number of acres in the tract in question, both of said parties assured them that it contained 800 acres, and Couzens assured them that he had been around the tract, and being a civil engineer and a surveyor was competent to judge of its size, and that it certainly contained 800 acres or more, and they were also assured that they should be admitted to immediate possession. That moved by these representations and assurances the defendants

closed their trade for the land and took the deed and gave the mortgage referred to in the complaint. That very soon thereafter they came with their families to this state, expecting to go upon the land, but upon their arrival found one Morrow in possession of the land, claiming to be there, and to keep the possession as a tenant to the plaintiff Robert Knight and Couzens, and to be a partner in the crops, and refusing to quit until they settled with him and paid what they owed him. That being strangers in the county and homeless, the defendants were compelled to purchase the possession from said Morrow—which they did, paying him $750 therefor. That after getting possession they made the payments alleged in the complaint, the first one being in January, 1871, and the last in August, 1873. That soon after making the last, they had the land surveyed and found that instead of 800, it only contained 575 acres, and thereupon immediately wrote to the said plaintiff and Couzens telling them of the deficiency and demanding a rescission of the contract of purchase and a return of the amounts they had paid. That getting no reply, and knowing that the parties lived beyond the state and were in doubtful circumstances, the defendants retained the possession of the land as a security for the amounts due them and have so held it ever since. The defendants ask that the contract of sale be set aside and all the deeds be cancelled and an account taken of amounts paid by defendants and their expenses in getting possession, and of the rents and charges with which they may properly be chargeable, and that whatever may be found due them may be declared to be a charge on the land.

In their reply the plaintiffs deny each and every allegation of fraud and misrepresentation, and especially do they deny representing to defendants that the tract was composed of 800 acres. That so far from giving them any guaranty for immediate possession, the defendant Woods came to

North Carolina before the contract was entered into and saw the land, and upon his return to New York, at the time of the execution of the contract, stated that he had made his own arrangements with Morrow for possession, in case they effected a trade, and would claim nothing from plaintiffs in the event he should make any difficulty with them about it. The plaintiffs further deny that the defendants ever gave them any notice of any deficiency in the quantity of acres, or demanded a rescission of the contract, on the contrary, they say, that so late as August, 1873, the defendant Wood called on the plaintiffs at their home in New York, and made the payment of that date stated in the complaint, that he did not then or at any other time whether before or since utter a single complaint or set up any sort of claim, and neither has his co-defendant ever done so.

On the trial issues were submitted to a jury who find:

1. That Couzens falsely and fraudulently represented to the defendants that the tract of land contained 800 acres.

2. That he also made a like representation of his ability and willingness to give the immediate possession thereof.

3. That he also made similar representations as to the ownership of the crops of corn and oats made on the land and the wheat seeded thereon.

4. That all of said representations were reasonably relied upon by the defendants, who had exercised reasonable prudence in the premises.

5. That neither of the defendants, since their discovery of the deficiency in the number of acres, had recognized their contract of purchase.

Thereupon the court gave judgment that all the contracts and deeds and bonds for money, between the parties growing out of the transaction be cancelled and declared void, and directed an account to be taken between the parties, in which credit should be given the defendants for all sums paid by them towards the purchase money, and for all costs,

charges and damages which they incurred under said contracts, and charge them with reasonable rents for the land while in their possession, and declaring the land to be subject to a lien for any amount that may be found due the defendants and directing a sale thereof for its payment.

There were several exceptions taken by plaintiffs to the admission of evidence, the refusal of the judge to give certain instructions asked for, and to other matters occurring during the progress of the trial, all of which are fully set out in the opinion of the court. Verdict and judgment for defendants, appeal by plaintiffs.

Messrs. M. V. Lanier and *Gilliam & Gatling*, for plaintiffs.
Messrs. Merrimon & Fuller, for defendants.

RUFFIN, J. It being established by the verdict of the jury, that the defendants were deceived by the fraudulent representations of their vendors as to certain matters constituting material inducements to their purchase of the land, out of which this action grows, and that they on their part, had used all necessary diligence and prudence, it must follow that they are entitled to relief in the premises, unless some error was committed in the conduct of the trial by the admission of improper testimony, the withholding of proper instructions asked for, or the rendering of such a judgment as the law does not contemplate in the premises. And these are the matters we now proceed to consider.

1. The plaintiffs' first exception is to the admission of testimony and is thus set out in the case: The deposition of one Lusk, who was a real estate broker in New York state, and as the agent of plaintiffs, first began the negotiations which led to the purchase of the land by defendants, and was present when the contract was executed and the deeds all signed, was taken by defendants and offered in evidence by them. The witness was asked whether the

land was sold as containing any definite number of acres and if so, how many? and in response said, it was represented as containing 800 acres, and he had so entered it on his book. He was then asked—what was the agreement of the parties as to the time the defendants were to have possession of the land? and in reply said they were to have immediate possession. He was then asked—who was to pay the expenses of delivering the possession of the land to the defendants and be at the costs of the same? and his reply was, the vendors.

The above questions and answers were all objected to at the taking of the deposition, and the objections renewed at the time of the reading on the trial, and the grounds assigned were, that it appearing that the contract was in writing and by deed, the deed itself was the best evidence of the terms of the trade and no parol evidence was competent to disprove, or add to, the terms as there written, and as to the last question it was further objected that it called for, not the declarations and agreement of the parties, but the conclusions of the witness' own mind. For the purpose for which this evidence was offered, its competency cannot be questioned. A sale of property brought about by misrepresentation as to facts materially affecting its value, and which though false may reasonably be relied on by the purchaser, will always be avoided, at the instance of the latter, in a court of equity, which court never permits an evil act done with an evil intent to work an injury to an innocent person.

The way must be always open then to show both the fact that the representations were made, and their falsity.

Fraud rarely lurks in the written agreement of parties, entered into at the end of their negotiations with each other, but almost universally precedes it, and consisting as it must necessarily do in such a case, of acts and declarations merely, it can only be exposed by allowing the conduct of the par-

ties, their words and deeds throughout the entire treaty, to be shown to the jury.

To hold the law to be, as contended for by the plaintiffs here, that, because the negotiations of the parties culminated in a written instrument all inquiry into their preceding conduct is excluded, would be to say that fraud, by its very success, might be made secure, unless as can but seldom happen, it could be detected in the mere words of the instrument.

Neither can we yield our assent to the other grounds of exceptions. Taken literally, and disconnected with the preceding inquiries and answers of the witness, the question proposed may seem to be justly liable to the plaintiffs' objection, but taken in connection with matters immediately preceding, it is impossible to doubt that both he who proposed the question, and he who answered it, did so with reference to the agreement of the parties, and were so understood to do by the jury who heard the deposition read.

The second exception was also as to the admission of evidence and is thus stated:

The same witness, Lusk, was asked whether anything but the land was sold to the defendants at the same time, and the price thereof included in the amount they promised to pay the plaintiffs? To which he answered that there were some vinegar and the products of the place. This question had not been objected to at the taking of the deposition, but was at the trial on the ground that it was inadmissible to show by parol the sale of anything not mentioned in the written contract of the 14th of February, 1870.

Without undertaking to determine, and wishing to be understood as not determining, whether the plaintiffs' objection was in apt time, not being made when the deposition was taken, it is sufficient to say that the evidence was, in every possible point of view, admissible.

In the first place, the plaintiffs attach the written contract

of the 14th of February, 1870, to their complaint, and ask that the same may be taken as a part thereof, and that instrument on its face shows that other articles, such as corn, oats and wheat, were included in the sale and went to make up the consideration of the defendants' promise to pay the sum of $8,000, and it was in no wise varying its terms therefore to inquire into that fact, and fix the values of the several articles sold.

But apart from this and upon the naked question of fraud the evidence was competent, as going to show what inducements to the trade were held out by the plaintiffs to defendants, and what assurances of accommodation in their proposed new homes.

The third exception was, because the defendant Wood, who was examined as a witness for the defendants, was permitted to testify that a short time before the trade he was shown by one Morrow, then a tenant of the plaintiffs and occupying the land, a printed hand-bill, signed by Couzens, offering the land for sale and describing it as having advantages of situation, buildings and meadows which in fact it did not possess, it also being shown that the hand-bill had been received by Morrow from Couzens with instructions to exhibit it. His Honor allowed the witness to testify as above and put the hand-bill itself in evidence, and in neither particular do we think any error was committed. This like the other matters considered was one of a series of representations made, and as the defendants say fraudulently made, to induce them to purchase, and the jury were entitled to consider it in that light.

The fourth exception was to the admission in evidence of a letter written by Couzens, four days after the completion of the contract and the execution of the deeds, addressed to the tenant Morrow and handed to defendant Wood for delivery to him, and in it there being a recapitulation of the terms of the trade.

The case does not disclose the grounds of this exception and we cannot conceive of any.

Bearing in mind that the writer, Couzens, was the joint owner of the land with the plaintiff Robert Knight, and that he seems to have been the chief actor in making the sale to defendants, it cannot be doubted that his declarations, made just upon the heels of the trade, are competent evidence, not of the fraud, for that they could not be, being subsequent to the trade, but of the terms of the original contract, and as casting light upon the previous conduct of the parties.

The sixth exception is stated thus:

The plaintiffs offered in evidence two letters—one for each of the defendants—addressed to Couzens and dated one in December, 1875, and the other in October, 1875, asking further indulgence and promising to pay the purchase money of the land as soon as certain crops could be sold. These letters, at some time prior to the trial, had been exhibited by plaintiffs to an attorney of the defendants with a request for an admission of their genuineness, and said attorney had endorsed such an admission thereon and signed the same.

At the trial when one of the letters was offered to be read, the same attorney stated to the court that he had made the admission unadvisedly, without noticing its contents, and under the impression that it was in his client's handwriting, whereas it was now ascertained that he could not write, and there was no envelope accompanying it, and no address upon it, and he objected to the reading of the letter notwithstanding his admission. The plaintiffs' counsel thereupon stated that they had gone to trial relying upon the admission, and were not therefore prepared to prove the genuineness of the letter, and insisted that the letters must either be admitted in evidence or a mistrial ordered. The court was about to direct a juror to be withdrawn when the attorneys for the

defendants asked time to consult together and advise with their clients, and were allowed to retire for that purpose. Upon returning into the court-room, they stated, they would *admit the letter for what it was worth*, and the trial proceeded—the letter being read in evidence without other proof of its genuineness than the admission of the attorney. In their argument to the jury, they having the conclusion, the counsel for the defendants commented on the fact that it purported to be written by a man who could not write, that it was enclosed in no envelope, and was addressed to no particular person, and had about it other marks of suspicion, so that it was entitled to no weight in the minds of the jury—to all of which no exception was taken at the time; but the plaintiffs after the verdict, made it a ground of a motion for a new trial, and now assign it as error in the court that the attorney was permitted, under the circumstances of the case, thus to comment upon the letter without correction either at the time or in the judge's charge to the jury.

The statute (C. C. P., §331) provides that either party may exhibit to the other any paper material to the action, and request an admission in writing of its genuineness, which if he fail to give, he may, in a certain contingency, be required to pay any expense that may be incurred in order to establish its genuineness on the trial. We do not understand the statute, by this, to intend to commit the party, whose admission of the genuineness of the instrument is sought, in any degree beyond that to which he would be committed had the execution of the instrument been established by proof *aliunde*.

The authenticity of the letter in question being admitted as it was in the court below, the truth of the matters therein contained might still be the legitimate subject of inquiry—inquiry, too, in which its appearance, the absence of an envelope, the want of an address, and the fact that it was written by an amanuensis for one incapable of writing for

himself, might all lend efficient aid to the jury in reaching a right conclusion.

It was the privilege, thus to comment on the contents of the letter, which we understand the counsel to have reserved to themselves, when they announced their purpose *to admit it for what it was worth*, and it does not appear to us that they either abused the privilege reserved, or improperly resorted to any other in connection with the letter in question. But if they had done so, we should still be constrained to hold that the plaintiffs' objection comes too late. They heard the comments of counsel (unwarranted as they say) without once invoking the interference of the court, and when specially asking instructions as to other matters, they were silent as to this, which is now the subject of their exception, thus giving to His Honor no opportunity to correct the error, if any was committed, and place the matter right in the minds of the jury. A party cannot be allowed thus to speculate upon his chances for a verdict, and then complain because counsel were not arrested in their comments upon the case. Such exceptions, like those to the admission of incompetent evidence, must be made in apt time, or else be lost.

The seventh exception: At the close of His Honor's charge to the jury (to which up to that time no exception seems to have been taken) the plaintiffs' counsel asked that the jury might be instructed, "that if they should believe that Couzens said they could give immediate possession of the land sold to defendants, knowing that they could not, it would still not be a fraudulent representation, unless he contracted to give such possession," and they were so instructed, except that the judge added, "it was for the jury to consider all that was said, and if they find there was any false statement or agreement outside the written contract which formed a material inducement to it, they should consider that in

making up their verdict." As it cannot be supposed that the plaintiffs complain of that portion of the charge, which was given in their own words, their exception must be confined to that which was added by His Honor. This, as it seems to us, is in almost exact conformity, as regards both its language and intent, with the decisions of this court on the subject. "When representations are made by a party to a contract," says BYNUM, J., "which may reasonably be relied on by the other, and those representations are false and fraudulent and cause loss to the party relying on them, he is entitled to relief." *Hill* v. *Brower*, 76 N. C., 124.

The eighth exception: The plaintiffs' counsel asked that the jury might be further instructed, "that if they should believe that Couzens represented to defendants, that they could give the immediate possession of the land, and were entitled to sell the crops mentioned in the contract, and such representations were false with his knowledge, and were material inducements to defendants to enter into the contract, they would still be immaterial, provided they should further believe that the defendants themselves procured the possession, and made the payments towards the purchase money as admitted in their answer," but this, the court declined to give. If we correctly apprehend the plaintiff's meaning, his prayer was, in effect, to ask the court to tell the jury that however fraudulent the plaintiffs' conduct may have been and however gross their imposition upon the defendants, it would be cured provided the defendants had subsequently acquired, by an expenditure of their own money, that possession and the crops, which they were induced to believe they were acquiring under their contract with the plaintiffs, and taken in this light, it was properly refused by the court.

We were referred by counsel to the case of *Nance* v. *Elliott*, 3 Ired. Eq., 408, as an authority in support of the position, that when one purchases land from a vendor whose title is

defective, and by his own means supplies the defect and secures the title, he can have no claim on his vendor for the money so expended. But upon a careful review of the case, it becomes perfectly manifest that Judge NASH, who delivered the opinion, was speaking with reference to a purchaser, who had knowledge of the defect at the time of his purchase, and in whose case there was no element of fraud. We say this is manifest because this was a case of fraud stated in the bill filed, but the party failed in his proofs, and in the closing part of his opinion, the judge distinctly says that if the fact had been, as stated in the bill, that he believed his vendor had a good title, and upon discovering the contrary, had applied to a court of equity to compel him to complete the purchase by paying the necessary expenses, his prayer would have been granted, thus furnishing not only an authority in support of the judge's ruling in the case now before us, but a rule to the defendants by which their damages may be determined.

Neither can the fact that the defendants continued after the discovery of the fraud, to make partial payments of the purchase money, take from them *all* right to relief.

A party is not bound to abandon a contract brought about by fraud and imposition upon him, but he may, if he sees proper, adhere to the contract, and seek his compensation for the fraud in an action at law for damages.

That such an action will lie for fraud practiced in the sale of land was intimated first in *Ransom* v. *Shuler*, 8 Ired. Eq., 304, and was expressly declared in *Pettijohn* v. *Williams*, 1 Jones, 145.

The law allows the purchaser in such a case to either abandon the contract absolutely or else abide by it and sue at law for the deceit, and the only requirement it puts upon him is to make and declare his election the moment the knowledge of the fraud is attained by him.

Our conclusion upon the whole case is, therefore, that no

such error was committed on the trial below, as entitles the plaintiffs to have another jury to pass upon the issues between the defendants and themselves, and this leaves as the only matter for our further consideration their exception to the judgment rendered in that court. By its terms, the judgment declared all the contracts and agreements between the parties, having reference to the land in question and whether executed or executory, and including the bonds given by the defendants for the purchase money, to be null and void, and directed the same to be cancelled.

The rule of law is, that he who would rescind a contract to which he has become a party must offer to do so promptly on discovering the facts that will justify a rescission, and while he is able of himself, or with the aid of the court, to place the opposite party substantially *in statu quo*; he must not only act promptly upon the first discovery of the fraud, if fraud be the cause assigned for the rescission asked, but he must act *decidedly*, so that his vendor may certainly know his purpose, and thereby have the opportunity afforded him to assent to the rescission, resume the property and look out for another purchaser. In no case is he permitted to rescind when he has continued to treat with his vendor upon the basis of the contract after his discovery of the fraud practiced upon him, and neither is it allowed him to rescind in part and to affirm in part; but if done at all it must be done *in toto*.

This rule is founded on the plainest principles of justice and has been universally recognized, and virtually so by this court in the cases of *McDowell* v. *Sims*, 6 Ired. Eq., 278; *Tomlinson* v. *Savage*, *Ib.*, 430; and *Alexander* v. *Utley*, 7 Ired. Eq., 242.

Under an application of this rule to the conduct of the defendants in the case at bar, it must be apparent that they are not entitled to the relief given them in that part of the decree excepted to, of having their contract with the plaintiffs entirely annulled.

They entered into the contract in the year 1870, it being an entire one for the purchase of the land and the crops mentioned. The fraudulent misrepresentations of which they complain had reference—

1. To the title to the crops sold.

2. The ability of the plaintiffs to deliver the possession of the premises.

3. The deficiency in the quantity of the land.

Of the fraud practiced upon them in regard to the first two particulars they became informed before the first year expired, and of the last, by actual survey in 1873.

In spite of this information they continued to make payments on the purchase money until late in 1873, and even after that to recognize the obligation of the contract in their correspondence with the plaintiffs, permitting one of their vendors to assign his interest in the contract without a word of warning to the assignee, and indeed, without a word of notice or complaint to any one so far as the evidence discloses, until 1878, when the present action was instituted for the enforcement of their contract, and then for the first time, they plead fraud, on the part of their vendors in procuring the contract, and ask to be relieved from its obligation after having enjoyed its benefits, and receiving the entire profits from the land for more than eight successive years.

Such a defence has too much the appearance of a pretext set up for the purpose of getting rid of what has turned out to be a bad bargain, and it cannot be tolerated in a court of equity, which insists upon fair play from both sides. It is true, that by their verdict the jury have said that the defendants have not recognized their obligation since they discovered that their tract did not contain 800 acres. But then, that was in 1873, and five years intervened before this action was brought, through all of which they were passive.

It is not sufficient that they did nothing to manifest their

recognition of the contract, but they were required to be active in making known their repudiation of it, and a delay of five years to do so is fatal to their right to have a rescission of their contract. In the case of *Alexander* v. *Utley*, before cited, a delay of a single year was held sufficient to preclude the plaintiffs from such a right.

So much then of the judgment of the court below as declares the contract of the defendants null and void is by this court deemed to be erroneous, and to that extent it is reversed.

They are, in our opinion, entitled to be allowed every such sum as was reasonably expended by them in procuring the possession of the land and purchasing the crops of every kind, agreed to be sold to them; also for the deficiency in the number of acres in the tract, at the average price per acre supposing it to have been sold as containing 750 acres. Having knowingly accepted a deed for that number of acres, they are precluded from asserting that their contract was for more, as that would be adding to a written instrument by parol proof, which the law does not permit to be done.

The above allowances, with the interest on all, are to be deducted from the aggregate of the purchase money now due, and there must be an account taken to ascertain the residue of the plaintiffs' claim for the purchase money, which is declared to be a lien upon the land in question.

The plaintiffs insist that, inasmuch as the defendants might have sued at law for the deceit as soon as known to them, their right to have the above allowances made them is now barred by the statute of limitations. Not so, however. The rule in equity is, that a vendor who has fraudulently sold more than belonged to him, cannot with a *good conscience*, coerce the payment of the whole purchase money, but on the contrary, the vendee has the right to withhold so much of it as will reimburse him for his loss, because to

that extent the consideration has failed, and in such a case, so long as the contract remains unexecuted the statute of limitations has no application. *Ransom* v. *Shuler*, supra. *Earl* v. *Bryan*, Phil. Eq., 278.

We have not failed to observe that the answer of the defendants contains but a single prayer for relief, and that for a rescission of their contract. But we understand that under the code-system, the demand for relief is made wholly immaterial, and that it is the case made by the pleadings and the facts proved, and not the prayer of the party, which determines the measure of relief to be administered, the only restriction being that the relief given must not be *inconsistent* with the pleadings and proofs. In other words, the code has adopted the old equity practice when granting relief under a *general prayer*, except that now no general prayer need be expressed in the pleadings, but is always implied. The case of *Whitfield* v. *Cates*, 6 Jones Eq., 136, furnishes an instance where a plaintiff, though he failed as to his principal equity, was allowed to avail himself of a secondary equity not inconsistent with the allegations in his bill and the proofs in the cause.

It will therefore be referred to the clerk of this court to take the accounts between the parties in accordance with this opinion, and the cause is retained further for orders.

Error. Judgment modified.

W. M. WALTON d others v. RICHMOND PEARSON, Ex'r, and others.

Judgment—Merger—Estoppel—Statute of Limitations—Amendment of Record.

1. **Taking judgment upon a sealed obligation does not merge the specialty so as to estop the judgment creditor from bringing action on the ad-**

ministration bond of the defendant in the judgment, assigning as a breach a *devastavit* by the defendant and a consequent failure to pay the plaintiffs' claim.

2. Mere irregularity in the granting of an injunction will not render it a nullity so as to prevent the suspension of the statute of limitations, under section 46 of the code, during the pendency of the injunction.

3. The doctrine that equity will not upon the filing of a general creditors' bill restrain a particular creditor, who has obtained an absolute judgment against an administrator, from proceeding against such administrator personally and his sureties, has no application to a case where such judgment creditor is the one to file the bill, thereby submitting his claim to the control and disposition of the court.

4. It is the duty of every court to correct its records, when erroneously made up, so as to make them speak the truth, regardless of the consequences to parties or third persons; and no lapse of time will debar the court of the power to discharge this duty.

5. If the judge mistake his powers or fall into other errors in amending the record of a cause, an appeal is the only remedy, and certain it is that the judge of another superior court cannot reverse the order directing such amendments, in the progress of another cause in which the effect of the record is drawn in question.

6. *Semble* that an absolute order to amend the record has the legal effect of an actual amendment, at least as to its inviolability except by appeal.

(*Simmons* v. *Whitaker*, 2 Ired. Eq., 129; *White* v. *Smith*, 2 Jones, 4; *Phillipse* v. *Higdon*, Busb., 380; *Foster* v. *Woodfin*, 65 N. C., 29; *Mayo* v. *Whitson*, 2 Jones, 231; *Kirkland* v. *Mangum*, 5 Jones, 313; *Barnard* v. *Etheridge*, 4 Dev. 295; *Marshall* v. *Fisher*, 1 Jones, 111; *Conrad* v. *Dalton*, 3 Dev. 251, cited and approved.

CIVIL ACTION, upon the bond of administrator, tried at Fall Term, 1879, of CATAWBA Superior Court, before *Schenck, J.*

On the 25th of November, 1855, W. F. McKesson, as principal, and Charles McDowell and James McKesson, as sureties, executed their bond to the plaintiff, Walton, for the sum of $2,250, payable one day after date. Charles McDowell died in 1859, leaving a will which was admitted to probate in November of that year, and upon the renunciation of the executor therein named, N. W. Woodfin was ap-

pointed his administrator with the will annexed and entered into bond as such in the sum of $50,000, with R. M. Pearson and W. F. McKesson as his sureties. James McKesson also died, and William F. McKesson became his administrator. In 1866, the plaintiff instituted suit upon his said bond for $2,250 against W. F. McKesson in his own right and against him, as the administrator of James McKesson, and N. W. Woodfin as administrator of Charles McDowell, in Burke superior court, and at fall term, 1869, thereof recovered a judgment against the three for the amount of the bond and interest, of which judgment a memorandum appears upon the civil issue docket as follows:

"W. M. WALTON *vs.* N. W. WOODFIN *& als.* } Jury—verdict—See minutes.

Judgment against defendant and N. W. W., adm'r, W. F. McK., adm'r. $4,039.92. Int. on $2,200 from 2nd Nov., 1869, (this in pencil mark). From this judgment the deft. McKesson appeals to supreme court (this is in ink.) *Quando* as to adm'rs; absolute as to W. F. McK. (this in pencil.)"

Whereas the minute docket, after stating the impanneling of the jury and their verdict and amongst other things their finding specially that "the defendants N. W. Woodfin and W. F. McKesson have not fully administered upon the estates of their intestates but have assets belonging to the same sufficient to satisfy the plaintiff's demand," contains a record of a judgment absolute against W. F. McKesson individually, and the two administrators for the amount then due upon the plaintiff's bond.

From this judgment of the superior court of Burke, an appeal was taken to the supreme court, where the same was affirmed at January term, 1870. In November, 1869, R. V.

Micheaux and the plaintiff Walton instituted an action in Burke superior court against N. W. Woodfin as administrator of Charles McDowell, and Samuel McDowell, Anna McDowell, Cora McDowell, and Charles M. McDowell, all infants, and the parties to whom the said Charles McDowell devised the lands whereof he died siezed. In their complaint, which was filed at spring term, 1870, of said court, in behalf of themselves and all other creditors of Charles McDowell, deceased, who will come in, prove their claims and contribute to the expenses of this suit, they allege the death of the said Charles and the qualification of N. W. Woodfin as his administrator as hereinbefore stated. That at the time of his death he was indebted to the parties bringing the action and to other persons in large amounts and divers ways. That besides the lands devised to the infants above named, he owned a large personal estate, embracing some forty or fifty slaves, and amounting to some $50,000 in value, all of which went into the hands of his said administrator, who, in December, 1859, sold eleven of the slaves and all the other personal property, for about $13,000, taking bonds with surety from the purchasers, who by reason of the accidents and results of the war, became insolvent and their obligations of no value; and the slaves unsold being emancipated, the personal estate of the said decedent was insufficient to pay his debts; and therefore they pray that proper accounts may be taken to ascertain the amount of the debts owing, the assets which came into the hands of the defendant Woodfin, as administrator, and what part thereof he then had in hand, and the value of the real estate devised to the infant defendants, and that said real estate might be sold and the proceeds applied to the payment of the claims of plaintiff and the other creditors. At the same spring term, 1870, the said Woodfin, as administrator, filed his answer, in which he admits that the said McDowell, at the time of his death, owed debts of his

own to about $5,000, and a much larger amount as surety for others, but avers that all of his said testator's principals were men of means and abundantly able to pay the debts for which he was bound for them. He further avers that immediately after his qualification as administrator, he advertised, according to law, for all creditors to present their claims, but none of those to whom his testator was bound as surety presented their claims to him, or gave him any notice thereof, and it was not until after the war that he had such notice of their existence. That as administrator he took possession of all the personalty, and in December, 1859, sold a portion of it amounting to some $13,000, upon a credit of six months taking the notes of the purchasers with security amply sufficient at the time. That the amount of said sale was more than sufficient to pay all the debts, as well those of which he had no notice as those of which he had notice, and would have been so applied, but that before he could collect the said notes, stay laws were passed which prevented his doing so until late in the war when he could only have collected confederate money, and such continued to be the case until all the parties to the said sale notes had become insolvent by reason of the accidents of the war and the emancipation of their slaves. That having sold enough to satisfy all claims against the estate of which he had notice, he desisted from selling any more of the personal property and divided the same amongst the legatees according to the terms of the will—there being some thirty or more slaves so divided; and he submitted to the taking of the various accounts prayed for and joins in the prayer for a sale of the lands devised to the infant defendants for the purpose of paying the debts of the estate. At the same term an answer was filed by the infant devisees, by their guardian, in which it is insisted that according to the provision of the will of Charles McDowell his personal estate was expressly charged with the payment of his debts. That

of the personalty, some was sold in 1859, and the administrator had ample time to collect the proceeds before the beginning of the war or the adoption of any stay laws, and that he divided the slaves and the unsold personalty amongst the legatees long before the war began and without taking any refunding bonds from them, in doing which he was guilty of a *devastavit;* and that before selling the land devised to said infants, it was the duty of the creditors to exhaust the personalty and all their remedies on the administration bond. Upon the coming in of the answers, the court, at the same term, made an order of reference and appointed T. G. Walton commissioner to take the account between the said administrator and the creditors of the testator, and directed him to give notice by advertisement at three public places in Burke county, or in a newspaper if he might deem necessary, to all persons interested in taking the account; and further directed the clerk of the court to *notify the creditors of said testator that they were restrained from collecting their debts otherwise than as should be ordered in the said cause.* At fall term, 1872, the commissioner Walton made his report, in which he finds that there came to the hands of Woodfin, as administrator, personal property to the amount of $30,000, of which he sold $12,500 worth, and received from other sources $1,727. That the claims against the estate amounted to $25,000, of which $9,000 were due from the testator individually, and the balance from him as surety for others; and that the amount disbursed by the administrator was $1,488.31. At fall term, 1873, an order was made in the cause making R. M. Pearson, a surety on the administrator's bond, a party defendant to the action, and at fall term, 1874, the cause was dismissed by order of the court.

On the 19th day of June, 1874, the plaintiff began the present action against N. W. Woodfin as administrator of Charles McDowell, R. M. Pearson, and W. F. McKesson his

sureties on his bond as administrator. In his complaint as originally drawn and subsequently amended, by leave of the court, after alleging the execution to him on the 25th of November, 1855, of the bond for $2,250, by W. F. McKesson as principal and Charles McDowell and James McKesson as sureties, and his having recovered judgment thereon at fall term, 1869, against said principal and N. W. Woodfin as administrator with the will annexed of Charles McDowell and W. F. McKesson as administrator of James McKesson, and the non-payment of his claim, the plaintiff assigns as a breach of the condition of the bond given by Woodfin as administrator, the fact that there came to the hands of such administrator a large personal property greatly exceeding in value the amount of claims against the estate, which the administrator neglected and refused to apply to the payment of the debts, but distributed the same very soon after his qualification—to wit: in December, 1859, among the legatees mentioned in the will of his testator and without taking from them refunding bonds, thereby being of a *devastavit*, by reason whereof the plaintiff was damaged to the amount of his debt and costs of suit. The defendant, Pearson, alone filed an answer, and in it, after admitting that the testator, McDowell, left a large personal estate—in all about $50,000—which went into the hands of his administrator, Woodfin, who made sale of a part thereof and distributed the residue amongst the legatees, he insists that the judgment which the plaintiff recovered at fall term 1869, on the bond for $2,250, was not, and was not intended by the court to be a judgment absolute as to Woodfin and McKesson as administrators, but only as to McKesson in his own right and *quando* as to said administrators; and being a judgment *quando* he insisted that it was an admission of record by the plaintiff that the said administrators had no assets and ought not to have had any at the time of its rendition, which estops the plaintiff from averring to the con-

trary in his present action; and in support of his allegation that the judgment was intended to read judgment *quando* he referred to certain discrepancies in the record of the judgment as entered upon the "civil issue docket" and the "minute docket" of the court, and as a farther defence, he insisted that, should the judgment be held to be an absolute one against the administrators, it had been rendered more than three years before the commencement of the plaintiffs' action, and as the plaintiffs' original debt was merged in the judgment—that being a higher security—and the breach complained of, being the failure to pay the judgment, having occurred in 1869, the plaintiffs' action was barred by the statute of limitations; and since his debt on the bond had been so merged in the judgment, it was no longer open to the plaintiff to complain of a breach in regard to it in its original form.

At spring term, 1878, of Burke superior court, His Honor Judge Cloud presiding, a motion was made to amend the record of the judgment which the plaintiff had recovered at fall term, 1869, against W. F. McKesson individually, and Woodfin as administrator of McDowell and McKesson as administrator of James McKesson, so as to make the record speak the truth, and after hearing evidence His Honor found as a fact that the judgment as rendered by the court was a judgment *quando* as to the two administrators and that the entry of an absolute judgment against them was a *mistake* and thereupon ordered that the record of the judgment "be so amended as to make it a judgment absolute as to W. F. McKesson in his individual capacity and a judgment *quando* against the said McKesson as administrator of James McKesson and *quando* against N. W. Woodfin as administrator of Charles McDowell deceased." The present action, after the suggestion of the death of N. W. Woodfin and making Jno. G. Bynum as administrator *de bonis non* with the will annexed of Charles McDowell

and Richmond Pearson, Jr., as the executor of R. M. Pearson deceased, parties defendant, was removed from the superior court of Burke county to that of Catawba county, where a trial was had at fall term, 1879, before Judge Schenck—a jury trial being waived by the parties. His Honor found as a fact that the judgment rendered at fall term, 1869, was absolute and not *quando* as to Woodfin administrator of Charles McDowell and that the judgment filed in that case at said term was regular and correct, and adjudged as a matter of law, inasmuch as there was no evidence before him, that said judgment was not taken according to the course of the court, and no motion made to set it aside in a year and not until spring term, 1878, that Judge Cloud did not have the power to make the order he did, and that it did not affect the absolute judgment rendered at fall term, 1869. To which ruling the defendant Pearson accepted.

His Honor further held that the plaintiff could maintain his action against the sureties of Woodfin on his administration bond, and especially as Bynum the administrator *de bonis non* of Charles McDowell deceased had been made a party defendant. Defendant Pearson excepted.

His Honor further held that the judgment against Woodfin as administrator, being absolute, was conclusive as to the question of assets, upon the sureties on his administration bond. Defendant Pearson excepted.

His Honor further held that the plaintiff's cause of action against Pearson, the surety on the administration bond, was barred by the statute of limitations, and gave judgment for Pearson, his executor, dismissing the action as to him and for costs. Plaintiff excepted.

Messrs. J. M. McCorkle and *Battle & Mordecai*, for plaintiff.
Messrs. D. G. Fowle and *J. M. Clement*, for defendants.

RUFFIN, J. In this case appeals were taken by both plain-

tiff and defendant and are now pending in this court. For the sake of convenience we have considered them together.

In his complaint as first drafted, the plaintiff, after setting out the death of Charles McDowell and the appointment of Mr. Woodfin as his administrator and his execution of the bond sued on with R. M. Pearson and W. F. McKesson as his sureties and the fact that at fall term, 1869, of Burke superior court he had recovered judgment against the said McKesson in his own right and as administrator of James McKesson, deceased, for a certain sum, assigns as the breach of the condition of the bond sued on, the fact that the said administrator received a large personal estate to an amount greatly in excess of the debts of his testator, which he failed to apply to the payment of the debt due the plaintiff, and failed to sell and convert into money and assets for the payment of his testator's debt, but immediately after his qualification in 1859, distributed the same amongst the legatees mentioned in his testator's will without taking from them refunding bonds as in duty he was bound to do, thereby being guilty of a *devastavit* to the plaintiff's injury to the amount of his said judgment, interest and costs. The allegations of the amended complaint are the same with the original except that the plaintiff's claim against the estate of McDowell is said to consist of a certain "sealed obligation" for the sum of $2,250, executed on the 25th of November, 1855—no part of which has been paid—with a similar assignment of the breach of the administration bond. It is conceded that the "sealed obligation" declared on is the same debt for which the judgment was recovered at fall term, 1869. The defendant insists that having obtained a judgment against all the makers of his note, it became merged in the judgment as being a security of higher dignity, and could not therefore constitute a good cause of action in any suit subsequently instituted, and hence he

argues that the plaintiff can only complain of the non-payment of the judgment as a breach of the administrator's bond, and as that was obtained in 1869 the case falls under section 34 of the Code, which limits actions against the sureties of executors, administrators and guardians on the official bond of their principal to three years *after the breach thereof complained of.* We cannot yield our assent to the position assumed by the defendant or the conclusion he deduces therefrom. Every administrator owes the duty of faithfully administering the assets that come to his hands, and any default in that duty constitutes a breach of his official bond, which then and there gives to the creditors and others interested in a proper administration a sufficient cause of action against him and his sureties; and this breach of his bond can be cured only by a full satisfaction or by a release. Very sure it is, we think, that it cannot be cured or in any wise affected, by any change short of actual payment, which may occur in the mere form or character of a claim against the estate. The dereliction of duty, for which the administrator and his sureties are chargeable and the one assigned is the misapplication of the assets of the estate in December 1859, by making distribution thereof amongst the legatees without refunding bonds from them; and the moment this occurred each creditor had a right of action on the bond—the plaintiff amongst others—which right continued to subsist notwithstanding his claim against the estate might subsequently assume the shape of a judgment. Can there be a doubt that after such breach, the plaintiff might have brought and maintained cotemporaneous actions against the makers of the bond for money and the parties to the administration bond? And that the pendency of one such action could not be pleaded in abatement of the other? Suppose such actions to have been brought and pending together, and the one on the "sealed obligation" conducted to judgment, could that fact be pleaded

in bar of the other action? Even if such judgment had been taken and satisfied, it would still be ineffectual to cure the breach on the bond, but could only be used in mitigation of damages. *White* v. *Smith*, 2 Jones, 4. As we understand the doctrine of *merger*, it has no application to a case like the present. The courts, in order to discourage superfluous and vexatious litigation, have adopted a rule that a judgment recovered in any court of record upon any cause of action, is a bar to another action between the same parties and for the *same cause*—and this purely because it would be useless as well as vexatious to subject the defendant to another suit for the purpose of obtaining the same result. But this rule is never so applied as to deprive a party of any substantial advantage; and no cause of action, save that one actually declared upon, is, or can be, merged in any judgment that may be rendered in any cause, however nearly related the two may be or dependent the one upon the other. See Smith on Contracts, 19, and Freeman on Judgments, 190. But even if this were not so, we should feel ourselves constrained, by section 46 of the code, to hold that the plaintiff was saved from the bar of the statute during the continuance of the injunction granted at spring term, 1870, in the case of the creditors' bill by ..... and the plaintiff against the administrator Woodfin and the infant devisees of McDowell. The court which granted that injunction was one of competent jurisdiction and the cause was regularly constituted before it. Why should not full force and effect be allowed to its decree? The defendant says it was inoperative, because no facts were stated, in the complaint filed in the cause, to show that such an order was proper; no prayer for it; no affidavit filed as a basis for it; no undertaking given, and, withal, it was done at the instance of the plaintiff himself—who should not be allowed thus to tie his own hands and then make that an excuse for his inaction. But the defendant fails to observe the distinction between an injunction

asked for by a plaintiff, for the purpose of staying proceedings at law, and the one that is ordinarily issued when a creditor's bill is filed against an executor or administrator for an account of the assets and a settlement of the estate. An injunction of the kind first mentioned is an extraordinary remedy, and it must not only be specially asked for, but the court must be satisfied by the affidavit of the party or other proof that there exists reasonable grounds for issuing it. But in the case of a creditors' bill, such as the one under consideration, the injunction is not usually sought by the creditor suing, but by the personal representative, for his own relief and benefit of the estate. The practice of the court of equity in such case is thus stated in 1 Story's Eq. Jur., § 549: "As soon as the decree to account is made in a suit brought in behalf of all the creditors, and not before, the *executor or administrator is entitled to an injunction* to prevent the creditors from suing him at law, or proceeding in any suits already begun, except under the direction and control of the court of equity," and the object of the decree is said to be to compel all the creditors to come in and prove their debts before the master and to have the proper payments and discharges made under the authority of the court; so that the executor or administrator may not be harassed by a multiplicity of suits, and the fund wasted in costs or a race of diligence be encouraged between different creditors, each striving for an undue preference or advantage—thus showing that in such cases it is the executor or administrator, and not the suing creditor, who usually asks for the injunction and that it is granted for the relief of the estate and the benefit of all creditors alike; and upon an examination of the precedents we do not find that, except in some few cases in which some unusual relief was sought, it has been the practice to incorporate in the bill a prayer for an injunction. It is true that, in order to prevent any abuse of such bills by improper connivance between the

representative of the estate and a creditor, it is the common practice to grant the injunction only when the answer is filed under oath, or the motion for it supported by an affidavit as is stated by the author last quoted and by this court in the case of *Simmons* v. *Whitaker*, 2 Ired. Eq., 129; and as the answer of the administrator Woodfin was not sworn to, it must be conceded that so far the court proceeded irregularly; but that did not render the decree void and ineffectual so as to justify its utter disregard.

But it is further urged for the defendant that inasmuch as the plaintiff had, prior to the filing of the creditors' bill, recovered an absolute judgment against the administrator, thereby fixing him with assets, it was not within the power of the court of equity to deprive him of the fruits of his diligence and enjoin his proceeding under his judgment at least against the administrator personally and his sureties, and we are referred to the case of *Burles* v. *Popplewell*, 10 Sim. 383 (16 Eng. Chanc. Rep.), in support of this position. Had this creditors' bill been filed by any other than the judgment creditor himself, and the application to stay proceedings under the judgment had proceeded either from the administrator or other creditor, then it would be true that the court while it might have restrained the plaintiff from enforcing his judgment against the testator's assets, would have left him to pursue his remedy against the administrator personally and his sureties; and the case cited is full authority to that extent, as is also the case of *Drewry* v. *Thacker*, 3 Swanston, 529, where LORD ELDON declared that he knew of no instance where proceedings at law had been restrained after judgment absolute against the personal representative of the estate on a decree for the administration of assets subsequently obtained.

But in our case the creditors' bill was filed by the judgment creditor himself, who thereby voluntarily submitted his cause to a court of equity, which court might very

well suspend his remedy against the administrator personally, until the true state of the assets could be ascertained upon the account to be taken by the master; and if suspended as to him, it is not to be expected that such a court would allow it to be pressed against his sureties—all parties being then before the court. So that our conclusion is that in no point of view is the plaintiff's action barred by the statute of limitations.

This then brings us to the consideration of the character of the plaintiff's judgment, recovered in 1869, and of the power of the court in 1878 to amend the record of that judgment; and upon these two points as suggested by *Mr. McCorkle* in his argument for the plaintiff the whole case hinges.

If as rendered it was but a judgment *quando*, it amounts to an admission of record that the administrator, then, had not and ought not to have had any assets of the estate in hand, which estops the plaintiff from now asserting the contrary; and inasmuch as he makes no suggestion that assets have since come to hand and assigns no subsequent breach of the conditions of the bond, it must be that his action must fail. In the uncertainty as to the real character of the judgment, growing out of the inconsistent and contradictory entries upon its dockets, the law imposed the duty of determining the question upon the court in which the judgment was rendered and lodged with it alone the power to make the records consistent in themselves and with the truth. It is the duty of every court to supply the omissions of its officers in recording its proceedings and to see that its record truly sets forth its action in each and every instance; and this it must do upon the application of any person interested, and without regard to its effect upon the rights of parties or of third persons; and neither is it open to any other tribunal to call in question the propriety of its action or the verity of its record as made. This power of a court

to amend its records has been too often recognized by this court, and its exercise commended, to require the citation of authorities—other than a few of the leading cases on the subject. See *Phillipse* v. *Higdon*, Busb. 380; *Foster* v. *Woodfin*, 65 N. C., 29; *Mayo* v. *Whitson*, 2 Jones, 231; *Kirkland* v. *Mangum*, 5 Jones 313.

It is to be observed that it is not, as His Honor below seems to have considered it to be, a motion to relieve a party from a judgment taken against him through his mistake or excusable neglect; for then it would have come within the scope of section 133 of the Code, and must, as suggested by the judge, have been made within one year after notice; but it was a motion to *amend*, not the action of the court, its judgment or its process, but simply its record as inadvertently made by its officer, and there is no length of time which will bar this power of the court or relieve it of the duty of exercising it. The court as presided over by His Honor Judge Cloud, in 1878, after hearing evidence and argument, found as a fact that the judgment as originally intended and as actually delivered by the court was a *quando* judgment; and it would have been derelict in its duty, if after this, it had allowed its record to perpetuate the false entry of a judgment absolute. But should it be conceded that Judge Cloud was mistaken in his finding of the facts of the case, and in his conclusions of the law in regard to his power and duty in the premises, still there was no appeal from his order, and it would seem that until reversed in a direct proceeding to that end, it must be conclusive as to all the world; and sure it is, we think, beyond all cavil that the court of Catawba could not reverse an order of the court in Burke, touching its own record and made in a cause not then before the former court.

But it is said that the amendment, though ordered, was not in fact made, and the record of the judgment stands as before and can only be considered as written. It is undoubt-

edly true that it was the duty of the clerk of the superior court of Burke, so soon as the order of amendment was made, to have altered the record of the judgment as made in 1869, and not merely to have recorded the order directing the amendment. In this way only could the record of the court be made to appear as it was intended by the court it should appear. But we are not prepared to say that a party shall lose the benefit of the court's order, because of the misprision of the clerk.

In the case of *Barnard* v. *Etheridge*, 4 Dev. 295, leave was granted the plaintiff to amend his writ, but no such amendment was actually made, and the case afterwards coming before the court, Judge GASTON, in delivering its opinion, said that the court could not tell whether or not the party had availed himself of the leave given him and could not therefore treat the order as being equivalent to the amendment itself. But in our case there was no mere leave given to make the amendment but a positive order commanding it to be made, leaving nothing to the election of a party and no further step to be taken by him in the premises. This point however we do not determine, for upon looking to the case, we find no such point was taken in the court below, but His Honor was permitted to consider this branch of the case only in connection with the question as to the power of Judge Cloud to allow the amendment, and if his order had been executed; and it would be just, neither to the court nor the defendant to allow the plaintiff now to shift his ground of objection. Had it been raised in the court below, it might have been in the power of the defendant to remove all ground for it by procuring the amendment to be actually made and certified, during the progress of the trial, as was done in the case of *Marshall* v. *Fisher*, 1 Jones, 111.

There is still one other point made for the defendant, which, while we have somewhat considered it, we do not wish to be understood as determining; and that is the right

of the plaintiff, a creditor suing upon the bond of the administrator Woodfin for a *devastavit* committed by him, to revive his action, after the death of Woodfin, by making the administrator *de bonis non* of the original testator a party defendant. It is a difficult question. So difficult, that when before the court in *Conrad* v. *Dalton*, 3 Dev., 251, the late learned Chief Justice HENDERSON declared he was at a loss to say what should be done; and it is too important to be lightly determined, or until an actual necessity arises, when we may hope to have a full court to pass upon it. In the present case it is not necessary to decide it, because, even if we concede the right to the plaintiff, he cannot maintain his action for other reasons given—differing, it is true, from those assigned by his His Honor in support of his judgment, but leading to the same conclusion.

No error. Affirmed.

MARGARET MILLER v. T. B. LASH and others Adm'rs.

Master and Servant—Implied Contract—Statute of Limitations.

1. Where services are performed by one person for another under an express or implied contract that the party receiving the service will provide compensation in his last will, and the latter dies without making such provision, an action will lie on a *quantum meruit* for the reasonable value of such services, freed from the operation of the statute of limitations, such action not being maintainable until after the death of the party liable.
2. Where services are given in the mere expectation of a legacy, not founded on contract, no action can be sustained for their value when such expectations are disappointed.
3. Where services are rendered for a series of years under no definite contract as to duration, rate, or mode of compensation, other than that

implied by law, the promise which the law implies is to pay for such services as they are rendered, and the statute of limitations begins to run then, or at least, from the end of the year in which they were performed.

4. In an action against an administrator for personal services rendered his intestate by the plaintiff, it appeared in evidence that the services were of considerable value and highly estimated by the intestate, who declared his intention of compensating plaintiff in his will; and further, that plaintiff had frequently declared that she was not working as an hireling: *Held*, that the evidence authorized an inference involved in the verdict of the jury, that the services were not gratuitous, but did not justify the finding, in effect, of a mutual understanding as to the terms and conditions of plaintiff's service, so as to remove the bar of the statute of limitations.

(*Hauser* v. *Sain*, 74 N. C., 552, cited and commented on.)

CIVIL ACTION tried at Fall Term, 1880, of DAVIDSON Superior Court, before *McKoy, J.*

Verdict and judgment for plaintiff, appeal by defendants.

Messrs. J. M. McCorkle, Starbuck and *Bailey*, for plaintiff.
Mr. J. M. Clement, for defendants.

SMITH, C. J. In this action the plaintiff seeks to recover from the defendants, administrators of I. G. Lash, compensation for services rendered their intestate in the management and supervision of his domestic affairs and providing for his servants at Bethania, for a series of years succeeding 1849; and also for her special personal care and attention to the intestate himself, at his residence in Salem, for more than two years and a half preceding and until his death on April 17, 1878. The summons was sued out, after an ineffectual demand, on the 30th day of September following. There was much testimony offered to show the nature and value of the plaintiff's services, and the high estimate put upon them by the deceased, but there was no evidence of any special contract or understanding between the parties

as to their duration or compensation; and the defendants insisted, from their relations and dealings with each other, as disclosed by the witness, it was to be inferred that what was done by either was intended to be and was gratuitous; and they further contended that, if the plaintiff was in law entitled to remuneration, she could recover for such services only as were performed within three years next preceding the bringing of the action. There was proof of declarations of the intestate of his high appreciation of the plaintiff's services, of their extent and usefulness, and of his intent to make a liberal provision for her in his will on account of them; and of her declarations to the effect that she was not acting as a hireling nor to be rewarded as such. It was also shown that at the intestate's instance, a paper writing was produced on one occasion, bearing his signature, and then attested in his presence by a witness. The instrument was not read by the witness nor explained by the deceased, and he knew nothing of its nature or contents.

Numerous exceptions were taken during the trial, which, with the testimony (much of it wholly irrelevant to the points presented) reiterated with equal particularity of detail in the case prepared on the appeal accompanying the record. But it is necessary in our view of the case to notice and pass upon one only—that arising on the defense under the statute of limitations.

Among the instructions prepared by the plaintiff's counsel and presented to the court to be submitted to the jury, the third is in the following words: If the jury believe that the plaintiff was to serve the defendants' intestate for no certain or determinate time, and not from year to year, then no part of the claim for services is barred by the statute of limitations. The court so charged, adding, "if the services were to be paid for by the week, month or year, then the statute will bar the action for all sums which were due to be paid three years prior to the bringing of the action: if

the services were to be continuous, and no amount fixed to be paid, and no time fixed for payment, the statute will not begin to run until the death of the intestate."

The defendants' counsel requested and were refused this modification: "In the absence of express contract a right of action accrued, as the services were rendered on the implied promise, and, as there was no credit, the law implied that every day's service was to be paid for what it was worth."

To these rulings exception is taken, and out of them arises the question we propose to examine, which is, whether services thus rendered for a series of years under no definite contract as to duration, rate, or mode of compensation, other than that implied by law, are without the operation of the statute of limitations until put an end to by the death or positive act of one of the parties?

The authorities cited in the argument for the plaintiff seem to establish the proposition that where personal services are performed by one person for another during life under a contract or mutual understanding, fairly to be inferred from their conduct and declarations and the attending circumstances, that compensation therefor is to be provided in the will of the party receiving the benefit of them, and the latter dies intestate or fails to make such provision, the subsisting contract is then broken, and not only will the action then lie for the recovery of their reasonable value freed from the operation of the statute, but it could not be maintained before. It is equally plain that if the services were given in the mere expectation of a legacy, without a contract express or implied, and in reliance upon the gratitude and generosity of the deceased, the action cannot be sustained. *Little* v. *Dawson*, 4 Dallas, 111; *Sevires* v. *Parsons*, 5 W. & S., 357; *Nimmo* v. *Walker*, 10 La. An. Rep., 581; *Riddle* v. *Backus*, 38 Iowa, 81.

In *Osborne* v. *Governors of Guy's Hospital*, 2 Strange, 728,

Chief Justice RAYMOND told the jury that if the plaintiff did not expect to be paid for transacting certain stock affairs of the deceased, but to be considered for it in his will, "they could not find for the plaintiff, though nothing was given him by the will, for they should consider how it was *understood by the parties at the time of doing the business*, and a man who expects to be made amends by a legacy cannot afterwards resort to his action."

In *Patterson* v. *Patterson*, 13 John., 379, VAN NESS, J., delivering the opinion of the supreme court of New York, in a case where the evidence showed the existence of such mutual understanding as to the mode of remuneration, and suit was instituted, during the life of the recipient, remarks: "The defendant is bound to make, and it is presumed will make, such a provision for the plaintiff in his will as will do him perfect justice, and which may be perfectly satisfactory to him, or which, in judgment of law, may amount to a satisfaction." He adds that, upon failure, the plaintiff can maintain his action upon a *quantum meruit*, but he cannot until such failure occurs. This statement of the law is substantially embodied in the second of the series of instructions asked and given, and would not be obnoxious to complaint if there were evidence of facts to which it would properly apply. But the testimony does not disclose any definite agreement or such facts as warrant the deduction of a common or mutual understanding, so as to make a contract broken by intestacy and give legal validity to the demand. Certainly frustrated expectations of a bounty, not the offspring of agreement, furnish no ground in support of an action. The evidence does, however, authorize the inference involved in the verdict and necessary to its support, that the services were not, nor intended to be, gratuitous, although there was none to enable the jury to solve the inquiry contained in the third instruction, upon the answer to which is made to depend the applicability of the statutory

bar to any part of the claim, extending as it does over a period of twenty-nine years. There was no evidence as to the terms of the implied contract, the sole proof being that valuable services were performed for the intestate during that long interval for which remuneration is due.

The question then is, is it to be assumed in the absence of evidence that compensation is not to become due at definite periods, and does become due at and not before the intestate's death, and thus the statute remain inactive during his life. Such was the charge, as we understand it, asked and substantially given with the explanatory supplement. At least such seems to have been its practical effect in guiding the jury to their verdict.

This view of the law is sustained in the remarks of the late Chief Justice (erroneously ascribed to Justice RODMAN in the reports,) delivering the opinion in *Hauser* v. *Sain*, 74 N. C., 552, where the facts were somewhat similar and the statute had been held in the court below to exclude all claim for labor performed more than three years before the commencement of the suit. He says, "His Honor erred in ruling that the plaintiff's right of action was barred by the statute of limitations, except as to the last three years. There was no reference to the number of years that the plaintiff was to render his services, nor was she to perform those services from year to year. So it was indefinite as to time, and her right of action did not accrue until her service terminated by the death of her grandfather."

This exposition of the law proceeding from a judge so thoroughly familiar with its principles, and entitled to great consideration, was given nevertheless upon a ruling adverse to the plaintiff and which was not before the court for review upon the defendant's appeal. It is but an expression of opinion upon an incidental question not presented in the appeal, and has not the force of an adjudication upon the point. It contravenes moreover the decision of the judge

who tried the cause in which the plaintiff's counsel acquiesced, in not asking for a review or correction. It is however in consonance with the ruling of the supreme court of Indiana, which sustains and approves the following charge to the jury: "If the plaintiff performed labor for the defendant's intestate under an agreement to be paid therefor, without specifying at what time such payment should be made, or how long such labor should be performed, then the statute of limitations would not commence running until such labor was ended." *Lettler* v. *Smiley*, 9 Ind. 116.

The contrary view has been taken in other cases of the legal consequences of the rendition of services wholly indefinite in time and rate of compensation.

In *Baxter* v. *Neuse*, 3 Term Rep. 10, TINDALL, C. J., thus declares the law: "The general rule of law is that, when there is nothing to contradict, if a person engages another upon a service, that is, in its nature, a lasting and enduring service, the engagement is for a year; but the law always looks at the nature of the contract as affected by usage in determining its import."

In *Davis* v. *Gordon*, 16 N. Y., 258, JOHNSON, J., reviewing the report of the referees upon exceptions, then proceeds as follows: "The referees have found that no time was fixed for the termination of the employment, nor for the payment therefor, and that the services in question were rendered under a general employment and retainer, and that they were continued without interruption from their commencement to their termination, a period of thirteen years. The referees have not found that the services were performed under a contract, that they should be paid for after Morris' death in case he did not provide by will for the compensation of the parties who rendered them; but *they are placed upon the mere ground of service, to be paid for at their value without any express agreement as to the time or measure of compensation or the time of employment.* The law will not, I think, in-

tend in respect to permanent and continuous employment, an agreement as to compensation, so unusual in its character, and so little conducive to the interests of either party to it, as that the payment of any compensation shall be postponed until the termination of the employment. *We think it should be deemed a hiring by the year.*

So Chief Justice THOMPSON, of the supreme court of Pennsylvania, in trying a cause before the jury, where the facts were not unlike those in the present case and quite as favorable to the plaintiff, charged them upon this point, in these words: "If there were nothing more in the case than simply that the plaintiff entered into the employ of the decedent, seven or more years ago, without any definite arrangement between them as to the amount of wages or as to time for compensation, then the law would imply that she was to be paid what her services were fairly worth; that would be for you to determine, and *the law would imply that she was to be paid for these services from time to time as they were rendered.* In the event of the merely implied contract between the parties, *the plaintiff could not recover for the whole time of her services, because here the statute of limitations steps in and limits her recovery to what her services were worth during a period of six years prior to the time of suit brought.*"

There was no exception to this ruling in the appeal, the counsel acquiescing in it as in the case in our own reports.

In this conflict of opinion we are disposed to adopt as the more correct exposition of the law applicable to the facts, that for indefinite and continuous services payment may be required *toties quoties*, otherwise no action would lie until death, or perhaps until an end is put to the relations subsisting between the parties by the act of one of them, and hence, there being no default before, interest cannot accrue on detached parts of the demand. The allowance of interest is incompatible with the supposed unity of the implied promise, which is thus put beyond the reach of the statute.

We are of opinion then that the unexplained fact of labor performed and extending over a series of years raises no implication that payment is to be made at any fixed period, unless perhaps annually, as controlled by a prevalent custom appropriate to the kind of service and entering into the contract, when it so appears in evidence. The implied promise is to pay for services as they are rendered, and payment may be required whenever *any are rendered;* and thus the statute is silently and steadily excluding so much as are beyond the prescribed limitation.

There was error then in allowing the jury to find without evidence the terms and conditions of the implied contract, and thus place the claim wholly outside the statutory bar, and there must be a new trial, and it is so ordered.

Let this be certified.

Error. *Venire de novo.*

JOHN C. KING and wife v. HENRY UTLEY.

Construction of Will—Rule in Shelley's Case.

A testator, dying in 1837, devised as follows: "I leave to my daughter C, the tract of land that I bought of H., to her, her natural life, and after her death, I give the same to her heirs forever." In another clause of the will there was a similar bequest of personal property.

Held, that the word "heirs" was one of limitation, and not of purchase, and the daughter took an estate in fee.

(*Folk* v. *Whitley*, 8 Ired., 133; *Sanderlin* v. *Deford*, 2 Jones, 74; *Coon* v. *Rice*, 7 Ired., 217; *McBee ex parte*, 63 N. C. 332; *Worrell* v. *Vinson*, 5 Jones, 91; *Zollicoffer* v. *Zollicoffer*, 4 Dev. & Bat., 438; *Floyd* v. *Thompson*, *Ib.*, 478, cited and approved.)

CIVIL ACTION to recover land heard at Fall Term, 1881, of WAKE Superior Court, before *Gilmer, J.*

Judgment for defendant, appeal by plaintiff.

Messrs. A. M. Lewis & Son, and *J. H. Fleming*, for plaintiff.
Messrs. Battle & Mordecai, for defendant.

SMITH, C. J. The single question presented in the case agreed upon which judgment was rendered for the defendant in the court below, arises upon the construction and operation of the following clause contained in a codicil to the will of Woodson Clements:

"I loan to my daughter, Candis Utley, the tract of land that I bought of Henry Utley, lying on Buck branch, to her, her natural life, and after her death, I give the same to her heirs forever."

The testator executed his will and died in the year 1837. The feme plaintiff is the daughter of the devisee and the defendant, who upon the death of his wife in the year 1880 has since remained in possession, claiming the premises as tenant by the curtesy. The portion sought to be recovered in the action was assigned in severalty to the plaintiff in a proceeding for partition between herself and co-tenants who claim the estate in remainder, to which the defendant was not a party. The controversy is as to the legal effect of the terms of the devise: if it be to vest in the said Candis an estate in fee, the defendant is rightfully in possession; if an estate for her life only, with remainder to her children, the plaintiffs are entitled to recover.

The body of the will contains a bequest in terms not dissimilar—"I lend unto my daughter, Candis Utley, during her natural life, one negro girl, named Annis, together with all her future increase, and after the death of the said Candis Utley, I give the said negro girl, Annis, to the heirs of the body of the said Candis forever." There are no other provisions in the instrument to guide in interpreting these clauses and ascertaining the legal intent of the testator.

The words employed are clearly and directly within the

rule established in *Shelley's* case, and which has been repeatedly recognized as the common law in force in this state. The rule is in substance that when a freehold is given to one and by the same gift a limitation is made to his heirs or the heirs of his body, the inheritance vests in him and not in his heirs. 1 Coke Rep., 93: 2 Jarman on Wills, 178; O'Hara Wills, 92; *Folk* v. *Whitly*, 8 Ired., 133; *McBee ex parte*, 63 N. C., 332; *Coon* v. *Rice*, 7 Ired., 217; *Worrell* v. *Vinson*, 5 Jones, 91. The act of 1827, which renders effectual limitations in a deed or will made after January 15, 1828, depending on the death of a prior deviseee without heirs, heirs of the body, issue, issue of the body, children, offspring, or other relation, which were previously held to be too remote and void, does not interfere with the application of the principle in determining the nature and extent of the precedent estate. This is declared in *Sanderlin* v. *Deford*, 2 Jones, 74, in construing a will executed in 1838.

The legal import of a limitation over to the heir or heir of the body is the same in this state, since the estate-tail created at common law by the superadded words *of the body*, is converted by the act of 1784 into an estate in fee, and there is but a single inheritance produced by the use of either expression. *Zollicoffer* v. *Zollicoffer*, 4 Dev. & Bat., 438; *Floyd* v. *Thompson*, *Ib.*, 478.

The section introduced in the Revised Code which went into operation on January 1, 1856, declaring "that any limitation by deed, will, or other writing to the heirs of a living person, shall be construed to be the children of such person, unless a contrary intention appear by the deed or will" (ch. 43. § 5), whatever may be its effect upon instruments of writing thereafter executed, cannot change or control the construction of the present will, or impair the vested estate then devised under it. The estate in fee then became absolute and fixed in the said Candis, and is unimpairad by any subsequent legislation.

It must be declared that the defendant as tenant by the curtesy is entitled to an estate for his life in the said land, and there is no error in the ruling of the court below.

No error. Affirmed.

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*HENRY W. PATRICK and others v. J. T. MOREHEAD and others.

Construction of Will—Power—Rule in Shelley's Case.

1. A devise of an estate generally or indefinitely, with a power of disposition over it, carries a fee; but where the estate is given for life only, the devisee takes only an estate for life, though a power of disposition, or to appoint the fee by deed or will, be annexed.

2. A testator devised as follows:—"I give unto my grandson, J. D. P., the plantation known as the old 'Iron Works,' to hold during his lifetime, and if it shall so happen that he has any lawful heirs, I give it to them or any of them that he may think proper; and should it so happen that he dies without any lawful issue, for the land to be equally divided among all my grandchildren." At the death of testator J. D. P. was about fourteen years of age and unmarried; and at the date of the will the testator's son, J. P., and daughter, M. F., had children then living;

Held, that J. D. P. took a life estate only, and that the remainder in fee vested in his children as purchasers.

(*Alexander* v. *Cunningham*, 5 Ired., 430; *Bass* v. *Bass*, 78 N. C., 374; *Allen* v. *Pass*, 4 Dev. & Bat., 77; *Ward* v. *Jones*, 5 Ired. Eq. 400, cited and approved.)

CONTROVERSY without action under section 325 of the Code, for the construction of a will, heard at Fall Term, 1880, of ROCKINGHAM Superior Court, before *Eure, J.*

Case agreed.—The facts agreed upon are as follows: James

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

Patrick, Sen., late of Rockingham county, died in the year 1835, having first made and published his last will and testament, bearing date the 28th of March, 1835, which was duly admitted to probate at May term, 1835, of the county court of said county. He died seized and possessed of the land in dispute.

In the third clause of his will he devised as follows: "I give unto my grandson, James Dillon Patrick, the plantation known as the old 'Iron Works,' containing about eight hundred acres of land, to hold during his life time, and if it shall so happen that he has any lawful heirs, I give it to them, or any of them that he may think proper; and should it so happen that he dies without any lawful issue, for the land to be equally divided among all my male grandchildren. I likewise give him my three negroes, York, Jane and Bob, together with all the plantation tools, one set of smith-tools and carpenter-tools, and I give my executors privilege to sell all the stock at the old Iron works, either publicly or privately, discretionary with themselves, and the money thence arising I give to my grandson, James D. Patrick."

At the time of the testator's death, James D. Patrick was an infant about fourteen years of age and unmarried. He died about the first of May, 1879. About the year 1849 or 1850, several creditors recovered judgments against him amounting to some $579, upon which executions issued and were levied upon the land in controversy, and the interest of the said James D. in the same was sold by the sheriff and bought by James T. Morehead, Sen., (deceased) and John A. Gilmer, (deceased) and Gilmer conveyed his interest in the land to Morehead, Sen.

The plaintiffs are the children and only heirs at law of the said James D. Patrick, and the defendants are the only heirs at law of James T. Morehead, Sen.

At the date of testator's will, his son James Patrick and

his daughter Mary Foulkes, each had children then living. The land on the first of May, 1879, was assessed at $5,000, which is a reasonable valuation, and the net yearly value since that time is $111.33.

Upon this state of facts it was agreed, if the court shall be of opinion with the plaintiffs, then they are to have judgment for the recovery of the land and for $—— damages, for rents and profits thereof and for costs, but if the court shall be of opinion with the defendants, they are to have judgment.

The court thereupon adjudged, first, that the plaintiffs have not the title to the land described in the case agreed; and secondly, that defendants have the fee simple title to the same; and from this judgment the plaintiffs appealed.

Mr. E. S. Martin, for plaintiffs.
No counsel for defendants.

ASHE, J. This case comes up by appeal from a judgment rendered in the court below on a statement of facts agreed upon by counsel in a controversy submitted without action. The statement contains the following clause in the last will and testament of James Patrick, Sen., namely: "I give to my gandson James D. Patrick, the plantation known as the old 'Iron Works,' containing about eight hundred acres of land, to hold during his life time, and if it shall so happen that he has any lawful heirs, I give it to them or any of them that he may think proper; and should it so happen that he dies without any lawful issue, for the land to be equally divided between all my male grandchildren."

The plaintiffs claim that James D. Patrick, their father, under the third clause of his grandfather's will took a life estate in the land, and they, the remainder in fee simple after his death; and that the sheriff's deed to Morehead and Gilmer conveyed only the interest of James D. Patrick,

which terminated at his death on the first of May, 1879. The defendants on the other hand resist this construction of the will, and claim that James D. Patrick by the devise to him acquired an absolute estate in the land, and that they as heirs of James T. Morehead, deceased, have the fee simple title. And we are now called upon to determine the true construction of the above recited clause in the will of James Patrick, Sen., and to decide whether James D. Patrick took thereby an estate in fee simple or only an estate for life with remainder to his children or descendants.

It is the well settled rule in the judicial construction of wills, that the intention of the testator shall prevail unless it contravenes some established principle of law. It is therefore our duty to ascertain what the intention of the testator was, and to effectuate that intention if warranted by law in so doing.

There perhaps is no branch of the law that has given rise to more conflicting decisions, or a greater display of legal learning, than the application of the rule in *Shelley's* case to the construction of deeds and wills. But fortunately in this case we are not compelled to grope our way through the mist with which the subject has been enveloped by the many clashing decisions, to reach what we conceive to be the correct interpretation of the will under consideration. A few decisions of our own court with some others lead, we think, to a satisfactory solution of the question.

It has been settled upon unquestionable authority, that if an estate be given by will to a person generally with a power of disposition or appointment, it carries the fee; but if it be given to one for life only and there is annexed to it such a power, it does not enlarge his estate, but gives him only an estate for life.

In the case of *Jackson* v. *Robbins*, 16 Johnson Rep., 537, the court say: "We may lay it down as an incontrovertible rule that where an estate is given to a person generally

or indefinitely with a power of disposition, it carries a fee, and the only exception to the rule is where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposition. In that particular and special case, the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion."

In this state in the case of *Alexander* v. *Cunningham*, 5 Ired., 430, which was a petition for dower, depending upon the construction of a will which read, "I will to my son, M. W. Alexander, all my estate, real and personal, for his use and benefit and then to be divided off and distributed among his children, as he may think proper, that is to say, my land to be used by him and the profits thereof to be to him, but the land to be by him divided and distributed as he may think proper," Chief Justice RUFFIN in delivering the opinion of the court, said: "We are of the opinion that the son took but an estate for life, with the power of dividing the land and the other property within his life-time or at his death among his children as purchasers from the testator; and that until such an appointment, the remainder in fee either vested in the children, or descended to the heirs of the testator. *It is very clear that where there is an express estate for life to one, and a power to him to appoint the estate among certain persons, the first taker gets but an estate for life.*" Same principle in Sugden on Powers, 15 Law Lib., 66; *Bass* v. *Bass*, 78 N. C., 374.

It is true the word employed in the will in *Alexander* v. *Cunningham* was "children," but that does not affect the appositeness of the authority, for it is evident the testator in this will did not use the words "lawful heirs" in their technical sense, but as synonymous with issue or children. The father, the brothers and sisters, and aunt of James D. Patrick, were all alive at the date of the will. Several of them were the objects of the testator's bounty. He knew if James

D. died immediately after the publication of his will that his brothers and sisters would be his heirs, and the very male grandchildren, to whom the estate was devised in the event of James D. Patrick's dying without issue, would have been his heirs, if all others standing in nearer degree had died before him. If he meant heirs general, why say "if it should so happen that he has any lawful heirs," &c., knowing at the time that the persons were then living who must be his lawful heirs, in the event of his dying, and that he must continue to have such heirs, so long as those to whom the land was limited in remainder continued to live. The words "if it shall so happen," &c., refer to the future, not to the class of heirs the devisee then had, but to a class yet to come into existence, and who could only be composed of his lineal descendants. If this be so, and we think it is too plain to admit of controversy, then the will should be construed, as reading, I give unto my grandson, James D. Patrick, the plantation, &c., to hold during his life-time, and if it should so happen that he has any heirs of his body, I give it to them, or any of them that he may think proper, &c. And if the devise had stopped with the words "I give it to them," it would have been a case clearly falling within the rule in *Shelley's* case, and by operation of the act of 1784, the defendants would have a title in fee simple. But the superadded words "or any of them that he may think proper," have an important bearing upon the question of interpretation, and we think prevent the application of the rule.

In *Allen* v. *Pass*, 4 Dev. & Bat., 77, Judge GASTON used the following language: "Before the application of the rule in *Shelley's* case, it is always proper first to ascertain whether, on the true interpretation of the words of the gift, there is a limitation of the inheritance in remainder to the *heirs*, or to the *heirs of the body*, of one to whom a precedent estate is given—such a limitation does exist when the limitation is to them in the *quality of heirs*—embracing the same num-

ber—in succession of objects and conferring the same extent of interest, as would be embraced and conferred when the inheritance has been limited to the ancestor." He proceeds to say that when these requisites are embraced in the terms of a devise, the rule in *Shelley's* case applies. But he adds: "On the other hand, as the law will not entrap men by words incautiously used, if in the limitation of a remainder by any instrument of conveyance, the phrase *heirs* or *heirs of the body* be expressed, but it is unequivocally seen that the limitation is not made to them *in that character*, but simply as a number or class of individuals thus attempted to be described, then the whole force of the phrase is restricted to this designation or description—it shall have the same operation as the words would have, of which it is the representative; there is not in fact a limitation to *heirs*, and of course there is no room for the application of the rule."

And in the more recent case of *Ward* v. *Jones*, 5 Ired. Eq., 400, Chief Justice PEARSON says: "The rule in *Shelley's* case only applies where the *same persons* will take the same estate, whether they take by descent or purchase; in which case they are made to take by descent, it being more favorable to dower, to the feodal incidents of seignories, and to the rights of creditors, that the first taker should have an estate of inheritance; but where the persons taking by purchase would be different or have different estates, then they would take by descent from the first taker, the rule does not apply, and the first taker is confined to an estate for life, and the heirs, heirs of the body, or issue in wills take as purchasers."

In our case it was by no means certain when the will was made, whether one or more or all of the issue which Jas. D. Patrick might happen to have, would take the estate. It was in his power, if he would have, as he did, more than one child, to give the land to one of them; and that one would not have taken the same estate which he would have

taken if the land had come to him by descent, for in the latter case he would have taken as tenant in common with his brothers and sisters, but as appointee the whole estate would have vested in him; and we do not conceive that it can make any difference that the power has not, in fact, been exercised. It is the existence of the power that affected the quality of the estate. It could not be foreseen whether it would be exercised or not, but was enough to prevent the application of the rule, that the limitation to the heirs of the devisee was coupled with a power, the exercise of which would prevent them from taking the same estate they would have taken if the land had come to them by descent from him.

Upon the authorities above cited and the deductions we have drawn from them, we are of the opinion that the judgment rendered in the court below was erroneous and that the plaintiffs are entitled to the land described in the pleadings in fee simple. The judgment of the superior court of Rockingham is therefore reversed and judgment must be rendered in this court in behalf of the plaintiffs.

Error. Reversed.

CHARLES BRYANT v. JULIA FISHER, Admx.

Appeal—Practice—Issues—Award.

1. Where the facts of a case are to be passed on by the judge, an omission to find upon an issue claimed to be raised by the pleadings is not assignable for error, unless the judge was requested on the trial to pass upon such issue or his failure to do so then called to his attention.

2. A reference to arbitration of "all matters between the parties" justifies an award which declares that the defendant's intestate is indebted to the plaintiff in a certain sum, and directs the cancellation of two

mortgages from the plaintiff, put in evidence by the defendant, the debt secured by which was adjusted by the arbitrators.

3. Where such award is imputed to the bias of the arbitrators the bias must be found by the judge when the facts are referred to his decision, or he must refuse to pass on the same, on timely application, before the question will be considered on appeal.

(*Chastain* v. *Coward*, 79 N. C., 543; *Williamson* v. *Canal Co.*, 78 N. C., 156; *Bank* v. *Graham*, 82 N. C., 489; *Wellons* v. *Jordan*, 83 N. C., 371; *Kidder* v. *Mellheuny*, 81 N. C., 123; *Curtis* v. *Cask*, 84 N. C., 41; *Smith* v. *Hahn*, 80 N. C., 240, cited and approved.)

CIVIL ACTION tried at Fall Term, 1881, of WAKE Superior Court, before *Gilmer, J.*

This action is to enforce an award rendered upon an agreement of reference in the following words: In the matter between Charles Bryant and Mrs. Julia Fisher, administratrix of Jefferson Fisher, deceased. It is agreed that all matters between the said parties are referred to Samuel F. Mordecai and W. Whitaker, as arbitrators, who are to call in a third man, and the decision of any two of them to be final. (Signed by A. M. Lewis attorney for Bryant, and T. C. Fuller attorney for Mrs. Fisher). The appointees failing to agree, selected and called in C. D. Upchurch to act with them, and he and one arbitrator concurred in making an award, finding the defendant's intestate indebted to the plaintiff, upon an adjustment of their respective demands, in the sum of $222.07, to be paid with the costs. They further direct the cancellation of two mortgages executed by the plaintiff to the intestate, one on September 1, 1876, the other on April 1, 1877, the claims secured in which are allowed and adjusted in the award.

Two defences to the action are set up in the answer:

1. That the arbitrators exceeded the terms of the submission in passing upon and disposing of the mortgage debts; and

2. The award is not supported by the testimony and was made under a bias in favor of the plaintiff.

A trial by jury was waived, and the court by consent passing upon the facts finds that the arbitrators met and heard the proofs offered by both parties, and the two mortgages were produced by the defendant as charges against the plaintiff to the amount of the debts specified in each; that the arbitrators, Whitaker and Upchurch, agreed upon and united in making the award, the other arbitrator not assenting thereto; and thereupon the court rendered judgmemt in favor of the plaintiff and according to the award, and the defendant appealed.

Messrs. A. M. Lewis & Son and J. H. Flemming, for plaintiff.
Messrs. Merrimon & Fuller, for defendant.

SMITH, C. J., after stating the case. No case of appeal is transmitted, and the record discloses no assignment of error and no exception to the ruling of the court during the progress of the trial, or to the findings of fact, or to the judgment rendered. It has been too often decided to admit of discussion that points not made in the court below, except the want of jurisdiction or that the statements contained in the complaint do not show a cause of action, will not be heard in this court, and that where error is not apparent on the record, the judgment will be affirmed. The more recent cases in our reports are *Chastain* v. *Coward*, 79 N. C., 543; *Williamson Canal* v. *Company*, 78 N. C., 156; *Bank* v. *Graham*, 82 N. C., 489; *Wellons* v. *Jordan*, 83 N. C., 371.

1. It is pressed in argument for the appellant that the findings of fact are defective, in that, they do not dispose of the issue raised by the allegation that the arbitrators "were moved by bias" towards the plaintiff "in making up their decision." The objection would apply with equal force to the omission to frame an issue for the jury, for it is equally the duty of a party to call the attention of the judge to it where the facts are to be passed on by him, as where upon

proper issues they are to be passed on by the jury. And this court has said in answer to an objection that an issue ought to have been and was not submitted to a jury upon matters controverted in the pleadings, that the appellants ought not "to have been content with the proposed issues if they desired others. They should *then* have asked for other issues, and if necessary they should have been allowed, or if not allowed, the refusal would constitute matter of exception. It might produce serious inconveniences and delays, if where a party has opportunity to propose other and further issues, he refuses or fails to do so, he could then be heard to complain of the consequences of his neglect, and thereby increase the costs, as well as delay the determination of the cause." *Kidder* v. *McIlhenny*, 81 N. C., 123; *Curtis* v. *Cash*, 84 N. C., 41. When there is an omission to present matters of defence and the defendant acquiesces by his silence, it is a reasonable inference that they are not relied on by him in the court below, and consequently they are unavailable on his appeal.

2. It is insisted also that the award exceeds the limit of the reference and hence it is void: This objection, if the facts were as asserted, and the award was so essentially one that the excess could not be separated from so much of it as is within the terms of submission, would be open to the appellant, since both the agreement and the award under it are parts of the complaint, and there would be no cause of action upon the face of it. But the objection is wholly untenable. "*All matters between the said parties*" are committed to the arbitrators, without qualification, and the judge finds as a fact that the defendant introduced the mortgages and claimed what was due under them as a charge against the plaintiff. So the referees and the defendant put the same, and what we consider the proper, construction upon the submission and the subject matter referred.

3. The bias imputed to the arbitrators, if sufficient to

vitiate the action of the arbitrators in a direct proceeding to impeach it, is not established as a fact, and for the reasons already stated, is not before us.

The cases cited for the defendant do not militate against this opinion. That of *Smith* v. *Hahn*, 80 N. C., 240, the most pertinent, simply declares that on application to set aside a judgment under section 133 of the Code, the facts must be found, so that this court may review the ruling of the judge upon the point of law whether the judgment was taken "through his mistake, inadvertence, surprise or excusable neglect," and if the finding is so imperfect as not to admit of the decision of the question of law, the cause will be remitted for a fuller finding. We do not disturb this decision in holding that the facts established do warrant the judgment rendered upon the award.

There is no error and the judgment is affirmed.

No error. Affirmed.

J. T. HUNT and others v. WILLIAM SATTERWHITE.

Will, construction of—Tenant by the curtesy.

A testator devised land to a trustee for the benefit of his daughter and her children, she having two children when the will was made who survived the testator; *Held* that the devisees take a fee simple estate as tenants in common; and upon the subsequent death of the mother, the father is entitled to an estate for life as tenant by the curtesy in one-third part of the devised land.

(*Moore* v. *Leach*, 5 Jones, 88; *Gay* v. *Baker*, 5 Jones Eq., 344, cited and approved.)

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

The facts were agreed upon, and judgment rendered for the plaintiffs, from which the defendant appealed.

Messrs. Gilliam & Gatling, for plaintiffs.
Mr. W. H. Young, for defendant.

SMITH, C. J. The controversy in this action requires in its solution the construction of the following clause in the will of Jesse J. Kelly: I wish my old tract of land on the east side of Glebe road to be equally divided by a line running east and west; that portion on the south side of said line, I give in trust to John W. Kelly for the benefit of my daughter, Martha E. Satterwhite, and her children; that part of my old tract lying on the north side of said line, I give to my daughter, Sue A. Kelly.

The will was made on July 7th, 1865, and the testator died the next year, leaving him surviving the said Martha E., wife of the defendant, and their two infant children, Susan and George. Martha E. has since died, and afterwards her son George also, without issue, and his sister Susan is his sole heir at law. After the death of both, the latter intermarried with John McKeonn, and they (the wife being of full age) executed a deed of mortgage of said land, under the provisions of which it has been sold and conveyed to the plaintiff. The defendant claims an estate for his own life, as tenant by the curtesy in one undivided third part of the land, while the plaintiff contends that an estate for life only vested in the said Martha E. under the will, with remainder to her children, which under the deeds has been transmitted to him.

The only question to be determined is whether the devisees take the entire land as tenants in common, or in succession, the mother during her life, and the children the remainder in fee.

The rule of interpretation of such and similar words in *Wild's* case (6 Rep. 17) is concisely expressed thus: A devise to one and his children gives the parent an estate tail, if he has no children at the time of the devise; but if he then has children, he takes jointly with them, and under the operation of our statute, as tenants in common. O'Hara Wills, 814. The reason assigned for this method of construction is, that "the intent of the devisor is manifest and certain that the children or issue should take, and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder they cannot take, for that was not his intent, as the gift is immediate; therefore such words are taken as words of limitation." But if there are children or issue then in being, the express particular intent may take effect according to the common law, and will prevail unless a contrary intent appears in the will, and all will share equally in the devised estate.

This rule was recognized and enforced in *Moore* v. *Leach*, 5 Jones 88, the facts of which are essentially the same as those now before us. There, the devise of the houses and lots was to "Eliza Ann Leach (wife of John Q. A. Leach) and her children, to her the said Eliza and her children forever." At the time of making the will, the said Eliza had three children, all of whom survived the testator. Eliza and her husband conveyed the premises with warranty of title to the plaintiff. It was held that the mother and her children "should take together the houses and lots," as the devise was *in presenti* to her and her children forever. The rule of construction is reaffirmed and applied to a conveyance by deed in *Gay* v. *Baker*, 5 Jones Eq., 344, and it is declared that by force of such a gift, the mother and her children, including one then *in ventre* and excluding all born afterwards, were "entitled to the absolute estate in the trust fund *as tenants in common*."

There is no indication in the other provisions of the will

that the testator used the terms of this devise in any other than their common acceptation, as a present and direct gift to all the persons designated. Wherever there has been a different construction, admitting of estates in succession, it is based upon an intent that such should be the operation of the words of donation gathered from other parts of the instrument. No such intent is manifested elsewhere in the will. There is a devise of another tract in the preceding clause in language almost identical, "in trust to John W. Kelly *for the benefit of Martha E. Satterwhite and her children;* and again in the last clause, a bequest of a horse "to John W. Kelly in trust *for her (his daughter) and her children,*" thus uniformly associating them as common and equal objects of his proposed bounty.

The interposition of a trustee in whom the legal estate vests, is obviously to secure the property for the use of the married daughter and her infant children, and whether the terms employed are in law sufficient to create a separate estate in her, (a point to which the cases cited for the plaintiff are directed) they cannot change the import of the expression in apportioning the trust estate among the mother and her children.

The ruling of the court below is therefore erroneous and the judgment must be reversed, and we adjudge that the defendant has an estate for his own life in the one-third part of the devised land, and is entitled to possession.

Error. Reversed.

STEWART ELLISON v. FRANK RIX.

Pleading—Payment—Practice—Evidence.

1. The defense of payment being one which confesses the cause of action and seeks to avoid it by new matter, the party setting it up must plead and prove it.
2. Whether or not the loss of a paper has been sufficiently proved to admit parol evidence of its contents is a question for the court, but if the judge, not content with his ruling, leaves the matter to the jury, whose finding agrees with that of the court, there is no harm done, and therefore no error.
3. It is not error to refuse to charge that the failure to produce the subscribing witness to a note is evidence that it was never executed, when there is no evidence that there ever was a witness.

(*Wells* v. *Clements*, 3 Jones, 168; *State* v. *Revels*, Busb. 200, cited and approved.)

CIVIL ACTION begun before a justice of the peace and tried on appeal at Fall Term, 1881, of WAKE Superior Court before *Gilmer*, J.

The plaintiff filed the following complaint in which he alleged:

1. That defendant executed and delivered to plaintiff on the —— day of December, 1867, his bond under seal for the sum of one hundred and nineteen dollars, due and payable twelve months after date.

2. That no part of said bond has been paid and the same has been mislaid or lost and plaintiff after due diligence is unable to find the same.

Wherefore plaintiff prays judgment against the defendant for the sum of one hundred and nineteen dollars, with interest thereon from the —— day of December, 1868, together with costs.

A bond of indemnity was tendered and filed. The defendant answered:

1. He denies each and every allegation of section one of

the complaint, and says they and each of the same are untrue.

2. He denies each and every allegation in section two of the complaint, and says that they and each of them are untrue. Wherefore he demands judgment that he recover of the plaintiff his costs, and that the action be dismissed.

On the trial the following issues were submitted to the jury:

1. Did the defendant in December, 1867, execute his note to the plaintiff for $119? Ans. Yes.

2. Has said note been lost? Ans. Yes.

The defendant asked the court to submit the further issue, to-wit: Has the said note or any part thereof been paid? which the court declined to do, and the defendant excepted. After a good deal of evidence as to the loss of the bond, a witness began speaking of its contents. The defendant objected to any proof of the contents on the ground that the loss had not been sufficiently accounted for, but the objection was overruled, and the defendant excepted.

During the charge the defendant asked the court to tell the jury that inasmuch as no subscribing witness was produced or accounted for, this was evidence to the jury to show that the note was not executed. The court declined to give the instruction, remarking to the jury that there was no evidence as to whether there was or was not a subscribing witness. There was a verdict and judgment for plaintiff, and the defendant appealed.

Mr. Armistead Jones, for plaintiff.
Messrs. Argo & Wilder, for defendant.

ASHE, J. The first exception taken by the defendant to the ruling of His Honor in the court below is, to his refusal to submit an issue to the jury—whether the note, or any part thereof had been paid: His Honor, we suppose, ex-

cluded the evidence because payment was not specially pleaded. Whether under the code-practice, payment is a defence that may be given in evidence under a general denial, or must be specially pleaded in the answer, is a question which has given rise to a good many conflicting decisions and a contrariety of practice in different states. In California the courts have held that it may be given in evidence under a general denial, and that the plea of payment was but a traverse of the plaintiff's allegation of non-payment. In Indiana the plea of payment is held to be a statement of new matter, to be met by a reply like other new matter, and that the facts put in issue by a denial are only those which it is incumbent on the plaintiff to prove as a part of his case. In Kansas it is held that proof of payment is new matter and cannot be given in evidence under a general denial. In New York the current of authorities is, that evidence of payment could not be given without an averment in the answer. *McKyring* v. *Bull*, 16 N. Y., 297; *Texier* v. *Gouin*, 5 Duer., 389; *Edson* v. *Dilange*, 8 Howard Pr., 273.

In *Van Giesen* v. *Van Giesen*, 12 Barb., 520, the court held that neither payment nor any other defence which confesses and avoids the cause of action can in any case be given in evidence as a defence, in an answer containing simply a general denial of the allegations of the complaint; and it has been there held that the defendant may give as evidence under the general denial, whatever controverts the allegations of the complaint, which the plaintiff is bound to prove in order to make out his case. *Andrews* v. *Bond*, 16 Barb., 633. And again it has been held in that state when new matter is relied upon in defence, it must be set out in the answer. *Weaver* v. *Barden*, 49 N. Y., 286; *Evans* v. *Williams*, 6 Barb., 34, Whitaker Practice, 87. From which authorities we gather that under a general denial, any evidence that tends to controvert the allegations of the complaint, which the

plaintiff must prove to sustain his action, may be given to the jury. But where the defence relied upon is *new matter*, or is in confession and avoidance of the plaintiff's cause of action, it cannot be given in evidence in a denial of the allegations of the complaint, but must be set out in the answer.

It is true the complaint in the case contains the allegation that the bond sued on has not been paid, but that is an averment that the plaintiff is not required to prove. The *onus* in that case is in the defendant who maintains the affirmative of the issue, and the defence of payment is in *confession and avoidance*, and is *new matter*. That is new matter which shows that a cause of action which once existed has been defeated by something which has subsequently occurred. *Evans* v. *Williams, supra.* Payment, then, is new matter, and our conclusion is that there was no error in overruling this exception.

The second exception of the defendant was to the ruling of His Honor upon the objection that sufficient proof had not been offered of the loss of the bond sued on to let in evidence of its contents: This was a question for the court, which it decided in overruling the objection. Taylor's Ev., 35; Greenleaf's Ev., 526; 11 M. & W., 486. But the court not content with its own ruling, submitted the question of loss to the jury, who upon the evidence found that the note sued on had been lost. This was not properly a question for the jury, but as the finding was in accordance with the ruling of the court there was no harm done, and therefore no error.

The third exception was to the refusal of the court to charge the jury as requested, "that inasmuch as no subscribing witness was produced, or accounted for, this was evidence to the jury to show that the note was not executed": The court declined to give this charge, and very properly met the exception by remarking to the jury, that

there was no evidence as to whether there was or was not a subscribing witness.

In the argument of the case, the defendant's counsel insisted there was not sufficient proof of the execution, nor of the contents nor of the loss of the note sued on, and that there was not sufficient evidence to identify the note in evidence and that sued on. If this may be considered as a prayer for instruction, the court declined to give it, and very properly. Whether the loss of the bond was sufficiently proved to admit secondary evidence of its contents, as we have shown, was a question for the court, and it being admitted in the argument or prayer for instruction, that there was some evidence, it was the exclusive province of the jury to determine whether the evidence was sufficient to establish the facts of the execution and contents. *Wells* v. *Clements*, 3 Jones, 168; *State* v. *Revels*, Busb., 200.

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

No error. Affirmed.

T. C. HAUSER v. SAMUEL McD. TATE.

Bank Officers—Notice—Fraud—Evidence.

1. The president of a bank is chargeable with constructive notice of the management of its affairs by the cashier and other subordinate officers; and where such bank is doing business without legal organization he cannot escape the responsibility resulting from such notice by showing that he supposed himself the president of a legally constituted bank, if he has contributed the influence of his reputation to give undeserved credit to a spurious corporation.

2. Where the charge is a combination to defraud, the declarations of any one of the alleged confederates is evidence against the others, though

made in the absence of the latter, if made in furtherance of the common design; and slight evidence of concert is sufficient to let in such declarations.

3. The liability of the ostensible president of a spurious bank for debts contracted by his assistance is not collateral, but direct and original, and he must respond in damages to the same extent as the bank, if legally constituted, would have been liable.

(*State* v. *George*, 7 Ired., 321, cited and approved.)

CIVIL ACTION commenced in Yadkin and removed by consent and tried at Spring Term, 1880, of ROWAN Superior Court, before *Buxton, J.*

Verdict and judgment for the plaintiff, appeal by defendant.

Messrs. Clement, McCorkle and *Watson & Glenn* for plaintiff.

Messrs. Jones & Johnston, Henderson, Buxton and *Folk*, for defendant.

SMITH, C. J. The act of the general assembly granting a charter to the bank of Statesville, ratified and taking effect from March 22, 1870, with a capital stock not to exceed $500,000, divided into shares of $100 each, authorized an organization when 200 shares were subscribed and the money paid, and the election of a board of directors to hold office for one year, and who should choose a president thereof.

Under the supervision of C. A. Carlton, one of the five designated commissioners, a stock subscription book was opened, in which are entered the name of R. F. Simonton as a subscriber for 180 shares, and the names of H. Reynolds, C. A. Carlton, A. M. Powell and Samuel McD. Tate, for five shares each. The signatures of Simonton and the defendant were genuine. Carlton denied any authority to sign his name or to bind him therefor. The name of Reynolds, since deceased, is not in his proper hand. The shares

taken by Powell and the defendant were, on March 27, 1871, the day of making the subscription as the defendant testifies, transferred to the said Simonton in the same book, after many intervening blank pages. There was no proof of the amount and kind of funds paid in upon the subscriptions or of any organization under the act, or of the election of directors or other bank officers previous to the assumption and exercise of the corporate rights conferred, and the bank commenced operations under the agency of Simonton professing to be the cashier, and the presidency of the defendant as communicated to the public in advertisements and printed letter-heads, and in direct correspondence with one of the banks in New York, to whom was furnished the genuine signature of both of these officers, with their full consent. The plaintiff, with the assurance that the bank was operated and managed under the control of the persons thus designated as president and cashier, both men of prudence and financial skill and experience as well as of high repute for integrity, deposited at different times sums of money which have been lost by mismanagement and disasters, and for the recovery of which in this action he sseks to charge the defendant personally.

The gravamen of the complaint is that there was never any proper organization under the charter, and the bank having no legal corporate existence, its name was assumed by said Simonton and his personal banking transactions conducted thereunder, in silent if not active co-operation with the defendant, and that the association of them in imposing upon the public a fraudulent, as and for a regular and real banking company, and thus securing and abusing the plaintiff's confidence to his injury and loss, renders each personally and equally exposed to his demand for redress.

These are the general facts which the plaintiff proposed to establish and in support of which much evidence was offered, and upon which depends the admissibility of such

as was the subject of exception during the progress of the trial and is set out in the transcript.

The plaintiff alleges that the defendant, owning no stock, and assigning that entered in his name, in permitting himself to be held out as the president and principal officer of a spurious banking institution, and thus giving it a personal sanction and credit, was in law, with or without any explicit knowledge or information of the manner in which its affairs were conducted, a participant with Simonton, the principal actor, in imposing it upon the public as real and trustworthy, and equally answerable to creditors, their relations to the public, although not *inter se*, being those of partners or *quasi* partners.

The evidence offered and received after objection rests upon the support of this hypothesis, consisting of printed letter-heads used in correspondence, declarations of Simonton, and letters written by him in his capacity of cashier in the bank business, letters copied from the press after notice to produce the originals addressed to him, his own letters to Simonton and the stock subscription book. The competency of most of this evidence depends upon the foundation laid for its introduction in the proof of the personal relations subsisting between them and their co-operation in getting up and carrying on the banking business, and its effect must be judged of by the jury in passing upon the existence of the confederate relations between them.

"The president is usually expected," says a standard authority, "to exercise a more constant, immediate and personal supervision over the affairs of the bank than is required from any other director." Morse Bank. 128.

"Bank directors are not mere agents, like cashiers, tellers and clerks. It is the duty of the board to exercise a general supervision over the affairs of the bank and to direct and control the action of its subordinate officers in all important transactions. * * * * They invite the public

to deal with the corporation and when any one accepts the invitation, he has the right to expect reasonable diligence and good faith at their hands, and if they fail in either they violate a duty they owe not only to the stockholders but to the creditors and patrons of the corporation." "*United Society* v. *Underwood*, 9 Bush., 609.

The directors of a banking or other corporation are, in the management of its affairs, only trustees for its creditors and stockholders and are bound to administer its affairs according to the terms of its charter and in good faith. If they fail in either respect they are liable to the party in interest who is injured by it for a breach of trust and may be made to account with him in a court of chancery." *Bank* v. *St. John*, 25 Ala., 566.

Carrying the principle still farther, VALENTINE, J., delivering the opinion of the court in *Bank* v. *Wulfekuhler*, 19 Kans., 60, uses this language: "While we assume as a matter of fact that the defendant knew nothing of the condition or management of said bank and nothing of the condition of Herman's account with the bank, yet still as a matter of law, we must presume that he knew all about these matters. He was a director and the vice-president of the bank, and it was his duty to have such knowledge, and therefore the law will conclusively presume that he had it."

But the aspect in which the case is presented to us involves the imputation of bad faith in the defendant in countenancing the exercise of corporate privileges by Simonton without compliance with the terms on which they are conferred, and giving thereto the endorsement of his own official position, by means whereof the plaintiff was induced to confide his money to the keeping of Simonton, and has lost it. If this connection between them subsists, then the declarations and acts of the latter in the furtherance of the common purpose are competent against either.

"In the case of the charge of a combination to defraud,"

remarks a recent writer, "the declarations of each of the parties to such combination, relating thereto, are evidence against the others though made in the absence of the latter, provided the parties were at the time of the declarations in the furtherance of the common design. * * * * Slight evidence of collusion or concert is sufficient to let in the declarations of one of the parties as evidence against all, but there must be some evidence of the combination." Big. on Frauds, 483, 484.

The same doctrine will be found in most of the text books on evidence. Greenl. Ev., 111; Abb. Trial Ev., 190 and 621; *State* v. *George*, 7 Ired., 321. These general statements of the law remove the objections to the testimony and show that upon slight proof of an illicit combination, the acts and declarations of each in promoting its success should be allowed to go to the jury who are to determine as well the existence of the combination as its nature and extent.

To the suggestion that the defendant did not supervise the operations of the bank and knew nothing of its condition, the answer is obvious that he voluntarily assumes a position the obligation of which demands this of him, and persons dealing with the bank may reasonably expect his faithful discharge of that obligation, and if he bestows no attention on the business, it is his own neglect from which others should not suffer. But the prominent feature in the transaction is his assenting to be held out to the world as the chief officer of a corporation which has no legal being and of which, if he had not, he ought to have had, knowledge before lending his name in furtherance of its object.

The instructions to the jury in our opinion properly presented the question of the defendant's liability, and is in harmony with the views already expressed. Nor can the defendant complain of the refusal to charge that such liability did not exist if the defendant supposed himself to be the president of a legally constituted bank. His assump-

tion of the office of president is a positive act, the consequences of which he cannot evade by his failure to inquire into the existence and character of the organization of which he becomes the head. This is equivalent to a direct endorsement, challenging the confidence of all, who knew of his own superior business qualifications, in the institution supposed to be under his care.

It is not an act of good faith to accept the place with its attendant responsibilities without making the proper enquiries and thus knowing the real condition of this patronized applicant for public favor and for business, and the publication of his name with his concurrence is a direct sanction to the enterprise itself.

The remaining exception is to the direction as to the damages, and is equally untenable. If the defendant's legal undertaking was collateral and subsidiary the damages would consist in the money actually lost, that is, the entire sum less that receivable in the distribution of the assets by the receiver.

But the obligation is direct and original, as is that imposed on Simonton himself, because of his participation in giving the bank credit and inducing the plaintiff to make his deposits. The plaintiff remits the excess of the damages found by the jury above those claimed in the complaint, and thus removes the effect of the variance.

There is no error, and the plaintiff will have judgment for the residue and unremitted part of the verdict.

No error. Affirmed.

JOHN S. STELL v. HYATT BARHAM.

Appeal in Forma Pauperis.

An appeal *in forma pauperis* must be perfected during the term at which judgment was rendered, and the judge has no power to allow the party praying such appeal twenty days from the last day of the term in which to file his affidavit of inability to give the bond required by law.

(*Weber* v. *Taylor*, 66 N. C., 412; *Miazza* v. *Calloway*, 74 N. C., 31; *State* v. *Patrick*, 72 N. C., 217; *State* v. *Morgan*, 77 N. C., 510, cited and and approved.)

EJECTMENT tried at Fall Term, 1881, of WAKE Superior Court, before *Gilmer, J.*

The jury rendered a verdict for the plaintiff, and from the judgment thereon the defendant prayed an appeal. A certificate was filed by the defendant's counsel stating that in his opinion the judgment was erroneous, and that the defendant was unable by reason of insolvency to deposit an amount necessary to secure the costs of an appeal or to execute a bond for the same, and that said insolvency is admitted by the plaintiff. Thereupon the court adjudged that the defendant be allowed to appeal *in forma pauperis*, and be allowed twenty days from the last day of this term to file his own affidavit of his insolvency, which affidavit was accordingly filed. In this court the plaintiff moved to dismiss the appeal.

Messrs. Battle & Mordecai, Strong and *Batchelor*, for plaintiff.
Mr. Armistead Jones, for defendant.

SMITH, C. J. The plaintiff's motion to dismiss the appeal as taken in disregard of the directions of the act of 1874 passed "to enable indigent parties in civil actions to appeal to the supreme court" must be granted. The act makes it

the duty of the presiding judge, upon application to him at the time of trial, to make an order allowing the appeal without security with the proviso that the party desiring to appeal "shall make affidavit that he is unable by reason of his poverty to give the security required by law," and that he is advised by counsel that there is error in matter of law in the decision of the court. The affidavit must be accompanied also by a written statement from a practicing attorney of the court "that he has examined the affiant's case and that he is of opinion that the decision of the superior court in said action is contrary to law." Acts 1873-74, ch. 60, § 1. A similar right to appeal without security upon conviction of a criminal offence in the same court was given to defendants by a previous enactment, upon the filing an affidavit of inability and that "he is advised by counsel that he has reasonable cause therefor and that the application is in good faith." Acts 1869-70, ch. 196.

These enactments were intended to enlarge the operation of the act of 1869, amending section 72 C. C. P. which authorises the institution of a suit *in forma pauperis* under certain conditions, by allowing the prosecution of appeals to this court without giving security, to which the previous authority for bringing the action did not extend. *Weber* v. *Taylor*, 66 N. C., 412; *State* v. *Patrick*, 72 N. C. 217.

Whether the application be to commence the action or to appeal from an adverse determination without security, it must be supported by the affidavit of the party, and no provision is made for any other mode of proving the fact that he is unable to give security. The necessity of such affidavit is held in *Miazza* v. *Calloway*, 74 N. C., 31.

There is no less necessity for it when the appeal is asked from a judgment, at least in a civil action, for this raises "a strong presumption against the party," as was said in *Weber* v. *Taylor*, *supra*.

The oath may be exacted from the party because the in-

ability is within his personal knowledge, while the statement of any agent acting on his behalf must rest largely if not wholly on information and belief, and the law gives a specific legal effect to the affidavit and seems to admit no contradictory evidence of the fact stated. The sufficiency in substance and form of the affidavit is to be determined by the judge, and it must therefore be before him when he makes the order. The order is in terms absolute and cannot be made contingent upon a subsequent compliance with conditions essential to its validity, of which he must be the only judge. Ordinary appeals are of right, not under leave of the court, when the right is exercised in conformity with the law regulating appeals. The required security can be dispensed with only when so adjudged in pursuance of the terms of the statute which confers the power. As all the conditions prescribed by law for an effectual appeal must be observed and the mandate of the law enforced, so its provisions in favor of insolvent litigants can be sought and obtained in the prescribed mode only.

It must be declared, therefore, that there is error in the order allowing the appeal without security because of the absence of the affidavit of the appellant when it was made. *State* v. *Morgan*, 77 N. C., 510.

PER CURIAM. Appeal dismissed.

CONSIDER BOOSHEE v. L. M. SURLES.

Costs—Suit by Pauper.

Under the act of 1868–69, ch. 96, § 3, wherever one sues *in forma pauperis*, no officer shall require of him any fee, and if successful in his suit he shall recover no costs.

(*Morris* v. *Rippy*, 4 Jones, 533, cited and approved.)

BOOSHEE *v.* SURLES.

MOTION to retax costs heard at Spring Term, 1880, of HARNETT Superior Court, before *Eure, J.*

Mr. N. W. Ray, for plaintiff.
Mr. W. A. Guthrie, for defendants.

SMITH, C. J. The plaintiff suing *in forma pauperis* under the statute, recovered judgment against the defendant L. M. Surles for a certain sum, and against his associate defendant J. C. Surles for the one-eleventh part thereof, to be when paid a reduction *pro tanto* of the debt. The fees of the plaintiff's witnesses were omitted in the bill of costs, and after notice the present motion is made in their behalf to tax those fees against both defendants. Upon the hearing the court allowed a reformation of the judgment, so as to charge L. M. Surles with ten-elevenths, and J. C. Surles with the remaining one-eleventh of the sum due for the attendance of the witnesses. From so much of the judgment as refuses to tax the latter with the entire amount, the plaintiff and his witnesses appeal.

Under the former law allowing a poor person to sue at the discretion of the judge without paying costs or giving security for the prosecution of his suit, it is provided that counsel shall be assigned to attend to his case who shall not charge therefor, and that "no costs shall be charged to such person by any officer of the court." Rev. Code, ch. 31, § 43. This statute has been construed to embrace only the officers of the court, and that witnesses are not required to give their time and labor to any person, not even to one suing *in forma pauperis*, without compensation therefor. And while they are bound when subpoenaed to attend and give their testimony, they may receive for their attendance from the plaintiff the sums due them, or file them in the clerk's office and have them collected from the defendant, if the

plaintiff succeeds in his action. *Morris* v. *Rippy*, 4 Jones, 533.

Referring to an ancient but disused practice of giving a plaintiff allowed to sue without payment of costs, if nonsuited, an election to pay costs or be whipped, Mr. Justice BLACKSTONE declares the rule to be that a pauper may recover costs though he pays none, except voluntarily, for that the "counsel and clerks are bound to give their labor to him, but not to his antagonist." 3 Blk. 400. This right is limited to such as he is out of pocket, not such sums as another plaintiff might be entitled to recover. *Rice* v. *Brown* 1 B. & P. 39; Beavens Costs 121.

The present statute in force was evidently intended to prevent the reimbursement of the plaintiff any costs he may have chosen to pay to witnesses to secure their attendance, in declaring that whenever any person shall sue as a pauper no officer shall require of him any fee, *and he shall recover no cost.* Acts 1868-'69, ch. 96, § 3. The change in phraseology we think was intended to declare that as he paid none of the defendant's costs if he failed, so if successful in his action the defendant should be taxed with none of his costs. This act in connection with other contemporary legislation ameliorates the rigors of the pre-existing law in regard to witnesses who are not compelled to attend for more than one day if the party summoning shall on presentation of the certificate of such attendance fail to pay what may be then due them, unless summoned for the state or a municipal corporation. Acts 1868-'69, ch. 280, sub. chap. 11, par. 3.

We think there was no error in the refusal to charge the defendant, J. C. Surles, with the residue of these fees, and as no exception is taken by the defendants to the judgment rendered apportioning the charge between them, it will not be disturbed.

No error. Affirmed.

FORNEY SMITH v. D. P. HIGH, Adm'r and others.

Homestead—Execution—Lien.

A note or bond given for land is not a *lien* on the land for the purchase money, but no property of the vendee is exempt, under the constitution of 1868, from sale under *execution* against him for payment of obligations contracted for the purchase thereof.

(*Womble* v. *Battle*, 3 Ired. Eq., 182; *Cameron* v. *Mason*, 7 Ired. Eq., 180; *Simmons* v. *Spruill*, 3 Jones Eq., 9; *Hoskins* v. *Wall*, 77 N. C., 249. cited and approved.)

CIVIL ACTION tried at Spring Term, 1881, of COLUMBUS Superior Court, before *Gudger, J.*

The action was brought by the plaintiff against the defendant as administrator of Forney George who died intestate in 1879, and against Mary and Elizabeth George, his heirs at law, in which he seeks to recover the amount of a writing obligatory executed by the intestate, as follows: "On or before the first day of January, 1879, I promise to pay Forney Smith five hundred dollars with interest from date, for value received of him. This 25th of November, 1876." (Signed and sealed by F. George.) The plaintiff alleged that the bond was given for a tract of land described in the complaint, and which has descended to the said heirs at law, and prays judgment for the amount of bond and interest, and that the land be sold to pay the same, with costs of suit.

The defendants admit the execution of the bond, but deny that it was given for the purchase money of the land, and say that even if it was, it is no lien upon the land.

The issues raised by the pleadings were submitted to the jury who found them in favor of plaintiff, and thereupon the court gave judgment for the amount of the bond, but refused to order the land to be sold to pay the same; and

the plaintiff appealed from the judgment refusing to order the land sold.

Mr. B. B. Lewis, for plaintiff.
Mr. D. J. Devane, for defendants.

ASHE, J. The only exception taken in the court below was to the refusal of the court to grant an order to sell the land described in the complaint, and the consideration of the alleged error involves the only question raised by the appeal, to-wit, whether a note or bond given for land is a lien on the land for the purchase money.

It has been settled in this state that the vendor of real estate who has conveyed it by deed has no lien upon the land for the purchase money. *Womble* v. *Battle,* 3 Ired. Eq., 182; *Cameron* v. *Mason,* 7 Ired. Eq., 180; *Simmons* v. *Spruill,* 3 Jones Eq., 9. And this is still the law, unless as contended it has been altered by the constitution of 1868. But there is nothing in that instrument which has effected any alteration of the law in this respect.

It might at first sight seem that such a lien as that contended for by the plaintiff was given by the concluding sentence of section two of article ten of the constitution, where it is declared: "But no property shall be exempt from sale for taxes or for payment of obligations contracted for the purchase of said premises." In interpreting this concluding part of the section which was added as a qualification of its provisions, it must be construed with the context which declares that the real property, &c., of any resident of this state not exceeding the value of one thousand dollars shall be exempt from sale under *execution* or other final process, obtained on any debt. What follows is a proviso or exception to the general provision of the section, and should be construed as if it read: "But no property shall be exempt from sale for taxes or from *execution* for payment

of obligations contracted for the purchase of said premises." This gives no lien to the holder of the note for the purchase money, but its plain and evident meaning is, that if such holder shall obtain a judgment on the instrument and issue his *execution* against the vendee, his right to a homestead in the land purchased by him shall not be an impediment to the sale of the land under the execution. The creditor holding the note may proceed to sell, just as he might have sold, any land belonging to the debtor before the adoption of the constitution.

And for further proof that the note creates no lien on the land, if the vendee should sell the land to another before any docketed judgment against him, the land in the hands of the purchaser would not be liable to be sold under an execution against the first vendee. In the case of *Hoskins* v. *Wall*, 77 N. C., 249, Chief Justice PEARSON speaking for the court, said: "Suppose the vendee sells the land to one who knows it has not been paid for, the purchaser has a good title, for the vendor can get no judgment against him, and a judgment against the vendee will not reach property that he has sold. So the vendor, although he has the notes given for the purchase money, has no lien, nothing 'that sticks' like a mortgage or docketed judgment."

The two infant defendants, Mary and Elizabeth George, were improperly made parties to the action. The judgment of the superior court must be affirmed against D. P. High, as administrator of Forney George, and judgment entered in behalf of the defendants, Mary and Elizabeth, that they go without day and recover their costs.

Modified and affirmed.

BENJAMIN WYCHE v. E. G. WYCHE.

Homestead—Purchase at Execution sale.

Where land is sold at execution sale "subject to homestead," the purchaser takes it with the encumbrance. *Barrett* v. *Richardson*, 76 N. C., 429, approved.

(*Barrett* v. *Richardson*, 76 N. C., 429; *Knight* v. *Leak*, 2 Dev & Bat. 133, cited and approved.)

CIVIL ACTION tried at Fall term, 1880, of GRANVILLE Superior Court before *Eure, J.*

This is an action brought to recover the possession of a tract of land which it is admitted formerly belonged to one Andrew J. Harris, who is now dead. The plaintiff claims to have purchased at sheriff's sale under a judgment against Harris. The defendants are his widow and children, and claim to hold the land under an assignment of homestead made in his lifetime.

The judgment founded on a note given in 1861, was obtained in March, 1869, and docketed on the 10th day of the same month. Execution issued and was placed in the hands of the sheriff who endorsed thereon as follows: "I have this day levied this *fi. fa.* on one tract of land situate, &c., containing 181 acres more or less—levied on as the property of Andrew J. Harris, March 11th, 1869." A return was made to August term, 1869, as follows: "Satisfied in part by the sale of *one tract of land* described in levy on back, which land was sold to the highest bidder for cash, &c., at which time and place Benjamin Wyche became the last and highest bidder," &c.

The deed to plaintiff was executed on the third day of July, 1869, and after reciting the judgment and execution against the said Harris, and the levy and sale by the sheriff, it proceeds as follows: "In consideration of the premises

and the purchase money paid, &c., the said Moore, sheriff as aforesaid, hath bargained and sold unto the said Wyche and his heirs all the right, title and interest of the said Andrew J. Harris as aforesaid in and to the said following tract of land levied on as aforesaid, situate, &c., containing 181 acres more or less. *This land is sold by the sheriff subject to the right of the said Harris to a homestead therein.*" To have, &c.

In the court below a trial by jury was waived, and all the issues, whether of law or fact, submitted to the finding and determination of the judge.

In addition to the documentary proofs above referred to, it was shown in evidence that previous to the sale by the sheriff a homestead covering the whole of the tract had been set apart to Harris, upon his petition to a justice of the peace, and one Jones testified that as deputy sheriff he made the sale of the land, and that the same was sold subject to the right of Harris to a homestead therein. It was further in evidence that the land was worth from $850 to $1,000, and the amount bid by the plaintiff and paid to the sheriff was $95. Judgment for defendant, appeal by plaintiff.

Messrs. Gilliam & Gatling, and *J. W. Hays*, for plaintiff.

Mr. W. H. Young, for defendant, cited *Sheppard* v. *Simpson*, 1 Dev., 244; *Barrett* v. *Richardson*, 76 N. C., 429; *Knight* v. *Leak*, 2 Dev. & Bat., 133; *Hodge* v. *Houston*, 12 Ired., 108; *Jackson* v. *Jackson*, 13 Ired., 159; *Clarke* v. *Trawick*, 56 Ga., 359; and contended that *Palmer* v. *Giles*, 5 Jones Eq., 75, and *Green* v. *Rutherford*, 2 Ired. Eq., 122, (cited for plaintiff) did not apply to this case.

RUFFIN, J., after stating the case. His Honor, as we infer, (though the statement as to this part of the case is by no means as clear as it should have been) found as a fact, that the sale was made subject to the homestead as allotted to

the defendant in the execution, and that the sheriff's deed was intended to convey only his reversionary interest in the land.

These findings are conclusive alike upon the parties to the action and this court, and being so, we cannot perceive how the case differs from that of *Barrett* v. *Richardson*, 76 N. C., 429, in which it was said that where land is sold at execution sale "subject to homestead," the purchaser takes it with the encumbrance—even though the debt be one against which no such homestead right exists, and in the absence of all direct authority on the point, it would seem that reasoning on general principles must lead to a like conclusion.

A sheriff sells not by virtue of any property in himself, but as the mere instrument of the law, and his deed can convey just that which was actually sold and no more, and the rule that deeds are taken most strongly against the makers does not apply to it, for which see *Knight* v. *Leak*, 2 Dev. & Bat., 133, and the other cases referred to in the carefully prepared brief of defendant's counsel.

It is very true that the sheriff is presumed to sell the whole interest of the defendant in the execution, and when he does so and makes a deed accordingly, it will effectually convey every such interest, even though not within the contemplation, or knowledge of the officer at the time. But when he expressly limits the interest sold, and is understood to do so by persons present, it would be most unjust to hold that a greater interest passed.

No error. Affirmed.

ANN E. GEORGE v. D. P. HIGH, Adm'r.

Husband and Wife—Contracts.

1. In a suit brought by a wife against the administrator of her deceased husband for money "advanced and lent" to him during the coverture, where the marriage took place since the adoption of the constitution of 1868; *Held*, that the contract between them was not inconsistent with public policy, and therefore valid, the making thereof not being prohibited by the act of 1871-72, ch. 193, and that the action could be maintained.

2. The policy of the courts in respect to the enforcement of contracts of a husband with his wife, based upon valuable consideration, discussed by RUFFIN, J.

(*Love* v. *Com'rs*, 64 N. C., 706; *Kirkman* v. *Bank*, 77 N. C., 394; *Dula* v. *Young*, 70 N. C., 450; *Kee* v. *Vasser*, 2 Ired. Eq., 553; *McKinnon* v. *McDonald*, 4 Jones Eq., 1; *Smith* v. *Smith*, Winst. Eq., 30, cited, commented on and approved.)

CIVIL ACTION, heard on complaint and demurrer at Fall Term, 1880, of COLUMBUS Superior Court, before *Avery, J.*

The demurrer was sustained and the plaintiff appealed.

Mr. D. J. Devane, for plaintiff.

Messrs. W. H. Pace and *J. W. Ellis*, for defendant.

RUFFIN, J. The issue in this case is altogether one of law growing out of the demurrer of the defendant to the complaint.

The complaint alleges that the plaintiff being the wife of the defendant's intestate, at several times *advanced* and *lent* to her husband divers sums of money, amounting in the aggregate to some $2,700, no part of which has been paid.

The defendant assigns as grounds for his demurrer:

1. That as it appears on the face of the complaint, the plaintiff was the wife of the defendant's intestate, at the time the alleged advancements were made, and it does not

appear that the amounts advanced were to be repaid, or that said intestate accepted the same as a loan and agreed to repay them, or that they were advanced for his benefit, and not the mutual benefit of both husband and wife, and for the support of their family, the action cannot be maintained.

2. That the plaintiff has not the legal capacity to sue the administrator of her intestate husband for money, or on account of business transactions between them during coverture.

3. That the complaint does not state facts sufficient to constitute a cause of action.

Upon the authority of the case of *Love* v. *The Commissioners of Chatham*, 64 N. C., 706, we shall have to disregard the defendant's last ground of demurrer, since it fails to specify any particular objection to the complaint.

As to his first ground of objection, it does not seem to us to be true in point of fact. The language of the complaint is that the plaintiff *advanced* and *lent* to the defendant's intestate a sum of money, &c., and this in common acceptation is equivalent to saying that he accepted it as a loan under an agreement to repay. Webster defines the verb *lend* to mean, "to grant a thing to be held on the condition that its equivalent in kind will be returned—*as to lend money.*" It must be observed, too, that the demurrer admits the truth of her allegation that she did so advance and lend him the money.

As expressed, we suspect, the second specification goes beyond the real meaning of the draughtsman, as it will hardly be contended, we suppose, that a widow is without all legal capacity to sue the administrator of her deceased husband, on account of any transaction that may occur between them during her coverture. It must therefore have been intended to raise the question as to the plaintiff's capacity, not to sue her husband's administrator, but to make

the contract alleged with her husband while living, and which it is the object of her action now to enforce. It was so treated by *Mr. Pace* in his well considered argument for the defendant, and we will consider it in the same light.

As the effect of the plaintiff's contract with her husband is not to charge, or pervert any part of her real or personal estate, her case does not fall within the act of 1871–2 (Bat. Rev., ch. 69, § 17,) which forbids her entering into any such contract without the written assent of her husband, for as said in *Kirkman* v. *Bank of Greensboro*, 77 N. C., 394, that statute, like the constitution, was intended merely to restrict a wife's power to *convey* or *charge* her estate, and in no wise to deprive her of the power to receive or acquire property independently of her husband's consent. Her capacity to make such a contract as the one sued on with her husband, depends therefore upon the law as it stood originally or as modified by some statutory provision other than the one just referred to.

At the common law the husband and wife were regarded as so entirely one as to be incapable of either contracting with, or suing one another, but in equity, it was always otherwise, and there, many of their contracts with each other were recognized and enforced. In the case of *Dula* v. *Young*, 70 N. C., 450, a contract between husband and wife made in 1842, under which he sold her land and put the proceeds in another tract, promising to take the title to his wife, but instead thereof taking it to himself, was given force and effect after his death, and his administrator was not permitted to sell the same, though urged to do so by creditors. And so in the case of *Kee* v. *Vasser*, 2 Ired. Eq., 553, it was held where a husband had given to his wife what money she could make by her own industry and the sale of the products of their own dairy and garden, and she had invested the same in the purchase of a tract of land, that the same could not be sold at the suit of the husband's executor, for,

say the court, it is the doctrine laid down by courts of equity in modern times that a wife can acquire separate property from her husband, when the gift is made clear by some irrevocable and distinct act of his, and the fact that the husband had himself, at times, borrowed the money of his wife, though without giving any bond or written acknowledgment therefor, was taken, with other acts and declarations of his to be of sufficient significance to confirm her title to the land.

It is true that in the later case of *McKinnon* v. *McDonald*, 4 Jones Eq., 1, it was said that such a gift from husband to wife would not be good against the *creditors* of the former. But that was upon a distinct ground altogether, and because as to them it was fraudulent, being voluntary, and the case of *Kee* v. *Vasser* is expressly referred to, and distinguished from the one then under consideration. And in the case of *Smith* v. *Smith*, Winst. Eq., 30, where under an agreement with her husband, similar to that made in the case of *Dula* v. *Young*, the plaintiff had joined in a sale of her land, and permitted her husband to receive the purchase money, he subsequently purchased another tract intending to have the same conveyed to his wife, but died before doing so, it was held that the wife, though she could not have her parol contract with her husband in regard to the land specifically enforced, was still entitled to recover from his administrator the proceeds of her land. And the decision goes upon the express ground that courts of equity will enforce contracts of a husband with his wife based upon valuable consideration.

These cases have not been referred to because they have any direct bearing upon the plaintiff's case, for being a plain action of assumpsit, hers must depend upon the law as distinguished from equity, but they have been cited because they serve to show the *policy* of the courts of modern times in regard to this fiction as to the unity of person and their readiness to dispense with it on account of its tendency

oftentimes to defeat real justice and disappoint the most generous intentions of husbands.

By reference to the original act of 1871-'2, it will be seen that the contracts which a married woman may make are classified under two heads. (1) Those which she may make with strangers, and which are required to be with the written consent of her husband in case they affect her real or personal estate, and (2) those which she may make with her husband. Under the latter it is provided that no contract between husband and wife made during coverture shall be valid to effect her real estate for a longer time than three years, or to impair the capital of her personal estate for more than three years, unless the same shall be in writing, and proved as required of conveyances of her land, but that all other contracts between them *not inconsistent with public policy* shall be valid. Act 1871-'2, ch. 193, sec. 17, 27, 28. As it cannot be pretended that the contract of the present plaintiff with her husband can affect, either her real or personal estate in the sense of the statute, and as it is consistent with what we have just seen to be the long established policy of the law, it would seem to follow *necessarily* that it must be valid.

By a further provision of the same statute (§ 29) the savings of the wife's separate property are secured to her, so that if the husband receive and use the same without objection on her part, the law will imply a promise to repay, and hold him to account therefor, provided the action be begun within a prescribed time. If so, then how can it be doubted that an express promise to pay on his part will be valid?

Whether he could be held to account in case his receipt and use of her income were done with her *knowledge* and *express assent* we do not decide, but are inclined to the opinion that the law in that case would imply no assumpsit and that nothing short of a positive agreement on his part to repay would suffice to charge him or his estate, especially if used

for their mutual comfort, or the maintenance of their children. Of course it will be understood that we have been speaking with reference to marriages contracted since the adoption of the constitution of 1868. In the case of the plaintiff here the marriage occurred in 1875, as admitted by the demurrer.

We think therefore that His Honor in the court below erred in sustaining the demurrer and that the same must be overruled. Let this be certified and the cause remanded to the end the defendant may answer if so advised.

Error. Reversed.

W. H. DAIL and others v. SARAH W. SUGG.

Ejectment—Evidence—Lost Records.

In ejectment, the plaintiff claimed under execution sale and sheriff's deed, and the defendant under a homestead allotment; *Held*,

(1) In order to show that the land was not exempt from execution, it is competent to prove by the plaintiff in the judgment on which the execution issued, the *time* when the debt was contracted, (without producing the evidences thereof) as an *independent fact* and collateral to the contract, which was between other persons than the parties to this suit.

(2) Where the loss by fire of the execution under which the sheriff sold was shown, entries in the judgment docket of the levy, sale, &c., may be admitted and proved by the clerk who made the entries, as secondary evidence of the contents of the execution. And in such cases the recital in the sheriff's deed is *prima facie* evidence of the existence and validity of the execution. Bat. Rev. ch. 14, § sec. 19.

(*Oates* v. *Kendall*, 67 N. C., 241; *Brem* v. *Allison*, 68 N. C., 412; *State* *Corpening*, 10 Ired., 58, cited and approved.)

CIVIL ACTION to recover the land tried at Spring Term, 1881, of Greene Superior Court, before *Graves, J.*

The plaintiffs claim title to the land in controversy as

heirs of Mary E. Suggs, and a deed from W. H. Dail to her and a deed from the sheriff of Greene county to said Dail.

The defendant claimed the right to hold possession of the land as widow of Josiah Suggs, to whom the land had been allotted as a homestead by proceedings for that purpose had before a justice of the peace and freeholders.

In support of their title the plaintiffs offered in evidence the judgment docket of Greene superior court and three judgments of a justice of the peace of said county there docketed on the 12th March, 1869, in favor of J. F. Freeman against Josiah Suggs, the husband of the defendant. They also offered evidence showing that the execution under which the sheriff sold the land in dispute had been destroyed by fire with the court house in the year 1875 or 1876, and that the judgment docket which had been preserved from the fire showed that executions had been issued to the sheriff of Greene on the judgments of Freeman against Josiah Suggs, and an entry of a levy and sale of the land in dispute under execution. To this evidence the defendant objected on the ground that the entry on the docket was not in the handwriting of the clerk. A witness was then introduced by the plaintiffs who testified that he was the deputy clerk of the superior court, that he had no distinct recollection of copying the returns, but the entry was in his handwriting in the course of the business of his office. There was no other evidence of the execution in the hands of the sheriff, or its contents. There was evidence of a sale of the land by the sheriff and its purchase by Dail.

The defendant objected to reading the sheriff's deed in evidence, but the objection was overruled and the defendant excepted. There was a further exception to this deed on the ground of the uncertainty in the description of the land conveyed, but that was abandoned in this court.

The sheriff's deed contained the usual recital of the exe-

cution, the levy, advertisement, sale, and the payment of the purchase money by the purchaser, W. H. Dail.

To show that the land in controversy was not exempt from the execution by the allotment of the homestead therein to Josiah Sugg, the defendant in the execution, the plaintiff introduced Freeman, the plaintiff in the judgments upon which the execution issued, who proved that the debts upon which the judgments before the justice had been obtained were debts contracted before the war, and that the evidences of the indebtedness were in the hands of the justice who rendered the judgments. The defendant objected to this evidence, the objection was overruled and the defendant excepted.

Verdict and judgment for the plaintiffs, appeal by defendant.

Messrs. W. C. Munroe and *Battle & Mordecai*, for plaintiffs.
Messrs. W. T. Faircloth and *Gilliam & Gatling*, for defendant.

ASHE, J. The first exception taken by the defendant to the ruling of His Honor was to the admission of evidence to prove the time when the debts were contracted, upon which the Freeman judgments were rendered, without producing the evidences of debt. This evidence was competent. It was not offered to prove the contents of the notes, but to establish the fact of the time of their execution. It was an independent fact and collateral to the enforcement of the contract, which was between other persons than those who were parties to this action. *Oates* v. *Kendall*, 67 N. C., 241; *Brem* v. *Allison*, 68 N. C., 412; Starkie on Ev., 726; 1 Greenl. Ev. §§ 90 and 285.

The second exception was to the admission of the judgment docket showing the entry of execution issued and the return of the sheriff setting out the levy and sale, &c. The objection to the reception of the judgment docket came too

late, for it had been offered in an early stage of the trial without objection; but the defendant still objected to the entries there made because they were not in the handwriting of the clerk. This objection was fully answered by the testimony of one Sugg who was examined as a witness for the plaintiff and testified that he was deputy clerk of the superior court of Greene county, and although he had no distinct recollection of making the entry, it was in his handwriting, and was made in the course of the business of his office. The entries were such as the law required to be noted in the judgment docket. C. C. P., § 144 (2). They were made by a proper officer in the discharge of his duty and are presumed to have been entered under the direction of the court, whose province it is to make its own record, and no other court can indirectly examine into the manner in which it is made. *State* v. *Corpening*, 10 Ired., 58. It was shown by the entries on the judgment docket that an execution had issued and that there was a levy and sale. These recorded facts establish the existence of the execution and its return to court when it became a record, and when it was shown that it had been lost or destroyed, it was competent to prove its contents by secondary evidence. 1 Starkie on Ev., 272 and notes 1 and 2. This evidence was furnished by the sheriff's deed, to the introduction of which objection was made by the defendant, but upon what ground it is not made to appear by the statement of the case, and this objection forms the fourth exception of the defendant. The exception was properly overruled by His Honor and the deed allowed to be read. It recited with the utmost particularity the issuing of the execution to him from the superior court of Greene county in the case of *Freeman* v. *Josiah Sugg*, its date, its exigence, the levy, advertisement, sale, the purchaser and the price paid. The court house having been burned and the execution which constituted a part of the records of said court having been destroyed, the

recital in the sheriff's deed of the execution is made *prima facie* evidence of the existence and validity of the execution, and is made to all intents and purposes binding and valid against all persons who were parties to the execution, and against all persons claiming by, through or under them; and it is declared that said deed may be read in any suit as *prima facie* evidence of its existence and validity. Bat. Rev., ch. 14, §§ 19, 20 and 21 as amended by the act of 1874-75, ch. 254.

The defendant for a further ground of exception contended that the sheriff's deed to Dail was void on account of the uncertainty of the description, but this objection was abandoned in this court. There is no error. The judgment of the superior court of Greene county must be affirmed.

No error. Affirmed.

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*L. A. VINCENT v. J. D. CORBIN.

Landlord and Tenant—Notice to quit—Practice.

1. A tenant from year to year is entitled to a written or verbal notice to quit, to be given three months before the expiration of the current year; a mere demand for possession is insufficient. But where the tenant disclaims to hold as such, a notice to quit is not necessary and need not be proved in a summary proceeding in ejectment.

2. Where a question of law is improperly left to the jury and they decide it correctly, the verdict cures the error of the court.

(*Glenn* v. *R. R. Co.*, 63 N. C., 510; *Head* v. *Head*, 7 Jones, 620, cited and approved.)

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

SUMMARY PROCEEDING in ejectment tried on appeal at Spring Term, 1881, of ALAMANCE Superior Court before *Avery, J.*

This proceeding was commenced before a justice of the peace to recover possession of a house and lot alleged to have been rented by plaintiff to defendant who held over after the expiration of the lease.

In his affidavit before the justice, the plaintiff alleged substantially as follows: 1. That he was owner in fee simple of the premises in dispute. 2. That the house and lot were rented to defendant who became his tenant on the 2nd of February, 1878. 3. That the tenancy has terminated. 4. That the possession of the premises has been demanded of the defendant and refused by him.

The defendant filed a counter-affidavit in which he denied the first, second and third allegations of the plaintiff's affidavit and admitted the fourth, but denied the right of plaintiff to make demand, inasmuch as he was himself in lawful possession of the premises, and claimed them as his own.

The justice having disposed of the question of tenancy adversely to defendant, gave judgment for plaintiff and the defendant appealed to the superior court. It was in proof on the trial in that court that the plaintiff and his brother bought the lot in controversy in 1873 and held it as tenants in common until the 2d of February, 1878, when the plaintiff by purchase from his brother became sole owner; that the defendant has lived on the land continuously since 1873, and rented from Joseph Vincent in the year 1875; that in November, 1878, the plaintiff took from the defendant his note for fifty dollars for the rent of the lot, which embraced the rent from the time of his purchase in February, 1878, to the date of the note, to wit, November, 1878; that the defendant was then living on the land and has lived there ever since and still is in possession; that in April, 1880, the

plaintiff made a demand of the possession of defendant, and in November following, made a similar demand which was refused; that on the 19th of January, 1881, the plaintiff brought an action against the defendant and recovered the rent in arrear up to that date, and on the 25th of the same month instituted this summary proceeding to recover possession.

The defendant insisted that upon the facts disclosed in the plaintiff's evidence he could not recover, and asked the court so to charge. He also insisted that the evidence showed a tenancy from "year to year," and that the taking a judgment for the rent due up to January 19th, 1881, was a waiver of any former trespass and demand of possession and a continuation of the former tenancy, or the creation of a new tenancy beginning on the 19th of January, 1881, and required other demand before suit brought.

The court refused to charge as requested, but told the jury "that if the plaintiff demanded possession on April 6, 1880, and the defendant was his tenant, even from year to year, the plaintiff would be entitled to recover in an action brought on the 25th of January, 1881, under the landlord and tenant act, and the fact that he had recovered judgment for rent to January 19th would not necessitate a new demand for possession and thereby defeat his recovery in this suit." The defendant excepted. Verdict and judgment for plaintiff, appeal by defendant.

Mr. John W. Graham, for plaintiff.
Messrs. Scott & Caldwell, for defendant.

ASHE, J. The exception to the charge of the court was well taken. The instruction "that if the plaintiff demanded possession on April 6th, 1880, and the defendant was his tenant, even from year to year, the plaintiff would be entitled to recover," as an abstract proposition is erroneous. A

tenant from year to year according to all the authorities is entitled to a notice to quit before he can be dispossessed, except in cases where he has disclaimed the relation of landlord and tenant, and a mere demand for possession like that made on the 6th of April, 1880, or in November following, is not the kind of notice which the law requires, but a notice to quit in the contemplation of the law is a written or verbal notification given by the landlord to the tenant that he will require the possession to be surrendered at the end of the current year of the tenancy, expiring on the day when the tenancy commenced. And this notice must be given three months before the termination of the current year.

If nothing else appeared in the case the defendant would undoubtedly be entitled to a *venire de novo* for misdirection to the jury. But it was an immaterial error which did not mislead the jury and therefore was harmless. For if a jury decide correctly a question of law improperly left to them by the court, the verdict cures the error of the court. *Glenn* v. *R. R. Co.*, 63 N. C., 510. The jury we think found a verdict in consonance with the law of the case.

The tenancy in question here was clearly one from year to year; for when a party has obtained possession of premises belonging to another, and the owner does any act from which a jury may infer that he intends to acknowledge him as his tenant, a tenancy from year to year is created by such act, and the party will be entitled to a regular notice to quit before he can be ejected. Tillinghast Adams, 107. But however well settled it may be, that a tenant from year to year is entitled to the regular six months notice at common law and three months by our statute, there is another principle of law equally well settled, *i. e.*, that where such a tenant sets his landlord at defiance and does an act disclaiming to hold under him as tenant, this dispenses with the necessity of notice to quit; as for instance, by attorning to

another, claiming the premises as his own, &c.. Tyler on Ejectment, 223; *Jackson* v. *Wheeler*, 6 Johns Rep., 272; *Jackson* v. *Whitlock*, 3 *Ib.*, 422; Tillinghast Adams, 119.

We have been unable to find any adjudication upon the effect of a disclaimer set up in a plea or answer to an action or proceeding brought to recover the possession of the land alleged to be held by a tenant from year to year, for the reason we suppose that such questions have only arisen in actions of ejectment where the plea was the general issue, and the defendant was not permitted to plead specially in bar in this action matters which in most actions would be required to be set up specially; and consequently all such matters had to be given in evidence under the general issue. But in a proceeding like this where the defendant sets up in his counter-affidavit or answer the special matters, that the landlord has no title, that the title is in himself, and disclaims to hold the premises as tenant, we cannot see the reason of a rule that will require the plaintiff to give the regular notice to quit. In such case the disclaimer is stronger than if made *in pais*, and must therefore relieve the plaintiff of the necessity of proving a regular notice to quit. The defendant cannot be allowed to say, "I am not your tenant, but I claim the privilege of a tenant." As was said by Chief Justice PEARSON in the case of *Head* v. *Head*, 7 Jones, 260, "one is not allowed to blow hot and cold in the same breath, that is, if he disallows the relation, he cannot afterwards claim the privileges of a tenant."

Under this view of the law as applicable to this case, we hold there is no error, and the judgment of the superior court of Alamance is therefore affirmed.

No error. Affirmed.

ANN E. GEORGE, Guardian, v. D. P. HIGH, Adm'r, and others.

Guardian and Ward—Parties.

One who conducts a suit as guardian or next friend of infants is not a party of record, but the infants themselves are the real plaintiffs; nor will *any one* who has an interest in the action hostile to that of the infants be permitted to conduct the same.

(*Branch* v. *Goddin*, 2 Winst., 105; *Falls* v. *Gamble*, 66 N. C., 455; *Mason* v. *McCormick*, 75 N. C., 263; *Wilson* v. *Houston*, 76 N. C., 375; *Walker* v. *Crowder*, 2 Ired. Eq., 478, cited and approved.)

CIVIL ACTION tried at Spring Term, 1881, of COLUMBUS Superior Court, before *Gudger, J.*

The action is brought upon a bond given by Forney George as guardian of the infant relators. The other defendants were sureties on the bond, together with Ann E. George, who at the time of its execution was the wife of said George, and is now the guardian of the said infants, and brings this suit in their behalf. In the complaint she alleges her incapacity, as a married woman, to give the bond and insists that the same is void as to her.

The defendants demur upon the ground that the plaintiff Ann E. George, is one of the obligors in the bond and cannot, therefore, maintain an action thereon, and also upon the ground that in the action brought as guardian she seeks relief for herself individually. The demurrer was sustained in the court below, and the plaintiff appealed to this court.

Mr. D. J. Devane, for plaintiff.

No counsel for defendants.

RUFFIN, J. It has been decided by this court in several cases, and amongst them the cases of *Branch* v. *Goddin,* 2 Winston, 105; *Falls* v. *Gamble,* 66 N. C., 455, and *Mason* v.

McCormick, 75 N. C., 263, that one who conducts a suit as guardian, or next friend for infants is not a party of record, but that the infants themselves are the real plaintiffs. It cannot be therefore that the infant plaintiffs are to be prejudiced, and their action dismissed because of the peculiar relations of their guardian towards the subject matter of their action, and more especially in a court of equity that disregards all technical rules with regard to parties and only looks to see that all are before the court, whose interests may be affected by the decree to be made. At the same time no court will permit any person who has an interest in the action hostile to that of the infants to conduct it on their behalf—whether they be guardian or next friend; and the court below did right in refusing to proceed with the case in its present condition. And now though we reverse the order sustaining the demurrer, we direct that the case be remanded to the end that a competent and disinterested next friend may be appointed to protect the interests of the infant plaintiffs. This was the course taken in the case of *Walker* v. *Crowder*, 2 Ired. Eq., 478; and so too in the case of *Wilson* v. *Houston*, 76 N. C., 375, though in the latter case it was said inadvertently that the demurrer was sustained.

Error. Case remanded.

STATE ex rel. COMMISSIONERS OF WAKE v. ALBERT MAGNIN and others.

Reference—Practice—Appeal.

1. A referee under the code should report in writing all the testimony taken by him, and file copies of all documents adduced in evidence and considered by him.

2. Referees should exercise their own judgment in taking and mak-

ing up accounts which they are required to state; not merely adopt a statement made by other parties; and *it seems* that the items should be given in detail, and not simply the result of an adjustment of them.

3. When exception is taken to the failure of a referee to report evidence the omission may be supplied by an order for its production, if it has been preserved in writing, but when it has not been so preserved, a re-committal of the report becomes necessary.

4. Where the court orders a compulsory reference to state an account, an appeal does not lie from an order re-committing the report of the referee for the correction of errors and irregularites.

(*State ex rel. &c.*, v. *Peebles*, 67 N. C., 97; *University* v. *Lassiter*, 83 N. C., 38; *Cain* v. *Nicholson*, 77 N. C., 411; *McCampbell* v. *McClung*, 75 N. C., 393; *Bushee* v. *Surles*, 79 N. C., 51, cited and approved.)

CIVIL ACTION tried at Spring Term, 1881, of WAKE Superior Court, before *Schenck, J.*

The action was brought on the official bond of defendant, Magnin, as treasurer of Wake county, and heard before His Honor upon exceptions to the report of a referee. Both parties appealed from the ruling below.

Messrs. Geo. H. Snow and *T. R. Purnell*, for plaintiffs.

Messrs. Hinsdale & Devereux, Fowle and *Haywood*, for defendants.

SMITH, C. J. When this cause was before us upon the defendants' appeal from the judgment overruling their demurrer (78 N. C., 186) it was decided that the action was brought by the proper relators and a cause of action sufficiently set out in the complaint. Answers were subsequently filed, replication made thereto, and thereupon at fall term, 1877, the cause was referred to George V. Strong "to state an account," which order was modified at January term, 1879, by substituting S. G. Ryan as referee. At February term following one of the defendants, A. W. Shaffer, a surety to the bond, withdrew his answer, and submitted to

judgment for the penalty thereof, to be discharged on payment of the sum demanded by the relators and the interest meanwhile accrued. At the succeeding term of the court the referee made his report, with the oral testimony heard in which he finds that certain appointees of the relators under their direction to examine the books and papers of the defendant, Magnin, ascertained and reported his default at $1,111.36, and that the referee, upon an examination of his vouchers, finds the same to be correct, and that the interest thereafter accruing to July 9, 1879, ($338.92) is to be added to that sum. Among the depositions accompanying the report is that of Magnin himself, who states that he exhibited before those appointees all the vouchers which he has and knows of no others, and of W. W. White, the clerk of the board of commissioners, to the effect that he produced before the referee the vouchers deposited by Magnin in his office. It does not appear that any one of them was rejected or any objection made to its allowance.

The court submitted to the jury the inquiry whether any demand was made on the defendant, Magnin, before the action commenced, to which there was an affirmative response, and declined to submit any other issues.

Numerous exceptions were taken to the referee's report by the defendants, some of which were disallowed, the report set aside and the matter re-referred with directions. From so much of these rulings as are adverse to the parties, plaintiffs and defendants, they respectively appeal.

It is only necessary to notice the allowed exceptions since the result in the order of the recommittal would be in no manner affected by a different determination of the others. These assign in their support:

1. The omission of the referee to report in writing all the testimony heard and considered by him.

3. The neglect to file copies of part of the records of the county commissioners, consisting of orders, accounts, vouch-

ers and other writings, which were offered in evidence by the contesting parties.

4. The failure of the referee to exercise his own judgment in taking and making up his account, and his adoption of that made by the appointees of the relators.

6. The inability of defendants for want of this information to frame explicit exceptions to the report, and to the admission and rejection of evidence.

In passing upon these exceptions his Honor was of opinion that the referee has not "stated an account" in accordance with the terms of the order of reference in not setting out the series of debits and credits of which it should consist, nor exercised his own judgment in making it up, and he further finds as a fact that the referee has not reported all the evidence which was before him and on all which he has acted. Thereupon the order of re-reference was made.

"It is a well settled rule," says the court in *State* v. *Peebles*, 67 N. C., 97, "that exceptions to such reports must be made *as a matter of right* at the court to which the report is made," and the practice is again recognized and sustained in *University* v. *Lassiter*, 83 N. C., 38.

To enable a party to exercise the right intelligently it is necessary that the evidence and exhibits should accompany the report and be open to the examination of counsel. If the evidence is preserved the omission may be remedied by an order for its production, and the costs, delay and labor of a new reference avoided. When the evidence is not in a form admitting of its being afterwards transmitted, the recommittal of the report becomes necessary for a fair and proper hearing of the matters in difference. *Cain* v. *Nicholson*, 77 N. C., 411. The ruling of the court that the order of reference required a detailed statement of the items of the account, and not the mere result of an adjustment of them seems to be sustained by the decision in *McCampbell* v. *McClung*, 75 N. C., 393.

But apart from the question of the sufficiency of the reasons assigned for the action of the court in setting aside the report and recommitting the matter of the reference, the order is in our opinion within the sound discretion of the judge in conducting the trial and is not the subject of appeal.

In *Bushee* v. *Surles*, 79 N. C., 51, the report was returned by the referee and exception filed by the defendant. On the plaintiff's motion and without passing on the exceptions the court set aside the report and having vacated the order of reference proceeded to try the cause. In answer to an objection that he had not the power, at that stage of the proceeding to make the order, the court say: "We think he did have the power and that the exercise of his discretion in regard thereto is not reviewable in this court, as it is in a certain class of references under C. C. P."

The proper and orderly method of procedure in actions against those who receive and disburse the funds of others is first to dispose of such defences as go to defeat the action and may require the intervention of a jury, as the findings may be such as dispense with a reference and put an end to the suit. And if such reference is ordered by the court of its own motion or on application of one of the parties, as may be done in the cases specified in section 245, and it appears from the report that the moneys received have been kept and paid out as required by law and that nothing is due, the plaintiff must fail in his action because there has been no default in official duty. The awarding of the jury trial upon one issue without exception shows that the reference, compulsory as we understand, was not intended to conclude the defendants from maintaining any proper defense they may have to the action—notwithstanding the order.

This view of the case disposes of all exceptions of either party to the ruling of the court in the order of re-reference, which neutralizes their force, as a new trial supersedes all errors and irregularities which may have been committed

upon the first trial. They will not come up again unless repeated.

There is no error and the judgment must be affirmed. Let this be certified that the cause may proceed in the court below.

No error. Affirmed.

NANCY HAM v. W. F. KORNEGAY and others.

Parties—Executors and Administrators.

Where an administrator dies without having fully administered his intestate's estate, an action will not lie by the next of kin for distribution against his administrator, but must be brought by an administrator *de bonis non* of the original intestate.

(*Latta* v. *Russ*, 8 Jones, 111; *Lansdell* v. *Winstead*, 76 N. C., 366; *State* v. *Johnston*, 8 Ired., 331; *State* v. *Britton*, 11 Ired., 110; *Taylor* v. *Brooks*, 4 Dev. & Bat., 143; *Goodman* v. *Goodman*, 72 N. C., 508, cited and approved.)

CIVIL ACTION heard upon complaint and demurrer at Spring Term, 1881, of WAYNE Superior Court, before *Graves, J.*

The plaintiff in her complaint alleged substantially as follows: That she is the widow and one of the distributees in the estate of Haywood Ham, who died intestate in the year 1868, and Henry B. Ham qualified as his administrator. That the defendant W. F. Kornegay and W. G. Hollowell were the sureties to his administration bond. That the plaintiff is also the widow of Henry B. Ham with whom she intermarried after the death of her first husband. That H. B. Ham settled the estate of his intestate Haywood Ham, and made a final return to the probate court showing a

balance in his hands of $5,886.29. That this balance was due to her and Robert H. Ham and W. H. Ham, the children of Haywood Ham, as his next of kin, the one third, to-wit, $1,960.43 to each. That the two children have received their distributive shares, leaving the distributive share due the plaintiff still unpaid. That Henry B. Ham died April 15th, 1879, leaving a last will and testament from which the plaintiff dissented, and the defendant W. F. Kornegay was duly appointed and qualified as administrator with the will annexed. That no administrator *de bonis non* on the estate of Haywood Ham has been granted, and that a considerable personal estate has come to the hands of the defendant as administrator of Henry B. Ham who died seized of a large real estate in said county.

The plaintiff demanded judgment against the defendants for the penal sum of $30,000, the amount of the administration bond to be discharged on paying $1,960.43 with interest, &c.

The defendants demur to the complaint upon the ground that it appears from the face thereof,

1. That there is a defect of parties, in that, the administrator *de bonis non* of Haywood Ham should be a party plaintiff.

2. That the plaintiff has not the legal capacity to sue, she not being the administratrix *de bonis non* of Haywood Ham.

3. That the amount claimed by the plaintiff is her distributive share in the estate of Haywood Ham deceased, which remained in the hands of H. B. Ham, (the defendant Kornegay's intestate,) as administrator of said estate unadministered at the time of his death, and the plaintiff sues as a distributee in the estate of Haywood Ham.

The demurrer was sustained by the court and judgment given against the plaintiff for costs. From which judgment the plaintiff appealed.

Messrs. Gilliam & Gatling, and *Faircloth*, for plaintiffs.
No counsel for defendant.

ASHE, J. This suit is against the defendant W. F. Kornegay, administrator of H. B. Ham and the other defendants, who are the sureties on the official bond of said H. B. Ham as administrator of Haywood Ham, deceased, to recover a distributive share in the estate of the said Haywood, due to the plaintiff as one of the distributees as shown by the final account of said H. B. Ham, as administrator, returned to the probate court of the county of Wayne.

There have been so many adjudications in this state upon this point, that there is no proposition of law better settled than that where an administrator dies without having fully administered the estate of his intestate, an action will not lie by the next of kin for distribution against his administrator, but must be brought by an administrator *de bonis non* of the original intestate; and the reason is, there is no privity between the next of kin of the intestate and the personal repsesentative of the deceased administrator, but there is a privity between them and an administrator *de bonis non*. *Latta* v. *Russ*, 8 Jones, 111.

An administration is never complete so long as there are debts uncollected or assets remaining in the hands of the administrator for distribution. It is the duty of an administrator to collect the assets, pay the expenses of his administration, discharge the debts of his intestate, and make a final distribution among the next of kin of his intestate. If an administrator dies before this is done, his administration is unfinished and an administrator *de bonis non* must be appointed to finish his administration, and so on *ad infinitum*, until a final and completed distribution of the estate. *Lansdell* v. *Winstead*, 76 N. C., 366.

The facts in the case of *State* v. *Johnson*, 8 Ired., 331, were very similar to those in this case. There, one Baldwin died intestate, leaving a widow and brother who were entitled to

his personal estate. Letters of administration were granted to one Bennett who gave bond, and after paying the debts of his intestate and the widow her third, had in his hands a considerable sum unadministered. Bennett died, and an action was brought on the administration bond by the brother, to recover his distributive share, and Judge NASH, who delivered the opinion of the court, said: "The administrator alone is recognized as legally entitled to the assets, and to him must the creditors and next of kin look. If he dies before these ends are attained, an administrator *de bonis non* must be appointed, and to him the like rights, duties and responsibilities attach, and so on as often as the representative dies without closing his administration, and the action at law to collect the unadministered assets must be brought in the name of the administrator *de bonis non*, and not in that of the next of kin. See also *State* v. *Britton*, 11 Ired., 110; *Taylor* v. *Brooks*, 4 Dev. & Bat., 143; *Goodman* v. *Goodman*, 72 N. C., 508. In the case of *Landsdell* v. *Winstead, supra*, Judge BYNUM said: "The rule is inflexible that the next of kin cannot call for an account and distribution of an intestate's estate without having an administrator before the court."

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

No error. Affirmed.

E. BELO v. E. SPACH.

Statute of Limitation—Payment on Bond.

Payment on a bond within ten years after it falls due by the assignee in bankruptcy of one of the obligors, repels the presumption arising from the lapse of time.

(*Lowe* v. *Sowell*, 3 Jones, 67; *McKeethan* v. *Atkinson*, 1 Jones, 421; *Hamlin* v. *Hamlin*, 3 Jones Eq., 191, cited and approved.

BELO *v.* SPACH.

CIVIL ACTION tried, on appeal from a justice's court, at Spring Term, 1881, of FORSYTH Superior Court, before *Seymour, J.*

Case Agreed—The following are the facts: The action is brought to recover the amount of a note of which the following is a copy: One day after date we or either of us promise to pay to E. Belo, the just and full sum of one hundred dollars for T. J. Boner for value received of him, as witness our hands and seals this 28th day of January, 1860, (signed and sealed by Isaac Tice, H. A. Holder and E. Spaugh.)

That some time in the year 1868 Tice went into bankruptcy, and among the debts scheduled was the foregoing note, and on the 24th of March, 1870, a dividend was paid to plaintiff, the payee, in this action on said note by the assignee of said Tice to the amount of seven dollars and sixty-two cents, and on the 22nd day of May, 1872, another dividend of eight dollars and eighty-eight cents was paid by said assignee, and this action was commenced on the 26th day of January, 1880.

The defendant for his defence to the action relied upon the plea of payment and the statute of limitations, and his Honor being of the opinion that the payments by the assignee of Tice rebutted the presumption of payment arising from the lapse of time, gave judgment for the plaintiff, from which judgment the defendant appealed.

Mr. J. C. Buxton, for plaintiff.
Messrs. Watson & Glenn, for defendant.

ASHE, J. The only question presented for our determination by this appeal is, whether the payment on a bond within ten years after it falls due by the assignee in bankruptcy of one of the obligors, will repel the presumption arising from the lapse of time.

The bond was due on the 29th of January, 1860, and Tice went into bankruptcy, and among the debts enumerated in his schedule was the said bond given by him and the other obligors to Boner.

There were two dividends paid by the assignee on the bond to the plaintiff, the holder of the bond, the one on the 24th of March, 1870, and the other 22d of May, 1872. It has been held in this state that payments made by one of several obligors to a bond in the absence of the other, before the expiration of the time necessary to create the presumption of payment, will prevent such presumption from arising, as well in respect of the absent obligor, as of him that made the payment; and it is the case as to the joint obligors, when there are several who are sureties, as well as the principal who makes the payment. *Lowe* v. *Sowell*, 3 Jones, 67; *McKeethan* v. *Atkinson* 1 Jones, 421.

And in *Hamlin* v. *Hamlin*, 3 Jones Eq,. 191, it was decided that the payment of a bond within ten years by an assignee in bankruptcy out of the funds and with the assent of the obligor, repels the presumption of payment arising from the length of time.

No error. Affirmed.

JAS. W. BACON, Ex'r, v. JOHN BERRY, Adm'r.

Account and Settlement--Pleading—Statute of Limitations.

1. A demurrer to a complaint in a proceeding for account and settlement, which assigns as cause, that a certain justice's judgment was dormant and that plaintiff had no right to have the same docketed in the superior court, is insufficient on the ground of irrelevancy to defeat plaintiff's action.
2. The statute of limitations, relied on as a defence, must be pleaded in the answer, and not set up by demurrer.

(*Green* v. *R. R. Co*, 73 N. C., 524, cited and approved.)

BACON *v.* BERRY.

PROCEEDING in nature of creditor's bill heard at Fall Term, 1881, of Orange Superior Court, before *Gudger, J.*

This was a creditor's bill, filed by the plaintiff against defendant, as administrator of Isaac Holden, deceased, before the clerk of the court under the act of 1871-'72, ch. 213, for an account and settlement of the defendant's administration, and for payment of a judgment which plaintiff's testator, Duncan Carrington, had recovered before a justice of the peace against the defendant's intestate. The summons was dated March 4, 1881.

The complaint alleged: 1. That on the 10th of August, 1872, Duncan Carrington obtained a judgment before a justice in Orange county against John T. Lyon and Isaac Holden for sixty-one dollars with interest and costs. 2. That a transcript of the same was docketed in the superior court on the 31st of January, 1879. 3. That Harrington was dead, and the plaintiff had qualified as his executor. 4. That Holden was dead, and the defendant was his administrator. Judgment was demanded that defendant come to an account of his administration, and pay to plaintiff the amount due upon said judgment out of the personal estate, if sufficient, but if not, that proceedings be taken against the heirs to subject the lands, &c.

The defendant demurred to the complaint and assigned as grounds therefor: 1. That said judgment being rendered on the 10th of August, 1872, was dormant after one year, and the plaintiff had no legal right to issue execution after August 10th, 1873, nor to transfer the same to the superior court and have it docketed, unless he had obtained a new judgment thereon; and it appearing from the complaint that the transcript was obtained on the 31st of January, 1879, the defendant insists that the judgment was not legally docketed in the superior court. 2. As appears from the complaint, more than seven years have elapsed from the rendition of the judgment to the bringing of this action.

Upon the hearing, the court adjudged that the demurrer be sustained and the action dismissed, and the plaintiff appealed.

Mr. John W. Graham, for plaintiff.
Mr. Isaac Strayhorn, for defendant.

ASHE, J. This proceeding is in the nature of a creditor's bill, filed under the act of 1871–'72, ch. 213, and is for an account and settlement of the estate of the defendant's intestate.

The matters set up in the first clause of the demurrer are insufficient to defeat the plaintiff's action. Whether the judgment was dormant and the defendant had no right to issue execution thereon after the 10th day of August, 1873, or had no right to have the judgment transferred to the superior court and docketed, are questions totally irrelevant; and for that reason, that clause of the demurrer should not have been sustained.

And the second cause of demurrer is not less untenable, for the cause assigned is that more than seven years have elapsed from the rendition of the judgment to the bringing of the action. It is in fact a plea of the statute of limitations, which must always be pleaded in the answer. It is an objection that can never be taken by demurrer. *Green* v. *R. R. Co.*, 73 N. C., 524.

There is error. The judgment rendered below must be reversed, and this must be certified to the superior court of Orange county, that a *procedendo* may be issued to the probate court for that county.

Error. Reversed.

GUILFORD FLEMMING v. J. M. FLEMMING, Adm'r.

Statute of Limitations—New Promise by Administrator.

Plaintiff commenced action in 1879 for services rendered in 1875 to defendant's intestate, and, to repel the plea of the statute of limitations, testified that in November, 1875, he told the administrator that the deceased owed him $56; that the administrator never said whether he would pay it or not; that this was repeated several times, but that the adminstrator persisted in saying nothing: *Held*,

(1) That plaintiff's claim was barred by the statute of limitations;

(2) That what occurred between the parties was not such a recognition of a subsisting claim as would repel the bar of the statute, and even if it were, would be ineffectual unless in writing, under section 51 of the Code.

(3) That plaintiff's claim derived no aid from the act of 1881, ch. 80, allowing to admissions of administrators and executors the effect of an action commenced in preventing the operation of the statute of limitations.

(*Fall* v. *Sherrill*, 2 Dev. & Bat., 371; *Oates* v. *Lilly*, 84 N. C., 643; *May* v. *Darden*, 83 N. C., 237; *Hawkins* v. *Long*, 74 N. C., 781, cited, distinguished and approved.)

CIVIL ACTION tried on appeal at Fall Term, 1880, of WAKE Superior Court, before *Graves, J.*

This action commenced before a justice of the peace on April 25, 1879, and carried by appeal to the superior court, is founded on contract to recover the value of work and labor alleged to have been rendered to Lemuel Mitchell, deceased, the intestate of defendant, in the year 1875, previous to his death. The defence was a denial of the indebtedness and the plea of the statute of limitations. The evidence relied on to remove the bar of the statute was that of the plaintiff, who testified as follows: "Shortly after the appointment of the defendant as administrator of Lemuel Mitchell (shown to have been on November 24, 1875), I told the defendant that Mr. Mitchell owed me $56; he never

said that he would pay it or that he would not pay it. I went to him a time or two, two or three times afterwards. He would not say much about it, but never promised to pay or said that he would not. He said nothing. Mitchell and myself had a settlement the first part of the year that he died, and I owed him eight dollars which I have never paid." The defendant insisted, and asked the court to instruct the jury, that there was no evidence of the defendant's admission of the claim. This was refused and the jury were directed if they should find that "the work was done in 1875, suit brought in April, 1879, the plaintiff would be barred of his action, unless the plaintiff presented his claim in a few weeks after defendant was appointed administrator, and thereafter and it was then admitted, the plaintiff would not be barred, but if it was denied, he would be barred." The jury returned a verdict in favor of the plaintiff, and from the judgment thereon the defendant appealed.

Mr. A. M. Lewis, for the plainriff.
Messrs. G. V. Strong and *W. H. Pace*, for defendant.

SMITH, C. J. There are exceptions to portions of the testimony of the plaintiff, as incompetent under the proviso of section 343 of the Code, which we deem it unnecessary to consider, and confine ourselves to an examination of the rulings of the court in reference to the instructions given the jury.

It is quite plain under numerous adjudications, that what transpired between the parties is not such a recognition of a subsisting claim as repels the statute; and if it were, would be ineffectual unless in writing, under section 51 of the Code. It is equally well settled that the death of the debtor, after the cause of action has accrued, will not suspend the running of the statute to the completion of the prescribed time. It seems also that a distinct acknowledg-

ment and promise made by an executor or administrator and based upon a sufficient consideration, imposes a personal liability upon the representative, but does not take away the protection afforded by the lapse of time to the estate represented. *Fall* v. *Sherrill*, 2 Dev. & Bat., 371; *Oates* v. *Lilly*, 84 N. C., 643. The action then cannot be maintained unless the running of the statute is arrested by the presentation of the claim to the personal representative and his admission of the indebtedness of the deceased, under the recent legislation "concerning the settlement of the estates of deceased persons," (Bat. Rev., ch. 45,) upon which we understand the ruling of His Honor to have been founded. An examination of certain sections of the enactment in connection with its general scope and manifest purpose, even in the absence of express declarations of this import, leads us to concur in this interpretation of its meaning and force, and we refer to some of the provisions which sustain the conclusion:

Where a copy of the notice directed to be given by publication (sec. 45, 47) is personally served upon the creditor of a deceased debtor, he is required within six months thereafter to exhibit his claim to the personal representative, or be forever barred from maintaining any action thereon against such representative. Sec. 48.

Upon its presentation, the affidavit of the creditor or "other satisfactory evidence" of its validity and amount may be demanded. Sec. 49.

If it be doubted, the parties are authorized to agree to a reference, which agreement and the award thereon shall be filed in the probate court, subject to impeachment for fraud, error or irregularity. Sec. 50.

If it be rejected by the executor, administrator or collector and not adjusted by reference, the claimant must sue in six months after notice of rejection. Sec. 51.

If action is brought when there has been no unreasonable

delay in payment, the plaintiff is not allowed his costs. Sec. 54; *May* v. *Darden*, 83 N. C., 237.

Again, where a creditor's suit is brought (sec. 73) the personal representative must on oath render to the clerk a list of "all claims against the deceased of which he has received notice or has any knowledge, with the names and residences of the claimants," and any who have failed to file evidence of their claims must be notified by the clerk to produce it. Sec. 80.

The clerk is directed to exhibit to the representative on the day fixed for his appearance "a list of the claims filed in the office with the evidence thereof." Section 81.

Within five days afterwards the defendant shall in writing specify the claims he disputes, and the creditor upon being notified of the objection must thereupon file a complaint based upon his claim, and proceed as in an action begun by summons. Section 82.

Other creditors may exercise the right to contest the demand. *Oates* v. *Lilly*, *supra*.

A judgment, subject to certain exceptions, simply ascertains the debt. Section 95.

But whatever doubts may have been entertained as to the meaning and force of these provisions, they are removed by the recent act, amending chapter 17, section 43, of Battle's Revisal, by adding these words: "But if the claim upon which such cause of action is based be filed with the executor or administrator within the time above specified and the same shall be admitted by him, it shall not be necessary to bring an action upon such claim to prevent the bar; provided, that no action shall be brought against the administrator or executor upon such claim after the final settlement of said executor or administrator; and this shall apply to claims already filed. Act 1881, ch. 80.

It is plain the facts of the present case are not within the purview of the law as previously existing or as modified by

this statute. The plaintiff never presented his claim or any proof of it, but is content, upon a simple announcement of its amount followed by no response from the defendant, to rest for a period sufficient to bar the recovery under the general statute of limitations, even if his cause of action had then first accrued.

The case is unlike that of *Hawkins* v. *Long*, 74 N. C., 781, in which a silent acceptance of a rendered account against a person is held to be evidence of its correctness, since here, the work was not done for the plaintiff, and he may have had no personal knowledge or reliable information about the claim to call from him an admission or denial, and hence no inference of assent can be drawn from his failure to respond to charge the estate.

If the claim had been presented in the form of a bill of particulars, the plaintiff had the right to demand an explicit answer, and if refused, to enforce his claim by action, and perhaps under the recent enactment deem its acceptance without remark as arresting the running of the statute.

There was no evidence of the defendant's assent to the asserted claim, and the jury should have been so instructed. There is error in refusing so to charge and there must be a new trial. Let this be certified.

Error. *Venire de novo.*

T. LOWERY and others, Adm'rs v. WILLIAM PERRY.

Refunding by Distributees—Pleading—Jurisdiction—Practice.

Administrators declared against distributees upon a written contract without seal, conditioned for the refunding of their estimated shares in the estate, if the same be necessary for the purposes of adminis-

tration, and allege a deficit in the estate by reason of the fact that they were obliged to take back certain property of the estate for which the purchasers had refused to pay; *Held* upon demurrer,

(1) That the foregoing constituted such *special circumstances*, and manifested such diligence upon the part of the administrators, as justified them in calling upon the distributees to refund.

(2) That the benefit conferred by the receipt of the money was a sufficient consideration for the promise to refund.

(3) That it was not requisite that the complaint should set forth an "account of the administration."

(4) That the sum demanded not being in excess of two hundred dollars, the justice's court had jurisdiction.

(5) That it was immaterial as to whether the return of the property by the purchaser to the administrator was before or after the execution of the paper writing by the distributees.

(6) That as the instrument sued on was a simple contract, it was proper that the plaintiff should have demanded judgment for the exact amount of his claim, and no more.

Held further, That, the action being on a contract made prior to the adoption of the code, and the plaintiffs declaring in *assumpsit* and asking damages, there could only be an interlocutory judgment and a writ of inquiry to ascertain the damages.

(*Bumpass* v. *Chambers*, 77 N. C., 357; *State ex rel.*, &c., v. *McAleer*, 6 Ired., 632, cited and approved.)

CIVIL ACTION, tried on appeal at Spring Term, 1881, of WAKE Superior Court, before *Schenck, J.*

This action commenced in a justice's court, the defendant being summoned to answer the plaintiff's complaint "for the non-payment of the sum of $68.50 due by account." Before the justice the pleadings were oral—the complaint being for the non-payment of "$68.50 overpaid to defendant as a distributee in the estate of their intestate, William Geoplin, as evidenced by a refunding bond." The defendant at first demurred, but upon his demurrer being overruled, answered, denying the debt, setting up a counterclaim, and pleading the statute of limitations. After judgment against him in the justice's court, the defendant

appealed to the superior court, and when the case was called for trial moved to dismiss the action for want of jurisdiction in the justice's court, but his motion was overruled. By leave of the court the parties then filed written pleadings.

In their complaint the plaintiffs alleged that after paying all the debts of their intestate, they paid to the defendant, as one of his next of kin, in 1867, the sum of $150, the defendant then "executing to plaintiffs a paper writing by which he bound himself *to refund the said sum to plaintiffs*, provided the same was called for by them as administrators." That by reason of their having certain property belonging to the estate, which they had sold, returned to them on account of the refusal of the purchasers to pay for the same, a loss had been sustained; so that, when their account was taken before the judge of probate, it turned out they had overpaid the defendant the sum of $68.59, which sum he refused to pay, though demanded of him.

The defendant demurred, assigning as cause:

1. That the complaint does not set forth a cause of action, in that, it does not show special circumstances which would authorize the plaintiffs to recover.

2. It does not set forth the account of the administration of the estate.

3. It does not set forth what the paper writing is— whether a bond or note, or the date of it.

4. The court had no jurisdiction of the action.

5. It does not show whether the property alleged to have been returned, was so returned before or after the execution of the paper writing, or the value of the same.

6. It demands judgment for $68.59, and not the amount of the bond.

The court overruled the demurrer and the defendant appealed.

Mr. D. G. Fowle, for plaintiff.

Mr. J. H. Flemming, for defendants.

RUFFIN, J. We think His Honor did right in overruling the demurrer.

1. An administrator who voluntarily distributes the estate amongst the next of kin of his intestate, can not require them to refund unless he alleges and proves the existence of some *special circumstances*, such as acquit him of all blame and imputation of negligence, and may enable a court of equity to see that it is not consistent with the dictates of a good conscience that the loss should fall on him. He is required to be faithful, diligent and discreet. But that he should demand, when about to make distribution, refunding bonds from those into whose hands the estate is to pass, seems, according to all authorities, to be accepted as the highest evidence of good faith, diligence and discretion. The very case, cited for the defendant, of *Bumpass* v. *Chambers*, 77 N. C., 357, after laying down the general rule as above stated, speaks of the fact of his taking such a bond as one of the *special circumstances* which will entitle him to relief. And so it is with the case of *State ex rel.* v. *McAleer*, 5 Ired., 632, also cited for the defendant.

It is true that in the case last referred to, it was decided by this court that the refunding bonds which executors and administrators are authorized by the statute to take in the name of the state, inure solely to the benefit of the creditors, and cannot be sued upon in the name of the personal representative. But the fact that the law is so held, is the very reason given by Judge DANIEL, who delivered the opinion in that case, why the executor should have taken as well a bond payable to himself as an indemnity against loss. As the instrument in which this defendant promised to refund was executed to the plaintiff individually, and as the demurrer admits that upon taking the account of the estate it was ascertained he had been paid too much, the plaintiff must be entitled to recover, unless there be something to prevent in the other causes assigned. The defendant says

that the plaintiff should have set forth in the complaint the consideration upon which his promise to refund was based. Has he not done so in the statement that having in his hands after the payment of all debts of his intestate the sum of $150 due the defendant as a distributee, he paid the same to him upon his giving him the paper writing sued on? This surely was a benefit conferred, and must constitute a sufficient consideration.

2. It was not proper that the complaint should set forth the "account of the administration." It states the *fact* that the result of taking the account was to show that defendant had been advanced the sum of $68.59, more than his full share of the estate, and that was all on that point it should have stated. It is never proper that pleadings should be encumbered with the statement of legal conclusions, or of the evidence to be offered in support of the party's claim.

3. It is not stated in the complaint that the paper writing was under seal, and the presumption therefore is that it was not.

4. Inasmuch as the action is founded on contract and the sum demanded does not exceed two hundred dollars, the justice's court not only had jurisdiction of it, but was the only court known to our law that did have it.

5. The complaint seems to admit of but one construction, and that is, that the property alleged to have been returned, was in fact returned after the execution of the paper writing, but whether before or after is perfectly immaterial.

6. As the instrument sued on was a simple contract, it was proper that the plaintiff should have demanded judgment for the exact amount of his claim, and no more.

As the action is founded on a contract made prior to the adoption of the Code of Civil Procedure, it is governed by the law existing prior thereto, and upon the overruling of the demurrer the plaintiff is entitled to his judgment. But as he declares in assumpsit and seeks to recover damages,

the judgment can only be interlocutory, and the amount of his damages must be ascertained by a jury.

Judgment of the court below affirmed and the demurrer overruled. Judgment for plaintiff, and the cause remanded that there may be an inquiry to ascertain plaintiff's damages.

No error. Affirmed.

WILLIAM DAUGHTRY v. SAMUEL B. WARREN.

Injunction—Nuisance—Mills.

Where the jury find that the rebuilding of a proposed mill and dam would overflow and render useless the plaintiff's land, and injure the health of his family, but that the mill would be a public convenience, pecuniary compensation is all that the plaintiff can claim, and an injunction against such erection will be refused, upon the principle that private advantage must yield to public benefit.

(*Eason* v. *Perkins*, 2 Dev. Eq., 38, cited and approved.)

CIVIL ACTION tried at January Special Term, 1880, of SAMPSON Superior Court, before *Gilmer, J.*

This action is brought to restrain the defendants from rebuilding a mill on a stream in Sampson county, known as the "Great Coharie." The plaintiff who owns a tract of land near the head of the stream alleges that the defendants who own the tract next below his, contemplate building a mill, which when built will have the effect to pond the water and cause it to overflow and render valueless fifty acres of plantiff's land now worth five hundred dollars, and that it will also be destructive of the health of himself and family, and render his place unmarketable. The defendants admit the ownership of the lands as charged, and that

they purpose erecting a mill on theirs, but they deny that it will render valueless fifty acres of plantiff's land or injure the health of himself or family. They also say that there had been a mill at the place they propose to erect one, for a hundred years or more, until 1867, when it became ruinous and was permitted to go down, and has not been in operation since.

The issues involved were submitted to a jury who found that the proposed pond would overflow and render valueless a portion of plantiff's land, and that it would prove injurious to the health of plaintiff and family; also, that the mill would be convenient and useful to the community, and that the defendants and those under whom they claim have continuously and adversely kept up a mill at the place for more than twenty years, exclusive of the time disallowed by the statute.

Upon this finding the judge below dissolved the injunction that had been previously issued in the case, and gave judgment against the plaintiff for costs, from which he appealed.

Mr. E. W. Kerr, for plaintiff.
Mr. J. L. Stewart, for defendant.

RUFFIN, J. The allegations in the bill filed in the case of *Eason* v. *Perkins*, 2 Dev. Eq., 38, were in every particular similar to those set forth in the complaint filed in this action, and the findings of the jury in the two cases in substance identical. In that case it was held that where the right affected is clear or the injury irreparable, the court of equity would interpose to prevent the erection of a nuisance intended for mere personal gratification or individual gain. But inasmuch as private right must always yield to public convenience, when properly compensated for so doing, the courts would never interfere when the object sought was of

public benefit, unless the private injury should greatly exceed the benefits to be derived therefrom; and that the erection of a mill being a matter of public utility would not be enjoined merely because it affected the health of a single family or a few individuals. The case itself has been many times expressly cited and approved, and the principle announced still more frequently recognized and applied in other cases, and it must control our decision in this.

There is no special circumstance shown to exist in the plaintiff's case to make it an exception to the rule, and nothing indeed that must not attend the erection of almost every mill that is built in the country. He is not without a remedy for every mischief that can be done him by the defendant's mill—a remedy that the legislature, said to be "the source of the law," has declared to be adequate. The judgment of the court below is affirmed.

No error. Affirmed.

WILLIAM MORRIS v. EDMUND SAUNDERS.

Penal Bond—Justice's Jurisdiction—"Sum Demanded."

1. Where two parties, having agreed upon an interchange of lands, execute a bond in the sum of four hundred dollars, conditioned to make title and give possession in pursuance of the agreement, and providing that in default of performance the disappointed party may sue the other and recover the sum of two hundred dollars and all damages, the instrument will be construed as a bond for the penal sum of four hundred dollars, to be void upon certain conditions, and in case of non-performance to secure two hundred dollars and damages.
2. As the holder of such bond has no option but to take judgment for the full penalty, to be discharged upon the payment of two hundred

dollars and damages, the sum demanded is beyond the jurisdiction of a justice of the peace.

(*State* v. *Porter*, 69 N. C., 140; *State* v. *Rousseau*, 71 N. C., 194; *Hedgecock* v. *Davis*, 64 N. C., 650; *Dalton* v. *Webster*, 82 N. C., 279, cited and approved.)

CIVIL ACTION tried at Fall Term, 1881, of WAKE Superior Court, before *Gilmer, J.*

The suit was instituted before a justice of the peace to recover the sum of two hundred dollars. There was judgment for plaintiff, and the defendant appealed to the superior court where the case was dismissed on the ground that the justice had no jurisdiction, and from this judgment the plaintiff appealed. The plaintiff and defendant having agreed to an interchange of lands, entered into a written contract under seal, which contract after reciting the terms of their trade provides as follows: "And the said parties hereby agree and bind themselves in a bond for four hundred dollars, each to make a good title and deliver the possession of said land within thirty days from the date hereof, and if either of us shall fail to comply with the written contract, the other party shall have the right to sue and recover the sum of two hundred dollars and all damages, as witness our hands," &c.

Mr. T. M. Argo, for plaintiff.

Messrs. A. M. Lewis and *J. H. Flemming*, for defendant.

RUFFIN, J. The only point involved is as to the jurisdiction of the justice of the peace before whom the plaintiff brought his action.

As we construe the instrument, it is a bond for four hundred dollars to be void on certain conditions—the condition being that the parties shall make title to, and deliver possession of their respective lands; or, in case of default,

that the party guilty thereof shall pay to the other two hundred dollars and damages. We give it this construction because under any other that could be put upon it, all that is said about the four hundred dollars would be surplusage and needless, and the law will never presume that parties contracting under their hands and seals intend a *vain thing*.

It is clear that the four hundred dollars was never intended of itself to be paid, and if not, it could only have been meant as a penalty to secure the execution of the contract as to the sale of the lands; or in the event of a failure as to that, to secure the payment of two hundred dollars by the defaulting to the willing party.

Such being the construction given to it, it comes absolutely within the principle of the case of *State* v. *Porter*, 69 N. C., 140, and that of *State* v. *Rousseau*, 71 N. C., 194, where it was held that a justice could not entertain an action on a bond the penalty of which exceeded two hundred dollars, although the damages claimed for the breach thereof should be less than that sum. In the latter of the cases just cited it was held that the *penalty* of the bond, and not the damages claimed, is the *sum demanded* within the meaning of the constitution limiting the jurisdiction of justices of the peace, and in *Hedgecock* v. *Davis*, 64 N. C., 650, that the *principal* of the bond sued on was properly the *sum demanded* within such meaning; and in both cases it was said that the question of jurisdiction could not be allowed to depend upon the *claim* made in the plaintiff's complaint, or in anywise to fluctuate according to the will of parties or subsequent circumstances, but must be *fixed* at the time of the contract made.

This disposes of plaintiff's first position, and as to his right to sue, not upon the bond itself, but for his damages and offer the bond, only, in evidence in support of his demand (which he says is his case): That is exactly what, it is said in *Dalton* v. *Webster*, 82 N. C., 279, he could not do,

for that, the action *must* be brought on the bond, and the question of jurisdiction settled by its terms.

The judgment of the superior court dismissing plaintiff's action is affirmed.

No error. Affirmed.

L. & S. STERNBERGER v. W. L. HAWLEY and others.

Judge's Discretion—Appeal.

The decision of a judge below, either at chambers or in term, upon the question of the sufficiency of an indemnity bond executed in compliance with his order, is not reviewable on appeal; no notice is required in such case, nor is the judge concluded by the action of the clerk by whom he directed the bond to be approved. The act is ministerial and the power exercised discretionary.

APPEAL from an order made at Chambers in Wadesboro on the 31st day of January, 1881, (in an action pending in CUMBERLAND Superior Court,) by *Bennett, J.*

The facts are as follows: The plaintiff applied to Judge Bennett at chambers on the 29th of December, 1880, for an injunction in this case, and the judge made an order requiring defendants to appear before him on the 11th of January, 1881, and show cause why an injunction should not be granted and a receiver appointed, and in the meantime that defendants be restrained until the said 11th of January. On that day the parties appeared, and his Honor adjudged that Charles Glover, trustee in a deed of trust, made by defendant Hawley for the benefit of his creditors, give a bond in the penal sum of nine thousand dollars for the faithful performance of the trust, and the security of creditors who were interested in the same. It was ordered

that the bond be justified and approved by the clerk of the superior court of Cumberland county, for the convenience of the parties, and that the restraining order originally made in the cause be continued until the 31st of January, 1881, and on the 28th of that month, Glover tendered to the clerk his bond in obedience to said order. The bond was justified by all the sureties before the clerk, except one who justified before a justice of the peace in the county of Montgomery; and on this account and because the tax list of Cumberland county showed that the property of one of the sureties was only worth $1,400 in the year 1880, and not being satisfied as to the worth of another one of the sureties, the clerk refused to accept the bond. From this ruling of the clerk the defendants appealed to the judge of the district (Judge Bennett) and gave notice to the plaintiffs' counsel that they would submit a motion on the 31st of January, 1881, to have the bond approved, and on that day the motion was heard. One of plaintiffs' counsel wrote to the judge saying he could not be present any day of the said week when the motion was heard, and another of their counsel wrote that he would not attend, as the leading counsel was compelled to be absent, but they both expressed a wish to be heard. The judge of the fourth judicial district was to arrive in said district by law on Sunday night following the day appointed for the hearing, and the resident judge must act, if at all, during the week. Thereupon Judge Bennett, after diligent inquiry into the solvency, character and reputation of the sureties, adjudged said bond to be a substantial compliance with his order, and directed it to be filed in the clerk's office in Cumberland county.

From this order the plaintiffs appealed to this court, and assign as errors in the ruling of the judge:

1. In taking the bond which the clerk declined.

2. In hearing the motion of the 31st at chambers instead of in term time.

3. That the action of the court was taken without such notice as the law requires of said motion.

Mr. J. C. McRae, for plaintiffs.

Messrs. W. A. Guthrie, G. M. Rose and *Hinsdale & Devereux,* for the defendants.

ASHE, J. The only question presented by the record is whether an appeal lies from the action of a judge in taking a bond of indemnity from a party to a suit.

We are unable to discover any error in the ruling of His Honor. The taking the bond was a ministerial act on the part of the judge, which could be performed at chambers as well as at a term of the court. He not only had the right to take the bond, but the unquestionable right of determining upon the sufficiency of the sureties. No notice was required, and he was not concluded by the action of the clerk for he had no authority to take the bond, other than that which he derived from the judge.

The power of the judge being ministerial and discretionary, his action in the matter is not reviewable. The appeal is therefore dismissed.

PER CURIAM. Appeal dismissed.

P. M. TORRENCE v. J. P. ALEXANDER.

Surety and Principal—Statute of Limitations.

Where the surety to a sealed note relies for his defence upon the statute of limitations, proof that he was surety is not of itself sufficient; but he must also show that the creditor had knowledge of such suretyship,

where the same does not appear on the face of the instrument. *Goodman* v. *Litaker*, 84 N. C., 8, approved.

(*Goodman* v. *Litaker*, 84 N. C., 8; *Welfare* v. *Thompson*, 83 N. C., 276, cited and approved.)

CIVIL ACTION tried at Spring Term, 1881, of MECKLENBURG Superior Court, before *Eure, J.*

The action was brought by the plaintiff against the defendants to recover the amount due upon a bond of which the following is a copy: One day from date we or either of us promise to pay P. M. Torrence, executor of C. L. Torrence, three hundred and fifteen 45-100 dollars for value received. May 15th, 1872. (Signed and sealed by J. P. Alexander and John W. Moore.)

The plaintiff alleged that no part of the same had been paid except the sum of twenty-five dollars credited on the note on the day of its date; fifty dollars September the 23rd, 1872; and thirty dollars on the 7th day of January, 1874.

The defendant, Alexander, answered, and stated that the payment made by him and credited on the day of the date of the bond was fifty dollars; and for a counterclaim stated that he was the holder and owner of a note for one hundred and ninety-six 24-100 dollars given by the plaintiff to one R. F. Davidson.

The defendant, Moore, in his answer stated that he was surety for his co-defendant, J. P. Alexander, on the note described in the complaint; that the note was given by his co-defendant for the purchase of a tract of land in which he had no interest except that he had become surety on the note for the purchase money; that he had no knowledge whatever of the payment alleged to have been made on the note, and that the alleged cause of action did not accrue against him within three years prior to the institution of this suit, and he pleads the statute of limitations in bar of the same.

The plaintiff demurred to the counterclaim and assigned the following grounds: 1. That the debt upon which this action is brought and the debt which is the subject of the counterclaim, do not exist and were not contracted in the same right. 2. That the debt mentioned in the counterclaim cannot be asserted as a counterclaim against the debt sued on, which constitutes a part of the assets of the testator's estate, and when collected must be distributed to the creditors according to the dignity and priority of their claims.

The following issues were submitted to the jury:

1. Was there a payment made by defendant, J. P. Alexander, of fifty dollars prior to 23rd September, 1872?

2. Was defendant, John W. Moore, a surety to the note in suit?

The defendant Alexander testified that the note was given by him to the plaintiff in settlement for a tract of land purchased by him from the plaintiff, and that his co-defendant Moore was surety on the note. The jury responded in the affirmative to both issues.

His Honor sustained the demurrer and gave judgment in favor of the plaintiff against Alexander for the amount of the note and interest, and judgment in favor of the defendant Moore. From which judgment the plaintiff appealed.

Messrs. Burwell & Walker, for plaintiff.
Messrs. Jones & Johnston, for defendants.

ASHE, J. The only question presented by this record for our consideration is, whether there was error in the judgment pronounced by His Honor? We think there was. The defendant pleaded the statute of limitations and to avail himself of that defence, he proved that he was surety on the sealed note sued on. But that is not sufficient to make out such a defence to an action on a sealed note, where it does

not appear upon the face of the instrument otherwise than that the obligors are all principals.

The case of *Goodman* v. *Litaker*, 84 N. C., 8, was very like this case. The defendant there pleaded, as here, that he was only surety, and the statute of limitations; and as in this case were payments made by the defendant's co-obligor upon the bond in suit, within ten years after the date of the bond. It was held in that case that 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. See also *Welfare* v. *Thompson*, 83 N. C., 276.

The defendant in this case stopped short with his proof. The defence of being surety cannot avail him under the circumstances of the case. There should have been another issue submitted to the jury to the effect: "Did the plaintiff know that the defendant Moore was only surety to the bond?" Without such an issue and a finding upon it by the jury in the affirmative, it was error in the court to pronounce a judgment in favor of the defendant Moore.

There is error. Let this be certified to the superior court of Mecklenburg county that a *venire de novo* may be awarded to the plaintiff.

Error. *Venire de novo.*

QUINCEY W. PEACOCK v. A. J. P. HARRIS, Ex'r.

Will—Executors—Statute of Limitations—Laches—Parties.

A testator devised and bequeathed real and personal estate to his son for life, with a limitation over if he should die without issue. The ex-

ecutor was *authorized* to sell the land and invest the proceeds for the benefit of those entitled to the estate. The executor, having sold the land, turned over the purchase money, in the year 1858, to the testamentary guardian of the son, and a part of it was lost by the insolvency of such guardian; *Held*,

(1.) That the executor should have *invested* the money in the purchase of other property or in public or private securities, as directed by the testator, and retained the substituted fund under his control, for the benefit of the parties entitled.

(2.) That he was guilty of a breach of trust in turning over the *corpus* of the fund to the guardian.

(3.) That the claim of the legatees against the executor was not barred by the statute of limitations, or by the efflux of time giving rise to the presumption of a settlement.

(4.) That the contingent interest of the ulterior legatees should be represented by making them parties to the action to secure the fund.

(*Smith* v. *Barham*, 2 Dev. Eq., 420; *Ritch* v. *Morris*, 78 N. C., 377; *Edwards* v. *University*, 1 Dev. & Bat. Eq., 325; *Bird* v. *Graham*, *Ib.*, 168; *State* v. *McGowen*, 2 Ired. Eq., 9; *Foscue* v. *Foscue*, *Ib.*, 321; *Blount* v. *Robeson*, 3 Jones Eq., 73, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of FRANKLIN Superior Court, before *Eure, J.*

Zadock Peacock died in 1856, leaving a will in which after a devise of one-third of his lands to his wife for life, and a bequest to her of certain specified articles of personal property, a year's provisions and seven hundred dollars in money, is contained the following concluding clause:

"Item 3. All the rest and residue of my property of every and all description, whether real or personal or mixed, as well money as other kind of estate and property, including the remainder in the land given my wife as above in lieu of dower, I hereby devise, give and bequeath to my son Quincey Washington Peacock during his natural life, and after his death to his children born in lawful wedlock, and should he die without children born in lawful wedlock, then to be equally divided in remainder between the children of my brothers, Herman and Allen Peacock, and the children

of my sister, Ann W. Lee, all to take share and share alike. I authorise my executor to sell my real estate subject to my wife's dower, and invest the funds for the benefit of the above named legatees, and I do appoint my brother, Alvin Peacock, testamentary guardian of my son Quincey Washington, and I do also appoint Samuel Harris, my good friend, executor to this my last will and testament."

The plaintiff was four years of age at the time of the testator's death, two years after the execution of the will, and his only child. In the year 1857, the executor in exercise of the conferred power made sale of the devised land for the sum of $698, to some unnamed person who soon after reconveyed the same to him. The purchase money was on February 17th, 1858, delivered to the testamentary guardian, by whom a portion of it was expended for the benefit of the ward, and the residue retained uninvested, and lost by his insolvency.

Samuel Harris (the executor) died in 1869, leaving a will and appointing therein the defendant his executor, who has caused the same to be proved, and qualified himself for the discharge of its trusts.

The present action, commenced on October 13th, 1879, has for its object to charge the defendant's testator with the proceeds of the sale of the land for his dereliction of duty in not re-investing the money, and securing it for the persons and upon the trusts specified and mentioned in the will.

The defendant denied the personal liability of his testator in the premises, and relies upon the bar of the statute of limitations as a defence to the claim.

The facts stated, embodied in a case agreed, were submitted to His Honor, who if of opinion with the plaintiff should order an account and give such relief as the plaintiff was entitled to. The court upon consideration adjudged

that the plaintiff was not entitled to recover and dismissed the action and the plaintiff appealed.

Messrs. Reade, Busbee & Busbee, Timberlake and *Conner & Woodard*, for plaintiff.

Messrs. Davis & Cooke, for defendant.

SMITH, C. J., after stating the case. While it does not appear upon what ground this adjudication rests, whether that there has been no breach of trust committed by the deceased executor, or that, if any, the remedy has been lost by lapse of time since the plaintiff became of full age, we do not concur with His Honor in his ruling in either aspect of the case. In *Smith* v. *Barham*, 2 Dev. Eq., 420, Chief Justice RUFFIN declared it to be the duty of an executor, where a residue of personalty other than slaves is given as such, to sell and convert into money for the benefit of the persons to whom it is bequeathed, and in this way only could their successive interests be preserved. But the subject has undergone a thorough and searching examination, and the decisions in this state critically reviewed by BYNUM, J., delivering the opinion in the recent case, cited by counsel for the plaintiff—*Ritch* v. *Morris*, 78 N. C., 377. The testator gave to two living daughters, and the children of a deceased daughter, undivided parts of a residuary fund, "during the term of their natural lives, and at the death of each, to descend to the children of each, share and share alike, my said daughters during life to use the profits arising or accruing from their estate respectively, and to enure to their sole and separate and exclusive use and benefit, and at the death of each to descend as aforesaid." In the construction of this clause the court say, "the purpose of the testator here to benefit the remaindermen would be in a great measure defeated, if the legatees for life were entitled to the possession of the property," and conclude thus: "It

has become the general rule of the English courts of equity, and the same rule prevails in this state, that where personal property is bequeathed for life with remainder over, and the bequest is not specific in terms, and there is nothing in the will to show an intention or preference that the life tenant shall enjoy the specific property left, and in the form in which it is left, it must be converted into money as a fund and applied for the benefit of all, *by paying the interest to the legatee for life and the principal to the remainder man.*"

The principle thus laid down applies with full force to the facts of the present case.

It is true the fund here arises from a sale of land, but it becomes thereby personalty in the hands of the executor, and its preservation equally requires its being retained for the contingent limitations in remainder, and the payment to the life tenant of the accruing interest only. The executor is not allowed to pay over the principal money to the guardian of the plaintiff, and thus relieve himself of his assumed trusts under the will, but is required "to invest the funds for the benefit of the above named legatees," and as well for those whose interests are contingent and in remainder, as for the present benefit of the plaintiff.

The executor has not *invested* the money as the testator directs him to do, in the purchase of other property, or in public or private securities, as in his discretion he should deem most advantageous to the parties, and retained the substituted fund under his control for the use of the legatees; but in the attempt to divest himself of fiduciary responsibility has caused its total loss. The right of the testamentary guardian is no greater than that of an adult legatee to receive the whole fund, and he is but the legal protector of the interests of his ward, not the trustee for all the beneficiaries appointed in the will.

Nor will the statute release the estate of the deceased executor from liability to account. The bar is not interposed

between the *cestui que trust* and the trustee of an express trust to shield the latter from the equitable claims of the former, and the lapse of time avails only when it raises a presumption of settlement and discharge. *Edwards* v. *University*, 1 Dev. & Bat. Eq., 325; *Bird* v. *Graham*, Ib. 168; *State* v. *McGowen*, 2 Ired. Eq., 9; *Foscue* v. *Foscue*, *Ib.*, 321; *Blount* v. *Robeson*, 3 Jones Eq., 73.

It does not appear whether any of the ulterior legatees are living, and if any are, they and the representatives of such as are dead should become parties to an action directed to the securing of a fund in which they have an interest, though it be contingent. So far as the testamentary guardian has legally expended portions of the fund upon his ward, their amount should be appropriated to his accruing interest and *pro tanto* exonerate the estate of the deceased executor from the payment thereof.

We therefore declare there is error in the record, and the judgment below is reversed, and there must be judgment for an account.

Error. Reversed.

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*A. RIGGS v. A. J. ROBERTS, Adm'r.

Statute of Limitations—New Promise—Bankruptcy.

1. Where suit is brought upon a bond given in November, 1868, no acknowledgment or promise will be received as evidence of a new or

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

continuing contract, whereby the bar of the statute of limitations will be upheld, unless the same be in writing.

2. An unaccepted offer to discharge the bond by a conveyance of land, is not such a recognition of a subsisting liability as in law will imply a promise to pay the debt.

3. The obstruction of the statute may be removed by an act of partial payment proved to have been made at a time commencing from which the prescribed limitation would not have expired at the beginning of the action; but the burden is upon the plaintiff to show that the partial payment was made at such a time as to save the debt from the operation of the statute.

4. The new promise which will revive a debt extinguished by bankruptcy must be distinct and specific; and a mere acknowledgment of the debt, though *implying* a promise to pay, is not sufficient.

(*Green* v. *Greensboro*, 83 N. C., 449; *Fraley Kelly*, 67 N. C., 78; *Henly* v. *Lanier*, 75 N. C., 172; *Faison* v. *Bowden*, 72 N. C., 405, cited and approved.

CIVIL ACTION tried at Spring Term, 1881, of ORANGE Superior Court, before *Avery, J.*

The action was commenced on December 3rd, 1879, before a justice, to recover the amount due on a bond executed on November 2, 1868, by Nelson Rhew, the intestate of the defendant, to the plaintiff in the sum of $178, to which is set up in defence, the discharge of the intestate in bankruptcy and the bar of the statute of limitations.

In answer to the defence, the plaintiff relies on subsequent recognitions of a continuing liability and partial payments made on the indebtedness.

To sustain his replication the plaintiff introduced and proved by one Wiley Teaseley a conversation between the parties in 1874, at the house of the intestate, in which the latter said he had let the plaintiff have a cow and calf at $30, in part payment and expected to pay every debt he owed. The witness further testified that he knew the intestate let the plaintiff have some yearlings also. Another witness for the plaintiff, one William Day, testified that in 1877 he heard the intestate ask the plaintiff if he would be

willing to take a tract of land of about thirty acres for what he owed him, and that he had heard the intestate say at another time (not fixed) that he had let the plaintiff have a cow and calf and also an ox, in part payment of the debt he owed him, and he thought the plaintiff could realize $20 or $25 for the cow and calf, but the ox was in low condition.

The plaintiff further proposed to show by the witness a declaration made by the intestate to the plaintiff that he was indebted to the latter and expected to pay him out of some land, and further to repel the statute, that the intestate in 1877, told the plaintiff that he owed him a debt and inquired if the plaintiff would accept a piece of land, pointing it out, in satisfaction. This evidence on objection was ruled to be inadmissible.

The said Rhew obtained his discharge as a bankrupt on July 18th, 1871, and died intestate in February, 1878.

The bond and an order for $19.50 given in July, 1868, constituted the intestate's entire indebtedness to the plaintiff.

Upon the rejection of the proposed evidence the plaintiff submitted to a non-suit and appealed to this court.

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

SMITH, C. J. A strict construction of the record would confine us to a consideration of the ruling of the court in refusing to admit the testimony of the intestate's declarations as to his indebtedness, and of his offer of land in its satisfaction, as he was unwilling to submit his case to the jury upon the other proofs given.

The exception to this ruling so far as it affects the application of the statute of limitations to the claim, is disposed of by section 51 of the Code, which declares that "no ac-

knowledgment or promise shall be received as evidence of a new or continuing contract whereby to take the case out of the operation of this title" (Limitations of actions) "unless the same be contained in some writing signed by the party to be discharged thereby."

Again, the excluded declaration most favorable to the plaintiff is in effect, but an unaccepted offer to discharge the debt by a conveyance of land, and is in no proper sense such a recognition of a subsisting liability as in law will imply a promise to pay it.

But giving a more liberal interpretation to the case, and assigning the non-suit to an intimation from his Honor, that upon the evidence the plaintiff could not recover, we proceed to examine the sufficiency of the testimony received or offered to overcome the discharge pleaded, or to remove the statutory bar.

The obstruction of the statute while unremoved by any verbal promise however explicit, may be removed by an act of partial payment proved to have been made at a time commencing from which the prescribed limitation would not have expired at the beginning of the action. *Green* v. *Greensboro College* 83 N. C., 449.

But there is no date fixed to the alleged partial payment in the delivery of the cattle, and the declarations of the intestate and the direct oath of the witness to the fact, neither of them determine the time of the transaction, and the burden of showing this rests upon the plaintiff.

But if the statute were put out of the way, the discharge under the decree in the bankrupt court remains an unsurmounted barrier to the maintenance of the action.

In order to its removal the promise though not required to be in writing, must be "*distinct and specific*," and "a mere acknowledgement of the debt though implying a promise to pay" in the language of the court in *Kirkpatrick* v. *Tattersall*, 13 M. and W., (Ex.) 765, and as approved and re-

peated in *Fraley* v. *Kelly*, 67 N. C., 78, "would amount to no more than an account stated, and though in writing *would be a promise which the certificate would bar.*"

So LORD ELLENBOROUGH instructed the jury: "You ought to be satisfied that the defendant made a distinct, unequivocal promise to pay before he is placed again in the responsible situation from which the law has discharged him." *Fleming* v. *Hayne*, 1 Starkie R., 370; *Henley* v. *Lanier*, 75 N. C., 172.

The vague and indefinite language imputed to the intestate, would hardly be deemed sufficient to repel the statute before the reviving promise was required to be in writing, under the ruling in the case of *Faison* v. *Bowden*, 72 N. C., 405, where the deceased testator had said to the plaintiff, his attending physician, to whom he was lagely indebted for professional services, "I can't pay you what I owe you, but I will pay you soon, or next winter. I need what money I have now for building, and it will do you more good to get it in a lump." This was held to be insufficient to repel the plea, and the court say: "The rule to be gathered from the numerous cases to which we were referred by the counsel may be thus expressed—'the new promise must be definite, and show the nature and amount of the debt, or must distinctly refer to some writing, or to to some other means by which the nature and amount of it can be ascertained. Or there must be an acknowledgement of a present subsisting debt from which a promise to pay such debt may be implied,' and it is added, 'there is nothing in the conversation given in evidence which would enable any one to ascertain its amount.'"

But a more distinct promise is required to deprive a bankrupt of the exemption secured by his certificate, and it is held by the supreme court of Massachusetts, that even a payment of interest or principal endorsed on the note by the debtor himself is insufficient to warrant a jury in in-

ferring a new promise to pay the residue of the debt. *Merriam* v. *Bayley*, 1 Cush, 77; *Swings* v. *Littlefield*, 6 Cush., 210. See also 1 Par. Cont., 381; 1 Chit. Cont., 263.

There is no error and the judgment must be affirmed.

No error. Affirmed.

M. MARTIN v. JOHN A. YOUNG and others.

Statute of Limitations—Amendment.

1. Where an individual partner brings suit in his own name on a partnership claim not barred by the statute of limitations, and is defeated by reason of the non-joinder of his copartners, he may bring another suit on the same cause of action within a year, though the latter suit would have been barred by the statute if it had been the beginning of the litigation.

2. Since to achieve the same end by different means can prejudice no one, the same result may be attained by an amendment converting the individual action into one in the name of the partnership, if such amendment be made within the time in which a new action might have been brought.

(*Phillips* v. *Holland*, 78 N. C., 31; *Henderson* v. *Graham*, 84 N. C., 496; *Christmas* v. *Mitchell*, 3 Ired. Eq., 535; *Cogdell* v. *Exum*, 69 N. C., 464, cited, distinguished and approved.)

CIVIL ACTION tried at Spring Term, 1881, of MECKLENBURG Superior Court, before *Eure, J.*

A single point is presented in this case and to enable it to be understood, a very succinct statement of the facts will suffice.

In their answer the defendants deny having made any contract with the plaintiff individually, but say they did contract with a firm composed of the plaintiff and J. and E. Stowe, and set up a counterclaim against the said firm.

To this the plaintiff replied that the contract sued on was made with himself and not the firm, and he pleaded statute of limitations to the defendants' counterclaim.

At fall term, 1878, the issues of fact were tried, and the jury found that the contract sued on was made with the firm of Martin & Stowe, and was the property of the firm. Thereupon the court allowed the plaintiff to amend the process and pleadings by making the partners (Stowe) parties plaintiff, requiring him, however, to pay all the costs up to that time. The amendment was accordingly made, the allegations of the complaint being the same as in the original, except that the contract sued on was alleged to have been made with the firm.

At spring term, 1879, the defendants answered the amended complaint, and said that by the amendment a new action was constituted against them, which they had a right to plead to as if the action had then first commenced, and accordingly they pleaded the statute of limitations to the plaintiff's demand.

At spring term, 1881, a trial by jury being waived, the judge presiding in the court below held that the plaintiff's action was not barred by the statute, and gave judgment accordingly, from which the defendants appealed.

Messrs. J. E. Brown, and *Dowd & Walker*, for plaintiff.
Messrs. Jones & Johnston, for defendants.

RUFFIN, J., after stating the facts. It is insisted for the defendants that by law no amendment is permitted to be made, the effect of which can be to take away a defence that might be made to the action if begun at the time of the amendment asked for. *Phillips* v. *Holland*, 79 N. C., 31, and *Henderson* v. *Graham*, 59 N. C., 496. And again, that when by an amendment a new charge is introduced against the defendant, he make such defence to *it*, as if it were the foun-

dation of an action then newly begun. *Christmas* v. *Mitchell*, 3 Ired. Eq., 535.

Conceding both of these propositions to be true, and they certainly are true according to the authorities cited, we still think his Honor's ruling in the court below was a correct one, and its correctness becomes the more apparent when tested by the principles contended for by the defendants.

If the amendment had been refused, and the action as it originally stood in the name of the plaintiff, Martin, had failed on account of the defect of parties suggested, a new action brought on the same cause of action in the name of the present plaintiffs would have been saved from the bar of the statute, if brought within a year therefrom; and this, by virtue of the statute, Rev. Code, ch. 65, § 8. This statute has almost uniformly been held to extend to a new suit brought by a new party, either alone or in conjunction with the plaintiff in the original action, *if based upon the same cause of action and title.* Angell on Lim., § 324; *Coffin* v. *Cottle*, 16 Pick., 328.

Inasmuch, then, as the amendment deprived the defendants of no *legal* advantage, but left them free to set up every defence to the action as amended, which would have been open to them in case a new action had been begun against them, it was properly allowed, and the statute of limitations can no more avail them in one than in the other.

In the case of *Carne* v. *Malius*, 6 Eng. L. & Eq., 568, an action was brought in the name of three parties as members of a firm, and at the trial it was discovered that at the time the debt sued on was contracted, eight other persons were beneficially interested in the firm, and should have been made parties; and thereupon the court of exchequer on motion allowed the writ and pleadings to be amended by adding the names of those persons.

The case is distinguished from that of *Cogdell* v. *Exum*, 69 N. C., 464, in which an assignee in bankruptcy was made a

party plaintiff to an action brought by the bankrupt in his own name, more than two years from the date of his appointment as such, and it was held that the defendant might plead the limitation prescribed in the act of congress as to him. There, the new party not only sued upon a title distinct from that of the original plaintiff, but the bar of the statute applied to him personally, and not to the cause of action sued upon, and besides, as it was said, the courts could not permit a plain act of congress to be contravened in any such way.

No error. Affirmed.

SUSAN SLAUGHTER v. JOHN WINFREY.

Landlord and Tenant—Costs—Personal Property Exemption.

Under the act of 1876-'77, ch. 283, the landlord's lien extends to and includes the costs of such legal proceedings as are necessary to recover his rents; and as all the crops are his until such lien is duly discharged, the tenant has no property therein which he can claim as his constitutional exemption, as against such costs.

(*Durham* v. *Speeke*, 82 N. C., 87, cited and approved.)

CIVIL ACTION tried, on appeal from a justice's court, at Fall Term, 1881, of WAKE Superior Court, before *Gilmer, J.*

The action is to recover rent due the plaintiff. Verdict in favor of the plaintiff for $68.25, and judgment for the amount was rendered, with interest *and costs of action*, and the defendant appealed.

Messrs. Battle & Mordecai, for plaintiff.

Messrs. Geo. H. Snow and *Argo & Wilder*, for defendant.

SMITH, C. J. The only objection taken to the judgment in the court below and pressed in the argument before us is to so much of it as directs the payment of the costs incurred by the plaintiff in prosecuting her claim for rent out of the fund derived from the sale of the crop raised upon the rented land. It is insisted that the crop under the amendatory act of March, 1877 (acts 1876-'77, ch. 283,) is liable only for the rent, and that the right to the residue as a part of the exemption allowed the debtor is paramount to the claim for reimbursement of the plaintiff's costs.

We think there is no error in the ruling in this regard.

It is provided in section five when an order issues to the officer it shall direct him "to take into his possession all of said property (the crop) or so much thereof as shall be necessary to satisfy the claimant's demand *and costs*, and to sell the same under the rules and regulations prescribed by law for the sale of personal property under execution, and to hold the proceeds thereof *subject to the decision of the court* upon the issue or issues pending between the parties." As the act requires the seizure of a sufficient part of the crop to meet the plaintiff's demand and *costs* as well, it is obvious that both must be satisfied out of the proceeds of sale when so adjudged by the court. If it were otherwise the rent would be practically reduced by the costs incurred in obtaining it, and to this extent the ample security intended by the statute be impaired by the use of the necessary means of making it available to the landlord and its main purpose defeated. The first section vests the legal title to the crop in the lessor in the nature of a statutory mortgage to secure his rent and the fulfilment of other stipulations in the contract, or damages when they are broken, and also any advances he may make in cultivating and securing the crop.

The contract between the parties is regulated and controlled by this enactment, and if the lien has to be enforced by legal proceedings, it extends to and includes the costs

necessary therein. This lien, declared to be preferable to all others, adheres to the property as soon as it comes into existence, and subordinate thereto only is there any property in the defendant to be exempted.

It is manifest then that the exemption operates only upon the residue of the crop, or where sold the money received as a substitute, and can only be asserted against non-attaching liabilities.

In the language of Mr. Justice DILLARD announcing the conclusion to which this court came in the case of *Durham* v. *Speeke*, 82 N. C., 87, "The defendant's right of exemption did not include so much of the crop as was required to pay the rent," to which we will add, nor the costs rendered necessary in the enforcement of the rent.

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

No error. Affirmed.

JOHN W. HARRISON v. JOHN and JUBAL EMERY.

Trust—Account.

Where A takes out a grant of land from the State in pursunace of a contract with B, that the latter shall share the land upon payment of a certain proportion of the expenses incurred in securing and completing the title, and B is let into possession of the land by consent of A, a trust in favor of B attaches to the estate, and he is entitled to an account of the proceeds of timber cut from said land and sold by A.

(*Cohn* v. *Chapman*, Phil. Eq., 92; *Hall* v. *Hollifield*, 76 N. C., 476, cited, distinguished and approved.)

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

The facts are stated in the opinion. The court below gave judgment that plaintiff be declared a trustee for defendant, and referred the case to the end that an account may be stated between the parties, and retained the cause for further directions upon the coming in of the referee's report. From this ruling the plaintiff appealed.

Messrs. A. M. Lewis & Son, and *J. H. Fleming*, for plaintiff.
Messrs. Battle & Mordecai, and *W. H. Pace*, for defendants.

SMITH, C. J. The plaintiff claiming title to the two tracts of land mentioned in his complaint under separate grants from the state to himself, each bearing date December 2nd, 1872, seeks to recover possession and compensation in damages for trespasses committed by the defendants in cutting and removing timber therefrom, and also to restrain by injunction any further injury to the premises. The defendants jointly answering, admit the legal estate to be in the plaintiff and the occupation of a portion of the land by the defendant Jubal, who, as they allege, was put in possession by the plaintiff and the defendant John, under an arrangement that he should remain until their conflicting claims thereto were settled, and they allege that they have ceased to cut any more trees on the land.

Interposing an affirmative claim to relief, they further say, that shortly before the grants issued, an agreement was entered into between the plaintiff and defendant, John, that the larger tract should be entered for the benefit of both, and all expenses attending the entry, survey and taking out the grant, be equally borne by them, and that title should be taken in the name of the plaintiff and the estate therein held in trust for their mutual and common benefit; that in like manner an agreement was made by them and one Jubal Emery for the entry, survey and grant of the other and smaller tract, in which each one of the three was to have the

same interest and share and pay his ratable part of the expense incurred in securing the title, and the grant to be issued to the plaintiff upon similar trusts for the several parties, and that the share of said Jubal has since been acquitted by the plaintiff. The defendants further aver, that the defendant John has paid his part of the costs of securing both tracts, and the plaintiff has himself cut and sold large quantities of wood from the premises, for which he is accountable in an adjustment of the profits derived from the land. They ask for judgment declaring the plaintiff to hold as trustee for himself and said defendants in the proportions mentioned and directing him to convey to the defendant his moiety and third part in the respective tracts, and also for partition and an account.

The counter-claim asserted is positively denied in the replication, and the plaintiff admitting the contracts to have been made as charged and that the defendant did, during the progress of the survey pay daily his ratable part of the costs, says, that the defendant did not continue to do so, and in consequence the work was arrested and resumed only on his own undertaking to pay the whole, and that thereafter the defendant paid no more of that expense, as he did none of that afterwards incurred in procuring the grants. He further denies that any trust attaches to the estate conveyed to him by reason of anything that transpired between them.

The controversy growing out of the conflicting statements of fact upon which the alleged trust depends is expanded into a series of issues submitted to jury, the substance of whose material findings may be thus summarily stated:

The plaintiff and the defendant, John Emery, did agree that the grants should be taken out by the former for their joint benefit, and the latter should have a third interest in the tract of 117 acres and one-half interest in the other tract, described as containing 226 acres, except as to so much as had been previously conveyed to S. H. Rogers,

an area of sixty acres. This contract was on the condition (or terms as we interpret the word) that the defendant should pay his ratable part of all expenses incident and necessary to securing the title. The defendant has paid his share of the expenses of entering and surveying both tracts and five dollars towards the cost of the grants. He also boarded the hands employed in the survey and is entitled to a credit for the value thereof in making up his deficiency. The other needed expenditures were made by the plaintiff. The defendant never advised the plaintiff of his inability to supply his portion of the funds, nor for this reason authorized him to take out the grants for his own sole use, nor has he failed or refused to comply with a request from the plaintiff to contribute his share of the money required in procuring the grants. It appears further from the pleadings, that both parties have cut and used timber upon the land, with the value of which each charges the other. The other findings necessary to the recovery of possession are immaterial upon the issue made in the counterclaim and are passed without comment

The plaintiff, upon his motion for a new trial, assigns as the ground therefor, the indefiniteness of the responses of the jury to issue 2, 3 and 4, and the absence of any evidence to sustain the responses to issues 8 and 10, and upon its denial and the rendition of the judgment he assigns other exceptions thereto. Without an examination of each in detail, it is sufficient to say that all are based upon a misconception of the object for which the verdict was taken.

If a *final judgment* were to be rendered upon the findings, their insufficiency and the want of proof to authorize some of them, might be a just ground of objection. But this is not the case. The preliminary enquiry to be settled was as to the existence and validity of the trust adhering to the estate vested in the plaintiff, created by the alleged contract and recognized as in force during the pendency of the

proceedings to obtain the title, and if it has been abandoned, as asserted in the replication by any act or omission of the defendant. For this purpose the findings are not wanting in precision, nor are those objected to because of the want of evidence, if such be the fact, material to the adjudication that declares and establishes the trust. The contract and the payment under it and the use of the land by both parties, as owners, fully warrant the ruling of the court, and we deem it necessary only to refer to *Cokn* v. *Chapman*, Phil. Eq., 92, cited for the defendant to support the conclusions of His Honor.

The surrender or loss of the equity negatived by the verdict of the jury adverse to the alleged fact on which it is made to rest distinguishes the present from the case relied on in the argument for the plaintiff—*Hall* v. *Hollifield*, 76 N. C., 476. There, the equity arising out of the original agreement under which a joint entry was made was expressly surrendered by the ancestor under whom the plaintiffs claimed, and the defendant authorized at his own expense and for his sole benefit to proceed and take title to himself, and he was in fact at all the expense incurred in doing so. The reference was of course proper, and as the case states deferred until the issues were passed upon

No exception seems to have been taken to the rulings of the court upon the evidence, nor was His Honor asked to give any directions as to the deficiency in the evidence in regard to any issue, and this objection is first made after verdict. We have had occasion to refer to this point at the present term in ..... v. ....., and forbear further comment now as not required in disposing of the appeal, and it is referred to in order to avoid any improper inferences from our silence.

There is no error and the judgment must be affirmed. Let this be certified.

No error. Affirmed.

S. W. PATE v. A. J. BROWN.

Bond—Delivery—Evidence.

1. An instrument in the form of a promissory note, with a seal attached, has all the qualities of negotiable paper, in this State.
2. The production of such a paper, supported by proof of the handwriting of the obligor, is sufficient evidence of delivery and of the ownership of the holder.

(*Blume* v. *Bowman*, 2 Ired. 338; *Jackson* v. *Love*, 82 N. C., 405; *Whitsell* v. *Mebane*, 64 N. C., 345, cited and approved.)

CIVIL ACTION tried, on appeal from a justice's court, at Spring Term, 1881, of RICHMOND Superior Court, before *Gudger, J.*

The plaintiff declared upon a bond executed by the defendant on the first of February, 1868, and made payable to one Elijah Pate, for the sum of one hundred and thirteen dollars, and assigned by endorsement to the plaintiff on November 8th, 1876.

The facts relating to the point decided are stated in the opinion. Judgment for plaintiff, appeal by defendant.

Mr. Platt D. Walker, for plaintiff.
Messes. John D. Shaw and *W. A. Guthrie*, for defendant.

SMITH, C. J. The defendant denies that he executed the bond in suit and the only exception presented is to the ruling of the court as to the sufficiency of the proof of the delivery. The instrument was produced by the plaintiff on the trial and the subscribing witness testified that he saw the defendant sign it, and that the endorsed transfer to the plaintiff was in the proper handwriting of the defendant, with which he was acquainted. The defendant offered no testimony and his counsel asked the court to instruct the

jury that it was incumbent on the plaintiff to prove the execution of the bond, and that his possession was no evidence of the execution.

The court declined so to charge and told the jury "that the fact that the bond was in possession of the plaintiff was some evidence of its execution."

We think there was no error in this ruling and the court might have gone further and said that the possession and production of the instrument by the plaintiff raised a presumption of the delivery in the absence of rebutting evidence.

Bonds for the payment of money only, while they retain in other respects the properties and incidents of obligations under seal, are in this state put upon the footing of promissory notes and both are made negotiable securities under the statute. Bat. Rev., ch. 10.

Proof of their genuineness accompanied with their possession and production in court is sufficient evidence of the delivery and ownership. The same facts with proof of the assignment will enable the assignee to recover. Delivery is equally essential to the validity of the instrument as a contract whether with or without a seal, and is an essential element in the execution of each. "After the bill or note is produced," says GREENLEAF, "the next step is to prove the signature of the defendant." 2 Green. Ev. § 158.

Whenever a bill or note is found in the hands of the payee, it will be presumed that it was delivered to him, but the presumption may be rebutted. 2 Danl., Neg. Instr., § 65; Abb. Tr. Ev., 391.

So where a similar objection was made in *Blume* v. *Bowman*, 2 Ired., 338, DANIEL, J., delivering the opinion uses this language: "When a bond like this has no subscribing witness, then the proof of possession by the obligee, and also of the handwriting of the obligor, is a sufficient ground for presuming that the bond was what it purports to be,

sealed and delivered by the obligor. This inference is made because of the two possible modes of acquiring possession; it will be assumed to be rightful rather than tortious—because the possession accords with the terms of the instrument and the delivery a consummation of the expressed intent. *Jackson* v. *Love*, 82 N. C., 405.

The case of *Whitsell* v. *Mebane*, 64 N. C., 345, relied on for defendant is not repugnant to the authorities cited. There, the bond was placed in the hands of a third person to be delivered to the obligee on certain specified conditions, and was delivered to the obligee after the authority to do so had been withdrawn, and it was insisted that the obligee's possession raised the presumption that the conditions had been complied with and dispensed with proof, and the court declare that the burden of showing execution by proof of performance of conditions precedent rested on the plaintiff. The decision does not touch the general proposition that delivery of a bond will be presumed from the fact that it is in the possession of the obligee when there is no rebutting evidence offered.

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

No error. Affirmed.

WILLIAM FOY v. L. J. HAUGHTON.

Failure of Consideration—Fraud—Negligence.

Where the defendant had given to the plaintiff his bond for the payment of money in consideration of a quit-claim deed from the latter to land also claimed by the former, he cannot defend an action on such bond on the ground of a failure of consideration, in that, the plaintiff had no title to the land, without showing that, while in the exercise of due

diligence on his part, he had been misled by the fraudulent pretensions of the plaintiff to a title which he knew he did not possess.

(*Tilghman* v. *West*, 8 Ired. Eq., 183; *Etheridge* v. *Vernoy*, 70 N. C., 713, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1881, of CRAVEN Superior Court, before *Shipp, J.*

On the 9th of September, 1874, the defendant gave his bond to the plaintiff for $850, payable one day after date, which bond the plaintiff afterwards endorsed to one Bangert, who, upon failure of defendant to pay the same, sued the plaintiff as endorser and recovered from him for principal, interest and costs, the sum of $1.018.69, which plaintiff paid, and sues the defendant therefor. The defendant denies the right of plaintiff to recover, and says he was induced to give the bond through the fraudulent practices of the plaintiff. That being the owner of a tract of land in Jones county, he had covenanted to sell it to one McIver and to convey it to him by deed with warranty of title. Sometime afterwards he was informed by McIver that the plaintiff claimed to have title to the land, and that he would not complete his contract of purchase unless the defendant would get a quit-claim deed from the plaintiff. That plaintiff really had no title to the land, but as defendant believes, for the purpose of defrauding him, had caused to be registered in Jones county a deed for the same from one Pritchett, as sheriff of said county, wherein it was recited that, at a sale for taxes on the 2nd of March, 1872, by a predecessor of the then sheriff, the plaintiff had been the purchaser of said land, which deed purported on its face to have been made on the 27th of August, 1873. (within eighteen months after such sale for taxes) when in fact it had not been made until 9th May, 1874. That being deceived by means of said antedated deed, and supposing it to have been made, as on its face purported to be, and that

the plaintiff acquired some title to the land under it, the defendant was induced in order to remove an obstacle in the way of his selling the land to McIver, to take a quit-claim deed from the plaintiff, and to give the note sued on therefor. That as defendant is informed the plaintiff had the deed prepared and took it himself to Pritchett for his signature, and that he knew therefore of its being antedated.

As a counterclaim the defendant sets up the same alleged fraudulent conduct of plaintiff with reference to the sheriff's deed, and says he was thereby injured by being put to expense and costs in defending an action the said Bangert (the plaintiff's assignee) had brought against him upon the said bond, &c.

On the trial in the court below, the defendant was the only witness examined in the cause and testified that he gave the bond under the following circumstances: That supposing himself to be the owner of the land, he had contracted to sell it to McIver, who, however, declined to complete the contract on the ground that he had discovered an outstanding title in the plaintiff under a sale made for taxes. Afterwards he and the plaintiff met in Raleigh and had some conversation about the title, in which the plaintiff proposed to sell to him, but nothing being accomplished they separated, agreeing to meet again in Newbern and settle the matter.

They did subsequently meet there in the office of the defendant's brother, when they agreed on terms, and the bond was given and the deed made to defendant. He asked the defendant for his deed from the sheriff, who replied that he did not have it with him, and that he had come to settle the matter, and that it must be done then or not at all. That the land was sold for taxes in March, 1872, the deed from the sheriff was prepared and dated in September, 1873, but delivered and registered in May, 1874—more than eighteen

months after the sale. Upon this state of facts the defendant's counsel insisted that the deed from the sheriff to the plaintiff was void, and conveyed no title, and that it was a fraud practiced upon the defendant, as it bore date in September, 1873, and was not delivered until May, 1874.

His Honor charged the jury that if at the time the land and deed were executed, the plaintiff had a deed from the sheriff under the sale for taxes, which he believed conveyed to him a good title, he would be entitled to recover, whether such was its effect or not, as in that case there would be no fraud. The case closes with a statement that "the court also intimated an opinion that so far as the delivery of the tax deed was concerned the plaintiff ought not to be prejudiced by the laches of the sheriff."

The jury found all the issues in favor of the plaintiff, and from the judgment rendered in his behalf the defendant appealed.

Messrs. Green & Stevenson, for plaintiff.
No counsel for defendant.

RUFFIN, J. As the defendant was without the aid of counsel in this court, and his exception points to no particular error, we have carefully examined the whole case to discover if possible something of which he has a right to complain, without, however, being able to do so. As stated in his own answer, his right to the relief he asks seems doubtful. There is not a single allegation of any false affirmation on the part of the plaintiff in regard to his title to the land, or the date, or efficacy of his deed from the sheriff, nor the slightest pretence that the defendant had ever seen the registry of that deed before completing his contract with the plaintiff.

So far as the allegations of the defendant go, all that the plaintiff did in the premises was to have his deed registered

in the county in which the land lay, and this he was not only encouraged by the law to do, but required by every fair consideration of duty, seeing that the defendant was about to sell, and the purchaser should have notice before parting with his money of plaintiff's claim to the land, whether well founded or otherwise.

But upon the proof, the defendant being the only witness deposing, the weakness of his case becomes apparent. When the parties are brought face to face, whether at Raleigh or Newbern, there is literally nothing in the conduct of the plaintiff as given by defendant himself, from which a purpose to defraud and circumvent the defendant can be a legitimate inference.

On the contrary, it is apparent, as well from the testimony as the pleadings, that the defendant had doubts as to the validity of the title he was getting from the plaintiff, and that his object in buying was to rid his own title of all question, and thereby remove all objections on that score which might be entertained by McIver; otherwise, it is impossible to account for the defendant's willingness to accept from the plaintiff a mere quit-claim in lieu of an absolute deed for the land.

Conceding, even, that the law imposes upon every vendor the duty of disclosing every known defect in his title to the subject of the sale, there is nothing to show that the plaintiff in this case was aware of the existence of the defect in his deed now suggested by the defendant beyond that presumption of the knowledge of the law which all persons are supposed to have—a presumption, however, which is never so far indulged as to convict a party of fraud who is *in fact* innocent. As said in the case of *Tilghman* v. *West*, 8 Ired. Eq., 183, fraud cannot exist, as a matter of fact, where the *intent* to deceive does not exist, for it is emphatically the action of the mind which gives it existence. But the rule of law is that in sales of land it is the duty of a purchaser to

guard against all defects as well of title as of encumbrance or quantity, by taking proper covenants looking to the end, and if he fail to do so it is his folly, against which the law, that encourages no negligence, will give him no relief.

If there be on the part of the vendor any act of *actual misrepresentation*, or other *positive fraud* in regard to a material matter reasonably relied on, then the purchaser will be afforded relief, otherwise the maxim of *caveat emptor* applies in all courts, whether of law or equity. *Etheridge* v. *Vernoy*, 70 N. C., 713.

The charge given by his Honor to the jury in this case it being one in which a fraudulent intent to deceive is alleged, very properly left the question of the guilty knowledge on the part of the plaintiff to be determined by the jury, that being the point upon which the whole case hinged.

As to the intimation which it is said in the case he gave to the jury about the effect which the laches of the sheriff should have upon the plaintiff's title, we confess we do not see its pertinency, but as we cannot see that it worked any harm to defendant, or indeed, tell what his Honor did say on the point, we must decline to disturb the judgment rendered in the court below on account thereof.

No error. Affirmed.

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*M. L. FOX v. MARY KLINE.

Practice—Motion in Cause—Execution—Purchaser—Judgment Lien—Injunction.

1. One of a number of contesting claimants to a fund raised under execution cannot maintain an independent action to support his claim,

but must proceed by motion in the original cause of which such execution is the result.

2. A motion in the cause, and not a distinct action, is also the proper means of compelling the sheriff to make title to the purchaser at the execution sale.

3. The purchaser of land sold under execution is not entitled to an injunction to restrain another creditor from selling the property under an alleged prior incumbrance.

4. The sum bid for land at an execution sale is the measure of its value subject to all prior liens, and the purchaser cannot demand that the money paid by him shall be applied to the discharge of paramount incumbrances.

5. The lien of a docketed judgment is lost by delaying for more than ten years to enforce it by execution.

(*Millikan* v. *Fox*, 84 N. C., 107; *Bates* v. *Lilly*, 65 N. C., 232; *Dewey* v. *White*, *Ib.*, 225; *Child* v. *Dwight*, 1 Dev. & Bat. Eq., 171; *Patrick* v. *Carr*, Winst. Eq., 87; *Skinner* v. *Warren*, 81 N. C., 373; *Hasty* v. *Simpson*, 84 N. C., 590, cited and approved.)

MOTION for an injunction in an action pending in Randolph county, heard on the 9th of July, 1881, before *Gilmer, J.*

Motion allowed and defendant appealed.

Messrs. J. N. Staples and *Reade, Busbee & Busbee*, for plaintiff.

Messrs. Scott & Caldwell, for defendant.

SMITH, C. J. The case made in the pleadings and evidence is this: The plaintiff, assignee in trust for his wife and the other children of Lewis Lutterloh, of a judgment recovered by J. M. Jordan against him and docketed in the superior court of Randolph on June 15th, 1870, after obtaining leave of the clerk, sued out execution thereon on July 15th, 1880, and delivered it to the sheriff. The sheriff proceeded to advertise the land of Lutterloh for sale, previous to which, on August 19th, another execution on a judgment recovered by William Staley and docketed on the same day was placed

in the hands of the sheriff. On the 30th day of August, the land was sold and bid off by the plaintiff at the price of $1,025, and he gave his bond for that sum to the officer, none of which has been paid. Since the sale the defendant Kline, who also held a judgment against Lutterloh for about $900, docketed in the same court in December, 1874, and become dormant, obtained leave to issue and caused to issue an execution for its enforcement, under which the sheriff was proceeding to re-sell the land when he was stoppe by the restraining order sued out by the plaintiff, and afterwards continued until the final hearing of the cause. The plaintiff asserts a further lien on the premises superior to those of the other judgment creditors, by virtue of a consent decree entered in this court at January term, 1873, in a suit originating in the former court of equity and removed, wherein the assignor J. M. Jordan is plaintiff, and the said Lutterloh and his children and grand children to whom his land had been conveyed, as alleged, without valuable consideration, are defendants. The decree declares the lands bound and liable for the assigned judgment. But in passing on the merits of the present controversy, the force and effect of this adjudication may be put out of view, inasmuch as no steps have since been taken to give it practical operation.

The relief sought in the action is, that the plaintiff may be declared to be entitled to the purchase money, and if not, that he may be allowed to pay the same into court for the judgment creditors, defendants, as the court may determine their respective rights, and that a conveyance of the title be directed to be made to him.

From the interlocutory order for injunction the defendant, Mary Kline, appeals.

The issue between the plaintiff and defendant, Slatey, is confined to the disposition of the purchase money, which ought to be, and is not, in the sheriff's hands. For this reason the former proceeding to obtain an adjudication upon

their conflicting claims to the fund was not entertained. *Millikan* v. *Fox*, 84 N. C., 107.

The present method of procedure is exposed to the same fatal objection. Regarded as in the nature of a bill of interpleader, it should have been instituted by the sheriff against the two contesting claimants, and he is required to bring the money into court or at least offer to do so in his bill. But the action as prosecuted finds no precedent in the practice of a court of equity, and in its support no basis upon which the invoked jurisdiction can be exercised in administering relief. The appropriate and an adequate remedy can be found in an application to the court in the original action. While it is true that when under our former system an officer in possession of moneys raised under different executions is at a loss as to the proper and legal appropriation of them, he may, upon his own return, ask the advice of the court, and "the claimants," it is said by DICK, J., in *Bates* v. *Lilly*, 65 N. C., 233, "cannot be compelled to become parties, and their rights are not barred by the decision of the court." Yet, in the well considered opinion of RODMAN, J., delivered at the same term in *Dewey* v. *White*, 65 N. C., 225, he declares that the effect of the union of legal and equitable powers in a single tribunal, is to vest in it the right to determine the opposing claims of execution creditors to the fund under its control, and that the power is expressly conferred in section 68 of the Code of Civil Procedure.

Again, referring to the distribution of funds raised under execution at the instance of different contesting creditors, RUFFIN, C. J., remarks: "The question is one merely at law where the present plaintiff could get all the relief he was entitled to, *by a motion upon the return of the executions*," adding that the plaintiff "had another available and more obvious remedy" than that sought in the bill. *Child* v. *Dwight*, 1 Dev. & Bat. Eq., 171.

Nor can the action be maintained to compel the sheriff

to make title to the land, not only because a court of equity would not interfere in such a case, but for the further reason that the performance of this official duty, where the terms of sale have been complied with, and the money bid paid by the purchaser, will be enforced by a rule or order in the cause. *Patrick* v. *Carr*, 1 Winst. Eq., 87; *Skinner* v. *Warren*, 81 N. C., 373.

But the action has a wider scope than an adjustment of the matters in controversy between the plaintiff and the defendant, Staley. It undertakes to arrest the prosecution of the action of another creditor against the common debtor to subject his estate in the land to the satisfaction of her execution, when she is in no wise connected with the controversy between the others, and can perfect her remedy and render her lien effectual in no other way than by a sale. If the plaintiff has acquired title by the sale, he cannot be harmed by the proposed second sale of the land. If he bought an estate under the encumbrance of a superior lien, it can be removed by his paying off the paramount judgment. The sum bid is the measure of *value of the land subject to the encumbering judgment*, and to permit the plaintiff to discharge that debt out of the purchase money, aside from the wrong done to Staley, would be in effect to give him an *estate free from encumbrance*, at the price it sold for charged with the encumbrance. To this relief he can have no just claim, while he can relieve the property and prevent a resale by payment of the judgment debt to the defendant, Kline.

As was said in disposing of a motion made by a defendant to set aside an execution under which alleged exempted land had been sold: "The process should not be recalled upon the mere allegation that exempted land has been levied on and sold. If 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." *Hasty* v. *Simpson*, 84 N. C., 590.

Not only does the injunction suspend the exercise of the right of the defendant to perfect her lien and reach the property of the debtor, but if continued a sufficient time it may destroy the lien altogether and wholly defeat the purpose of the statute in limiting its duration. Where a party shall be "restrained from proceeding on his judgment by an order of injunction or other order, or by the operation of an appeal," the time of such restraint is not counted as part of the ten years during which the lien remains in force, but it is to be computed as part of that period in the words of the statute, "as against a purchaser, creditor, or mortgagee in good faith," whose rights are not impaired by the suspension. Hence the efflux of the limited time, although it may be caused by a restraining judicial order issued at the instance of other parties, and not by the creditor's voluntary inaction, may put an end to the lien and give precedence to junior judgments, a result which may produce an irreparable loss to the restrained creditor, and could not have been intended by the law.

While, therefore, if the cause was before us for a final disposition, we should be constrained to dismiss the action, we can only in this appeal pass on the validity of the order of injunction and reverse it. But as we have formed an opinion upon the points intended to be presented, and its expression may tend to facilitate a settlement of the controversy, we will add in conclusion that upon the facts the plaintiff's lien has been lost by his delay, and if, as we infer, the sale was made under both executions, the defendant Staley has a preferential right to the proceeds of sale, and the title acquired by the sheriff's deed, when executed, will be subject to the encumbrance of the judgment of the de-

fendant, Kline, by reason of its being docketed before that of her co-defendant, Staley.

There is error and the judgment below is reversed.

Error. Reversed.

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*JAMES L. MOORE v. B. D. AUSTIN.

Arbitration—Award—Practice—Evidence—Judgment.

1. Where a cause pending in court is referred to arbitration, the legal effect of the submission and award, if not successfully assailed, is to put an end to the action by a final judgment according to the award, if the reference was under a rule of court, or if not, to defeat it by the merger in the award of the original demand.
2. To have the benefit of the award at a later stage of the cause, it must be pleaded "since the last continuance," and it is not admissible as *evidence* upon issues previously joined.
3. An agreement of the parties pending a suit to submit to arbitration, and that the submission and award shall be a rule of court, will not constitute in fact such a rule as will authorize an entry of judgment in conformity to the award.
4. An award is not evidence of an account stated between the parties to the submission, unless, perhaps, in the single event of their being no regular agreement to refer, and consequently no award capable of being enforced.
5. Where an award is enforced by a justice as a rule of court, and the party aggrieved obtains a *recordari* in lieu of a lost appeal, an order directing the docketing of the cause for trial in the superior court is not an adjudication in any sense, upon the matters in controversy.

(*Lusk* v. *Clayton*, 70 N. C., 184; *Simpson* v. *McBee*, 3 Dev., 531, cited and approved.)

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

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

Verdict and judgment for plaintiff, appeal by defendant.

Messrs. Burwell & Walker, J. D. Pemberton and *G. V. Strong,* for plaintiff.

Mr. J. F. Payne, for defendant.

SMITH, C. J. This action to recover for work and labor done, began before a justice and coming on for trial the parties at his suggestion agreed to refer the matter in difference to two designated persons, one chosen by each for adjustment. On February 1st, 1876, three days thereafter, the arbitrators met at the house of the defendant to examine the work, when the plaintiff and defendant executed a bond in the penal sum of one hundred dollars, each to the other, to abide by the decision which might be made. The arbitrators after inspecting the premises agreed upon their award, charging the defendant with the payment of a balance of sixty dollars and the further sum of thirteen dollars and sixty cents, the estimated costs of the reference, and reported the same to the justice, who on April 12th following, without notice, entered judgment for the sum ascertained and fixed in the award. In October, the defendant applied for and obtained a writ of *recordari* and upon a suggestion of irregularity in its issue, a second similar writ, under which the cause was removed to the superior court, and docketed for trial and time given for filing pleadings.

The plaintiff thereupon filed his complaint setting out his original cause of action, the non-payment of the balance due for work performed, and without mention of the award. The defendant's answer denies the alleged indebtedness, sets up a special contract, work imperfectly done under it, and the plaintiff's refusal to complete it according to its terms and also relies on a counter-claim, the particulars of which are contained in an exhibit annexed. The pleadings are further extended, but it is not necessary to refer to their

conflicting allegations in disposing of the appeal. Two issues were framed and submitted to the jury without objection or any suggestion of others.

1. Is the defendant indebted to the plaintiff? and 2. If so, in what amount?

The exceptions of the defendant are to admission in evidence of the submission to reference and the award rendered by the referees, as not a matter presented and controverted in the pleadings nor pertinent to the enquiries before the jury; to the charge of the court as to the effect of the evidence; and for the further reason that the award was passed on and adjudicated adversely in the order directing the cause to be entered on the civil issue docket for trial. If the reference is to be taken as made under a rule by which the award was to become the basis of the justices' judgment, and a determination of the cause, no defence against such judgment could be entertained which does not impeach the validity of the award for intrinsic defects apparent upon its face, for misconduct on the part of the arbitrators, or upon other grounds legally sufficient to vitiate their proceeding and annul what they may have done.

In the absence of the impeaching allegations upon the production of the award, the plaintiff would be entitled to demand judgment thereon. This course was not pursued, but on the contrary the plaintiff in his permitted complaint re-asserts and relies on the same original cause of action, and the defendant in his answer contests the right of recovery and sets up his counter-claim in the same manner as before the justice. The arbitration and its results are not noticed in the pleadings, neither by the plaintiff with a demand for final judgment thereon, nor brought forward in the nature of a plea since the last continuance by the defendant, as a bar to the further prosecution of the suit. The legal effect of the submission and award if not successfully assailed, is to put an end to the action by a final judgment

for the plaintiff if the reference was under a rule, or if not to defeat it by the merger in the award of the original demand.

If the claim be for unliquidated damages, an award for a sum certain in satisfaction is, it is apprehended, a good bar without alleging performance. Russell Arb., 504; Morse Arb. and Aw., 591.

If the reference be after issue joined and the plaintiff proceed with his action after the award is made, it may be brought forward in the nature of a plea since the last continuance as a bar to the further maintenance of the action. To have the benefit of the defence it must be pleaded, and it is not admissible as evidence upon issues previously joined. Russell Arb., 505; Morse, 592.

The agreement and award were however produced on the trial, as definitely establishing the defendant's liability and fixing the damages to be assessed against him, and to the introduction of this evidence and the ruling of the court as to its legal effect, are the material exceptions we are called on to review.

The jury were also permitted upon the evidence to determine the character of the reference and whether it was the intention of the parties it should be under a rule of court and become a basis of a final judgment.

In our opinion, if parol evidence outside of the bond containing the covenant to refer were competent to prove a further agreement to enter judgment on the award, none such was allowed to go to the jury warranting a finding of the fact. The testimony of the justice shows simply that when the case was called for trial, the defendant insisted on leaving the controversy to arbitrators, to which after some hesitancy the plaintiff assented, and each then selected one of the arbitrators, and that when the award was returned he entered up judgment in accordance with its terms. Such judicial disposition of a pending suit is only authorized

when the reference is pursuant to a rule entered by consent, and this is in practical effect an agreement to confess judgment enforced by the court. *Lusk* v. *Clayton*, 70 N. C., 184. "A rule of court to stand to a submission and award," says DANIEL, J., speaking for the court, "was according to the common law a rule entered in some of the courts at Westminster where the records and pleadings in the cause were made up. A party who consented to have such a rule entered and disobeyed it afterwards, was subject to an attachment for a contempt," and he adds that no authority is found establishing the proposition "that an agreement of the parties pending a suit to submit to arbitration and that the submission and award should be a rule of court, was in fact such rule as by the principles of the common law would authorize an attachment to issue for its violation," *Simpson* v. *McBee*, 2 Dev., 531; or to enter judgment, the substituted practice in this state, according to the award.

Assuming the other aspect of the case, a submission *in pais* to be enforced by the covenant to abide by the action of the arbitrators, we meet the question of admissibility of the evidence, either conclusive or *prima facie*, of the indebtedness and the amount due from the defendant. It has been held that an award upon a verbal submission may be received to support an account stated and the other common counts in assumpsit, upon the idea that the referees are a common agency and their action that of the principals they represent, and this ruling has found its way into many of our text-books. *Keene* v. *Batshorn*, 1 Esp. N. P. C., 194; 2 Starkie Ev., 98; 2 Greenl. Ev., § 126; Wat. Arb., 356.

But the authority of this decision is denied, except where the submission is too indefinite to be enforced by action, and consequently is not a contract in the later and well-considered case of *Bates* v. *Fowley*, 2 Ex. Rep., 151, in which it is declared that persons chosen to arbitrate are in no sense

agents, but judges to decide between the parties, and hence their award is not evidence of an account stated. Referring to these cases, a recent writer on evidence says: "An award is not evidence of an account stated between the parties to the submission, unless perhaps in the single event of there being no regular agreement to refer, and consequently no award capable of being enforced in law." 2 Tay. Ev., § 1565. Accepting this as a correct exposition of the law, it was error in the court to allow the evidence upon the issue arising out of the pleadings and confined to the original cause of action.

We do not assent to the argument for the defendant that the order docketing the cause for trial is an adjudication of the matters in controversy, or has any wider scope than an appeal, for which it is substituted, would have had in its removal to the superior court.

There it then stood for trial as it did previous to the judgment before the justice in whose jurisdiction it originated. For the error assigned there must be a new trial, and it is so adjudged.

Error. *Venire de novo.*

MARY E. SCOTT v. L. F. BATTLE and others.

Deed of Married Woman—Lien for Purchase Money—Betterments—Notice—Damages.

1. Where the husband of a *feme covert* does not join in a conveyance of her land, and she is not privily examined as to her voluntary assent to the deed, the attempted conveyance is an absolute nullity; and the vendee has no lien on the land, or right of action against the woman personally, for the purchase money paid by him.

2. Such purchaser, being charged by implication of law with knowledge

of the invalidity of his title, cannot maintain a claim for "betterments" under the act of assembly (Bat. Rev., ch. 17, §§ 262 a et. seq.,) for improvements put by him upon the land.

3. One who acquires the estate of the first purchaser, under a mortgage sale, is affected with notice of the defect in the direct chain of his title, and stands in no better plight as regards improvements.

4. While purchasers so situated cannot claim for betterments *as such*, they will be entitled to a fair allowance as an equitable counterclaim, to the demand of the real owner for the rents and profits of the land.

(*Green* v. *Branton*, 1 Dev. Eq., 500; *Askew* v. *Daniel*, 5 Ired. Eq., 321; *Kerns* v. *Peeler*, 4 Jones, 226; *Harris* v. *Jenkins*, 72 N. C., 183; *Jones* v. *Cohen*, 82 N. C., 75; *Towles* v. *Fisher*, 77 N. C., 437; *Wharton* v. *Moore*, 84 N. C., 479; *Reed* v. *Exum*, *Ib.*, 430; *Dowd* v. *Faucett*, 4 Dev., 92; *Elliott* v. *Pool*, 6 Jones Eq., 42, cited, commented on and approved; and *Daniel* v. *Crumpler*, 75 N. C., 184, overruled.)

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

The facts are stated in the opinion of this court. The judge below held that plaintiff's deed of 7th December, 1858, to defendant, Battle, did not convey her interest in the land in controversy; but that she was not entitled to recover possession thereof until she repaid the purchase money paid to her by said Battle, and also the value of the permanent improvements put upon the land by Battle. The court held further that the claim of plaintiff for unpaid residue of legacy bequeathed by one W. L. Battle for the education of her daughters, in consequence of the failure of defendant Battle to pay the same, which was set up in the replication, cannot be allowed as a set-off to the purchase money paid and the value of the improvements made by defendant Battle; and also, that the sale and deed by a commissioner, appointed for that purpose, executed to defendants, Cobb and Batchelor, did not divest the title of plaintiff. And thereupon the judge framed issues for a jury, and retained the cause for further orders, and both parties appealed.

Messrs. Davis & Cooke and *Gilliam & Gatling*, for plaintiff.
Messrs. Bunn & Battle, for defendants.

RUFFIN, J. This cause comes here upon an agreed statement of facts in substance as follows:

In the year 1845, the plaintiff intermarried with one T. H. Scott, and lived with him until the year 1850, when she separated herself from him, and from that time until his death in 1876 they lived apart with the exception of one short interval—he at no time after the day of their first separation assuming any control over her property.

At the time of her marriage, the plaintiff was seized in fee of the land in controversy, and continued to possess the same until the 7th day of December, 1858, when she conveyed it to her brother the defendant, L. F. Battle, by a deed to which her husband was not a party. The deed was attested by two witnesses, and in 1872 it was admitted to probate upon the oath of one of them, and registered without her being privily examined in regard thereto.

At the time of the execution of the deed, the said L. F. Battle gave his note to the plaintiff for $600 upon which she brought suit, and at spring term, 1870, recovered judgment for the full amount of principal and interest, and in 1871, collected the same in full and used the money.

On the 14th day of March, 1870, just after the recovery of said judgment, the defendant, L. F. Battle, borrowed the sum of $3,000 of one Trevathan and executed a mortgage upon the said land as a security therefor, and failing to pay the same the said Trevathan sued for a foreclosure and obtained a decree under which the land in question was sold by a commissioner, when the defendants, Cobb and Batchelor, became the purchasers and took a deed under the sanction of the court in December, 1877.

The said Trevathan had no notice of any defect in the title of L. F. Battle at the time he took the mortgage, unless

the deed which plaintiff had given to defendant Battle was notice. Neither had defendants Cobb and Batchelor notice of such defect, except such as was given to them by this action which was instituted in May, 1877, and was pending at the time of their purchase—though they and L. F. Battle had notice of plaintiff's coverture.

During the time that L. F. Battle was in possession of the land he put upon it permanent improvements.

In 1859, one W. L. Battle died leaving a will by which he bequeathed to defendant, L. F. Battle, property valued at $10,000, and charged him with the sum of $1,000 to be paid to plaintiff for the benefit of herself and daughters—the interest to be used in their education and the principal to be theirs at the death of plaintiff. Of the amount thus bequeathed there has been paid only the sum of $320 in 1876 and the plaintiff has been compelled to advance her own money for the education of her daughters.

The questions submitted for the decision of the court are:

1. Is the plaintiff entitled to recover the possession of the land?

2. If so, is she liable to a charge for the purchase money paid her by the defendant Battle, and is the same a lien on the land?

3. Is she liable, and the land subject to a lien, for the value of the improvements put upon it by said defendant?

4. If so liable for purchase money and improvements, is she permitted to use as a counter-claim the amount still due her from said defendant upon the legacy to herself and daughters?

The plaintiff's right to the possession of the land cannot be questioned. The statute imperatively says that in order to effectually pass the estate of a married woman in lands, the conveyance must be executed jointly with her husband and after due proof or acknowledgment thereof as to him,

she shall be privily examined as to her voluntary assent thereto. Bat. Rev. ch. 35, § 14.

To properly understand the effect of these provisions it is necessary to remember that the statute is an enabling, not a disabling one.

At common law a married woman could not by uniting with her husband in a deed effectually convey lands of which she was seized in her own right, and there was but one mode known to the law by which she could do so, to-wit, by uniting with him in levying a fine. This she was permitted to do because it was supposed that the publicity of the occasion (it being done in the face of the court), and the care used by the judge to ascertain by a private examination whether her assent was freely given, afforded sufficient protection against the undue influence or authority of her husband. The statute confers upon her the power to convey by a simpler mode, but it prescribes the terms, and without their strict observance the act stands as it would at common law—absolutely null and void. The instrument executed by the present plaintiff to the defendant, Battle, lacked both of the essential elements to constitute it her deed—its joint execution by the husband and her own private examination—and consequently it is wholly inoperative. *Green* v. *Branton*, 1 Dev. Eq., 500; *Askew* v. *Daniel*, 5 Ired. Eq., 321. *Keerns* v. *Peeler*, 4 Jones 226; *Harris* v. *Jenkins*, 72 N. C. 183.

It would seem that the same reasoning must be a full answer to the defendant's demand upon the plaintiff for the restoration of the purchase money which she has received and used.

The incapacity of a married woman in law is not restricted simply to conveyances of her estate by deed, but extends to every contract, rendering her utterly unable to make any that can affect her estate either real or personal, except such as is technically known as her *separate estate*, that is, such as

may have been settled upon her by express deed or other instrument.

In no case will the law imply a promise on her part, and every one who deals with her is held to do so with a knowledge of her disability.

It is this disability of a married woman to make any contract, which we think distinguished her case from those in which a purchaser under a parol contract, void under the statute, has been allowed his claim for a restoration of the purchase money paid and compensation for his betterments. In such cases the ruling of the court has proceeded upon the idea that though the contract be void, the party making it had capacity to do so, and the very ground of the relief granted is that the vendor, by making such an agreement and thereby inducing the vendee to expend his money on the land, has obtained an unconscientious advantage which a court of equity will not permit him to use. But can this reasoning hold good when there exists as in the case of a feme covert no power to contract, and when indeed the law itself declares she shall not do so? We are referred however to the case of *Daniel* v. *Crumpler* 75 N. C., 184, as one in which the rule just spoken of governing parol contracts for the sale of land, was applied to such an agreement to sell by a married woman, and she was not permitted to oust her vendee until she had repaid the purchase money and the cost of improvements. On looking to the case, the fact that the plaintiff was a married woman seems not to have been observed by the court, at least there is no mention made of that circumstance in the opinion. So far as we can see, the point passed *sub silentio*, as if it had been the case of an ordinary vendor, resting under no disability, seeking to avoid his parol agreement; and regarding the decision to be inconsistent alike with precedent and principle, we do not feel at liberty to follow it.

In the case of *Askew* v. *Daniel*, 5 Ired. Eq. 321, it is said

that the deed of a feme covert, until she is privily examined by the proper authorities is *mere blank paper*, so utterly void, that even if it contain a stipulation in her own behalf, she cannot have the benefit thereof.

In *Green* v. *Branton* 1 Dev. Eq. 500, the court say that a feme covert can be bound as to her land in only two ways, first, by her deed executed jointly with her husband, with her privy examination thereto, and secondly, by the judgment of a competent court, and that if her deed be not executed as required by law, it is an absolute nullity, *under which no equity whatsoever can be set up.*

In 1 Bishop on married women §599 the principle is thus stated: If there is a defect in the wife's conveyance rendering it void at law, it is equally so in a court of equity, and even though the purchase money has been paid.

In *Martin* v. *Develly*, 6 Wend., 9, the court of errors for the state of New York held that a deed for lands executed by a married woman but not acknowledged pursuant to the statute, was absolutely void, and was in no wise aided by the payment of the purchase money. And so far from holding that the wife's land was subject to the lien of such purchase money, there was a clear intimation on the part of the court that the purchaser's only chance for redress was against the estate of the husband, and leave was given him to amend his bill so as to present his demand in that shape.

The supreme court of Ohio, in the case of *Purcell* v. *Gochom*, 17 Ohio, 105, say, that no precedent can be found of a decree against a married woman to convey lands upon the ground of her having agreed to do so, whether upon a full consideration paid or not, and the fraud of the wife in the transaction can make no difference.

And this court, in the case of *Jones* v. *Cohen*, 82 N. C., 75, where a husband and wife disaffirmed a deed for the wife's land made during coverture, on the ground of her infancy, held that the purchase money paid, and which had been

received by the husband, was his individual debt, without once suggesting that it created any lien upon the wife's land, which was the subject of the sale.

Upon principle, too, it seems impossible to conceive that the law will ever permit that to be done indirectly which it forbids to be done directly, or that it will give its countenance to a doctrine which must subvert its whole theory in regard to the contracts of married women. To do so would be equivalent to saying that a feme covert cannot by express deed, unless privately examined thereto, convey or charge her lands, and yet may by a mere contract to sell and the acceptance of the purchase money, create such a lien upon it as the *court of equity* will enforce by a sale against her will.

If this be tolerated, then the statute intended to regulate the contracts of a married woman has no longer any virtue left in it, and all the teaching of the common law as to her disability is swept away.

As to her not being privileged to commit a fraud: There can grow no fraud out of the *contract* of a married woman. It stands upon its own strength both in law and equity. If perfect, then, well and good. If imperfect, then it is an absolute nullity, no matter upon what consideration; and as said in *Towles* v. *Fisher*, 77 N. C., 438, no one can reasonably rely upon the contract of a married woman, or on a representation as to her intentions, which at best is in the nature of a contract, and by which he must be presumed to know that she is not legally bound, and it is only in the case of a pure tort altogether disconnected with a contract, that any estoppel against her can operate.

If in a case like the present a feme covert should retain and have actually in hand the money paid her as the consideration for her imperfect and disaffirmed contract, her vendee would be permitted to recover the same at law, or if he had converted it into other property so as to be traceable, he

might pursue it in its new shape by a proceeding *in rem*, and subject it to the satisfaction of his demand. But if she has consumed it, as it is admitted this plaintiff has done, the party paying it is without remedy; and this, because of the *policy* of the law which forbids all dealings with femes covert, unless conducted in the manner prescribed by the statute, and which throws the risk in every such case upon the party that knowingly deals with her.

We hold, therefore, that the plaintiff is not personally liable to a charge for the money paid her by the defendant Battle, nor is her land in controversy subject to a lien therefor.

The question as to the improvements put upon the plaintiff's land stands, we think, upon a different footing from that concerning the purchase money paid, and should be determined by reference, not merely to the invalidity of her contract of sale, but to the *bona fide* belief of the party making them as to the character of the title under which he held possession at the time. Admitting the plaintiff's deed to be wholly void *ab initio*, all she can ask is to get back her own, and at its original value, together with a just compensation for its use in the meantime by way of reasonable rents. All else above this is the fruit of another's labor or money bestowed upon the premises, and she can have no claim to be enriched thereby, provided it was innocently done, and in an honest belief that the party's title to the land was good. But on the other hand, if not done *bona fide*, and the party making the improvements should *know* that his claim to the land was not a valid one, then the law deems it his folly, and will allow him no compensation therefor. And especially should this be so if he act knowingly under a contract which the law declares *void*, because against its well known policy.

As has been several times said, this equity concerning *betterments* is of recent growth, and it has been diversely ap-

plied by different courts according to what seemed to them to be natural equities growing out of the facts presented in the several cases; and as might be expected in such a state of things, the decisions sometimes run counter to each other, thus proving the necessity for the establishment of some fixed rules in regard to the matter, and a strict adherence to them in order that the *law may be known*, and the rights of parties depend thereon, and not upon the discretion of the judges and their peculiar sense of what is equitable and right.

In the very recent case of *Wharton* v. *Moore*, 84 N. C., 479, this court took the position, that the party claiming for betterments must show not only that he meliorated the land, but that he did so under an honest conviction that the land was his; and it was there held that the constructive notice, to be derived from the registration of a mortgage, was sufficient to bar the claim; and still more plainly was this principle illustrated in the case of *Reed* v. *Exum*, reported in the same volume at page 430. There, the plaintiff sought to avoid his deed upon the ground of duress, and was allowed to do so, but was charged with the ameliorations by which the vendible value of the land was increased, and in delivering the opinion of the court the present chief justice justifies the charge upon the express ground that it was the duty of the plaintiff to have moved promptly to have his deed vacated, and that by his not doing so, the other party might reasonably have inferred a purpose not to do it at all, and therefore might *innocently* and under an honest belief of title have made the improvements. The case of *Thomas* v. *Thomas*, 16 B. Monc., 420, to which our attention has been kindly directed by a disinterested gentleman of the bar is on all fours with the present. There, the land of a feme covert was sold and conveyed by the deed of herself and husband, but so imperfectly acknowledged by her as to be inoperative. The purchaser made improvements and

resold to another who made additional improvements, and the question was whether the wife should account for the same. The court, being the court of appeals for the state of Kentucky, held that she should not account for those made by the first purchaser who had notice of the defect in his title, and could not therefore be considered as having expended his money innocently, but should account for those made by the sub-purchasers who acted under an honest belief as to the soundness of their title. This, we think, is the correct principle, and we have found no case in which compensation for improvement has ever been allowed to a conscious wrong-doer.

Applying this principle to the case in hand, we conclude that the defendants Cobb and Batchelor cannot be allowed their claim for the improvements made upon the land in question. They have "to work out their equity" through heir co-defendant Battle, and can occupy no higher ground than he did, and he was in law a *trespasser* at the time he made the improvements, and was known to himself so to be. The law would be unfaithful to itself to compensate a party for any loss sustained in so tortious a transaction. Still when the jury come to inquire into the plaintiff's damages on account of the use and detention of her lands, they will be at liberty, and indeed in duty bound, to make a fair allowance out of the same for improvements of a permanent character and such as she will have the actual enjoyment of. That such an allowance could properly be made by the jury was said in *Dowd* v. *Fawcett*, 4 Dev., 92, notwithstanding it was at the same time adjudged that the defendant's claim for improvements *as such* would not be recognized by the court.

This renders it unnecessary that we should determine the right of the plaintiff to use her demand for her unpaid legacy, as a defence to the counter-claim set up in the answer, and we forbear to do so, though it would seem at first blush

that her case comes within the rule of an equitable set-off as applied in the case of *Elliot* v. *Pool*, 6 Jones Eq., 42.

The judgment of this court is that the plaintiff is entitled to recover the possession of the land sued for, and that neither she nor her land is subject to any charge for the purchase money paid or the improvements made by the defendant L. F. Battle, and to this extent the judgment of the court below is reversed.

Let this be certified to the superior court of Nash county to the end that the case may be proceeded with according to law.

In our discussion of this case, it will be understood of course that we have been speaking throughout with reference to the law as stood prior to the adoption of our recent marriage act.

PER CURIAM. Modified.

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* JAMES M. CHEEK v. JOHN H. WATSON and others.

Parol Trust—Evidence—Impression of By-standers.

1. Where the plaintiff sues for the possession of land purchased by him at a judicial sale, and the defendant asserts an equity attaching to the estate by virtue of a distinct agreement that the plaintiff would buy the land for the defendant, and re-convey to him upon being reimbursed the sum bid and accruing interest, it is competent, after evidence has been given of an express promise on the plaintiff's part to purchase for the defendant conformably to such agreement, to show *as a fact* that there was a general impression among the by-standers at the sale that such an understanding existed, and that, in consequence, there was no competition among bidders.

2. Such evidence of what the by-standers understood is also admissible as corroborative of the defendant's statement as to what was the actual agreement.

(*Neely* v. *Torian*, 1 Dev. & Bat. Eq., 410; *Mulholland* v. *York*, 82 N. C., 510, cited and approved.)

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

CHEEK *v.* WATSON.

CIVIL ACTION to recover land tried at Spring Term, 1881, of ORANGE Superior Court, before *Avery, J.*

Defendant appealed from the judgment below.

Mr. John Manning, for plaintiff.

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

SMITH, C. J. The defendant does not controvert the title to the land acquired by the plaintiff under the sale and deed of the assignee in bankruptcy, but asserts an equity attaching to his estate therein by virtue of a distinct antecedent agreement between them, that the plaintiff would buy the land for the defendant, and reconvey to him upon being reimbursed the sum bid and accruing interest, in consequence of which the plaintiff having but a single competing bidder, was enabled to buy the land for about one-third of its actual value, and which it would have then brought but for the reluctance of others to bid against the defendant.

The plaintiff denies the agreement and the consequent trust, and the issue as to this disputed fact was among others submitted to the jury.

On the trial the defendant testified to a conversation had with the plaintiff on the morning of the sale, in which he told the plaintiff that two persons, his brother-in-law and another whose name he gave, had each proposed to buy the lot and allow him to redeem on paying the amount of the bid, and thereupon the plaintiff agreed to bid off the lot and permit him to redeem on the same terms; that he at once informed those persons of this agreement with the plaintiff and neither of them made a bid at the sale.

The brother-in-law, Suggs, testified in corroboration of the defendant and said that he had gone to the sale to buy the lot for the defendant, and would have done so but for the

defendant's communication of his agreement with the plaintiff.

The defendant's counsel then proposed to show that an impression prevailed among those present at the sale, that the plaintiff was bidding in the interest of the defendant, but without bringing the fact to the plaintiff's knowledge. The evidence was rejected by the court, and to this ruling the defendant excepts.

We propose to examine into the correctness of this action of the court.

The defendant had testified to the fact of a previous explicit understanding with the plaintiff, that he would bid on and buy the property and give the defendant an opportunity and time to redeem, and that the lot then worth $700 was bought for $176. It was certainly competent then to supply the connecting link between these separate facts and prove that the knowledge or belief of the bidders (or the prevailing impression among them) that the arrangement had been made for the defendant's benefit, caused them (as did information of it the brother-in-law) to refrain from competing with the plaintiff, then understood to be acting for the defendant, and he was thus allowed to obtain the lot at so reduced a price. This effect and the prevailing impression, whether produced by report or personal observation of the conduct of the parties on the occasion, to which it must be attributed, following the fact of an actual previous arrangement between them, constitute an important element in the asserted equity itself, as the means whereby the property was acquired for so inconsiderable a part of its value. As such, it would seem this general impression controlling the conduct of bidders, was susceptible of proof as a *fact in the case*. If the offer was to ascertain from the opinion of one witness the opinion of others, it was properly refused. But if the purpose was, and we so understand the record, to prove as a fact the same influence operating on a

large number of others, which restrained the brother in-law from participating in the sale, it was certainly competent evidence in charging the estate thus acquired with the alleged trust. We are sustained in our estimate of the value of the evidence by the case of *Neely* v. *Torian*, 1 Dev. & Bat. Eq., 410, cited in the brief of defendant's counsel, wherein Judge GASTON delivering the opinion says: "Whatever difficulty there may be in ascertaining the truth of this transaction in other respects, it is certain that an *almost universal belief prevailed among those present at the sale*, that the defendant was purchasing or bidding as a friend to the plaintiff, and under some agreement for the benefit of the plaintiff. Fourteen persons who were present at the sale have been examined, and eleven of these, and among them the trustee and the crier who conducted the sale, state explicitly, that such was their impression, and several of them testify that such was, as far as they had means of knowing, the belief of all the bystanders." The conclusion arrived at is thus announced: "Our conclusion upon the whole testimony is, that the defendant has deceived an embarrassed man into an assent to the sale of his land to the defendant, through the trustee, by taking advantage of his distress and exciting false hopes that the sale should not be treated as absolute, but that the land might be redeemed within a reasonable time." The trust would equally arise where the party relying upon the assurance, is prevented from making arrangements with others, by which he could have secured the same benefits promised by the purchaser. We have so recently had occasion to consider the grounds upon which parol contracts will raise trusts, that we simply refer to the case of *Mulholland* v. *York*, 82 N. C., 510, and the authorities therein referred to.

As the refused evidence was admissible, as in part the foundation of the defendant's equity, so it was in a measure corroborative of the defendant's testimony to the existence

of the agreement, as a shadow points to the object that produces it, and the rejection may have impaired the credit of the witness with the jury in passing upon the conflicting statements of the parties as to the agreement itself.

There is error, and there must be a new trial awarded.

Error. *Venire de novo.*

MINNIE MOORE by her next friend J. S. Carr v. W. F. ASKEW.

Guardian and Ward—Investments—Appeal.

A ward is entitled to demand of her guardian an annual statement of the manner and nature of his investments of her estate; and the rejection, by the probate court, of such a demand, is the denial of a substantial right, which entitles the ward to an appeal.

SPECIAL PROCEEDING heard an appeal at Spring Term, 1881, of WAKE Superior Court, before *Schenck, J.*

This is a proceeding commenced before the probate judge of Wake county, in which the plaintiff by her next friend, asks that the defendant, her guardian, may be required to disclose the manner in which he has invested her estate and the nature of the securities taken therefor.

The proceeding began with a motion on the part of plaintiff based on a proper affidavit, to compel the defendant to give additional securities upon his guardian bond. Notice of this motion was served on the defendant and made returnable on the 6th of March, 1879, on which day the matter was continued by the consent of the counsel of both parties to the 14th day of March, the plaintiff at the same time asking that the defendant might be required not only to give the additional security, but to make a state-

ment on oath as to the manner and nature of the investments made of her estate. Notice of this last motion was issued returnable on the 14th, and service thereof accepted by defendant's counsel. The defendant afterwards gave the additional security, and in return to the other motion filed an account in which he charged himself with a balance reported in a former return and the interest subsequently accrued thereon, and took credit for the amounts since then expended, without disclosing the nature of his investments. The plaintiff excepted to the account returned as being an insufficient answer to the rule upon defendant, but the probate judge held it to be sufficient and discharged the rule, and thereupon the plaintiff appealed to the superior court.

Upon the hearing in the superior court the defendant's counsel moved to dismiss the plaintiff's appeal upon the ground that it had been improvidently granted and without the authority of law. He also moved the court to dismiss the case, and not to proceed further therein on the ground that the matter was not embraced in the action, the same having been brought merely to compel the defendant to give additional security, and that it was not properly before the court as a part of said action.

The court overruled both of the defendant's motions, whereupon he appealed to this court.

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

RUFFIN, J. The exceptions taken here by defendant's counsel being the same taken in the court below, are,

1. That the refusal of the probate judge to require the defendant to disclose the nature of the investments made of her estate did not affect any "substantial right" of the plaintiff, and could not therefore be the subject of an appeal.

2. That this motion of the plaintiff having been improperly interpolated into her other motion asking for additional security from her guardian, did not constitute any part of the proceeding, and was not rightfully before the court.

If satisfied that the defendant's first exception was well grounded, our first duty would be to inquire into its effect upon his own appeal, since if it be true that the refusal of the probate court to allow the plaintiff's motion affected her rights so immaterially and unsubstantially as not to afford her sufficient ground for an appeal, it might be difficult to understand how an order, though a contrary one, of the superior court touching exactly the same subject matter, could confer such right on him. But we do not trouble about this, because we are decidedly of the opinion that the right of appeal from the refusal of the probate court to allow her motion lay on the plaintiff, and that the superior court did right in entertaining it.

With a view to securing the ward's estate, every guardian is required, before entering upon his office to give a bond, one of the conditions of which is that he shall obey all lawful orders of the probate court, and within twelve months after qualification, and annually thereafter, to file with the probate judge an inventory under oath, of the amount of property received and invested by him, with *a statement of the manner and nature of such investments.* Bat. Rev., ch. 53, § § 11 and 55.

As a further precaution, the probate judge has full power given him to take cognizance from time to time of *all* matters concerning orphans or their estates, and upon complaint made, to *make any order or rule necessary for the better ordering or securing of their estates.* § § 4 and 20, same chapter.

The power thus conferred upon that officer by express statute is exactly the same, with the exception of the power to sell or convert the estate of the ward, with that which the court of chancery has always exercised in the case of

wards in chancery, and by force of which it has wielded a superintending jurisdiction over guardians. The guardianship is there treated merely as a delegated trust, and the sanction or direction of the court is needed for every act which could affect the ward or his estate. We are not prepared to say that our probate court may now do all that the court of chancery assumed to do in the interest of its wards, but it is certainly true, that it has a much wider jurisdiction and more extensive powers than the county courts possessed under the old system, and that it performs many of the functions of a court of equity. So that in the absence of express statutory authority, we should be disposed to hold it to be within the range both of the *power* and *duty* of the probate judge to require every guardian within his jurisdiction to set forth in his returns not only the amount of his ward's estate, but how, and with whom invested. We can conceive of no other means by which he can with certainty acquire that information in regard to the condition of the fund, and the conduct of the guardian, which is necessary to enable him to perform understandingly many of the duties imposed upon him by law.

But the statute is express, and in so many words makes it the guardian's duty to include in his annual returns a statement of "the manner and nature of his investments" of the ward's funds, and by an implication equally as strong as a positive command, imposes an obligation on the probate judge to see that the same is done.

It might have been sufficient simply to have referred to the plain letter of the law, but we deemed it best to give some prominence to the matter in order that guardians generally and the judges of our probate courts might understand that the law attaches importance to this duty and will not tolerate its neglect.

There is no trust known to the law which so urgently calls for *good faith*, as that which subsists between the guar-

dian and his ward, and no higher evidence can be offered of that good faith than perfect candor, full information, and minute detailed accounts.

As to the defendant's other exception, we confess, we do not see the point of it. The plaintiff was entitled to have both of her motions considered and passed upon by the judge of probate, and had given full notice to the defendant of her purpose to do so. Indeed the day was fixed for the hearing of both with the written consent of his counsel, and surely it cannot involve any legal principle whether they were made and heard together, or made and heard separately.

There is no error in the judgment of the court below. Let the case be remanded to the superior court of Wake county and this opinion certified.

No error. Affirmed.

BANK OF STATESVILLE v. W. G. BOGLE.

Pleading—Demurrer.

A general demurrer that the complaint (or answer) does not set forth facts sufficient to constitute a cause of action (or defence) was properly overruled.

(*Love* v. *Com'rs*, 64 N. C., 706, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1881, of IREDELL Superior Court, before *Seymour, J.*

The summons in this action issued on the 21st day of May, 1879. In the complaint the plaintiff alleges that the defendant was in its employment, as a clerk, from the 1st of June, 1871, to the 1st of June, 1876, during which time he

was permitted to draw money from the bank and charge himself with the same; and that in this way, and within those periods, he drew and charged himself with the sum of $336.55, which he has failed to pay.

In his answer the defendant admits the allegations of the complaint, but says, "that he pleads the statute of limitations in bar of a recovery in the action."

To this answer the plaintiff demurs because, "there are not sufficient facts set forth in said answer to constitute a defence to plaintiff's complaint."

On the trial of the issue of law thus raised upon the pleadings, the court overruled the demurrer and the plaintiff appealed.

Messrs. J. M. Clement and *D. M. Furches*, for plaintiff.
No counsel for defendant.

RUFFIN, J. The stress of the argument in this court was laid upon the sufficiency of the answer, in setting up the defence of the statute of limitations—the plaintiff contending that as pleaded without any statement of facts to support it, it was but a mere announcement of a conclusion of law. We do not feel at liberty, however, to go into that question, as the demurrer itself is so defective as to require that it should be disregarded.

A general demurrer that the complaint (or answer) does not set forth facts sufficient to constitute a cause of action (or defence) should be overruled, or rather, disregarded." *Love* v. *Commissioners of Chatham*, 64 N. C., 706.

However much the correctness of the decision of the court in that case may have been questioned at the time, it has stood too long, and been to often approved, to admit of it at this late day.

No error. Affirmed.

C. L. FINCH and wife v. C. T. BASKERVILLE.

Demurrer—Answer—Joining Tort and Contract—Jurisdiction—Practice.

1. A demurrer precedes an answer, and cannot be put in after it, without leave obtained to withdraw the answer.
2. An application for the partition of land, joined with a demand for an account of the rents and profits, from certain tenants in common, alleged to have been in exclusive possession, and to have converted such rents and profits to their sole and separate use, is not a joinder of a demand in *tort* with one arising on contract.
3. Where the court has cognizance of the cause made by the complaint as first filed, the jurisdiction will not be ousted by an amendment averring additional matter which the court is not competent to consider; but such new matter should be disregarded as surplusage.

(*Ransom* v. *McClees*, 64 N. C., 17; *Van Glahn* v. *DeRosset*, 76 N. C., 292; *Street* v. *Tuck*, 84 N. C., 605, cited and approved.)

SPECIAL PROCEEDING for partition, heard on appeal (in a case pending in Granville county) at chambers, in Greensboro, on the 13th of September, 1881, before *Gudger*, *J.*

Defendant appealed from the judgment below.

Messrs. Gilliam & Gatling, for plaintiffs.
Messrs. Edwards & Batchelor, for defendant.

SMITH, C. J. In this action, commenced in the probate court of Granville on September 7th, 1880, the plaintiffs ask for partition of certain lands devised by George T. Baskerville, their father, and inherited from their deceased mother, who survived him, to which the feme plaintiff and the efendants are entitled as tenants in common; and they further demand a division and distribution of the personal estate derived from both sources, of which the defendants have had the possession and enjoyment, and an account of

such as they may have wasted and lost or appropriated to their own use, to the end that they may be charged with the value thereof. The defendants answer admitting the tenancy in common of the land retained (a part having been sold under a judicial proceeding at their instance) and their equal right to share in the personal estate of both ancestors, and they submit to the required division of both, and that an account may be taken in which each party shall be charged with portions of the personal estate, as he may be justly liable for in the proposed settlement. Thereupon a decree was made in October for partition of the lands, and commissioners appointed for that purpose, the matters of account and the distribution of the remaining personal estate being reserved. The commissioners made their report on March 8th, 1880, dividing the lands into three parts of equal value, and assigning to each tenant his and her share with specified boundaries in severalty. No exception is taken to the report, and no motion made for its confirmation. At this stage of the proceeding the plaintiffs file a written statement which seems to have been treated as an amendment to the complaint, but for which no leave appears of record to have been given, wherein they recite in substance that since the institution of the suit, they have learned that the personal property is in litigation in the circuit court of Mecklenburg, an adjoining county in Virginia, in a suit at their instance against the defendants and others, and they therefore abandon all claim to that fund in this action, and confine their demand to their share of a reasonable rental value of the lands while in the exclusive occupancy of the defendants, for the years from 1876 to 1880 inclusive, and of the profits and damages made and committed thereon. Upon the filing this paper, and without disturbing the previous action of this court, the defendants put in what is termed a demurrer to the amended complaint, and therein assign as cause of demurrer the improper

joinder of "a cause of action founded on contract, with a cause of action founded in tort." The probate judge sustained the demurrer, and on appeal his ruling was reversed by the judge of the superior court, and from this judgment the case is brought up by appeal to this court.

The proceeding is anomalous, and disregards the well established rule of practice that a demurrer precedes and cannot be put in after an answer, (*Ransom* v. *McClees*, 64 N. C., 17; *Van Glahn* v. *DeRosset*, 76 N. C., 292), without leave obtained to withdraw the answer. As the cause then stood, actual partition of the lands had been made under an order still in force, and only awaited confirmation, when the defendants undertake to contest an adjudication, to which at the time no opposition was offered, by a defence which if sustained, under the former practice at least, would put an end to the action, and would now require it to be divided. C. C. P., § 131; *Street* v. *Tuck*, 84 N. C., 605.

If the demurrer were interposed in the proper order of pleading, the causes assigned in its support are insufficient. Considered as distinct and independent causes of action, they neither rest in tort, but on an equity growing out of a common ownership, to share equally in its use and profits, and to have an adjustment where one or more has received more than his ratable part. If the new supposed cause of action were in tort, or if the adjustment of their respective interests in the fund involved the exercise of an equitable jurisdiction not conferred upon the probate court, as we are disposed to hold to be the law, the demurrer should be directed to the new cause of action introduced by the amendment, and not to the misjoinder, or a more direct defence might be made to the order allowing the amendment.

But the legal incapacity of the probate judge to take cognizance of the matters embraced in the new cause of action introduced, and for this reason demurrable, does not deprive the court of the jurisdiction which it does possess to

proceed with the other, and may be deemed an inoperative surplusage, needlessly and uselessly added. The court properly overruled the demurrer and corrected the error of the probate judge in this respect.

The solution of the difficulty may be found in striking out or disregarding all matters in the pleadings not connected with the division of the lands, of which the jurisdiction is unquestionable; and recurring to the point in the proceedings from which the erroneous departure was taken, to-wit, the reported partition of the commissioners, let the cause proceed, as an application for partition of lands only, to a final determination.

There is no error, and this will be certified to the end that a *procedendo* issue to the probate judge for further proceedings in the cause in accordance with law as declared in this opinion.

No error. Affirmed.

D. A. SPAUGH v. N. E. BONER.

Appeal—Practice.

1. One who is made, by service of process, a party to an action in a justice's court, must serve notice of an appeal, with a statement of his grounds therefor, within ten days after judgment.
2. *Quære*, as to whether an appeal will lie from a refusal of the superior court to dismiss an appeal from a justice's judgment.
3. The correct practice in case of a refusal to dismiss the action is to reserve the exception and proceed with the trial, so that on appeal the court may dispose of the whole case.

(*Sparrow* v. *Trustees*, 77 N. C., 35; *Crawley* v. *Woodfin*, 78 N. C., 4, cited and approved.)

SPAUGH v. BONER

MOTION to dismiss an appeal from a justice, heard at Spring Term, 1881, of FORSYTH Superior Court, before *Seymour, J.*

Motion refused and plaintiff appealed.

Messrs. J. C. Buxton, and *Watson & Glenn,* for plaintiff.

No counsel for defendant.

RUFFIN, J. The facts of this case so nearly resemble those which existed in the case of *Sparrow* v. *The Trustees of Davidson College,* 77 N. C., 35, as to render that case a controlling authority in this. There, as here, a summons issued from a justice's court, was served on the defendant who failed to appear at the trial, and judgment was rendered against him. More than ten days thereafter he gave notice of appeal, and the justice made his return thereto, to the next term of the superior court, when a motion to dismiss the appeal, as not taken in time, was allowed, and upon an appeal to this court the judgment of that court was affirmed.

In the opinion of Mr. Justice RODMAN delivered in that case, it is said there is a misprint in Bat. Rev., ch. 63, § 54, and that the word "or" should be "and," so that the section should read thus: "The appellant shall, within ten days after judgment, serve notice of appeal, stating the grounds thereof. If the judgment is rendered upon process not personally served *and* the defendant did not appear and answer, he shall have fifteen days," &c. Where the party is *made a party* by actual service of process, he is bound to take notice of the judgment, and of everything else that may be regularly done in the course of the cause.

We have, therefore, had no difficulty in reaching the conclusion that the defendant's appeal should have been dismissed on the motion of the plaintiff; but have had serious doubts as to the point whether an appeal would lie from the refusal of the judge in the court below to dismiss it.

In the case of *Crawley* v. *Woodfin*, 78 N. C., 4, it is said that no appeal lies from the refusal of a judge to dismiss an action or non-suit a plaintiff, and for the plain reason that such refusal affects no substantial right of the party, as every defence is still open to him that he ever had to the action. So certain is this, that it has more than once occurred in this court that the very points which had been argued upon appeals of this character, and adjudged, and considered as settled, have come back for argument and consideration a second time, when the causes were finally tried upon their merits in the courts below. To say nothing of the labors of this court, the effect of such a practice is to multiply appeals, protract litigation, and increase its costs, and in consideration of this mischief it is the fixed purpose of this court to suppress it. The correct practice in case of a refusal of the court to dismiss the action is to reserve the exception and proceed with the trial, so that on the appeal this court can have the whole case before it, and make such a decision as may at once dispose of it.

We do not, however, regard this case as coming certainly under the ban, for the reason that the motion to dismiss was based upon the want of all right in the defendant to have his cause in court, and was therefore in the nature of a plea to the jurisdiction, which question is always open, and at every stage of the case.

There is error. The judgment of the court below is reversed, and the appeal of the defendant from the judgment of the justice is ordered to be dismissed.

Error. Reversed.

DUNCAN CROMARTIE v. COMMISSIONERS OF BLADEN.

Contempt — Appeal — County Indebtedness — Taxation — Mandamus.

1. Where, at the instance of a party litigant, judgment of imprisonment is rendered against the adverse party for a contempt in wilfully disobeying an order of court, the party aggrieved is entitled to an appeal.
2. Under the act of 1868-'69, ch. 177, the court has no power to *punish* a contempt already committed by an imprisonment of indefinite duration; but it may, by "proceedings *as* for contempt," coerce obedience to any lawful order, by imprisoning the contumacious party until he shall comply.
3. Upon the principle that private interests must yield to those of the public, if the entire fund which can be raised by taxation within constitutional limits is required to meet the necessary expenses of an economical administration of the county government, a statement of such facts, supported by proof, will be a due return to a peremptory mandamus directing the county commissioners to levy and collect a sufficient tax to satisfy a judgment in favor of an individual creditor.

(*Bond* v. *Bond*, 69 N. C., 97; *In re Walker*, 82 N. C., 95; *In re Daves*, 81 N. C., 72; *State* v. *Mott*, 4 Jones, 449; *Pain* v. *Pain*, 80 N. C., 322; *Johnston* v. *Comr's*, 67 N. C., 101; *Clegg* v. *S. S. Co.*, 66 N. C., 391, cited and approved.)

RULE upon the defendant commissioners to show cause why they should not be attached for contempt, heard at Spring Term, 1881, of BLADEN Superior Court, before *Gudger, J.*

The defendants appealed from the ruling below.

Messrs. W. A. Guthrie and *T. H. Sutton*, for plaintiff.
Messrs. D. J. Devane and *C. C. Lyon*, for defendants.

SMITH, C. J. The plaintiff having sued, and at spring term, 1875, recovered judgment against the board of county commissioners of Bladen for the sum of $4,760, with interest thereon from February 5th preceding, to enforce the pay-

ment thereof applied for and obtained a writ of *mandamus* commanding the commissioners, as soon as permitted by law, to levy and collect a sufficient tax to discharge the debt. The process issued on December 25th, 1879, and was returnable and returned to spring term following. To this mandate the commissioners answered that they were only authorized by law, with a concurrence of a majority of the justices of the peace sitting with them, to levy taxes on the first Monday in August, and had been unable to comply with the directions of the writ since it was issued. At fall term, 1880, they made further answer and say that they have levied the maximum tax allowed under the constitution upon the taxable property in the county, from which would be realized about $4,000, according to their estimates, all of which was needed to meet the ordinary expenses of the county government for the current fiscal year, and necessary reparation of the public buildings and bridges.

At spring term, 1881, a rule, supported by affidavits of the plaintiff and others, was granted by the presiding judge against the commissioners personally, requiring them to appear before him *instanter*, and show cause, if any they have, why an attachment should not issue against them for contempt in failing to obey the command of the writ, to which rule the chairman of the board, W. J. Parker, on behalf of himself and associates, responds and says:

The commissioners did on August 1st, 1880, levy a tax on the real and personal estate in their county subject to taxation, to the full limits allowed by law, to-wit, for school purposes 8⅓ cents and for county expenses 34⅓ cents on every one hundred dollars valuation, and $1.28 upon each taxable poll for the school and pauper fund. The nett amount expected to be raised from the assessment upon property will be $4,630.38, whereof has been already disbursed by the treasurer $532.76, and $2,472.55 remains in the collector's hands.

The expenses to be provided for during the year out of this fund are:

For costs incurred upon *nol. pros.* docket of fall term, 1880,	...$	200
" " of holding the present term of the court,	...	1,200
" " mileage and per diem of the commissioners,		300
" " payment of fees due the clerk,	.....	300
" " estimated jail charges $250, necessary repairs $300, and cost of providing an iron cage therein $1,200,	.....	1,750
" " repairs of court house $400, and of bridges $200,	.....	600
" " other unascertained costs for taking tax list and holding August election, estimated at	.....	300
Making in the aggregate,	...$	4,650

The fund in the treasury on March 1st, 1881, was for general purposes $1,625.11, and not the larger sum stated in the plaintiff's affidavit.

Upon the coming in of this response, without inquiry or reference to ascertain the correctness of its specifications or the necessity and reasonable cost of the expenditures for the proposed objects, so far as we can see from the record, his Honor finds as a fact that no steps had hitherto been taken towards the reparation of the public buildings and bridges, and that all accruing demands on the treasury to that date had been met, except the expenses of the pending term and the *nol. pros.* docket and the sum of $75 to be paid under a contract for a bridge, that the available county means in possession of the treasurer were for public schools derived from the property tax, $2,033.47; and the poor from the poll tax, $236.86; general county purposes, $1,625.11; and to be

collected and paid in by the sheriff for the same objects, to wit, public schools, $662.95; poll tax, $827.45; general county fund, $2,472.45. And the court thereupon made the rule absolute and adjudged that the several defendants be each committed to the custody of the sheriff and be by him imprisoned in the common jail until they pay to the plaintiff out of the general fund in the county treasury the sum of $1,000, and deliver to him an order on the sheriff for a further like sum to be paid out of the taxes which have or may come into his hands, and that an alias writ of mandamus issue returnable to the next term, commanding the commissioners to levy and collect a sufficient tax to pay the residue of the plaintiff's demand.

From this judgment the defendants appeal, and the plaintiff objecting to the appeal in the court below insists it cannot be entertained here.

1. The judgment of imprisonment of the defendants for the alleged disobedience of the mandate of the court and for the enforcement of its order, made in a pending proceeding between parties, and affecting a substantial right, is clearly the subject matter of appeal. An appeal under similar circumstances was upheld in *Bond* v. *Bond*, 69 N. C., 97; *In re Walker*, 82 N. C., 95, and *In re Daves*, 81 N. C., 72.

In the last case in meeting the objection that an appeal does not lie from a judgment punishing a party for contempt, it is said, "this is true as to that class of contempts which are committed in the presence of the court or so near as to interfere with its business, and the reasons for which are set out by NASH, C. J., in the opinion in *State* v. *Mott*, 4 Jones, 449. But in cases like the present, where the right to punish depends upon a wilful disobedience of any process or order lawfully issued, the lawfulness of the power exercised is a proper subject of review in this court."

2. The defendants contend that the imprisonment being indefinite in duration is in contravention of the act regula-

ting contempts, the second section of which prescribes the only punishments to be imposed and limits the extent of the fine and imprisonment. Bat. Rev. ch. 24.

An examination of the enactment, with its divisions in full as published in the acts of 1868-'69 ch. 177, renders its proper construction plain and the intent of the general assembly in passing it, manifest. The first section declares what acts and omissions are contempts for which the guilty party may be punished. In these cases the judgment is punitory for offences already committed, and its object the vindication of the rightful authority of the court and its protection in the exercise of judicial functions. The punishment which may be imposed is restricted to a fine not in excess of $250, and imprisonment for not more than thirty days, one or both, at the discretion of the court. The four next sections are entitled "Proceedings in contempt," and regulate the manner of exercising the power before conferred. The remaining sections have a different caption and are designated "Proceedings *as for contempt to enforce* civil remedies." It is there declared that "every court of record shall have power to punish as for contempt" in certain enumerated cases mentioned in the first six paragraphs of section seven and those in paragraph seven, in "all other cases where attachments and proceedings as for contempt *have been heretofore adopted and practiced in courts of record in this State to enforce the civil remedies or protect the rights of any party to an action.*"

It will be noticed that throughout these latter portions of the statute, the proceeding is designated not as the former, but a proceeding "*as for contempt,*" and while regulating, not intended to deprive the court of its well established jurisdiction to enforce obedience to its lawful orders as before possessed and exercised.

"Without the ability to compel obedience to its mandates," say the court in *Pain* v. *Pain*, 80 N. C., 322, "whether

the order be to surrender writings in possession of a party, to execute deeds of conveyance, *to pay money*, as in the present case, or to perform any other act the court is competent to require to be done, many of its most useful and important functions would be paralyzed." The order here is coercive only upon persons capable of performing its requirement and its force is exhausted by rendering obedience. There is therefore no excess of power apparent in the judgment.

3. The findings of fact are however so imperfect that we are unable to decide the case upon its merits. It is manifest that where the public interests conflict with private interests, the latter must yield. If the entire fund which can be raised by taxation is required to meet the necessary expenses of an economical administration of the county government, and none can be diverted to pay its indebtedness without serious detriment to the public, none ought to be thus appropriated. This is the statement in the answer of the defendants showing cause against the rule, and if true, would seem to be a sufficient defence. The commissioners are under an official obligation to keep and maintain the public buildings and bridges, falling under their supervision, in good repair and safe condition, and to provide for the other specified public objects. But these must be reasonable estimates, and the necessity for the expenditure, present and pressing. If by any economic and prudent administration a part of the fund can be spared for the county indebtedness, undoubtedly the creditor has a right to demand that it be appropriated to his judgment. But this does not appear in the findings of fact by his Honor, nor does it seem that any inquiry in this direction was made by reference or the hearing of testimony. His decision seems to have been based upon the unexplained facts that the moneys had not been expended upon any of the specified objects up to that date, and the current demands upon the treasury

had been met, not adverting to the effect which the continued prosecution of the writ may have had upon the commissioners in preventing the use of the moneys until its determination. Until the suggested information is furnished and the necessary additional facts found and supplied, we are unable to decide whether the contempt has been committed or the coercing order *lawfully issued*. The commissioners however can only be required to give an order upon the treasurer when there are funds in his hands which ought to be applied to the judgment, since this is the method alone by which they can control and dispose of the county moneys. Bat. Rev. chs. 27, 29, 30 and ch. 102 §§ 40 and 41.

But for the insufficiency of the statement of facts upon which the contempt is adjudged and our inability in consequence to decide upon the validity of the order of commitment and the correctness of the ruling, the cause must be remanded.

We have expressed our opinion upon the several points noticed as of practical importance and perhaps facilitating the settlement of the present controversy. The difficulties arise out of the constitutional restrictions upon the taxing power and the inadequacy often times of the county authorities to provide for all the public liabilities, superinducing the frequent necessity of applying to the legislature for its authoritative sanction for levying an increased tax for special purposes beyond the constitutional limits. Const. Art. 5, §§ 1 and 7. *Johnston* v. *Commissioners of Cleaveland*, 67 N. C., 101.

Before concluding this opinion we call attention to the fact that the sheriff is no longer required to collect taxes, under a judgment of the court to be applied to the debts of counties or municipal corporations, except in three counties and instead a special tax collector may be appointed to collect the taxes thus assessed by these bodies. Acts 1876-77,

ch. 257. The cause is remanded and this will be certified, *Clegg v. N. Y. W. S. Co.*, 66 N. C., 391.

Error. Remanded.

JAMES MOORE v. T. B. HILL and others.

Exception—Appeal—Issues—Estoppel.

1. An exception in order to be available on appeal must point out specifically the error of which complaint is made.
2. If issues framed by the court are defective or insufficient to develop the whole case, the party prejudiced thereby must lay the foundation of an appeal by suggesting the proper corrections at the time of the trial.
3. The owner of a chattel which has been sold as the property of another, is estopped from asserting his title against the vendee by accepting and collecting to his own use a note which he knows that the vendee gave for the purchase money.

(*Brumble* v. *Brown*, 71 N. C., 513; *Baines* v. *Drake*, 5 Jones, 153; *Sapona Iron Co.* v. *Holt*, 64 N. C., 335; *Curtis* v. *Cash*, 84 N. C. 41; cited and approved.)

CIVIL ACTION tried at January Special Term, 1881, of SAMPSON Superior Court, before *McKoy, J.*

Judgment for plaintiff, appeal by defendants.

Messrs. J. L. Stewart and *E. W Kerr*, for plaintiff.

No counsel for the defendants.

SMITH, C. J. The action is upon a promissory note under seal executed by the defendants to Thomas B. Ashford, and the recovery is resisted upon the allegation of a failure of consideration and an assignment to the plaintiff after its maturity. After the jury were empanelled, no issues hav-

ing been previously prepared, the court drew up and submitted those set out in the record, in response to which the findings are in substance, that the steam engine for the payment of which the note was given was not the property of Ashford, but belonged to the plaintiff, and there was no fraud in the sale; that the note was transferred before it became due; that there was not an entire failure of consideration, and that the plaintiff when he took the assignment knew that the vendor had no title to the engine, but did not know of any fraud committed in making the sale. The record shows two exceptions taken by the appellants.

1. The defendants excepted to the issues submitted to the jury without specifying any grounds of objection, and we are unable to see whether the objection is directed to the time when the issues were drawn up, to their form, or to their sufficiency to present all the material matters in controversy, or upon what other ground it may rest. It does not appear that additional issues were offered and declined, and we have not had the aid of counsel to point out the force and pertinency of the exception, or wherein the ruling is erroneous.

The indefiniteness of the exception itself as stated in the case is a sufficient reason for its not being entertained, as has been often heretofore ruled. *Brumble* v. *Brown*, 71 N. C., 513, and other cases.

But it is untenable upon any grounds suggested, and must be overruled.

It could not be a surprise that the issues were made up after the empanelling of the jury, since they must be eliminated from the pleadings, and are but a condensed expression of what is contained in them. The material matters in controversy upon which the jury are to pass are known to the parties, and are not changed when merely put in the form of distinct and separate propositions for the convenience of the jury, and their better understanding and dis-

position of the points in dispute. And if in consequence of an amendment they should take a wider range and new issues be introduced, a party cannot complain that the trial is allowed to proceed when no delay is asked and no objection interposed.

If the issues prepared were defective in form, or insufficient in number to develop all the elements involved in the controversy, it was the duty of the appellants to call the defect or omission to the attention of the judge in order to a correction, and they cannot here take advantage of the consequences of their own neglect. It is enough that the findings warrant and sustain the judgment rendered upon them. *Curtis* v. *Cash*, 84 N. C., 41; *Bryant* v. *Fisher*, at this term.

2. Upon the trial in order to show title of the vendor at the time of sale, the defendants introduced the registry of a bill of sale from him to the plaintiff made shortly before the execution of the note, and for the recited sum of $579, conveying among many other enumerated articles the steam engine, the price of which forms the alleged consideration. In answer and explanation the plaintiff was allowed, after objection from the defendants, to show from the same registry a contemporary penal bond entered into with the vendor for the reconveyance to him on payment of a note for the like sum of $579, the same articles specified in the bill of sale as a part of the same transaction, and pursuant to an agreement that included the making of both conveyances.

We are relieved from the necessity of deciding whether the two deeds in connection constitute a mortgage requiring registration, and of which the registry or certified copy "may be given in evidence in any court," Bat. Rev. ch. 35, § 9,) since it appears that the original deeds were themselves produced, and their execution proved by the subscribing witness who drew them, after the introduction of the registry, thus removing from the exception whatever force

if any, it might otherwise possess. While we are not at liberty to look into the evidence for authority in Ashford to make the sale, the acceptance by the plaintiff of the note known to have been given for the purchase money, and his enforcing payment through the present action, would in law be a full ratification of the sale, and disable him from disturbing the vendee's possession and use of the property thereafter, by the assertion of a superior hostile title in himself. While we do not assent to the unqualified proposition embodied in the defence, that a defective title in the vendor or the worthlessness of the article of personal property sold and delivered, can absolve the vendee from his special contract to pay a definite price, or be made available otherwise than as a counter-claim founded upon an express or implied warranty or fraud in the transaction, (*Baines* v. *Drake*, 5 Jones, 153; *Sapona Iron Co.* v. *Holt*, 64 N. C., 335) the jury find that there was no entire failure of consideration, nor any fraud practiced by Ashford in making the sale.

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

No error. Affirmed.

OWEN W. DAIL v. JULIA A. JONES.

Deed—Construction—Remainder in Chattels—Evidence.

Where the operative words of a conveyance were that the grantor "doth give, grant, bargain, sell and convey unto the party of the second part all his household and kitchen furniture, *to be theirs at his death*, to have and to hold," &c.; *it was held*

(1) That such conveyance was an attempt to limit an estate in remainder

in chattels, expectant upon the determination of a precedent life estate reserved to the grantor;

(2 That the reservation of the life interest could not be disregarded as inoperative by reason of its repugnancy to the estate conveyed to the grantor;

(3) That the particular estate for life absorbed the entire interest, and the limitation over was void;

(4) That parol evidence that the grantor put the grantees in possession of the property immediately after executing the deed is inadmissible to affect the construction of such deed.

(*Wilson* v. *Sandifer*, 76 N. C., 347; *Graham* v. *Graham*, 2 Hawks, 322; *Morrow* v. *Williams*, 3 Dev., 263; *Sutton* v. *Hollowell*, 2 Dev. 185; *Hunt* v. *Davis*, 8 Dev. & Bat. 42; *Foscue* v. *Foscue*, 2 Ired. Eq., 321; *Lance* v. *Lance*, 5 Jones 413, cited and approved.)

CLAIM AND DELIVERY tried at Spring Term, 1881, of GREENE Superior Court, before *Graves, J.*

This is an action of claim and delivery, brought to recover certain articles of personal property from the possession of the defendant, who claims to hold the same as administratrix of Owen W. Jones, deceased.

The plaintiff claims it under a deed to himself and wife from the defendant's intestate, the conveying clause of which is as follows: "And the party of the first part doth also, in consideration as before stated (natural love and affection) and the further consideration of the sum of one dollar, to him in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, give, grant, bargain, sell and convey unto the party of the second part, all the household and kitchen furniture, *to be theirs at his death*, to have and to hold," &c.

On the trial in the superior court the plaintiffs offered to show by the subscribing witness to the deed, that at the time of its execution the grantor put the property conveyed into the possession of the plaintiff, but upon the objection of the defendants, the evidence was excluded, and the plaintiff excepted.

His honor being of opinion that the grantor had reserved to himself a life estate in the property mentioned in the deed, and that the plaintiff could take nothing therein by way of remainder after such life estate, directed a verdict to be entered for the defendant, to which the plaintiff excepted.

There was a verdict and judgment in favor of defendant and the plaintiff appealed.

Messrs. W. C. Munroe, and *Battle & Mordecai,* for plaintiff.
No counsel for defendant.

ASHE, J. The first exception taken to the ruling of His Honor was to his refusal to admit evidence on the part of the plaintiff to prove an actual delivery of the property conveyed in the deed by the grantor to the plaintiff, the grantee, at the time of executing the deed. This evidence was offered to show that the grantor intended by the deed to convey a present interest to the plaintiff and his wife, and for that purpose was clearly incompetent because it would contradict the deed, and the deed must speak for itself; it cannot be added to, varied or contradicted by parol evidence. *Wilson* v. *Sandifer*, 76 N. C., 347. The deed in this case conveyed the property to the grantees to be theirs on the death of the grantor, but the parol evidence offered was to show that the property was to be theirs immediately upon the execution of the deed.

The next exception by defendant was to the ruling of His Honor "that by the deed the grantor reserved to himself a life estate in the property, and that the grantees could take nothing in remainder."

The grounds taken in support of this exception were, first, because the premises of the deed completely disposes of the property before the phrase which it is insisted reserves a life estate to the donor. The words of the deed being, "and the party of the first part doth also, in consideration of one

dollar to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, give, grant, bargain, sell and convey, unto the party of the second part all his household and kitchen furniture to be theirs at his death to have and to hold," &c., the counsel insists that the names of the grantor and grantees, words of grant and description of the thing granted, are all before the so-called reservation, and perform the office of premises; and the words, "to be theirs at his death," perform the office of an *habendum*, as it is used to qualify the premises, and being totally repugnant thereto is void. We do not see the force of the argument. The whole conveyance is here set out in the premises of the deed which includes the words, "to be theirs at his death," and then follows the *habendum* to have and to hold which in no way qualifies the estate conveyed in the premises.

And secondly, because though the phrase "to be theirs at his death," be a part of the premises, inasmuch as it is repugnant to the prior clause of the deed conveying this property to the grantees, it is void. The effect of such a rule would be to exclude reservations from all deeds having no *habendum*, and as CHANCELLOR KENT says, (in 4 Kent Com. 468), in modern conveyancing the *habendum* clause in deeds has degenerated into mere form, and a deed may be good without any *habendum*.

It is now too late to contend that a remainder in personal chattels may be limited in remainder after a life estate. It is too well settled by numerous adjudications in this state to admit of serious argument to the contrary, and upon this well established principle it has been repeatedly held that a reservation of a life estate in chattels, in a deed attempting to convey them in remainder, reserves the whole estate and the limitation over is void. So if in this deed there is a reservation of a life estate to the grantor, the plaintiff takes nothing by the deed. The law prescribes no formula for

such a reservation; any expression in a deed that indicates the intention of the donor to reserve a life estate is sufficient, as in the case of *Graham* v. *Graham*, 2 Hawks, 322, the words were, "have given and granted *at my death* and by these presents, *at that time*, do give and grant to the said M. G. my negro girl, (this was before the act of 1825); it was held that it resembled the common case of a conveyance by deed of personal property for life, remainder to another after the determination of the life estate, and nothing passed to the remainder-man.

In *Morrow* v. *Williams*, 3 Dev. 263, after giving the property to the donee the words used were "*to enjoy full power and possession after my death*;" Judge HALL observes: "Now it has been held in repeated decisions, that such a remainder in personal chattels cannot be created by deed," and after citing *Graham* v. *Graham* and several other decisions of this court, added: "The doctrine may therefore be considered settled." See also *Sutton* v. *Hollowell*, 3 Dev. 185; *Hunt* v. *Davis*, 3 Dev. & Bat. 42; *Foscue* v. *Foscue*, 2 Ired. Eq, 321; *Lance* v. *Lance*, 5 Jones, 413. The law was altered in this respect as to slaves by the act of 1823 and this act of the legislature is a very strong recognition of the principle and was as much as to have declared that as to other kinds of personal chattels than slaves, no conveyance by deed of a remainder after a life estate shall be good.

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

No error. Affirmed.

A. R. MASON by next friend v. RACHEL McCORMICK and others.

Boundary—Declaration of Deceased Owner—Evidence—Record of Former Action.

1. The declarations of a deceased owner of land, locating an angle of an adjoining tract, is admissible, though the corner so established is coincident with one of his own boundaries, where both parties to the action place the corner in the declarant's line and it is immaterial to him at what point it is fixed.
2. Upon an issue as to the defendant's occupation of land in dispute, it is proper to introduce the record of a former suit by the defendant against the plaintiff and others for an injunction and to stay trespass, for the purpose of showing, by an affidavit made in that cause in behalf of the plaintiff therein, a deliberate admission of such possession.

(*Sasser* v. *Herring*, 3 Dev. 340; *Hartzog* v. *Hubbard*, 2 Dev. & Bat. 241; *Dancy* v. *Sugg*, *Ib.* 515; *Hedrick* v. *Gobble*, 63 N. C. 48; *Caldwell* v. *Neely*, 81 N. C. 114; *Smith* v. *Walker*, 1 Car. L. R. 514; *Mushatt* v. *Moore*, 4 Dev. & Bat. 124; *Ryan* v. *McGehee*, 83 N. C. 500, cited and approved.)

CIVIL ACTION to recover land tried at Spring Term, 1881, of CUMBERLAND Superior Court, before *Gudger, J.*

Verdict and judgment for plaintiff, appeal by defendants.

Mr. N. W. Ray, for plaintiff.
Mr. W. A. Guthrie, for defendants.

SMITH, C. J. The plaintiff claims the tract of land represented in the surveyor's map within the yellow lines designated by the figures 1, 2, 3, 4, 5, under a grant from the State issued November 22nd, 1872, for one hundred and ninety-seven acres. The defendants derive title under a grant issued November 18th, 1873, to George Elliott for four hundred and seventy acres, and which they allege covers the place in dispute. The controversy is as to the loca-

tion of the land described in the Elliot grant and rectangular in form.

The plaintiff contends that its first corner is at 42 in McNeill's boundary, and is comprehended in the red lines 42, 46, 47, 52, while the defendants insist that the beginning is in McNeill's line further east at A, and the tract is included in the diagram A, B, C, D.

If the defendants' contention be sustained, they are not tresspassing upon the plaintiff's land; if the plaintiff's be sustained, they are, and the plaintiff is entitled to recover.

Two issues were submitted to the jury, in answer to which they find that the plaintiff is the owner of all the land mentioned in his complaint, except the part included in the triangle 2, 48, 52, and that Duncan McCormick, the defendants' testator, was at the commencement of the action in possession of all the plaintiff's land, except the triangular figure represented by the marks 1, 2, L.

The third issue was as to damages, and they are assessed at $200.

There are two exceptions to be considered in the appeal.

1. The admission of the declarations of John McNeill as to the position of the first corner of the Elliott grant on his line.

2. The reception of the record of a former suit of the defendants against the plaintiff and others for an injunction and to stay trespasses.

First: The objection to the evidence of the declarations of the deceased owner of the McNeill tract, is based upon his supposed interest in establishing his own boundaries by this location of angle of an adjoining tract. The objection is not tenable. Both parties to the action place that corner in the declarant's line, and to him it is entirely immaterial whether it is at one or the other point.

The declaration, moreover, is not used to ascertain and fix the limits of the declarant's own land, but the corner of an adjoining tract to determine its location, and the evidence

is not rendered incompetent because that corner is coincident with one of his own boundaries.

Such evidence is not admitted where the declaration comes from "the owner of the land, however ancient, in behalf of those claiming the same land under a different title," as was said by Chief Justice HENDERSON in *Sasser* v. *Herring*, 3 Dev., 340. To this effect are all the cases, *Hartzog* v. *Hubbard*, 2 Dev. & Bat., 241; *Daney* v. *Sugg*, *Ibid*, 515; *Hedrick* v. *Gobble*, 63 N. C., 48; *Caldwell* v. *Neely*, 81 N. C., 114; *Smith* v. *Walker*, 1 Car. L. Rep., 514.

Second: The ground of the objection to the introduction of the record of the former suit in which the present defendants were plaintiffs and the present plaintiff in association with others, was a defendant, is not set out, and we are unable to see its force. That action was prosecuted on behalf of the defendants in this by one J. F. Shaw, their agent, whose own oath verified the complaint, and upon whose separate affidavit an injunction restraining the alleged trespasses was obtained to continue till the hearing.

The affidavit affirms that Duncan McCormick died in the year 1873 in possession of the land previously mentioned, and that the plaintiffs, (the present defendants) have been in possession ever since, up to January 8th, 1874, the date of its verification. The admissions of this accredited agent in prosecuting the suit and in protecting the interests of the parties he represented are clearly competent upon the issue as to the defendants' occupation of the disputed land.

An affidavit made by a party for a *certiorari* may be read in evidence against him to show any facts which are provable by mere admissions or representations, *Mushatt* v. *Moore*, 4 Dev. & Bat., 24, and in like manner when made by an agent "whose testimony has been used," in the language of the court in *Ryan* v. *McGehee*, 83 N. C., 500, "to indorse certain actions on the part of the court for the benefit of the defendant, and to which he has thereby given credit." A

record may be admitted in evidence in favor of a stranger against one of the parties, not as a judgment conclusively establishing the fact, but as a deliberate declaration or admission of such fact. "It is therefore," says GREENLEAF, "to be treated according to the principles governing admissions, to which class of evidence it properly belongs." 1 Greenl. Evi., § 527 a. The ruling is clearly within these references, and the exception must be overruled.

The transcript in this appeal is needlessly voluminous, attended with much cost to the party who may have it to pay, and in the examination, greatly increasing the labors of the court. The rule which charges the party in fault with the costs of copying these parts of the record, not necessary to show a cause properly constituted in court, and having no bearing upon the rulings, the subject of exceptions, will be enforced.

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

No error. Affirmed.

S. B. CHRISTENBURY v. C. C. KING.

Adverse Possession—Color of Title—Estoppel—Evidence.

1. When the plaintiff's title to land is based on a seven years' adverse possession under a colorable claim, the law does not require that such possession should be for the seven years next preceding the commencement of the action.

2. When the title to land is out of the State, the adverse possession of the same, with color of title, by the occupant and those under whom he claims (the adverse claimant not being under disability) will vest in him the title against all the world, which cannot be divested except by a subsequent continued adverse possession for seven years with color of title, or twenty years' adverse possession without color.

3. It is a rule of justice and convenience, adopted to relieve the plaintiff in ejectment from the necessity of going behind the common source of title, that when both parties claim under the same person, neither of them can deny his right, and the elder title must prevail, unless the defendant can connect himself with a better title outstanding.

4. If the defendant who derives his title from the same source as the plaintiff can show that a deed in the chain of the plaintiff's title was never delivered save as an escrow, he may *then* build up his own title under a junior grant, by proper evidence.

(*Johnson* v. *Parker* 79, N. C. 475; *Lenoir* v. *South*, 10 Ired. 237; *Freeman* v. *Loftis*, 6 Jones, 524; *Caldwell* v. *Neely*, 81 N. C. 114; *Gilliam* v. *Bird*, 8 Ired. 280; *Ives* v. *Sawyer*, 4 Dev. & Bat. 51; *Fray* v. *Ramsour*, 66 N. C. 466, cited and approved.)

CIVIL ACTION to recover land tried at Spring Term, 1881, of MECKLENBURG Superior Court, before *Eure, J.*

The plaintiff claimed under a deed from Levi Spencer, William Foster and wife Mary Ann, and Rufus Nicholson and wife Annabella, dated March 15, 1870, to one John Davidson, (as to the execution of which deed, the femes covert were privily examined according to law) and a deed from John Davidson to the plaintiff. In order to estop the defendant from questioning Spencer's title, the plaintiff introduced a deed from said Spencer dated.....day of..... 18....., to one Schenck, and a deed from Schenck to defendant, conveying the premises in dispute, and it was admitted by defendant that he claimed the land under Spencer. The plaintiff also introduced a deed for the land, dated in 1854, from W. F. Strange to Minta Prim (or Spencer), and proved that Mary Ann Foster and Annabella Nicholson were the only children and heirs at law of said Minta, and that at the time of the execution of the deed by Strange to Minta, she was a free woman of color, and Levi Spencer was a slave, and that they were living together as man and wife and continued to live as such up to March, 1866, when Minta died. Mary Ann was a child of Minta by said Spencer. It was further in evidence that at the time of the

purchase, Minta took possession of the land, and with said Levi Spencer lived upon it until her death. It was in evidence that this property was in possession of the North Carolina gold mining company in the year 1830 with deed, by known and visible boundaries, and different persons claiming under said company to 1849, when one Boyd was in possession, and that said Strange was in possession of it in 1849, and the possession has been in him and those claiming under him up to the present time. There was no evidence of any connection between Boyd and Strange.

The defendant offered evidence tending to show that the deed from Spencer and the others had never been delivered as a deed, but as an escrow, and that Davidson had obtained it by unfair means; but on the other hand, proof was offered to show that the deed had been delivered and was *bona fide*. The defendant also introduced testimony to show that the money paid by Minta to Strange for the land, had been furnished by Levi Spencer who was then a slave, and also that he had a life estate in the land as tenant by the curtesy.

The following issues were submitted to the jury:

1. Is the plaintiff the owner of and entitled to the possession of the property? Ans. Yes.

2. Does defendant withhold possession? Admitted.

3. What damage has plaintiff sustained? Ans. $100.

4. Was the deed from Spencer, Foster and wife, and Nicholson and wife, delivered to John Davidson? Ans. ——.

5. Did Spencer pay the purchase money and have the deed made to Minta his wife? Ans. ——.

6. Was there a marriage between Levi Spencer and Minta Prim? Ans. ——.

The defendant requested the court to charge the jury, "that for the plaintiff to make out his title through Strange by length of possession, the title being proved out of the state, it was necessary for him to prove twenty years' continuous adverse possession, under known and visible boun-

daries, in the plaintiff and those under whom he claims; and in order for plaintiff to make out his title under the deed from Minta, as color of title, it was necessary that he and those under whom he claims should have had possession of the land continuously for seven years next preceding the commencement of the action." The court refused this instruction, and charged the jury that if they should find from the evidence that Spencer (and the others) made and delivered the deed to John Davidson, not as an escrow, but as a deed, then they must find the first issue in the affirmative, that is, in favor of plaintiff, and in that event they need not consider any of the other issues, except the third as to damages; but if they should find that the deed was not made and delivered to Davidson by all of said parties, but was delivered as an escrow by Spencer or either of the other parties, then they should find the other issues according to the preponderance of the evidence, and that as the defendant claims through Spencer and Strange, he was estopped to deny title in them. Defendant excepted.

The jury found the first and third issues in favor of plaintiff. Judgment, appeal by defendant.

Messrs. J. E. Brown and *C. Dowd*, for plaintiff.
Messrs. Jones & Johnston, for defendant.

ASHE, J. The instructions asked by the defendant were properly refused. The first instruction asked could not have been given, as there were other grounds disclosed in the evidence upon which the plaintiff was entitled to a verdict; and it would have been error to have given the second, because the law does not require that the seven years' adverse possession, with color of title, which gives a title under the statute of limitations, shall be a possession *next* preceding the commencement of the action. How could it

be, when the defendant is in possession, and must be proved to be so, in order to sustain the action.

When the title to land is out of the state, the continuous adverse possession of the same for seven years with color of title by the occupant and those under whom he claims (the adverse claimant not being under disability) will vest in him the title against all the world, which cannot be divested except by a subsequent continued adverse possession for seven years with color of title, or twenty years' adverse possession without color. *Johnson* v. *Parker*, 79 N. C., 475; *Lenoir* v. *South*, 10 Ired., 237; *Freeman* v. *Loftis*, 6 Jones, 524.

His Honor, we think, in his charge to the jury, put the case upon its true ground. He told them that if they should find that the deed made by Levi Spencer, and the others, was delivered by them, not as an escrow, but as a deed, they must find the first issue in the affirmative, and in that event they need not consider any of the other issues, except the third as to damages; but if they should find the deed was delivered as an escrow by Spencer or either of the other parties, they should find the other issues according to the preponderance of the evidence, and that as defendant claimed through Spencer and Strange, he was estopped to deny title in them.

Both parties claim title under Spencer. The plaintiff deduced his title by a deed from John Davidson to himself, a deed from Spencer, Foster and wife, and Nicholson and wife to Davidson, the femes covert being children and heirs of Minta Spencer. The deed from Levi Spencer and the heirs of Minta bears date the 15th of March, 1870, and the date of the deed from Spencer to Schenck is left blank in the "statement of the case," but we must assume it was of junior date to that from Spencer and the others to Davidson, as it seems to have been so treated on the trial below, and the case was agued in this court upon that assumption.

It is well settled as an inflexible rule, that where both parties claim under the same person, neither of them can deny his right, and then as between them, the elder is the better title and must prevail. *Caldwell* v. *Neely*, 81 N. C., 114; *Gilliam* v. *Bird*, 8 Ired., 280; *Ives* v. *Sawyer*, 4 Dev. & Bat., 51. To this rule there is an exception, when the defendant can show a better title outstanding, and has acquired it.

But the defendant's counsel contends that estoppels must be mutual, and in this case there is no mutuality; and by way of illustration, he says, if the case were reversed and the defendant claimed under the deed made by Levi Spencer and the children of Minta, the plaintiff claiming under the deed from Levi alone, could not recover. That is so, because he would be not only estopped by the application of the general rule, but the case would come under the exception to the rule, because the defendant could show in that case a better title in the heirs of Minta, derived from her, and that he had acquired it. It must be borne in mind, that the general rule applicable to cases like this, is not strictly an estoppel, but a rule of justice and convenience adopted by the courts to relieve the plaintiff in ejectment from the necessity of going back behind the common source, from which he and the defendant derive title, and deducing his title by a chain of mesnes conveyances from the state. *Frey* v. *Ramsour*, 66 N. C., 466.

But again, the defendant insisted on the trial below, and offered proof to show, that Levi Spencer was a tenant by the curtesy of the land in controversy. If that be so, then he must have claimed through his wife, Minta, from W. F. Strange, and hence it would follow that both parties claim under Strange and are estopped to deny his title. So that in whatever view we consider the case, under the rule above stated, it is shown that the plaintiff has the elder title de-

rived from Spencer or Strange, and has therefore the better title, and it must prevail.

No error. Affirmed.

TOLSON'S HEIRS v. WILLIAM MAINOR and wife.

Possession—Title—Royal Grant—Words of Inheritance—Evidence.

1. The actual title to land will draw to it such a constructive possession as will ripen, by lapse of time, into an independent title, in the absence of evidence of an adverse possession by some other party.
2. A royal grant of land in this state, issued prior to the revolution, will be presumed to be in fee, though the abstract of such grant contains no words of inheritance.
3. When both the plaintiff and the defendant in ejectment derive their title from the state, but under grants of different dates, it is competent for the defendant to show title out of the plaintiff by establishing a prior valid grant from the state to another party, though he fail in an effort to connect himself with such elder title.

(*Clarke* v. *Diggs*, 6 Ired., 159; *McLenan* v. *Chisholm*, 64 N. C., 323; *Taylor* v. *Shuford*, 4 Hawks, 116, cited and approved.)

CIVIL ACTION to recover land tried at Spring Term, 1881, of CARTERET Superior Court, before *Graves, J.*

On the trial the plaintiffs, in support of their title, offered in evidence a grant from the state, covering the land in dispute, dated in 1872. It was admitted the defendants were in possession. The defendants then introduced a grant from George II., King, &c., to David Shepard, dated April 20th, 1745, a deed from said Shepard to John Harman and his heirs, dated March, 1746, a deed from said Harman to John Saunders and his heirs, dated June, 1763, a deed from John Saunders to John Benthal and his heirs, dated July 5th,

1763, a deed from Jacob Benthal and others to John Cannaday and his heirs, a deed from Joseph C. Bell, sheriff, to Elijah Cannaday and his heirs, dated August 1st, 1807, a deed from Elijah Cannaday to Littleton Martin and his heirs, dated March 20th, 1832. It was admitted that the feme defendant was the daughter and heir of Littleton Martin.

The defendants offered evidence tending to show that they and those under whom they claimed had had possession of the land under known and visible boundaries for more than thirty years, and the plaintiffs on the other hand here introduced proof tending to show that the defendants had not had possession of the land for twenty years under known and visible boundaries and had not been in adverse actual possession seven years before suit brought. The evidence offered by the defendants in regard to the location of the deeds under which they claimed was conflicting. There was no evidence of the death of Shepard.

In charging the jury the court called their attention to the grant from King George II. to David Shepard, and said, "as the word 'heirs' was not in the grant it conveyed title to Shepard only for his life, and so far as that was concerned it could not be color of title for more than the life of Shepard, so that for all the purposes of this suit, it was not necessary for the jury to consider it. The court then explained that possession up to known and visible metes and bounds without any deed at all would give a good title. That the other deeds were all sufficient to be color of title, and that possession up to known and visible boundaries for twenty-one years would divest title out of the state, and give a good title although no grant had been issued."

The defendants asked the court to instruct the jury, "that the grantees in the deeds were presumed to have possession of the land conveyed by the deeds, nothing appearing as to possession." This the court declined to give, and said, "ac-

tual title will draw to it the constructive possession, but to originate title by possession under color there must be actual possession."

Verdict and judgment for plaintiff, appeal by defendants.

Messrs. Allen & Isler and *H. R. Bryan*, for plaintiffs.

Messrs. Green & Stevenson and *Mason & Devereux*, for defendants.

ASHE, J. We think the defendants were entitled to the instruction asked, with reference to some of the grantees or donees in the grant or deeds offered by them in evidence, and that it was error in the judge to have declined to so instruct the jury. It is true His Honor, while declining to give the instruction as asked, did tell the jury that "actual title will draw to it the constructive possession," but he had just remarked to the jury that the royal grant to Shepard "conveyed to him only the life estate, that it was color of title only for his life," and of course it must follow as a consequence, and the jury must have so understood him, that if he was dead, the mesne conveyances from him, gave no actual title, and therefore those claiming under him could not have a constructive title.

There was a good deal of discussion in this court whether the grantee, Shepard, who lived one hundred and fifty years ago, is in law presumed to be dead. If the absence of a person for seven years without being heard from will presume a person's death, the presumption will hardly be weakened after the lapse of one hundred and fifty years.

But for the purposes of this trial it was perfectly immaterial whether Shepard is dead or alive. If alive, he has been in the constructive possession of the land since 1745 the date of the royal grant; but if dead, those claiming under him, by an unbroken chain of titles, or their heirs, have had the constructive possession, unless some one has had the

adverse consecutive possession for at least seven years. The plaintiffs do not pretend that they or their ancestor have ever had possession.

The gist of the error consists in telling the jury that the grant from King George conveyed only a life estate to Shepard. The grant offered in evidence was a copy from the Secretary of State's office of an abstract of grant made by George II, king, &c., to David Shepard, which is as follows:

"George the second, &c., to all whom, &c.: Know ye that we, &c., have given unto David Shepard six hundred and forty acres of land in Carteret county, on Bogue Sound: Beginning on John Herman's corner, a pine, thence binding on the sound various courses 300 poles to a pine, Charles Cogdale's corner, so binding on his line 180 poles to Newell Bell's line, so binding on his said line 160 poles to a pine, then N. 160 poles to a pine, then N. 75 west 170 poles to a pine, then S. 12 west 172 poles, so binding on John Herman's line to the first station, to hold, &c. Dated the 20th day of April, 1745."

(Signed) GAB. JOHNSTON.

A large portion of the titles to lands in this State are traceable to royal grants like this. The grants were never, we believe, recorded in full, but only abstracts of them were enrolled, and these have been uniformly received and recognized in our courts as evidence of title. *Clarke* v. *Diggs* 6 Ired., 159; *McLenan* v. *Chisolm*, 64 N. C., 323. In this last case the abstract offered in evidence read: "Sampson Williams 300 acres. Anson Mountain Creek, beginning at a pine, (then tracing the boundaries). May 24th, 1873."

(Signed) JO. MARTIN.

The abstract was rejected as evidence in the court below, but on appeal it was held to be error, PEARSON, C. J., saying that "His Honor erred in rejecting the abstract of the grant. From the abstract it appears with the requisite certainty that Sampson Williams was the grantee, Governor

MARTIN the grantor, the three hundred acres of land therein described, the subject of the grant, and that a grant was executed May 24th, 1773." In that abstract there were no words of inheritance used, and yet the Chief Justice treated it as passing the absolute estate. In examining the registry books in the office of the secretary of State, we think it will be found that only abstracts of the grants are enrolled, and those made prior to the year 1776 contain no words of inheritance. But since that time it has been the practice of our secretaries of State to set forth the words "heirs" in the abstracts.

But no one at this day will seriously contend that all the royal grants issued by the king of England before the Revolution to his subjects in this colony, from which so many of our titles to real estate are derived, passed only life estates to the grantees. The word *heirs* was not inserted in the abstracts, we suppose, for the reason that the sovereign never granted land for life, and that it would be presumed they were be in fee simple.

The omission of the word "heirs" in this case could not have been an accident, for in this respect it is just like all the other abstracts. But it may be insisted that the error did not affect the plaintiffs' case as they failed to connect themselves with the royal grant. We think, however, it may have very materially affected their case, for if the grant to Shepard conveyed to him the fee simple title to the land, as we have no doubt it did, the legal title is still in his heirs or assigns or their representatives, unless it can be shown that the title has passed back to the state by confiscation or other means, as was the case with the royal grant to LORD GRANVILLE. *Taylor* v. *Shufford*, 4 Hawks, 116. But nothing of the sort is shown here.

The state then, in 1872, when the grant to the plaintiff was made, had no title to the land, and the state "cannot any more than an individual grant that which it has not."

Taylor v. *Shufford, supra.* But this is upon the assumption that the land in dispute is covered by both the grants—that made by the state to the plaintiffs and the royal grant to Shepard. As the statement of the case shows there was much conflicting testimony upon the question of location, we are unable to see how that was, but however it may be, there was error in the instruction to the jury, and "where there is error, its *immateriality* must clearly appear on the face of the record, in order to warrant this court in treating it as surplusage." *McLennon* v. *Chisolm, supra.*

There is error. Let this be certified to the superior court of Cartaret county that a *venire de novo* may be awarded.

Error. *Venire de novo.*

ALEXANDER OLDHAM and wife v. FIRST NATIONAL BANK OF WILMINGTON, and others.

National Bank—Mortgage—Ultra Vires—Mistake—Correction —Nudum Pactum—Usury—Pleading.

1. When several debts due to a national bank are consolidated into one, and a new note is given, the bank is not acting *ultra vires* in taking a mortgage on real estate to secure such note.
2. It is competent for a national bank to purchase a note in favor of a third party, and thereby acquire incidentally a mortgage on land which had been given to secure it; and the claim so evidenced may be incorporate with other indebtedness and a new mortgage on real estate taken to secure the whole sum.
3. Even if taking such security by the bank were *ultra vires*, the mortgage would not be *void*, but only an offence against the United States, of which the mortgagor could not avail himself to defeat his own deed.
4. Where, by the mistake or oversight of the makers of a deed, the same is incorrectly written, they have no equity to call upon the grantee to correct the mistake in the books of the Register, as they have an ample

remedy under Bat. Rev., ch. 35, § 26; and a promise by the grantee to make such correction at his own expense and trouble would be *nudum pactum*.

5. Usurious interest previously received by a national bank in the course of renewals of a series of notes, terminating in one upon which suit is brought, cannot be pleaded by way of set-off or payment.

6. The *only* remedy open to the party aggrieved is that prescribed by the Act of Congress, a *separate* action for double the interest paid by him.

(*Fulke* v. *Fulke*, 7 Jones, 497; *Hatchell* v. *Odom*, 2 Dev. & Bat., 302, cited and approved.)

CIVIL ACTION tried at June Term, 1881, of NEW HANOVER Superior Court, before *Graves, J.*

This action was brought to restrain the defendants from selling certain real estate, situate in the city of Wilmington, the property of the plaintiff, Alexander Oldham, under two mortgages executed by the plaintiffs on the 5th day of September, 1878, the one to secure a debt to the defendant bank for $10,999.67, and the other to the defendant Burruss for $3,880.

In their complaint the plaintiffs set out eight distinct causes of action against the defendants, who demurred to the 3d, 6th, 7th and 8th causes, and answered as to the others.

In the court below, the issues of law alone were tried, and His Honor sustained the demurrer as to the 3d, 6th and 7th causes of action, but allowed the plaintiffs to amend as to the 7th, and overruled it as to the 8th. Appeals were taken by both plaintiffs and defendants and are now pending in this court, but they were argued together by counsel and are so treated by the court.

Messrs. McRae & Strange and *D. J. Devane*, for plaintiffs.
Mr. E. S. Martin, for defendants.

RUFFIN, J. We will consider the several grounds of demurrer in the order mentioned, and as the questions involved are purely matters of law depending upon the

pleadings, it will be necessary to set them out with some particularity.

The plaintiffs allege, as constituting their third cause of action, that the indebtedness of $10,999.67, alleged to be secured in the mortgage to the defendant bank, was made up of three items of alleged previous indebtedness, on the part of the plaintiff, Alexander, to the said bank: (a) a debt due the same for the sum of $3,800 evidenced by his note given to it on the 17th day of March, 1877; (b) an apparent indebtedness to the defendant Burruss for $6,200 evidenced by a note dated the 17th March, 1877, and given to said Burruss by name, but really in secret trust for the bank and for moneys lent by it, and that it was so taken in order to conceal the true nature of a mortgage which the plaintiffs then gave to defendant Burruss to secure the same, and to evade the act of congress which prohibits national banks to take such securities except for antecedent debts; (c) the sum of $1,199.67 which, as was alleged, the said Alexander had overdrawn on his deposit account; that these three items being added on the 5th of September, 1878, made the sum for which the mortgage was given, and thereafter it bore a rate of interest different from that which had previously been paid on the several items of which it was composed, and therefore the plaintiffs insist that it became, (and especially that part of it which consisted of the debt taken from the defendant Burruss,) a cotemporaneous claim, and within the prohibition of the act of congress.

Taking the statements of the complaint to be true, it is impossible, we conceive, that the mortgage in question can be obnoxious to the objection urged against it.

Two of the items which went to make up the sum secured thereby, are admitted to have previously existed, as debts due the bank, and as to the third, to-wit, the $6,200 debt taken in the name of Burruss, it is immaterial whether it was so or not. If, as alleged, the entire consideration of the

original debt secured in the mortgage of the 17th March, 1877, proceeded from the bank, and the defendant Burruss acted throughout the transaction as its agent (though secretly), then from its very inception it was the claim of the bank. And while if the act of congress referred to should receive the construction insisted on by the plaintiffs, the security taken might have been assailed on some other grounds, it cannot be so on that assumed in the complaint. So on the other hand, if that debt were really what it purported to be, due to Burruss individually, there was no reason why the bank might not have purchased it at the moment of taking the new security.

In the case of *Bank* v. *Matthews*, 98 U. S., 621, it was expressly ruled that the purchase by an institution of a like character with the defendant bank, of a note secured in a mortgage, whereby it got the full benefit of the mortgage, was not within the purview of the statute. But apart from all that, the same court, in the same case, decided that a mortgage taken to secure a debt then newly created, or even future advances, was not *void*, since the act did not say so in terms, but was silent as to that, and the courts were always reluctant to the last degree to declare a forfeiture, and that the only objection to such a mortgage, which will be heard, must come from the government of the United States. So, too, in the case of *Bank* v. *Whiting*, 103 U. S., 99, so late as last year, that court made a similar decision, citing and approving the case of the *Bank* v. *Matthews*, *supra*.

As their sixth cause of action the plaintiffs allege that the defendant Burruss not being satisfied with the mortgage given him on the 17th of March, 1877, to secure the debt of $6,200, demanded of the plaintiffs that they should execute another to him for that purpose, and accordingly they did so on the 28th day of the same month, but either by mistake or design the said defendant caused it to be so written as to make it appear to be an additional indebtedness of

$6,200, whereas it was only an additional security for the same indebtedness, and upon the same being called to his attention, he promised to rectify the error on the register's books of the county, but has since failed and refused to do so, though often requested, to the damage of the plaintiff Alexander $10,000.

There seem to be several defects in this demand of the plaintiffs. In the first place, as stated, it is impossible for the court to see that any damage could have been the necessary consequence of the defendant's neglect in the particular complained of, and in the next place, if any mistake was made it was that of the plaintiffs themselves and in their own deed, so that the duty of correction rested as much upon them as upon the defendants, and the means of effecting it was entirely within their power. The statute (Bat. Rev. ch. 35 § 26) provides a remedy for every person in the registration of whose deed a mistake may be made, and if notwithstanding this the plaintiffs submitted to loss and inconvenience without any effort to relieve themselves, the consequences of their failure cannot be thrown upon others. In addition to this there was no consideration, moral or otherwise, for the promise of the defendant upon which the plaintiffs rely. The true test of a consideration, said this court in the case of *Fulke* v. *Fulke*, 7 Jones 497, is to be found in the enquiry—was there any benefit to the party promising, or any loss or inconvenience to the other party, *at the time the promise was made?* and admitting that a high sense of moral obligation might have prompted the defendants to make the correction when informed of the mistake, there was still no such legal duty resting upon them as a court could enforce. *Hatchell* v. *Odom*, 2 Dev. & Bat. 302.

For their seventh cause of action the plaintiffs say, that the note and mortgage for $10,999.67 given to the defendants, on the 5th day of September, 1878, were continuing parts of previous usurious agreements and transactions be-

tween the plaintiff Alexander and the defendant bank, directly and indirectly through its agent Burruss, under which there had been reserved and secured to the bank various illegal rates of interest, ranging from 12 to 24 per cent. per annum, and that the sum of $2,785.96 had been actually received by said bank in the way of such usurious interest. And they insist therefore that the mortgage is invalid by reason of such illegal consideration, but whether so or not, they say that the said sum of $2,785.96 is a payment of so much of the principal of the debt, and that they are entitled to a credit therefor.

The result of the decisions both of this, and the supreme court of the United States, is that no state law upon the subject of usury can be made to apply to national banks, and that the only law which touches them in this respect is the provisions of the statute under which they are organized. The construction given to those provisions too, by that court must be respected and accepted by every other tribunal, seeing that it is the court of last resort whose jurisdiction extends to the subject. And it is well, perhaps, however some of its determinations may differ from preconceived opinions, that we have a court whose judgments in such matters can have universal prevalence.

Institutions of this sort now pervade the whole country, and have become its great money-agents to the exclusion of almost all other agencies, so that it is a matter of infinite consequence that their powers and duties should be uniformly interpreted and enforced.

In the very recent case of *Barnett* v. *Bank*, 98 U. S., 555, it was held by a unanimous court, that usurious interest previously received by a National bank in the course of renewals of a series of bills terminating in the one then in suit, could not be pleaded by way of *set off* or *payment* to the bill, and that the only remedy the party aggrieved can have is that afforded by the national currency act of congress,

which act allows *nothing* in the way of such relief beyond a simple action of debt for twice the amount of interest paid, and that this relief could not be associated in the same action with other grounds of relief, but must be sought in an action brought solely and *exclusively* for that purpose, in which the single issue as to the guilt or innocence of the bank can be presented without the presence of any extraneous facts which might disturb the minds of the jury.

Influenced by this decision, as we feel ourselves to be, the supreme court of Pennsylvania in the case of *Bank* v. *Dushone*, (not yet reported at length but briefed in Albany Law Journal, March 12th, 1880,) made a similar ruling by which it overruled many of its previous adjudications.

As we read the decision, it goes to the full length of saying that in an action brought by a national bank the plea of *usurious interest paid*, whatever be its form, can avail nothing, and that no action for a like cause, of whatever nature, lies against such an institution save the one given in terms by the statute.

This being so, the demurrer was properly sustained in the court below, as to the plaintiffs' seventh cause of action in its original shape, and we cannot see that they are at all relieved by the amendment which they were allowed to make.

The interdiction of the statute as construed applies to their action in its present shape with as much force as ever. The action for money had and received on account of excess of interest paid, does not lie against the defendant bank, however it may lie against other defendants, for the reason that it is not the remedy given in the statute and no other can avail.

Treating the order of amendment as equivalent to a judgment overruling the demurrer to the complaint in its new form, we think His Honor erred.

In their eighth cause of action, the plaintiffs seek to re-

cover of the defendant bank the sum of $5,571.92, that being twice the amount of the usurious interest alleged to have been paid by the plaintiff Alexander in the transactions out of which the action grew.

This, as we have just seen, they are not at liberty to do, except by an action brought *solely* and *exclusively* for that purpose, and much less are they permitted to have any standing in a court of equity until they have waived their right to the penalty imposed by the act of congress. A failure to remit such a penalty was held to be a good ground for demurrer to a bill seeking the aid of a court of equity in the case of *Branson* v. *Dixon*, 1 Mur., 225. But it may be doubted whether it is so under the code which undertakes to say of what the causes for a demurrer shall consist. It is not necessary in this case that we should consider that question, or the further question whether a court of equity would not of its own motion withhold its aid in such a case, as the plaintiffs' action must fail for the reasons first given.

The judgment of the court below sustaining the demurrer as to the 3rd and 6th causes of action is affirmed, and the judgment overruling the demurrer as to the 7th and 8th causes of action is reversed, and as to them also the demurrer is sustained.

Let this be certified to the superior court of New Hanover county, where the action is pending.

Error. Demurrer sustained.

ANGUS H. McDONALD v. R. D. DICKSON and others.

Execution—Judgment—Action—Limitations—Pleading—Homestead.

1. A party may have execution on his judgment, and at the same time prosecute an action on it under leave of the court.
2. A judgment rendered in 1870, though upon a debt contracted before 1868, is subject to the provisions of the code of civil procedure as to the time of commencing action, whenever such judgment becomes itself a *causa litis*.
3. The statute of limitations is a proper plea and a complete bar to a motion for leave to issue execution on a judgment, when such motion is made more than ten years after the rendition of such judgment.
4. The provisions in the act of 1869-'70, (Bat. Rev., ch. 55, § 26,) suspending the statute of limitations until the falling in of the reversionary estate in the land embraced by the homestead, was only intended to apply where the homestead had been actually allotted, and only as to debts affected by such allotment, *i. e.*, to judgments docketed in the county where the homestead land is situate, and solely with reference to their liens upon the reversionary interest in such lands.

(*Carter* v. *Coleman*, 12 Ired., 274; *Binford* v. *Alston*, 4 Dev., 351; *Lyon* v. *Russ*, 84 N. C., 588, cited and approved.)

MOTION for leave to issue execution heard at Spring Term, 1881, of RICHMOND Superior Court, before *Gudger, J.*

The clerk before whom the motion was made refused the same and the plaintiff appealed to the superior court, where the judgment of the clerk was affirmed, and the plaintiff appealed to this court.

Messrs. Burwell & Walker, for plaintiff.
Messrs. John D. Shaw and *W. A. Guthrie*, for defendant.

RUFFIN, J. This was a motion for leave to issue execution under section 256 of the code.

The judgment was obtained and docketed on the 31st of October, 1870. On the 9th May, 1871, a partial payment

was made thereon, and on the same day the judgment was assigned by the plaintiffs of record to the present plaintiff. Execution issued in 1875, but was returned unsatisfied. Two of the defendants in the judgment have been insolvent from the time it was rendered, and are so still. The defendant, Dickson, was so until recently when he came into possession of both real and personal property.

Notice of the motion was given 30th April, 1881, and during its pendency the plaintiff has brought an independent action on his judgment. The defendant pleads the statute of limitations, and the pendency of the new action as a waiver of the right to have execution under the judgment.

First, as to this last ground of defence: A party may have execution on his judgment, and at the same time prosecute an action on it under the leave of the court. It is so said in Freeman on judgments, § 440, and was so decided by this court, under the old system in the case of *Carter* v. *Colman*, 12 Ired. 274, and there is no change in this particular worked by the Code, which simply substitutes the discretion of the court, for the will of the plaintiff in determining when a new action on a judgment may be brought. It is easy to see that very many times it may be absolutely essential to the rights of a judgment creditor, that he should be allowed the contemporaneous use of both remedies; and this more frequently perhaps under the new than under the old system, and the defendant can never be needlessly oppressed as he may always relieve himself if he will by paying the debt.

Two other preliminary questions may as well be disposed of at once, viz: whether the defence of the statute of limitations can be set up at all in a proceeding like this? and if so, then which statute governs the case, the Code of Civil Procedure, or the Revised Code?

We think there can be little doubt as to either point. Rendered as the plaintiff's judgment was in 1870, (though

upon a debt contracted before 1868), it must be subject to the provisions of the Code whenever it becomes itself a *causa litis.*

This proceeding by motion for leave to issue execution after a lapse of three years is in lieu of and a substitute for the ancient writ of *scire facias*, and it must be treated as such, and the same protection extended to parties thereunder as was done under the use of that writ. And while a *scire facias* for the purpose of reviving a dormant judgment was in the main regarded as a continuation of the old action merely, it was for some purposes a *new action. Binford* v. *Alston*, 4 Dev. 351. Its very object was to warn the defendant and furnish him the opportunity to plead any thing that could avail as a bar to the execution. In doing this, he was, of course, restricted to such defences as had supervened the rendition of the judgment, being estopped thereby as to all matters of defence against the original cause of action existing anterior to judgment. But, with this single restriction he was permitted to make any defence legally sufficient, and to enable him to do so, or rather indeed because he could do so, the proceeding was treated as being *in the nature of a new action.* "As a proceeding to revive a judgment," says Foster in his treatise on the writ of *scire facias*, "it is a judicial writ to continue the effect of, and have execution of the former judgment, yet it is in the *nature of an action*, because the defendant may plead any thing in bar of the execution;" and express mention is made by the author of the statute of limitations as constituting one of the defences which might be set up.

This brings us to the graver question as to the effect of the limitation prescribed in the Code upon the plaintiff's judgment and his right to have execution thereunder. Very much of the difficulty which surrounds the question comes from an effort to construe the provisions of our Code by the light of decisions made by the courts of other states, with

reference to their codes or statutes on the subject, when in fact their provisions are variant, and oftentimes incompatible with ours. Compare our code for instance with that of the state of New York, and it is hardly possible to conceive of greater differences than exist between the two, with reference to this very matter of the effect of the lapse of time upon a judgment and its lien upon lands. That code, after declaring that a judgment docketed shall be a lien on the lands of the defendant for ten years, expressly provides that after that period the lien shall cease only as against incumbrances and *bona fide* purchasers. Again it provides, that after the expiration of ten years, the lands of the judgment debtor, or of any one claiming under him as heir, *may be levied* upon by virtue of an execution under the judgment and sold, and the time fixed when an action on a judgment shall be barred is *twenty years.*

We have referred to the Code of that state, because it has been said that ours was mainly taken from it, and might therefore be supposed more nearly to resemble it than any other, and yet so marked are the discrepancies as to make it plain, that we can derive but little aid from the decisions of the courts there, in regard to the point in hand, and indeed so far as we have been able to investigate, ours is the only Code which fixes the current period of ten years as that which terminates the lien of a judgment and operates as a bar to a new action upon it.

That such is the effect of our Code, we can entertain no doubt, as its language is explicit as to both matters; a judgment docketed shall "be a lien on the real property in the county for ten years from the time of docketing the same," and an action on "a judgment or decree of any court of the United States, or of any state or territory thereof" must be commenced within ten years, or else be barred.

We can give no heed to the argument of counsel that under the maxim *noscitur a sociis* the words "any state" just

quoted from the 31st section of our Code must be taken to mean the judgment of a court of some state other than our own, for we find the same form of words used in the Codes of several of the states, and everywhere they have been construed as applicable to the courts of their own states.

But with us it could make no material difference which construction should be given to that particular section, since by another of our Code, every action for relief not specially provided for must be commenced within the same period of ten years after the cause of action shall have accrued. C. C. P., §37. And a cause of action on a judgment has been uniformly held to have accrued from the day of its rendition. Our conclusion therefore is that the plaintiff's judgment is barred by the statute, and that the defendant having the opportunity to plead, afforded by the plaintiff's motion, is at liberty to do so, and the plea is fatal to the demand for execution under it.

But the plaintiff insists, since it appears that the defendant until recently has been insolvent from the time the judgment was taken, and could not therefore have had more than the value of the homestead allowed by law, (though none was actually allotted to him,) that the case is saved from the bar of the statute by virtue of the act of 1869–'70, (Bat. Rev., ch. 55, §26,) which declares it to be unlawful to levy and sell under execution the reversionary interest in lands included in a homestead, until after the expiration of the homestead interest therein, and provides "that the statute of limitations shall not run against any debt owing by the holder of the homestead affected by this section, during the existence of his interest therein." We cannot give our assent to an interpretation of that statute, so little warranted by its words, as the one insisted on seems to be, and which would introduce into the law on the subject so much uncertainty and doubt. The language certainly contemplates an actual assignment of homestead before there shall be any stay of the

statute, and it is only as to the *lands included therein* that such a stay takes place. If held to be otherwise, what creditor could tell whether the statute was running against his claim or not, except in the rare instance of a debtor notably rich or one notably poor? and on the other hand the debtors of the country who need the relief against stale claims furnished by the statute, might find themselves deprived of it after the lapse of years upon the uncertain recollection of witnesses as to the value of their possessions during the time.

We cannot suppose that such a construction would meet the intention of the legislature, but that they intended what the words import, that there must be in order to stay the statute an actual allotment of homestead, and even then the cessation of the statute is only as to debts affected by such allotment, that is to say, as to judgments docketed in the county where the homestead land is situate, and solely with reference to their liens upon the reversionary interest in such lands.

As to every debt except judgments docketed, and for every purpose except that of enforcing their liens upon the reversionary interest after the falling in of the homestead interest, the statute runs and may become a bar.

This is not in conflict with the decision made at last term in the case of *Lyon* v. *Russ*, 84 N. C., 588. There, the cause of action accrued in 1865, the judgment obtained in 1868, and docketed on the 1st of January, 1869; the execution under which the sale was had issued the 3rd of July, 1879; the defendant had his homestead laid off in 1868. We held the sale to be ineffectual to pass the title, because the plaintiff sold under the statutory *lien* of his judgment, and that had expired by lapse of time. There was no stay to the statute by reason of the homestead because the plaintiff denied the defendant's right to it, and sold the land in defiance of that right, as in law he might have done provided he had

moved in time; but denying the defendant's right to have any homestead, he could not use the allotment thereof as a shield for himself against the consequences of the lapse of time.

Whether he did not have a lien on the reversionary interest, or indeed whether he may not still have, are questions we did not undertake to decide; neither was it intended in that case to determine the question as to what would have been the effect of a sale, provided the plaintiff in the judgment, having kept his judgment constantly alive, had procured an execution after the lapse of ten years from the docketing, and caused it to be levied on the land, and had sold, not by virtue of the expired lien of his judgment, but by virtue of his *levy and execution.* Such a case would have presented the question as to the effect of the statute upon the judgment, whether it operated only on the *remedy* thereon, in case it became the subject of a new action, or upon the judgment itself, and to its discharge as an existing debt. But no such question arose in the case as stated in the record, and we considered it then, as we do now, much too grave a matter to be passed upon until squarely presented by the real facts of a case.

There is no error.

No error. Affirmed.

C. B. COTTEN in her own right and as Executrix v. SARAH A. and MAGGIE MCCLENAHAN.

For principle decided, see syllabus in preceding case.

CIVIL ACTION, tried at Spring Term, 1881, of CHATHAM Superior Court, before *Avery, J.*

The plaintiff submitted to a nonsuit and appealed.

Mr. John Manning, for plaintiff.
Mr. J. H. Headen, for defendants.

RUFFIN, J. This action was begun on the 10th day of September, 1880. In her complaint the plaintiff alleges that she is the owner by purchase for value of a judgment which one A. H. Merritt had recovered of the defendant, S. A. McClenahan, at spring term, 1870, upon a note executed in February, 1860, which judgment was docketed on the 27th day of June, 1870, and under it an execution was issued in 1870, whereon the sheriff returned "nothing found over the homestead and personal property exemptions;" and that after her purchase of it, she caused the judgment to be revived in her name in 1878. That after making the note above referred to, to wit, in 1867, the said defendant made a voluntary gift of five hundred dollars to her daughter, the other defendant, who invested it in a lot of land, and one of the objects of the suit is to follow this fund and subject the land to the payment of the plaintiff's demand against the mother.

In addition to the foregoing, the plaintiff alleges that heretofore the defendant, S. A. McClenahan, had sued the plaintiff as the executrix of her deceased husband, on a note executed in 1861, to which action she had pleaded the judgment purchased of Merritt in 1878, as a set off and counter claim, and in the superior court where the said action was tried, her plea was allowed, and she had a judgment against the said S. A. McClenahan, who, however, appealed to the supreme court when the judgment of the superior court was reversed and judgment rendered in her behalf against the present plaintiff.

The answers in substance admit the allegations of the complaint, but both of the defendants plead the statute of

limitations. On the trial in the court below the issues were, first, whether the defendant, S. A. McClenahan, had, when she made the gift to her daughter, reserved estate sufficient to satisfy her creditors, and secondly, was the plaintiff's action barred by the statute of limitations?

It is impossible for this court to know, so imperfect is the statement of the case which accompanies the record, what proofs were made on the trial. After setting out the substance of the pleadings (which was altogether needless) it proceeds to say, that after the jury were empanneled and several witnesses were examined, "in addition to the facts already stated," (without saying what those facts are, or giving the statement of a single witness) it was admitted that the defendant, S. A. McClenahan, had given her daughter, the other defendant, the sum of five hundred dollars, which she invested in the lot of land now in her possession, and that an execution had been issued by Merritt in 1870, under the judgment subsequently assigned to the plaintiff, on which the sheriff had returned "nothing to be found over the homestead and personal property exemption." It then states that it did not appear whether any allotment of homestead or exemption of personal property had been made to the defendant in the execution or not, and thereupon the court announced that the jury would be instructed that the action as against the defendant, Maggie McClenahan, to subject her land was barred by the statute of limitations. The counsel for plaintiff insisted, that the statute did not run in this case, but was suspended by section 26 of chapter 55 of Battle's Revisal. The court held that said section did not apply to plaintiff's case, as she might have brought this action before the lapse of ten years from the date of docketing the judgment, to subject the land of the defendant, Maggie, and that the proviso to the section was intended only to protect the rights of creditors as against the revisionary interest in the homestead land, upon which the plaintiff sub-

mitted to a judgment of nonsuit and appealed. If anything can be certainly known from a statement so wanting in precision, it is that the plaintiff rested her case upon the single point that the bar of the statute was avoided, as to her debt, by reason of the provision of the law which forbids the sale of the reversionary interest in lands encumbered with a homestead.

Her counsel, it is true, took several other exceptions at the bar of this court, and so argued them as to carry the minds of the court with him as to one or more of them, but it does not appear that any of them were taken in the court below, and we have not felt at liberty therefore to consider them. If it was the purpose of counsel to raise such points, he ought not to have voluntarily submitted to a non-suit, but should have gone on and developed his whole case, and if they have occurred to him since the trial, it is too late.

As to the position taken that the plaintiff's action was saved from the statute by reason of the pendency of the defendant's action against her, and that she was allowed a year's grace after the reversal by this court of the judgment in her favor on her plea of counter-claim, a worse difficulty seems to meet her. Not only does there seem to have been no evidence offered at the trial in regard to the matter, but when we look to the complaint (the allegations of which are admitted in the answer as to this part of the case), we find nothing sufficiently definite to authorize us to act on. No date is fixed as to the time when the judgment in her favor was rendered, and none as to when it was reversed, except that it is all alleged to have been done since her purchase of the judgment in 1878. This last matter we have referred to because the counsel insisted that it was apparent on the record so as to be seen by the court, and we did not wish to seem to have overlooked it.

The only point, then, which we can consider is the one in relation to the effect of the statute, referred to in the court

below, as suspending the statute of limitations, and preventing its becoming a bar to the plaintiff's action on the judgment sued on.

We have had occasion to consider this statute in connection with the case of *McDonald* v. *Dickson*, decided at this term, and the construction given to it by us is the same with that put upon it by His Honor. There is no stay to the statute until there is an allotment of homestead, and then only as to the enforcement of the liens of docketed judgments upon the interest in reversion. As to all other debts and for all other purposes the statute runs.

No error. Affirmed.

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* T. D. MATTHEWS and others v. R. JOYCE and others.

Infant Defendants—Process—Signing Judgment—Subrogation—Judgment by Fraud—Bill of Review—Newly Discovered Evidence.

1. A judgment will not be vacated because some of a number of infant defendants united in interest, appeared only by a guardian *ad litem*, appointed without process previously served on such infants. (See C. C. P., § 59, for present practice.)
2. The act requiring the signature of a judge to authenticate his judgments and decrees is directory only, and such signature is not essential to their validity.
3. Where a surety, upon the conveyance of land by his principal to indemnify him against his contingent liabilities, substitutes his own note for that of his principal, the original liability remains undischarged, and the creditor is entitled to avail himself of the security, which he may enforce whether the surety is or is not damnified.
4. A successful plaintiff cannot be made to forego the advantages of his victory because his opponent, defending in a representative capacity

has fraudulently omitted to set up an available defense, if such failure was not the result of collusion with the plaintiff.

5. To entitle a party to the revision of a judgment on the ground of newly discovered evidence, the evidence must not be merely cumulative, nor such as ordinary diligence would have discovered in time for the first trial, nor then in the possession of the counsel or agent of the party.

6. Under the present practice it is not necessary to obtain leave of the court in order to bring an action in the nature of a bill of review.

(*Rollins* v. *Henry*, 78 N. C., 342; *Wiswall* v. *Potts*, 5 Jones Eq., 184; *Bank* v. *Jenkins*, 64 N. C., 719; *Harrison* v. *Styres*, 74 N. C., 290; *Love* v. *Blewit*, 1 Dev. & Bat. Eq., 108; *Greenlee* v. *McDowell*, 4 Ired. Eq., 481; *Bledsoe* v. *Nixon*, 69 N. C., 81, cited and approved.)

CIVIL ACTION in nature of a bill of review, heard at Spring Term, 1879, of ROCKINGHAM Superior Court, before *Buxton, J.*

The following are the facts set out in the plaintiff's complaint upon which rests their equity to a review and reversal of the impeached decree.

On March 17th, 1859, Ed. M. Matthews executed to the defendant, Walker R. Smith, a deed conveying his personal estate and a tract of land, described as containing four hundred and twelve acres, in trust to secure a debt of $1,000 due to William Dalton, his wife's father, and to indemnify him, as surety on several bonds, and among them one due to John Joyce, the testator of the defendant, Rea Joyce, in a sum represented to be "six hundred dollars more or less, the date of which is not remembered," and for the like indemnity of Thomas D. Price, as his surety upon another bond. Under the authority and directions of the deed, the land was exposed to sale in January, 1860, by the trustee, and bid off by John H. Price, at the sum of $8.10 per acre, and on the same day for the consideration of fifty dollars, he

* Ruffin, J., was of counsel and argued this case before his appointment as associate justice.

assigned his bid to said William Dalton for the benefit of said E. M. Matthews. No deed for the premises has been executed to the assignee, and the possession has continued in Matthews until his death, in 1863. At the time of the sale, Dalton owned a large estate and the effect of the small payment and transfer is alleged to be to make him a trustee for the former, and the transaction not intended to be, nor in fact was it a fraudulent arrangement to defeat or prejudice the rights of the creditors of either. Upon the death and intestacy of E. M. Matthews, the defendant, D. M. Matthews, became his administrator. The intestate left six infant children who with the husbands of such as have married, are plaintiffs in the action, and a widow, Elizabeth, who by proper proceedings in the late county court in April, 1867, caused her dower to be assigned and laid off in 102 acres of the said land. John Joyce died leaving a will in which the defendant Rea Joyce is appointed executor and he on December 13th, 1866, instituted in the court of equity of Rockingham, the proceeding which the plaintiffs in the present action impeach and ask to have reviewed and reversed, against the said Dalton, Smith, David Matthews (administrator of E. M. Matthews,) and a part of his children and heirs at law, setting the facts in reference to the making of the deed in trust and the sale of the land under it, and praying for a resale for the satisfaction of the secured indebtedness due to the testator. The children and heirs of the intestate upon some of whom, not named in the bill, no process was served, being infants, the court appointed the clerk and master guardian *ad litem* to all, and he accepting service for those omitted filed an answer in their behalf disclaiming knowledge of the truth of the allegations of the bill, and insisting on proof thereof, and placing their interests and rights under the protection of the court. The administrator made default and a decree *pro confesso* was entered as to him.

The remaining defendants, William Dalton, and Walker

R. Smith, answer jointly, admitting and explaining in detail many of the matters charged in the bill; and among others the defendant Dalton saying that he had substituted his own note (that claimed to be due the testator,) in the place of the one secured to which he was a surety, and had never paid the same in full, and that upon information believed to be correct, the intestate had discharged out of his own means the entire indebtedness provided for in the deed and that the full equitable estate in the land was revested in him and at his death descended to his heirs at law.

An order of reference was thereupon made by consent to John H. Dillard and Thomas Settle whose award when reported was to be acted on as of that term. The award was made, among other things declaring the debt of $612.25 due the testator unpaid and secured in the deed, and the land liable therefor, subject to the dower estate attaching to part, and directing a sale and application of the proceeds to the payment of the note; and being confirmed it was decreed accordingly. At the sale the land was bought for the sum of $400 by the said Rea Joyce, who in 1859, entered upon and has been since in continuous possession of the same outside of the limits of the part assigned for dower, claiming and using it as his own.

The right to relief against the interlocutory and final decrees in the suit in equity is maintained by the plaintiffs upon several grounds specified in their complaint.

1. The decrees rendered are not within the scope and equity of the bill, in that, the bill seeks to pursue and subject the equitable estate in fee as residing in Dalton to the payment of his substituted bond, while the decree recognizes the right of the widow of Matthews to dower therein, as if such estate was vested in her husband.

2. The substituted note of Dalton in discharge of that to which he was a surety (and his receiving payment from

his principal of that taken up) is a fulfillment of the trust declared for the surety and a complete indemnity to him.

3. The infants not served with process were not within the jurisdiction of the court, and no legal authority was possessed to appoint a guardian *ad litem* for them so as to bind them by the subsequent action of the court.

4. The payment of the secured debts by the intestate constitutes new matter discovered since the arrival at full age of the plaintiffs, of whom all but two have attained their majority.

To the complaint the defendant, Rea Joyce, for himself and in his representative capacity demurs and specifies as causes therefor the following:

1. That the subject matter of this action and the suit in equity is one and the same and the preceding adjudication is conclusive and a bar.

2. The decree was upon an award and in entire consistency with its terms, and the award not being impeached for fraud or otherwise, and being within the scope of the reference, is final both as to itself and the pursuant judgment.

3. The relief is in harmony with and warranted by the facts alleged in the bill.

4. The giving the single and individual bond of Dalton and taking up that to which he was a surety, did not extinguish the indebtedness represented in both, nor withdraw the security provided in the deed for the protection of the surety whose exoneration could be reached only by payment to the creditor.

5. The alleged new matter is not set up in the answers as a defence, which alleges only the discharge by the intestate of the debts secured other than that included in the award and decree.

6. There has been no leave obtained of the court to bring this action.

7. The averments in the complaint are indefinite and fail to show what the proposed evidence is, nor how and by whom to be proved, and it cannot be seen that, if true, the decree ought to be set aside.

At spring term, 1878, leave was granted the plaintiffs to amend, and thereupon they filed an amended complaint, reiterating what was alleged in the former, and further charging on information and belief that the intestate, Matthews, did, after the sale by Smith and the exchange of notes with Dalton, out of his own means pay all the secured debts inclusive of that transferred to and held by him, which information has come to some of the plaintiffs since attaining their majority, while it was fully known to the said David M. Matthews, the administrator, and he, as they allege, fraudulently concealed the fact from the referees and the court, and by his silence led both "into the erroneous and unjust determination arrived at." The further defence is relied on that the decrees are not accompanied with the signatures of the presiding judge, and without such authentication are inoperative and void.

To the amended complaint a demurrer was also interposed by the said Rea Joyce for himself, and as executor, with similar specification of defects, and assigning as to the newly discovered evidence that the answer in the equity cause alleges that all the trust debts had been paid by the intestate, except that to the testator, Joyce, and stating the facts attending the substitution of one for the other note, and the information was therefore before the court as well as the referees at the time of their action.

Upon the hearing of the issues made by the demurrer at spring term, 1879, the demurrer was sustained and the action dismissed, and from this judgment the plaintiffs appealed.

Messrs. Mebane & Scott, for plaintiffs.

Mr. Thomas Ruffin, for defendant.

SMITH, C. J., after stating the case. We propose then to consider the sufficiency of the grounds upon which relief is asked, to warrant a reversal of the proceedings in equity under which the land was sold and the funds arising from the sale appropriated to the debt due the testator.

1. The want of service upon some of the infant plaintiffs: While according to recent decisions jurisdiction over the person of infants is acquired only as in the other cases by the service of process on them, and then it is competent to appoint, in case there is no general guardian, a guardian *ad litem*, to act in their behalf and to protect their interests, so as to bind them by judicial action, a different practice has long and almost universally prevailed in this state, and this power of appointment has been generally exercised without the issue of process, for the reason that no practical benefit would result to the infant from such service on him, and the court always assumed to protect the interests of such party, and to this end committed them to the defence of this special guardian. To declare the legal proceeding void for want of such service upon a few of the class of whom the larger number with identical interests in the result have been regularly brought into court, would be to establish a rule subversive of much judicial action, unsettling titles dependent thereon, and introducing distrust and confusion in regard to the tenure of estates, the injurious consequences of which can hardly be foreseen or estimated, and we do not feel at liberty after so long delay to disturb the decree on this ground. We are supported in this by former adjudications as to the practice. In *Stillwell* v. *Blair*, 13 Sim., 399, there were several infant defendants in court, and for two who were absent the same guardian *ad litem* was appointed on proof of their being alive, and a similar course was pursued where one was ill, in *Hill* v. *Smith*, 1 Mad. Ch. Rep., 162; and again where one resided abroad. 19 Vesey, 357.

So, in *Bank of U. S.* v. *Ritchie*, 11 Curtis, 46, where a guar-

dian *ad litem* was appointed on motion of plaintiff's counsel for certain infant defendants, without bringing them into court by process, or issuing a commission for the purpose of making the appointment, Chief Justice MARSHALL declares that it is usual to call in to their defence by such appointment their "nearest relation not concerned in point of interest in the matter in question," yet there was no error in the action of the court. In the recent case of *Ins. Co.* v. *Bangs*, 103 U. S. Rep., 435, the supreme court distinguishes the several cases cited to show the regularity of an appointment of a guardian *ad litem* for non-resident defendants, so as to bind them by the decree in the cause, in that the suits related to property within the jurisdiction of the state courts, so holding, and over which they had control.

The practice, however, is regulated by statute, (C. C. P., §59,) and a previous service of process is required before the court can exercise the power of appointment.

2. The want of authentication by the signature of the judge to the decrees has never been held to affect their force where they were in fact rendered and filed among the papers, and even now under an act requiring such mode of authentition (acts 1868–'60, ch. 93, § 6), this is declared to be not essential to their efficacy as such. *Rollins* v. *Henry*, 78 N. C., 342.

3. The alleged discrepancy in the case made in the bill and that upon which the dower right is founded, as presented in the record, is not such as to authorize the interference demanded. The equitable estate was supposed to be vested in Dalton, but is shown to be in the intestate's heirs, to whom the right of dower was paramount, and this is so adjudged. The parties were all before the court, and whether the estate remained in Dalton or had revested in the intestate subject to the secured debt, it was equally liable to that debt, and no objection is made to the decree of sale which the facts charged fully warrant.

4. The substituted personal note of Dalton did not discharge the intestate's debt nor relieve the trust fund of the obligation to pay it, and the testator was entitled to have it applied to his own debt in exoneration of the surety from both. It is not alleged that the creditor knew of the additional security provided by the principal and intended to surrender all claim thereto. To deprive him of this security without his intelligent assent to the surrender, would be a fraud upon his rights and will not be upheld in a court of equity. He therefore retains that security, and the application of the land to his operates also to discharge the original obligation upon the equitable principle of subrogation. The indemnity furnished by the principal to his surety enures to the benefit of the creditor and as a security for his debt, (*Morrill* v. *Morrill*, 53 Vt.), which he may enforce whether the surety is or is not damnified. 1 Story Eq., § 499; *Wiswall* v. *Potts*, 5 Jones Eq., 184; *Bank* v. *Jenkins*, 64 N. C., 719; *Harrison* v. *Styres*, 74 N. C., 290.

5. The supplementary averment in the amended complaint of a fraudulent suppression by the administrator, Ed. M. Matthews, of facts known to him, and especially that his intestate had paid the very debt in suit, whereby the land was sold for a discharged demand then pressed, does not in our opinion justify the proposed interference. It is quite obvious that this matter was before the referees and passed on by them, and it is not charged or intimated that the omission to set up the defence, by whatsoever motive prompted, and whether available or not, if it had been, was in any way the result of collusion with the executor, or that the latter knew of or participated in the imputed fraudulent concealment. Unless he has, he cannot be deprived of the fruits of an adjudication reached in the *bona fide* prosecution of a claim believed to be due, because of the failure of an adversary party to make a successful resistance to the demand.

A decree or judgment equally as a deed procured by the practice of fraud by one upon the other may be annulled and set aside upon proof at the instance of the one who has suffered, and it is plain the present case does not fall within the rule.

A successful plaintiff cannot be made to lose the advantages of a favorable termination of his suit, because one or more of those who have antagonistic interests, have neglected to set up a defence, and sustain it by proof which might have been equally effectual and protective to all against whom the proceeding is directed. Were it otherwise, few suits would be determined by an adjudication, and the stimulus to make adequate preparation for resistance be greatly weakened and blunted. The policy of the law is expressed in the maxim, *interest reipublicæ ut finis sit litium.*

6. To entitle a party to a revision, on account of newly discovered evidence, the evidence must not be merely cumulative or additional to what was produced upon a point at issue, nor where by ordinary diligence it could have been discovered and used at the hearing, nor if in possession of the counsel or agent of the party. These requisites do not appear to have been met in the present application, and the knowledge was in one whose special duty it was to protect his intestate's estate from a false claim if he could do so. It is admitted in the answer of Dalton to whom the secured note was transferred, that the intestate had never paid the debt, and to him alone and the holder of the substituted note could payment be made, and this admission under oath comes from the grandfather of the plaintiffs, and as evidence, has a force which can scarcely be out-weighed by an averment based on information and belief that the intestate had made payment.

It was a point presented in the pleadings necessary to the relief demanded and assumed in the rendition of the award.

Love v. *Blewit*, 1 Dev. & Bat. Eq. 108; *Greenlee* v. *McDowell*, 4 Ired. Eq. 481.

We have not considered the objection taken in the demurrer to the want of previous leave to bring the action, a practice under the old system necessarily abrogated under the provisions of the new, and so declared in *Bledsoe* v. *Nixon*, 69 N. C., 81. The right to bring any proper action here rests with the plaintiff and the only conditions prescribed are those common to all suitors. C. C. P. § 71 *et seq.*

We must therefore sustain the demurrer and dismiss the action, and it is so adjudged.

No error. Action dismissed.

WILLIAM HAYMORE v. COMMISSIONERS OF YADKIN.

Statute of Limitations—Mandamus.

1. Defendants will not be allowed to set up the statute of limitations in bar of the plaintiff's claim when the delay which would otherwise give operation to the statute has been induced by the request of the defendants, expressing or implying their engagement not to plead it.
2. Mandamus is not now a prerogative or extraordinary writ, but a writ of right, to be used as ordinary process in any case to which it is applicable.

(*Daniel* v. *Com'rs*, 74 N. C., 494; *Lyon* v. *Lyon*, 8 Ired. Eq. 201; *Brown* v. *Turner*, 70 N. C., 93, cited and approved.)

CIVIL ACTION tried at Spring Term, 1881, of YADKIN Superior Court, before *Seymour*, *J.*

The plaintiff declares on two causes of action:

First, That in the year 1863 there were certain parties under indictment in the county of Yadkin, whose causes were removed for trial to the county of Surry, of which

latter county the plaintiff was at the time the sheriff and jailer. That at the first term of the superior court, next after such removal, the causes were continued, and the judge then presiding considering the jail of Surry county to be insecure, ordered that the prisoners should be transferred for safer keeping to the jail of Forsyth county, which was accordingly done by plaintiff—his charges for so doing including board, guarding, transportation, fees and expenses amounting to $137. That he present an itemized account of his charges to the board of commissioners of Yadkin county, and requested that the same might be audited and ordered to be paid, when the said board requested that the plaintiff should forbear to press his claims until a suit which the jailer of Forsyth county had then instituted against the defendants for the board and keeping of the same prisoners while confined in that county, was determined, promising plaintiff to pay his claim provided that suit resulted adversely to the county. That said suit did so terminate and the defendant board was adjudged to pay the claim of the Forsyth jailer, and have so done, but still refuse to pay the plaintiff, or even to audit his claim.

Second. That as sheriff and jailer aforesaid, the plaintiff had other claims against the county of Yadkin, which he presented to the board of commissioners thereof in the year 1869, when the same were approved and the plaintiff informed that an order would be issued for the payment thereof on the treasurer of the county, but the said commissioners requested a delay in the matter, in order that he proper entries might be made in their books and the order prepared by their clerk, to which the plaintiff assented, and the matter was thus postponed until 1879, when the plaintiff applied for the order and was refused—the defendant board saying that they preferred that plaintiff should sue them, and allowing him to take a copy of the order still in the hands of their clerk and which is as fol-

lows: " No. 59. $364.20. Board of commissioners of Yadkin county—Yadkinville, N. C., February 1st, 1869. Ordered that the county treasurer pay to Wm. Haymore three hundred and sixty-four 20-100 dollars for jail fees for keeping J. R. Joyce in Surry county jail in 1866, and others. Signed, T. D. Talbert, register and clerk," &c.

The plaintiff's prayer is for judgment for the amount of his demands and for a writ of mandamus, &c.

In their answer the defendants deny all knowledge of the facts alleged in the complaint and plead the statute of limitations in bar of the plaintiff's demands.

After the jury were impanneled and the pleadings read in the court below, His Honor announced that he should charge the jury that the plaintiff's right of action was barred by the statute of limitations, and thereupon the plaintiff submitted to a nonsuit and appealed.

Messrs. J. M. Clement and *W. H. Bailey*, for plaintiff.
Messrs. Watson & Glenn, for defendant.

RUFFIN, J., after stating the case. So far as regards the plaintiff's first cause of action, the case seems to be parallel with that of *Daniel* v. *Commissioners of Edgecombe*, 74 N. C., 494. It was there held to be contrary to equity and good conscience for the defendants to plead the statute of limitations, after they were understood by the plaintiff's attorney in the cause, to have agreed that his claim should abide the result of another action to be instituted, on a similar claim, by another person, and had in pursuance of that agreement accepted the service of the summons taken out at the instance of that other person. This holding is supported by the clearest authorities and is in itself reasonable and just. Courts of equity will prevent a party from setting up an unconscientious defence at law, acting by means of an injunction to that end, when the courts of law and courts of

equity are separate and distinct tribunals, but directly in the case where the two have been consolidated as with us. 2 Story Eq. Jur., 903.

The jurisdiction of a court of equity thus to restrain a party from pleading the statute of limitations, who has agreed not to take advantage of the delay in bringing the action, thereby contributing to such delay, is distinctly recognized in *Lyon* v *Lyon*, 8 Ired. Eq., 201, and also in High on Injunctions, 72.

In view of these authorities, we think His Honor erred in deciding that the plaintiff's right of action as to his smaller demand is barred by the statute, that is, as a matter of law and upon the statement as made in the complaint. How it will turn out to be when the facts are fully developed, we cannot now tell.

This renders it unnecessary that we should consider any other points made in the argument as they may not be raised on another trial, except to say, that the writ of mandamus is no longer regarded as an extraordinary remedy, to be issued only by the express order of the court, whose high prerogative it is to see that sufficient cause for it is shown, and that without it, there would be a failure of justice. According to modern practice, it has become to be a writ of right, to be issued as ordinary process in any case to which it is applicable, and the statute of limitations applies to it with the same force as to any other form of action. *Brown* v. *Turner*, 70 N. C., 93; *Kendall* v. *The United States*, 12 Peters, 524; *Commonwealth of Kentucky* v. *Dennison*, 24 How., 66.

Error. Reversed and *venire de novo.*

J. J. CRUMP v. B. M. THOMAS.

Trial—Estoppel—Jurisdiction.

1. Where the judge determines the facts involved in a question of estoppel with the tacit consent of the counsel for the defence, who argues the facts before the court, the defendant cannot complain on appeal that he was denied a trial by jury.
2. When the existence of such matter of estoppel depends upon a matter of record, the effect of which is a question of law to be determined by the court, it is unnecessary to refer the issue to a jury, whose verdict must be guided entirely by the instructions of the court.
3. *Quaere*, as to whether the determination of issues in a cause originating before a justice who has no jurisdiction where the title to real estate is in controversy, can be effectual in concluding a party as to the title to the recovered land in another suit where such jurisdiction does exist.

(*Yates* v. *Yates*, 81 N. C., 397, cited and approved.)

MOTION by defendant to vacate a judgment, heard at Spring Term, 1881, of CHATHAM Superior Court, before *Avery, J.*

The action is to enforce an alleged parol trust upon land, for an account to ascertain the residue of the encumbering debt and for redemption. The defendant relies upon a former adjudication, and in his answer avers that at fall term, 1879, in a case then depending in this court, and embracing the same issues, he recovered judgment against the plaintiff, which is a bar to the present suit. When the cause came on for trial, the defendant's counsel, without the consent of the plaintiff, suggested the reference, but preliminary thereto a decision upon the defence of estoppel, which might obviate the necessity and save the expense of the reference. Thereupon the court proceeded to consider the same on the pleadings and proofs offered, and after argument of counsel of both parties, declared and adjudged "that the matter set

up in the last article of the defendant's answer (the estoppel) constituted no bar" to the prosecution of the suit, and made an order of reference for an account to be taken of the purchase money and of the rents accruing during the defendant's occupation. The defendant's counsel then announced his intention to appeal (which however is not entered of record) and failed to prosecute the appeal. At spring term, 1881, the defendant's counsel, on notice, moved his Honor to vacate the judgment rendered at the preceding term for irregularity, in that, the matter was decided by the court and not submitted as an issue to the jury. On the hearing of the motion and the production and reading of the transcript of the record in the prior suit between the same parties (reversed), the court declined to set aside the judgment, and the defendant appealed.

Mr. John Manning, for plaintiff.
Messrs. Edwards & Batchelor, for defendant.

SMITH, C. J., after statingthe case. The case shows that the proposition to refer came from the defendant, as well as the preliminary trial of the defence arising upon the estoppel of record, and that thereupon, without demand of a jury from either party, the court proceeded to try the question on its legal sufficiency as a bar, and after argument from the counsel of each party, rendered a decision against the defendant. Nor does it appear that any objection was made to the assumption of the jurisdiction now the subject of complaint, before, during or after the rendition of the judgment during the term. The appeal of which notice was given, so far as the record discloses, did not spring from any supposed irregularity in the proceeding, nor the exercise of jurisdiction, but from an alleged error in the decision of the question of law involved. Under these circumstances his Honor properly declined to grant the motion to vacate and annul the former judgment.

The point in controversy, required to be disposed of upon a reference, is called to the attention of the judge by the defendant's counsel, and of which, without demand of a jury trial, he at once took judicial cognizance, was, as to the legal sufficiency of the record of the prior action to defeat a recovery, a question of law arising out of the pleadings and to be determined by an inspection of the record. If the acquiescence in the action of the judge does not take away the grounds of the exception now pressed, it is manifest, if an issue had been submitted to the jury, their verdict would be under an instruction from the judge as to the legal effect of the transcript as evidence to sustain the defence since none *dehors* was required. Why then should a jury be empannelled to pass upon an issue involving solely a matter of law in which it would be the duty of the judge to give them directions determining the verdict? And why may not the parties, as in the present case was done, submit the sufficiency in law of the transcript to the direct decision of the judge who in an issue submitted to the jury must pass upon the question in the form of an instruction for their guidance? We see no just objection there can be to this method of obtaining the opinion and ruling of the court, upon a simple legal proposition growing out of undisputed facts. It is certainly competent to the parties to pursue this course, and the judgment whether erroneous or not is liable to no imputation of irregularity when fully acquiesced in at the time by all.

We have not inquired whether an estoppel does arise upon the face of the record, for no proof is needed in its aid, and simply suggest whether the determination of issues in a cause originating before a justice who has no jurisdiction "where the title to real estate comes in controversy" (as has not the appellate court in trying the cause) can be effectual in concluding a party as to the title to the recovered land, in another suit where such jurisdiction does exist. We re-

fer on the subject to the notes to the *Duchess of Kingston's* case in 2 Smith's Leading Cases, 424, and to *Yates* v. *Yates*, 81 N. C., 397, and the cases therein cited. Abbott's Trial Evi., 826.

There is no error. This will be certified that the cause may proceed in the court below.

No error. Affirmed.

J. P. ALEXANDER v. JOHN ROBINSON.

Appeal—Exceptions—Judicial Sale—Paactice.

1. A party who neglects to tender on the trial such issues as he deems essential to the development of his cause cannot assign for error, on appeal, the failure of the court to frame and submit such issues.
2. It is error to order the making of title to property disposed of at a judicial sale, prior to the commissioner's report of such sale, and its confirmation.

(*Mebane* v. *Mebane*, 80 N. C., 34; *Kidder* v. *McIlhenny*, 81 N. C., 123; *Harris* v. *Bryant*, 83 N. C., 568; *Foushee* v. *Durham*, 84 N. C., 56, cited and approved.)

CIVIL ACTION tried at Fall Term, 1881, of MECKLENBURG Superior Court, before *Avery, J.*

Judgment for plaintiff, appeal by defendant.

Messrs. Wilson & Son, for plaintiff.

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

SMITH, C. J. This suit is to enforce the specific performance of a contract under seal entered into between the plaintiff Alexander, and the defendant, on June 3rd, 1878, for the sale by the former and the purchase by the latter of the

land described in the complaint, for a judgment for the residue of the purchase money, and in case of non payment, the sale of the premises for the satisfaction of the debt.

The defendant admits the substantial averments of the plaintiffs, but says he has not sufficient information of the title, as to admit the allegation that it is in either plaintiff, and their legal capacity to convey to him an estate in fee; and he further insists that the creditor secured in the deed in trust from the plaintiff Alexander, to his co-plaintiff Wilson, as also the wife of the former, are necessary parties to the action. The pleadings were made up at fall term, 1878, and no further action had until August term, 1881, when the creditor and the said feme came into court, as the record shows, and "make themselves parties plaintiff." At the same term, on plaintiffs' motion, an order of reference was made, directing the clerk to ascertain the amount due under the contract and report during the term.

The report was accordingly returned, and in the absence of exception confirmed, and it was thereupon adjudged that the plaintiff, George E. Wilson, trustee, do recover of the defendant the sum of $6,193.67 and interest on $4,780.80, principal money included therein from August 29th, 1881, until paid. And it was further adjudged, that the defendant do specifically perform his contract and pay the said moneys so due within ninety days from the rendition of the judgment, and in default that the trustee, acting also as commissioner of the court, sell the said land at public sale, and apply the proceeds after payment of costs to the satisfaction of the said debt as far as said proceeds will admit, and pay over any surplus to the defendant; and that upon payment of the purchase money, he make title to the purchaser.

There appears to have been no opposition to the form of the interlocutory order of reference, no suggestion to extend the scope of the inquiries of the referee, so as to include an

examination of the title which the plaintiffs were able to convey, and no exception then made to the confirmation of the report and the judgment following it, but subsequently thereto upon an appeal then taken the defendant files the following exceptions, in substance:

1. For that issues are raised upon the pleadings which ought to have been disposed of before the rendition of the judgment.

2. For that the plaintiffs' title is controverted and its sufficiency should have been included in the subjects of reference.

3. For that the judgment directing the sale does not require the same to be reported for the action of the court.

If these exceptions were properly before us for review, they would not be entitled to a favorable consideration, for the reason that no inquiry into the title was asked when the reference was ordered, nor the submission to the jury of any issue in regard to facts controverted in the pleadings, if indeed the answer in its present form does in legal effect amount to a denial of the plaintiffs' title. The defendant cannot complain of omissions which it was his duty to call to the attention of the judge, and of the consequences of his own neglect.

There is, however, an irregularity in the judgment, in that it does not provide for a report of the sale for confirmation before making title to the purchaser, which can be corrected in the judgment now to be rendered, as has been done in several cases heretofore. *Mebane* v. *Mebane*, 80 N. C., 34; *Kidder* v. *McIlhenny*, 81 N. C., 123; *Harris* v. *Bryant*, 83 N. C., 568; *Foushee* v. *Durham*, 84 N. C., 56.

Thus modified the judgment must be affirmed.

PER CURIAM. Modified and affirmed.

JONES, GASKILL & CO. v. COMMISSIONERS OF ROWAN.

Demurrer—Parties—County Commissioners—Re-assessment of Exemptions—A Casus Omissus.

1. A demurrer is too indefinite which assigns for cause "that the complaint does not state facts sufficient to constitute a cause of action."
2. Where the writ directed to the sheriff commands him to summon "the board of commissioners of Rowan county, composed of D," and others—(giving the names of the commissioners) the suit will be considered as one against the board in its corporate capacity, and the names of the members treated as surplusage.
3. It is not the duty of the county commissioners, individually or as a board, to revise upon appeal the allotment made by the appraisers of an execution debtor's exemptions.
4. The duty of revising such allotment, which, under the former law, was incumbent upon the township trustees, devolved upon them as individuals, and it seems that a legislative transfer of corporate duties *only* to the county commissioners was a *casus omissus*, which operated the discontinuance of any supervisory tribunal in the allotment of homesteads and other exemptions.

CIVIL ACTION heard upon complaint and demurrer at Spring Term 1881, of ROWAN Superior Court, before *Seymour, J.*

The summons commanded the sheriff to summon the board of commissioners of Rowan county, composed of D. A. Davis, J. G. Fleming, G. A. Bingham, D. C. Reid, and W. M. Kincaid, to be and appear, &c. The plaintiffs in their complaint allege substantially as follows: That they obtained judgment before a justice of the peace, in Rowan county against one W. H. Kestler, on the 6th day of September, 1879, for the sum of eighty-five dollars and sixty-one cents and costs; that an execution was issued on said judgment and levied upon certain personal property of said Kestler by the sheriff of the county, who summoned ap-

praisers to allot to the said Kestler his personal property exemption; that they allotted to him property in excess of five hundred dollars by at least one hundred and ten dollars; that the plaintiffs excepted to the said allotment upon the ground that the property allotted to the said Kestler was greatly in excess of the amount allowed by law to be exempted from execution, and duly certified the exceptions to the commissioners of the county, and notified them to reassess said allotment, and to confine it within the sum authorized by law, and gave them a list of the property, and informed them where it was to be found; that in response to the application of the plaintiffs, the commissioners refused to comply, and refused to take any action in the premises, excusing themselves upon the ground that it was not their duty to act; that they appealed from the neglect and refusal of the commissioners to perform their duty in the premises to the superior court, when the judge at the special term of said court, held in August, 1880, adjudged that the commissioners were guilty of error in refusing to act and ordered them to proceed to make said allotment according to law; that during the pendency of said appeal, the said Kestler disposed of all the property allotted to him by the sheriff and appraisers, so that it could not be reached by the commissioners to be re-assessed; that in consequence of the wrongful acts of the commissioners in not doing their duty in the premises, the plaintiffs were injured to the full amount of their judgment against said Kestler, and therefore demand judgment of that amount for damages and the costs of action.

The defendants filed the following demurrer:

1. That the complaint does not state facts sufficient to constitute a cause of action.

2. That an action against the county should be brought against the board of commissioners of the county, and it appears upon the face of the summons that the writ is

against the individuals (naming them) composing the board of county commissioners.

The demurrer was sustained and there was judgment against the plaintiffs for costs, from which they appealed.

Messrs. T. F. Klutz and *J. W. Mauney*, for plaintiffs.
Mr. Kerr Craige, for defendants.

ASHE, J. The demurrer ought not to have been sustained by his Honor. The first cause assigned was too indefinite, and the second was defective in that it assigned as cause of demurrer that the action should have been against the board of commissioners and not against the individuals constituting the board, when in fact, the action was against the board and not against the individual members thereof.

It is true, the names of the members of the board are mentioned in the summons, but that was surplusage, and the "board of commissioners" in its corporate capacity was by the terms of the process, the real defendant. It was so considered in the argument before us, for the responsibility of the *county* of Rowan was strenuously insisted upon.

But while we hold that the demurrer must be overruled, the motion to dismiss the action made by the defendants' counsel, under section 99 C. C. P., upon the ground the complaint did not set forth facts sufficient to constitute a cause of action, presents the same objection as that intended to be raised by the demurrer.

The question presented is one of very considerable importance and of the first impression in this state. The question is nothing more nor less than this: Is it the duty of a county through its officers to re-assess the allotments of homesteads and personal property exemptions, which have been made by appraisers, upon applications for re-assessment? and are they liable in damages for the neglect of their officers to perform that duty?

We cannot believe that it was the intention of the legislature to impose such a duty or liability upon the counties. There is nothing in the act of 1868 or that of 1876–'7 which warrants such a construction.

By the act of 1868–'9, ch. 137, it was provided that if a judgment creditor, or debtor who is entitled to a homesteads should be dissatisfied with the allotment of the appraisers, he might notify the clerk of the township and file with him a transcript of the return of the appraisers, and thereupon the clerk should notify the other trustees of the township to meet on a certain day and re-assess and allot the homestead, and that they should meet on the day specified on the premises, and view and examine the homestead laid off, and make their report according to law.

The township board of trustees were a *quasi* corporation, organized under the constitution of 1868, with certain limited governmental functions, as, the control of the taxes and finances, roads, bridges, and the duty of assessing the taxable property of the township. These were its corporate powers defined by the constitution. The duty of re-assessing the allotments of homesteads, &c., was not one of its corporate powers, but was a duty imposed by the legislature upon the individuals constituting the board, and when it was provided that this duty should be performed by the clerk and trustees of the township, it means to designate the persons to whom that duty was assigned, as a "*descriptio personæ.*" This construction is put beyond a doubt by the provisions of section 21, chapter 55, of Battle's Revisal, where it is declared that "if any *trustee* or any person summoned as an appraiser shall be related by blood or marriage to the debtor or judgment creditor, or shall be a party in interest in any action against the former, he shall be disqualified to serve in the valuation of the homestead or personal property exemption, and another person qualified to act as a juror shall be summoned and qualified to act in his place." If the

legislature intended to impose the duty of making re-assessments upon the "board of trustees" in their corporate character, they certainly would not have imposed any part of that duty, under any circumstances, upon one who was member of the "board."

And then when the act of 1876–'7, ch. 141, was passed abrogating several of the sections of article seven of the constitution of 1868, as the legislature had the right to do by the amended constitution, and especially that creating the board of township trustees and providing that the board of county commissioners should have and exercise the jurisdiction and powers vested in and exercised by the boards of trustees of the several counties, the question arises, what are the jurisdiction and powers thus transferred. As the act of 1876–'7 abrogates section five, article seven, of the constitution, which authorized the creation of the boards of trustees and defined their powers and duties, when the same act vested in the commissioners the same powers and jurisdiction that has been exercised by the *board of trustees* of the several townships, it must be that the legislature had reference only to the constitutional jurisdiction and powers which had been vested in the township board of trustees by section five, article seven, of the constitution of 1868, and did not include those duties and obligations imposed by legislative enactments, and especially this of re-assessing homesteads, &c.; because as we have seen, it was not imposed upon the board of trustees in its corporate capacity. Can it be possible that the legislature by vesting the jurisdiction and powers which had been exercised by township trustees in the commissioners of the counties, intended to tax them, in addition to their constitutional and corporate duties, with that of going to every man's house in their county whose property might be levied upon by a sheriff or constable, to view and examine his homestead and personal property exemption, whenever a dissatisfied judgment creditor, or de-

fendant in an execution, should claim a re-assessment of the allotment of the appraisers? It is rather more reasonable to conclude that the legislature has inadvertently overlooked the provision for a supervisory tribunal in the allotment of homesteads, &c., than that they have enacted a law the execution of which must be attended with such great inconvenience. LORD COKE says the *argumentum ab inconvenienti* is forcible in law, and that judges are to look upon an inconvenience as of things unlawful. Coke, 481. And Mr. Hargrave (in note 10, page 18, Coke) says such arguments deserve the greatest attention, and when the weight of the reasoning is really on equipoise, it ought to turn the scale.

This duty was no doubt originally imposed by the legislature upon the clerk and trustees of the townships, because they were presumed to know the value of the property in their immediate neighborhoods, and resided in convenient proximity to the places where their duties were to be performed.

We feel constrained to hold that the county of Rowan is not responsible in this case, for the reasons assigned.

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

No error. Affirmed.

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*A. W. ROBERTSON, Gdn., v. J. G. and R. N. WALL.

Confederate Securities—Guardian—Negligence.

1. The great depreciation reached by Confederate securities in June and July, 1863, raises a presumption of a want of caution on the part of a

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

fiduciary who collects well secured ante-war debts and invests the proceeds in such securities and calls for exculpatory evidence.

2. When the evidence shows that a guardian, without any sinister or selfish motive appearing, makes such an investment of funds arising from the collection of well-secured debts contracted before the war, he will be exonerated from blame, upon showing that he had invested his own funds in the same way; that he acted upon the advice of experienced business men; that he failed after due trial to make private loans; and that the money received in July, 1863, was the balance of an entire debt the other portions of which had been collected prior to 1863.

(*Cummings* v. *Mebane*, 64 N. C., 315; *Sudderth* v. *McCombs*, 79 N. C., 398; *Wells* v. *Sluder*, 72 N. C., 435; *Purser* v. *Simpson*, 65 N. C., 497; *Green* v. *Barbee*, 84 N. C., 69, cited and approved.)

SPECIAL PROCEEDING for account and settlement, commenced in the probate court, and heard at Fall Term, 1879, of STOKES Superior Court, before *Gilmer, J.*

Granville Wall died in 1859 intestate, and administration on his estate was committed to his widow Mary F. Wall who entrusted the entire management of the business to her father, the plaintiff. At September term, 1860, of the county court of Stokes, the plaintiff was appointed guardian to the defendants, infant children of the intestate, and gave bond as required by law. At May term, 1861, commissioners were appointed by the same court to audit the administration account then exhibited, which was done and they made their report showing to be due from the administratrix to the distributees the sum of $7,384.79, whereof she and her two children were each entitled to $2,462.59. This fund derived from the sale of slaves and other personal estate consisted mainly of bonds which were transferred to the plaintiff and thereafter held by him as guardian. The intestate also owned at his death a large and valuable tract of land which on a petition filed in the names of the widow and the infant defendants in the court of equity of Rockingham, where the land was situated, was sold under a decree rendered at the fall term, 1859, for $9,100 to one J. B.

Vaughn. The sale was not confirmed and a re-sale was ordered at which on June 16, 1860, R. B. Webster became the purchaser at the price of $10,861, and gave his bonds for equal parts thereof, payable at 6 and 12 months. The clerk and master in his report thereof, pursuant to an interlocutory order, ascertained and reported the value *in presenti* of the widow's dower right on the fund at $2,500. The land was sold at the suggestion of the attorney whose professional advice and aid had been sought in conducting the administration, that thereby the dower interest could be converted into an absolute sum of money, and the plaintiff also concurring in the expediency of the change of the real estate into money, as the family were to remove and thereafter reside with him, and the necessary renting would damage and deteriorate the property during the long minority of the infants. The moneys due for the land were paid to the guardian in different sums and at different times as appears from his receipt to the clerk and master as follows: On September 21, 1861, $200; on March 8, 1862, $1,000; on July 15, 1862, $2,500; on August 11, 1862, $2,000; on August 26, 1862, $5,000; on June 4, 1863, $600; and on July 28, 1863, $600, the residue.

The defendants having arrived at full age, the present suit was brought against them for a settlement of the trust estate before the probate judge, who took a large volume of oral and other evidence relating to the guardian's administration, and stated in detail the account of his receipts, disbursements and investments, in which he finds the plaintiff indebted as follows: To James G. Wall on June 1, 1875, $497.89; and to Robert N. Wall on June 1, 1876, $755.75.

In reaching this result the plaintiff is charged with the sum of $325.26, due to each ward which the plaintiff had erroneously applied as commissions in reduction of the shares of his wards in the balance transferred from the administration account, while it appears the claim had al-

ready been allowed and deducted. As to the correction of this obvious error, there is no dispute. The accounts between the guardian and his wards are stated upon the basis of annual rests, and the carrying the successive balances of each year into the next as in ordinary guardian settlements.

To the report the plaintiff takes a single exception to each account, in that, he is entitled to and not allowed a credit, as compensation for his services in managing the estate, a sum he claims sufficient to extinguish the indebtedness arising out of the error in the reduction of the sum received from the administratrix.

The defendants file numerous exceptions which are substantially comprised in these:

1. That the plaintiff is not charged with the debts due by T. L. Wall, Robert Lewis, Elizabeth Carter and Booker.

2. That he is not charged with the proceeds of the sale of the land, needlessly and negligently collected and lost.

3. That the plaintiff is not found to be negligent and careless in collecting the well secured funds of the estate, and investing them in securities of the Confederate States, and is liable therefor.

These exceptions were all overruled by the probate judge, and upon appeal that of the plaintiff was sustained, and those of the defendants which apply to the $1,230, the residue of the sales of the lands, collected in June and July, 1863, and all others overruled. From these rulings adverse to either, the parties respectively appeal to this court.

Messrs. John H. Dillard and *Boyd & Reid*, for plaintiff.
Messrs. Watson & Glenn, for defendants.

SMITH, C. J., after stating the case. We see no satisfactory grounds for reversing the decision of his Honor in allowing remuneration to the plaintiff for his management of the

trust estate in the form of commissions on the sums received. In law whatever per centum may be allowed should diminish *pro tanto* the amount received, when so received, and the sum remaining constitutes the part wherewith he is chargeable. While it may seem unimportant, when the entire amount has been lost under circumstances acquitting the guardian of personal responsibility, it is fair and reasonable to state correctly his dealings with the trust fund and the extent of his possible responsibility to the wards, and material in the present case since he is made accountable for the money erroneously charged, and is not excused for its loss.

The essential element in the controversy, however, is the plaintiff's liability for his various collections of well secured notes due for the land and otherwise, and the investments in Confederate securities by which the trust estate has been almost wholly destroyed. The plaintiff denies, and the defendants insist upon, his liability for losses thus incurred by the needless and negligent conduct of the guardian in changing the investments, but for which a large portion of the trust estate would have been preserved for the wards notwithstanding the financial disasters following the overthrow of the Confederate government.

His Honor in passing upon the question draws a separating line between the collections, thus lost, made in June and July, 1863, and those made before, declaring the plaintiff chargeable with the former ($1230) and exonerating him from liability for all moneys previously received. The correctness of this ruling is presented in both appeals.

There have been numerous cases before the court involving the management of trust estates during the late civil war, and the personal responsibility incurred by trustees in converting funds into Confederate securities. The general rule is well settled and thus declared by SETTLE, J. in *Cummings* v. *Mebane* 63 N. C., 315: "The degree of diligence to which, we think, they should be held liable is that which

a prudent man at that time would have exercised in the management of his own affairs," and he subsequently adds: "where a party acting in good faith received Confederate currency and afterwards lost, not only trust funds but his own also, he is to be regarded with all the favor that is consistent with the policy of the law in regard to those who undertake to discharge a trust."

The governing principle may be easily expressed in general terms, but the perplexing difficulty arises in its attempted application to the varying facts of each particular case. Good faith as well as ordinary prudence are required in the exculpation of a trustee for losses produced by his own unwise management of a fund committed to his control and protection: and hence it becomes necessary to inquire into the surrounding circumstances and the influences that prompted his action to determine in each particular case the question of the personal accountability of the fiduciary. "We cannot close our eyes," is the language of the court in the case cited, "upon the past, and forget that thousands of our most prudent citizens have become bankrupt by investments which appeared to be the very best that could be made at the time. It is one thing to sit in judgment upon the past, and quite another to foresee consequences It will not do to look back now and see how estates might have been better managed, and exact of those who had them in charge that degree of diligence which would have proved most beneficial in each particular case."

The great depreciation to which Confederate securities of all kinds had been reduced in June and July, 1863, raises a presumption of a want of fiduciary diligence and care, and calls for explanatory and exculpatory evidence to meet and remove it, and to excuse the act of substituting for solvent personal obligations such discredited funds. *Saddurth* v. *McCombs* 79 N. C., 398.

In the effort to fix upon some definite period up to which

such conversions of the trust estate made in good faith would, and after which they would not, be excused in a trustee, the court leaves the entire year, 1863, as marking the dividing line, and whose breadth the solution of the question in any particular case is made dependent upon the attending circumstances. *Wells* v. *Sluder*, 72 N. C., 435.

We must then look to the facts shown in the testimony connected with the impeached conduct of the plaintiff in making the collections and investments. There is no indication in the evidence of any sinister purpose in the plaintiff, or of any personal advantage to accrue to him in making the unfortunate change in the condition of the trust estate, or that he was prompted by any influence adverse to the interests of his young grand-children who with their mother had returned to the parental roof and were all the time under his protection and care. In his own testimony upon a full and searching examination he declares that he was at a loss to know what to do with the funds; they were bearing simple interest, and he sought advice in the emergency from some of the wisest and most experienced men in his section, all of whom advised him to invest in Confederate bonds, as one or more of them was then doing with trust funds under their control, not only because they bore a higher rate of interest, but because also it was payable semi-annually; that he had tried to make private loans and without success; and he thought the interests of his wards would be promoted by the purchase of Confederate bonds.

Under these circumstances, in the exercise of his own and in reliance upon the judgment of others whom we consulted, the disastrous investments were made for the consequences of which, without any just grounds, as far as we can see in the proofs to impeach the integrity and good faith of the act, it is now insisted he is personally liable, and while he loses funds of his own similarly disposed of, he must replace those of his wards. In the report of the probate judge, he finds

that the plaintiff made the investments "honestly believing it was the best he could do, and under the advice of R. W. Lawson and others who were known to him to be prudent business men," and that "the guardian himself as well as the mother of the wards made investments of their individual funds in the same kind of Confederate securities." This finding is in our review of it, fully borne out by the evidence, and is accepted as the basis of the rulings in the superior court.

His Honor, however, adjudged the plaintiff liable for the two sums collected in June and July, 1863, the remaining purchase money for the land as we infer upon the authority of *Purser* v. *Simpson*, 65 N. C., 497, and other cases of like import. While we do not propose to disturb the general proposition that good faith even will not protect from personal responsibility a guardian who accepts Confederate currency at par in payment of solvent debts contracted in good funds at the time when the last collections were made, of the proceeds of the sale of the land, yet it must be remembered that this was the last of the fund, and it could scarcely be expected that this should be left out in the disposition of the preceding collections. If the guardian is to be justified in what he had before done, it would seem to be reasonable that he should be in this, under the common motive that prompted all. We discover no just principle in discriminating against the plaintiff in this consummating act in reference to the fund.

The exceptions relating to other debts due the wards, resting upon the same ground of imputed negligence, must be disposed of in a similar way.

Although we are required in a case like the present, which would formerly have been of exclusive equitable cognizance, to examine the evidence and determine its force and credit in proving facts, we should be reluctant to disturb the findings and conclusions of the probate and revising judge,

where the matter is left in reasonable doubt and there is no decided adverse preponderance in the proof. *Green* v. *Barbee*, 84 N. C., 69.

We therefore declare there is error in the court below in sustaining the defendants' exceptions by which the plaintiff is charged with the sum of $1,200 collected in June and July, 1863, and we affirm all the other rulings of the court upon the exceptions. The account will be reformed accordingly, and to this end there must be a reference to the clerk of this court and the cause will be retained for further proceedings.

PER CURIAM. Judgment accordingly.

D. G. McMILLAN and others v. MARCUS A. BAKER.

Trusts—Execution Sale—Statute of Limitations—Supreme Court—Power Over Verdicts.

1. A husband, as trustee of his wife, was directed by a decree of court to purchase with her funds, and to take a conveyance to her separate use for life, with remainder in fee to his and her children. Instead of doing so, he took a deed "to the only proper use and benefit of the said R. M., [the husband] trustee of E. A., [the wife] her heirs and assigns forever: *Held*,

(1) That the children mentioned in the decree were the equitable owners of the remainder in fee;

(2) That the possession of the father under such conveyance was not adverse to the remaindermen, and hence, the statute of limitations would not run during the life-time of the mother to the prejudice of the children;

(3) That the purchaser of the feme's estate at an execution sale, after the death of the husband, took her interest subject to the equities of the children.

2. The supreme court, being a revisory and appellate tribunal, cannot enter or reform verdicts, and when errors have entered into them it can only set aside such verdicts and award a *venire de novo.*

CIVIL ACTION to recover land tried at Spring Term, 1881, of Cumberland Superior Court, before *Gudger, J.*

Verdict and judgment for defendant, appeal by plaintiff.

Messrs. N. W. Ray and *W. A. Guthrie,* for plaintiff.
Mr. J. C. McRae, for defendant.

SMITH, C. J. At spring term, 1855, of the court of equity of Cumberland, Ronald McMillan and Elizabeth Ann, his wife, filed their bill against David Lewis, who then held certain trust funds arising from the sale of certain real estate which he was required by a decree authorizing the sale, made in the court of equity of Bladen, to re-invest in the purchase of other lands and had failed to do so, wherein the plaintiffs, who had since changed their residence from Bladen to Cumberland county, ask for the removal of said Lewis, as trustee, for certain causes, and the appointment of another in his place: for his accounting for and paying over to the substituted trustee the funds in his hands, and for their investment in the purchase of a tract of land therein described, which they had already contracted for at a reasonable price, and situated in the last named county. The feme plaintiff therein specially prayed that her husband, the said Ronald, be so appointed.

The defendant answered, admitting the material allegations of the bill and consenting to the removal, to come to an account, and to such other order as the court should make in the premises.

Thereupon it was decreed as follows: "That Ronald McMillan be appointed trustee for his wife and children, instead of David Lewis, upon the same terms and conditions

and for the same purposes, and that David Lewis account with Ronald McMillan for all the money and notes now in his possession, and upon the said money being paid over to Ronald McMillan, that he be authorized to purchase land for the benefit and use of his wife and children;" and an account was directed to be taken between the parties by the master.

Professing to act under this authority, the said Ronald, after coming into possession of the trust funds, used them in the purchase of the tract of land referred to in the bill, (and the subject of controversy in this action,) and took a deed therefor from D. S. Williams, then owning the same and bearing date October 16th, 1855. The deed for the recited consideration of $2946.50 conveys the land, with specific boundaries, to the said "R. McMillan, trustee of Elizabeth Ann McMillan," (and he is thus described whenever his name is mentioned in the instrument,) "*to have and to hold the said land with its appurtenances to the only proper use, behoof and benefit of the said R. McMillan, trustee of Elizabeth Ann McMillan, her heirs and assigns forever.*"

Referring to the deed from McMillan to the former trustee to ascertain the trusts, or, as expressed in the decree, the terms, conditions and purposes for which he held the property conveyed, and in conformity to which the deed for the land to be bought was to be taken, it declares the trust to be "to the sole and separate use and benefit of the said Elizabeth Ann for and during her natural life, free and discharged from the debts, liabilities and contracts of her said husband, Ronald McMillan, and after her death to the use and for the benefit of the children of the said Elizabeth Ann, that shall be of the issue of the said marriage with the said Ronald." The decree thus plainly directs the title to the land to be acquired with the trust fund to be taken, so as to secure a trust estate therein to the said Elizabeth Ann for her life with remainder in fee to her children, the plaintiffs

in the action, though the interests of the latter are not mentioned in the deed as drawn to the trustee designated, as has been already mentioned.

It is manifest that the interests in remainder adhere to the estate vested in the said Ronald, and could be enforced as equities against him and his wife, under a decree which if not sought is rendered in a suit instituted by themselves, and to which no objection was then or since made by them. This final decree remains in force, and until modified by a direct proceeding, must shape and control the equitable estates of the mother and children in the land, and their relations in respect thereto, one with the other. While it is true, recurring to the period when the original trust was created, the land and slaves thus charged were the property of the wife and were to be settled for her sole and separate use, and the deed from her husband to Lewis did not conform to the decree which directed it to be made, yet that personal trust and separate estate have been superseded by a limitation to her for life only, and a remainder to her children by a subsequent decree rendered in a cause wherein she was a plaintiff, and to which she voluntarily assents.

Ronald McMillan died in August, 1860, and his wife on April 5th, 1878, less than a year before the bringing of this suit. The defendant claims title to the land under a sale by virtue of an execution against the said Elizabeth Ann, and the sheriff's deed therefor made November 1st, 1869, and conveying all her interest in said land, and continuous possession thereof since.

We do not enter upon the inquiry whether the said Elizabeth Ann had such an estate as was the subject of sale under execution, the legal title to which had then descended to the plaintiffs charged with the trusts by which their ancestor held it, for if he did thus acquire her life estate, his possession was but a continuation of hers, under and not adversary to that of the plaintiffs, then become trustees in

place of their father, and hence the statute would not run during her lifetime, to the prejudice of the equitable remainder. The *defendant* is subject to all the equities to which the said Elizabeth Ann would be, and he acquires, if any, the same limited estate vested in her.

We do not, therefore, concur with the ruling of the court that the effect of the decrees and other written memorials produced in evidence, was to vest the absolute estate in the said Elizabeth Ann, and this had passed by the sheriff's deed to the defendant, and in the consequent instruction to the jury to render a negative answer to the issue as to the plaintiff's title. The case presented seems to have been intended for a final determination for the one or the other party, as the question of title should be determined, but this cannot be done in this court.

The erroneous instruction to the jury vitiates their verdict and requires it to be set aside, but we cannot enter here such verdict as ought to have followed correct instructions in the court below. Verdicts cannot be entered here, nor reformed, and our office as a revising and appellate court is restricted to the correction of errors committed in the court below, and when they have entered into the verdict, to set the verdict aside and award a *venire de novo*. The parties may make the judgment final, if they are so disposed, in the superior court. It must be therefore, declared there is error, and there must be a new trial. Let this be certified.

Error. *Venire de novo.*

*R. M. SLOAN and others, Trustees, v. THOMAS MCMAHON.

Reference—Account—Practice—Appeal.

1. It is irregular to proceed with a reference to state an account while there are matters of defense left open which, if sustained by evidence, will bar the claim to have such account.
2. Under this rule, where the defendant's answer calls for an account, and the plaintiff replies a full settlement heretofore of all matters of account between the parties, it is proper for the court to submit to the jury the issue raised by the replication before ordering a reference to take the account demanded.
3. Such action on the part of the court decides no substantial right, and is not the subject of an appeal.

(*Sutton* v. *Schonwald*, 80 N. C., 20, cited and approved.)

CIVIL ACTION tried at Spring Term, 1881, of GUILFORD Superior Court, before *Avery, J.*

Defendant appealed from the order of the court below.

Messrs. Watson & Glenn and *W. S. Ball*, for plaintiff.
Messrs. Scott & Caldwell, for defendant.

SMITH, C. J. The plaintiff assignees of the insolvent partnership of Wilson & Shober for the benefit of their creditors, seek to recover the sums due on three accepted bills and two promissory notes executed by the defendant and bearing date in October, 1871, and the others in the spring of 1874, upon four of which is an endorsement in these or words of similar import: "This note re-assumed and statute limitations waived June 25th, 1877," and on the remaining bill: "Bal. of this note, $898.27, re-assumed and statute limitations waived, June 25th, 1877," all with the defendant's signature. The answer not denying the indebtedness aris-

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

ing upon the securities, avers that they were discounted by the assignors, then engaged in the business of bankers, and a sum placed to his credit, lessened by the deduction from their face of a large usurious interest at a rate never under 15 per cent., and generally 18 per cent., the particulars of which in each case he is unable to set out in consequence of the loss of his bank book, but which will appear by an inspection of their books; and the defendant further alleges that the assignors, before their conveyance, received large sums from sales of manufactured articles consigned to their agent in New York, and he sustained large losses from the mismanagement of said agent, whereof as well as for such illegal deductions for interest he demands an account, and that the sum ascertained to be due him may be applied towards the payment of his notes and bills.

To these allegations the plaintiffs, not admitting their truth, reply that at the date of the several endorsements, there was a full settlement of all matters of account between the parties, and the aggregate indebtedness then recognized in said entries as due.

To this replication the defendant demurs, and assigns as the ground thereof that the plaintiffs do not set out an exhibit of the dealings between the assignors and the defendant, nor of the several sums charged upon the discounted papers in excess of lawful interest, and that the replication fails to allege an account stated sufficient to bar an inquiry into the matters of defence constituting his counter-claim.

It does not appear what disposition was made of the demurrer, but the defendant's motion for a reference, as demanded in his answer, and the statement of an account was denied, and the court proceeded to frame issues to be submitted to the jury as follows: 1. Was there a settlement on the 25th day of June, 1877, between the assignors of the plaintiffs and the defendant of all matters of account and mutual claims and demands; and 2. If so, did the defen-

dant by his several endorsements, set forth in the complaint, agree to pay the balance ascertained upon said settlement to be due to the said assignors?

The defendant's appeal is from the overruling of his motion, and the order for submitting the prepared issues to the jury.

As we interpret the action of the court, it is but a refusal to make the reference before the verdict is taken upon the issues, and not the denial of the reference, if it shall be deemed necessary after the trial. It would be irregular to proceed with a reference unless in the exceptional cases specified in C. C. P., §245, while there is, or may be a defence to the whole action left meanwhile not acted on. The finding of the jury will be harmless if the facts when ascertained do not go to the merits of the case, and may be disregarded, while a valid defence which defeats a recovery, renders the taking of an account wholly useless. It was therefore a matter resting in the sound discretion of the judge, to ascertain the facts which the plaintiffs rely on to bar the counter-claim, in order to determine their legal sufficiency before instituting the laborious inquiry involved in the denied application, and this affects no substantial right of the appellant within the meaning of C. C. P., §299, as heretofore interpreted by the court.

The interruption of trials and the delays consequent upon appeals improvidently and needlessly taken, now without the assent of the court, imposes upon us the imperative duty of refusing to entertain them unless the order of determination of the judge not only "involves a matter of law or legal reference," but "which affects a substantial right claimed in the action or proceeding" by the appellant. We think the present not one of the cases provided for in the code, and must dismiss the appeal. *Sutton* v. *Schonwald*, 80 N. C., 20; *Commissioners of Wake* v. *Magnin*, at this term.

The appeal must therefore be dismissed and the cause left in the court below to proceed as if no appeal had been taken. This will be certified.

PER CURIAM. Appeal dismissed.

QUINCEY F. NEAL, Adm'r, &c. v. L. J. BECKNELL and others.

Administration Bond—Sureties—Reference—Account.

1. The bond of an administrator whose appointment has been revoked may be sued on by his successor in office or by the next of kin, in case of his failure to account fairly for the assets that came to his hands.
2. Where it is admitted or proved that there came into the hands of an administrator assets belonging to the estate of his intestate, it is proper to order a reference to take an account of his administration of the same, unless some defense is interposed which bars the right to such account.

(*Smith* v. *Collier*, 3 Dev. & Bat., 65; *R. R. Co.* v. *Morrison*, 82 N. C., 141; *Dozier* v. *Sprouse*, 1 Jones Eq., 152, cited and approved.)

APPEAL from an order made at Spring Term, 1881, of WILKES Superior Court, by *Seymour, J.*

This is an appeal from an interlocutory order of the superior court, directing an account to be taken of the administration of the estate of Rachel Stokes, which came, or ought to have come, to the hands of Jacob Fraley, the administrator *de bonis non* thereof. The defendants are the sureties on the bond given by the said Fraley as such administrator.

The letters of administration were granted to said Fraley in the fall of 1862, and on the 21st of November, in that year, he sold personal property amounting to upwards of fifty thousand dollars in value. In July, 1863, the court

revoked the letters of administration theretofore granted, in consequence of the pendency of an issue of *devisavit vel non*, but in November, 1864, reappointed the said Fraley as such administrator, who then gave another bond with other sureties. The said Fraley has since died, and the present plaintiff has been appointed administrator *de bonis non* of the said Rachel Stokes, and brings this action on the first bond given by his predecessor as above stated. In his complaint he assigns as breaches of the bond that the said Fraley failed to collect debts due the estate to the amount of ten thousand dollars and more; that he negligently and imprudently accepted Confederate money, when greatly depreciated, in payment for personal property, and lands sold by him, to the amount of at least fifty thousand dollars; that he negligently omitted to collect debts due him for property sold as administrator, and negligently permitted a large amount of confederate money, which came to his hands as such, to remain uninvested, whereby it was wholly lost, and that he misapplied to his own uses a large amount of the money received by him belonging to the estate. The plaintiff prays judgment that there may be an account taken, &c.

In their answer the defendants admit that the said Fraley was so appointed administrator, and that he took possession of the personal property belonging to the estate and sold the same, as well as some lands. They admit the execution of the bond sued on, but deny that their principal was guilty of any of the breaches complained of, and insist that the bond was made void by the subsequent revocation of the letters of administration, and further, that the conditions thereof are not such as the law prescribes and therefore it is void.

At the hearing in the court below, the plaintiff moved the court to order an account to be taken of the administration of the estate by the said Fraley, which motion was resisted by the defendants upon the ground that they had a

right to have certain issues passed upon before such an account could be ordered, and they submitted the following as the issues which they desired to have found: 1. Are the defendants as sureties of Jacob Fraley liable to plaintiff for anything upon the bond declared on? 2. If so liable, are they liable for any act of said Fraley after July, 1863, when the letters first given him were revoked? 4. If so liable, are they liable to account for the proceeds arising from the sales or rents of the real estate?

A jury trial being waived, his Honor found the facts to be, that the present plaintiff is the administrator *de bonis non* of Rachel Stokes, deceased; that at fall term, 1862, of the county court of Wilkes county, Jacob Fraley was appointed administrator *de bonis non* of the estate of said deceased, and gave the bond sued on with the defendants as his sureties; that in November, 1862, he sold personal property exceeding in value the sum of fifty thousand dollars, and some real estate; that his letters were revoked in July, 1863, while an issue of *devisavit vel non* was pending, but he was reappointed in November, 1864, and gave another bond with other sureties. Upon these facts the court ordered a reference to the clerk to take the account asked for by the plaintiff, and declined to pass upon the second and third issues proposed by the defendants, holding them to be matters that more properly belonged to the account, and could be raised by exceptions thereto. To this ruling the defendants excepted and appealed.

Mr. J. M. Clement, for plaintiff.
Messrs. R. F. Armfield and *D. M. Furches*, for defendants.

RUFFIN, J. In their argument here, the defendants' counsel did not strenuously insist upon the point that the bond sued on was rendered void, by reason of the subsequent revocation of the letters of administration granted to

Fraley in 1862, but still, they did not abandon it, and thereby imposed upon us the duty of determining it.

If any authority is needed in regard to it, the case of *Smith* v. *Collier*, 3 Dev. & Bat. 65, is directly in point. There, it was held that the bond given by an administrator, whose appointment was subsequently revoked and another appointed in his stead, might be sued on by his successor in office, or by the next of kin, in case of his failure to account fairly for the assets that came to his hands. This being so, and it being admitted in the answer, as well as found as a fact by the judge, that there came to the hands of Fraley as administrator assets of the estate of his intestate to be by him administered, it is certain that the plaintiff is entitled to the decree for an account, unless there be something in the defences set up that takes away that right.

To have that effect, the defence must be such as, if true, meets the whole of the plaintiff's demand for an account, (such as *bars the account* as is said in the case of the *Railroad* v. *Morrison* 82 N. C., 141) since at this stage of the case, nothing else is heard or considered, but the bare right to the decree for the account, and the courts never undertake in advance, to say, what shall constitute, or not, an item of charge in the account, but leave all such matters to be determined upon exceptions thereto.

The rule of the courts of equity in this particular, and the reason upon which it is founded, are so clearly stated by PEARSON, J. in *Dozier* v. *Sprouse*, 1 Jones Eq., 152, that we cannot do better than refer to that case.

Apply the rule to the defences set up in this action, and what is the result? The matter involved in the first of the proposed issues did go to the whole of the plaintiff's demand, and if true, defeated his right to have any account as against these defendants. His Honor therefore rightly considered it before making the decree—holding as a conclusion of law, upon the facts found by himself, that the

bond declared on was not annulled by reason of the revocation of the letters, which had been issued to the principal obligor therein, in which conclusion, as we have seen, this court fully concurs. The other two issues plainly refer to matters that pertain to the account, and should properly, as said by his Honor, be heard only upon exceptions to the report of the master.

There is no error. Let this be certified to the superior court of Wilkes county, to the end that the cause may be proceeded with.

No error. Affirmed.

J. N. HAYS v. D. A. HUNT.

Tax Titles.

1. The power of the sheriff in selling land for taxes, being a naked one, uncoupled with an interest, is strictly construed, so that he must conform in its execution to the terms of the statute which creates and confers it; but, the main object of the statute being to raise revenue for the state, the courts will not exact such a rigid observance of forms as will defeat the primary purpose, but will apply to such sales the rules applicable to execution sales for private debts.
2. The test of the validity of the sales just mentioned is the knowledge which the purchaser has, or is presumed to have, because of his opportunity to know, of the observance by the officer of the prerequisites to such sales.
3. Where the non-observance of the statutory requirements are known to the purchaser, or where he has participated in their violation, he will get no benefit from his purchase.
4. Under these rules, a purchaser of land sold for taxes will get no title when he has not observed the mandate of the statute, to pay the amount of the taxes, take a receipt from the sheriff, and have the same registered.

(*Avery* v. *Rose*, 4 Dev. 549, cited and approved.)

CIVIL ACTION, tried at Spring Term, 1881, of WILKES Superior Court, before *Seymour J.*

This is an action for the recovery of the possession of certain lands, sold by the sheriff of Wilkes county for taxes.

The lands had formerly belonged to the father of defendant, but after his death, his sons took the possession in 1864, claiming title under his will. This possession they continued to hold until 1869, when a deed was made by J. O. Martin, one of the sons, to the defendant D. A. Hunt, who was a daughter, and her two brothers Benj. P. Martin and Leland Martin, and since that time she has had the sole occupancy. The land was sold for taxes assessed in 1869, and amounting, both state and county, to the sum of $59.74. It had been given in for taxation in the name of "Leland Martin & Co."

The sale took place on the first Saturday of December, 1872, when one Welch was the highest bidder and declared the purchaser at the price of $40, which was more than the amount due for state taxes alone, and less than the amount of the combined taxes. Welch, on the day of the sale, assigned half his interest, under the bid, to the plaintiff, and some two years thereafter assigned to him the other half. There was no money paid, or receipt taken, on the day of the sale, and none paid until after the plaintiff had acquired the whole interest, the precise date of which, however, does not appear in the case. The sheriff made a deed to the plaintiff on the 5th day of April, 1875. On the trial, the sheriff testified that he first advertised the land for sale on the first Saturday in November, 1872, and that he gave Leland Martin written notice thereof, and also handed him a copy addressed to the defendant, which he undertook to deliver to her, but there was no evidence that such was ever done, and on the contrary the said Leland testified that the sheriff had never given him a copy of the notice for her.

The sheriff also testified that he postponed the sale from

the first Monday of November to the first Monday in December "to give indulgence," and that Leland Martin was present and had notice of such postponement, and that notice thereof was posted at the court-house door and other public places. The sale was by virtue of the act of 1871-'2, ch. 16, which empowered sheriffs and others, charged with the collection of taxes for the years 1869, 1870 and 1871, to collect arrears of taxes due them for the years aforesaid under such rules and regulations as are now prescribed by law for the regular collection of taxes.

There was no question made as to the amount of the taxes assessed upon the land, and it was shown in evidence that the sheriff levied on the land in question on the 29th May, 1872, and made return thereof to the clerk, who confirmed and docketed the same and issued an execution thereunder.

After developing his case to the extent set forth in the foregoing statement, the plaintiff closed, and thereupon the presiding judge intimated an opinion that he had failed to establish his title to the land for the following reasons, among others: 1. Because no notice was shown to have been given to the defendant. 2 Because the land was struck off to Welch for $40, when it was the duty of the sheriff to have bid in the same for the state, as less than the amount of taxes due had been offered. 3. That it was the duty of the purchaser to have immediately paid the amount of the taxes due and have taken a receipt therefor from the sheriff, and to have had the same registered, whereas, in fact, for the whole time during which the defendant had a right to redeem the land, she had no notice as to the purchaser.

Upon this intimation plaintiff submitted to a non-suit and appealed.

Messrs. J. M. Clement and *W. H. Bailey*, for plaintiff.
Messrs. Armfield, Furches and *Folk*, for defendant.

RUFFIN, J., after stating the case. Of the points made

by his Honor, we deem it only necessary to consider the last, as that is decisive of the case against the plaintiff.

The directions given in the statute, under which the sale was made, in regard to the mode of proceeding to sell the lands of a delinquent tax-payer, are briefly as follows: If the party charged has no personalty, the sheriff shall levy on his lands, and shall return a list of the levy to the probate judge, who shall confirm the same by issuing execution as in cases of other judgments, and shall enter the same on his docket as in case of other executions. The sheriff shall notify the delinquent of such levy, and of the day and place of sale, by service of notice personally on delinquent if to be found in the county. The sale shall be made at the court-house door of the county in which the land lies, and shall be conducted in all respects as a sale under an execution. The highest bidder to be the purchaser, who shall *immediately* pay the amount of taxes and costs due to the sheriff, who shall give him a receipt, setting forth the sum paid, and upon what account, and describing the property, and shall cause the same to be recorded in the office of the register of deeds. The delinquent may retain the possession of the property for twelve months after the sale, and within that time may redeem by paying to the purchaser the amount of his bid with twenty-five per cent. added, or, if the purchaser shall refuse to accept it, the delinquent may pay the amount to the clerk of the superior court for the use of the purchaser, and the clerk may give a receipt therefor, and the delinquent may cause the receipt of the clerk to be registered, and the register shall refer to such registration in the margin of the registration of the receipt from the sheriff to the purchaser. After the payment to the purchaser, or to the clerk for his use, his rights under the purchase shall cease.

The character of the authority conferred upon our sheriffs to sell lands for taxes has been the subject of frequent dis-

cussion in this court, and there have been many adjudications upon the terms of the several statutes by which the authority to sell has been given, determining when their provisions so affected the essence of the sale as to require a strict and liberal compliance therewith; or when, on the other hand, they were merely directory to the officer himself, and such as did not by their non-observance affect the validity of the title acquired by a sale under him. It is not needed that we should cite all the cases, or refer to the points settled by each one of them. The result of them all seems to be this: As the general rule, the power of the sheriff, being a naked power uncoupled with any estate of his own, is strictly construed, so that he must conform, in its execution, to the terms of the statute which creates and confers it. But still, the main object of the law being to raise revenue for the state, the courts will not exact such a rigid observance of forms as will defeat such primary purpose, but will apply to sales for taxes the same reasonable rules of construction as govern sales under execution for private debts.

With regard to sales of the latter sort, the rule has always been that while a failure on the part of the officer to observe certain directions of the law would defeat any sale which he might make, there were still some other matters, apparently amounting to mandates, which might be omitted without being attended with consequences injurious to purchasers, and the true test in such cases is the knowledge which the purchaser has, or is presumed to have, because of his opportunities to know of the officer's default.

Innocent purchasers are protected, that is, those who did not, and could not, because of their want of opportunity, know whether the prerequisites to the sale had been complied with or not. But where the violation of the law is known to the purchaser, and more especially when he has

procured it, he will receive no protection from the law and can take no benefit from his purchase.

Such a person is not permitted to say that that which the law requires him to do is unimportant in itself, and merely directory, but he must do all the law enjoins upon him, and do it in the manner and at the time prescribed; and doubly incumbent is this duty upon him, if prejudice to another can be the result of failure or delay on his part. An application of this principle to the case now under consideration, seems fatal to the claim of the plaintiff. The direction of the statute to the plaintiff was plain and simple, as soon as declared to be the purchaser. As the latest and highest bidder, it was his duty *immediately* to pay the sheriff the amount of the taxes and costs then due, and to take from that officer, after its registration, a receipt for the amount paid. The object of this requirement was manifestly for the benefit and protection of the delinquent tax-payer. Extending to him the privilege of redeeming his land within twelve months next after the sale, the law intended that he should have the earliest possible notice, and at a place certain, of the sale, the name of the purchaser, and the amount necessary to be paid by him, in order that he might be restored to the complete ownership of his land.

It will not do to say that all this information he could acquire by the return of the sheriff on the execution. In the first place the law did not impose on the sheriff the duty of making an immediate return of the execution, but treating it as he could other executions issuing from the same office, he might postpone his return for several months —possibly until the next term of the court—by which time much of the period allowed the delinquent for redemption may have transpired, without that notice which it was intended he should have. But whether so or not, the law intended he should have this other source of information; and no one will be permitted to deprive him of that advan-

tage and at the same time and by the same act take a benefit to himself.

In such a case the sale is void, because the officer, clothed only with a naked power, has exceeded the terms of his delegated authority, and in doing so has been aided and abetted by the purchaser.

As said by this court, in the case of *Avery* v. *Rose*, 4 Dev., 549, there is no instance in which the law allows a person who is to do a thing, or to do it at a particular time, to have himself the benefit of it, when omitted, as if it were done, or done in due time—and certainly not in a case where the delay is a prejudice to another and the effect of the act when completed is to defeat a former estate.

If the purchaser is not held to the time prescribed by the statute, then he has an indefinite period, and as in this case may postpone, for over two years, doing that which the law said should be done *immediately*.

Besides the matters of form, such as we have been considering, there are other matters of substance held to be essential in every case and as to all persons, to give validity to a sale for taxes, and it may be questioned, indeed, whether the immediate payment of the amount of taxes due, and the registration of the sheriff's receipt therefor, do not come within that class. If not so, it certainly is of so much consequence to the former owner as, if omitted, or unreasonably delayed, by the purchaser, will render the sale void as to him.

We hold, therefore, with His Honor in the court below, that the plaintiff has failed to establish his claim to the land sued for.

No error. Affirmed.

ABNER GUNTER v. JOHN WICKER and others.

Damages—Contributory Negligence.

Notwithstanding the previous negligence of the plaintiff, if at the time when the injury was committed, it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie for damages.

(*Doggett* v. *R. R. Co.*, 78 N. C., 305, cited and approved.)

CIVIL ACTION for damages, tried at Fall Term, 1880, of CHATHAM Superior Court, before *Eure, J.*

Verdict and judgment for plaintiff, appeal by defendants.

Mr. John Manning, for plaintiff.
Mr. John M. Moring, for defendants.

SMITH, C. J. The plaintiff, employed as foreman in running the steam saw mill of the defendants, and who had been in their service for five months, among other duties assigned, was required to oil the machinery after cutting up the third log, and also of every one thousand shingles made. The defendant Wicker, one of the partnership proprietors and the general manager of the business under whose control the plaintiff worked, was personally attending to the sawing. The third log had been cut and the machinery stopped, when the plaintiff as he was accustomed to do, and had before done with defendant's knowledge and without objection or caution from the latter, entered into the fly wheel, for greater convenience in doing his work, and was in the act of oiling the machinery when the defendant without notice or warning turned on steam and set the mill in motion, by means whereof the plaintiff sustained personal injury for which the action is brought. If the engine had been put upon a dead centre, it could only have been

started by applying a direct lever force, and the plaintiff's position in the fly wheel would have been entirely safe, and the turning on of steam would have been unattended with damage. There was some conflict in the testimony of the parties, but the verdict upon the issues presupposes the substantial facts recited.

The exceptions we are required to consider are to an instruction asked and refused, and to that given in response to the defendants' request. The court was asked to charge the jury if they believe the plaintiff knew how to secure his absolute safety by putting the fly wheel upon a dead center, and if he could easily and quietly do so, and neglected thus to secure his own safety, his failure to do so amounted to such contributory negligence as to debar a recovery. Instead of this, the jury were directed that if the plaintiff was instructed to arrest the motion of the machinery on a dead center, when the oiling was to be done, or if such was the custom of the mill, and the plaintiff neglected to do so, his failure would be contributory negligence, and the verdict should be for the defendants.

The other instructions as to the liability of the principal for an injury suffered by one from the negligence of the other co-servants and co-employees, acting under one common superior, have no application, since the damages result from negligence imputed to the proprietor and manager, to whom the plaintiff was subordinate.

We think the jury were properly guided in the directions under which their verdict was rendered.

While there is great difficulty in extracting from the numerous adjudications of the courts any clear and distinct principle or formula, determining when the co-operating agency of the plaintiff so directly contributes to the result, as to deprive him of remedy against the other party to whose negligence the injury is attributable, we have not much difficulty in passing upon the question of the defendant's

responsibility in the present case. The rule is thus laid down by a recent author: "Notwithstanding the previous negligence of the plaintiff, if at the time when the injury was committed, it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant an action will lie for damages." *Davis* v. *Mann*, 10 M. and W. (Exc.), 545.

'The negligence of the plaintiff, in order to bar a recovery, must have been a proximate cause of the injury complained of." Thomp. Neg., 1157, §8; 1151, §5.

Again the rule is thus declared by this court: "If the plaintiff's negligence contributed directly to the injury, it is well settled that he cannot recover; but it is equally well settled that when he is remotely and unconsciously negligent, he is entitled to redress for all injuries inflicted by another, when by the latter the injuries could have been avoided by reasonable diligence." *Doggett* v. *R. & D. R. R. Co.*, 78 N. C., 305.

There must be what is sometimes called a "*casual connection*" between the neglects of the parties, which concurring at the time produce the injury, to exempt the defendant from the consequences of his own." Whart. Neg., §302.

Let us apply the rule to the facts of the present case. Whatever want of care for his own safety the plaintiff may have manifested in occupying a place of peril in the wheel while doing his work, no harm would have come to him but for the hasty and inconsiderate act of the defendant in starting the mill without signal, warning, or himself looking to see, as he could have done, whether the oiling, then to be done, was finished, and the plaintiff had retired from his position. This care and attention would have prevented the accident, and to their absence it must be attributed. The place of peril assumed by the plaintiff in doing his work (and his habit was known to the defendant) not only did not excuse the defendant, but imposed upon him greater

diligence and a higher duty in examining to see if the way was clear for a resumption of the sawing. The plaintiff's exposure of his person was not a cause, but a condition which rendered the injury possible and actual, as the result of the absence of the caution which was imposed upon the defendant in consequence.

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

No error. Affirmed.

O. G. WILLIAMS and others v. J. W. WILLIAMS and others.

Judicial Sale—Trust—Contract—Consideration.

An administrator having obtained a decree for the sale of his intestate's land, to pay an alleged indebtedness to himself, and purchased the land at the sale procured by him, upon objection made by such of the heirs as were of age, contracted to convey to them, and also the minor heirs, each a moiety of the land equal to his share therein, upon the payment by them respectively of a corresponding portion of the claim against the intestate. The heirs that were of age paid their shares of the debt, and received their titles accordingly: *Held*, that the consideration inducing the promise on the part of the administrator enured to the benefit of the minor heirs, and that, upon coming of age, they were entitled to enforce the contract and call for conveyances of their aliquot portions of the land, upon discharging respectively their proportionate parts of the debt.

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

This was an original bill in equity, filed at the spring term, 1866, of Iredell superior court of law and equity by the plaintiffs against the defendants, to vacate a judgment of the county court of Iredell county, to set aside a sale under said judgment, and for an account and settlement of

the administration of the estate of Offa Williams, deceased, by the defendant James W. Williams, as his administator.

Offa Williams died in 1846, and the defendant administered on his estate. The intestate was possessed at the time of his death of a considerable personal estate and of several tracts of land lying in the county of Iredell, consisting of some twelve or thirteen hundred acres and quite valuable. He left surviving him the following children, James W. Williams, (the defendant,) and Elizabeth, wife of Russell Shoemaker, L. W. Williams, Abram L. Williams, Samuel B. Williams, Washington A. Williams, Offa G. Williams, Melvin Williams, and Milton Williams. His widow, Nancy Williams, also survived him. S. B. Williams died intestate before the institution of this suit, and his mother, Nancy Williams, administered on his estate. Leander Williams is dead and John Williams is his administrator, and Abram Williams is also dead leaving the following children and heirs at law, to wit, Melissa, Millard F., Martha, Roxanna, John and Archibald, all infants at the commencement of this action.

Washington A. Williams, O. G. Williams, Melvin Williams, Milton Williams and Nancy Williams, administratrix of S. B. Williams, are the plaintiffs in this action against the other children and grandchildren of the said Offa Williams and John Williams, administrator of Leander Williams.

The plaintiffs in their bill charge that James W. Williams as administrator of their father, Offa Williams, filed a petition in the county court of Iredell county, against all of the heirs at law of his intestate under section 8, chapter 63, of the Revised Statutes, to recover a debt which he alleged in the said petition was due to him from his intestate, amounting to some seven hundred and ten dollars, being money paid by him as surety for his intestate to one Hiram Williams.

At February term, 1849, a decree was rendered against

the defendants for the amount of the plaintiff's alleged debt, to wit, $702.08, and that he have satisfaction for the same out of the lands descended to the defendants. Execution was issued upon this decree and in August, 1850, all the lands descended from the defendant's intestate to his heirs at law, (the plaintiffs and defendants in this suit) were exposed to sale by virtue of said execution for cash and purchased by the defendant James W. Williams, at a price not equal to half their value. The plaintiffs charge that this was "an artful and fraudulent contrivance on the part of said administrator to use the power given him by virtue of his office, as administrator, for his own selfish and wicked gain, and self-aggrandizement, and at the great sacrifice and injury of the interest committed to his charge; and that the proceedings to sell the land were irregular and contrary to the orderly practice of the court; that no land was described in the petition and the plaintiffs were then infants of tender years without guardian, and their interest in said suit was represented by a guardian *ad litem* who acknowledged for them the service of the process; and they charge, that for the more effectual accomplishment of his purpose to defraud the complainants, the said James W. Williams artfully induced and caused Russell Shoemaker and wife and S. B. Williams, who were of age, to acquiesce in his selfish schemes, by conveying to them a portion of said land by deeds in fee-simple, and executing a bond, stipulating to convey to them and the other heirs at law of the intestate all the remainder of the land upon their arrival at full age. The prayer of the bill is for an account and settlement of the administration of the said James W. Williams; that the deeds executed by the sheriff of Iredell to the said J. W. Williams for the lands sold by him under the execution in favor of said Williams against the heirs of Offa Williams, be cancelled, or that he be decreed to convey the said land to the plaintiffs and the other defendants, or be charged with the full value at the time of his pretended pur-

chase and for such other and further relief in the premises as the nature and circumstances of the case may require.

The defendant, James W. Williams, answered the bill, and admitted that his intestate at the time of his death was seized of a large quantity of land consisting of about eleven hundred acres, but the most valuable of it was assigned to the widow for her dower, and that she was then living, being about sixty-five years of age, and that there were some five or six hundred acres almost worthless. That his intestate's estate was largely indebted, and that after exhausting the personal estate in the payment of the debts, he paid out of his own individual funds over one thousand dollars. That of this large sum he had been compelled to pay as surety for his intestate more than seven hundred dollars, and since the sale of the land mentioned in the pleadings, he has been compelled to pay as security for his intestate a debt amounting to some two hundred dollars or upwards, and besides the debts where he was surety, he has paid some one hundred and thirty-three dollars out of his own money. He denied any combination with Shoemaker and others or any conversation with them or any one else in regard to the sale of the land before it was sold, and averred that the proceedings had in the county court to effect the sale were conducted with perfect fairness, and were altogether regular as he was advised. He denied any purpose or attempt at any time to injure his brothers and sisters, and averred that the lands were sold for the full market value. He admitted the plaintiffs were infants of tender years at the time of filing the petition, and in conclusion relied upon the statute of limitations.

The defendant, Shoemaker, in his answer, states that some time after the sale of the land in controversy by the sheriff and the purchase by the defendant, James Williams, he bought a portion of the land from said Williams, but denied that there was any fraud or collusion between him and

Williams to injure the sale of said land, or to injure in any way either of the plaintiffs; that there had not been a word between him and the defendant in regard to the purchase of the land prior to the sale by the sheriff. He stated that he believed the land brought a fair price, that there were some five or six hundred acres of it almost worthless, and that the widow's dower covered nearly all the land fit for cultivation, and she was still living.

At August term, 1870, the cause, by consent, was removed to the county of Yadkin, and at the fall term, 1877, of the superior court for that county, it was referred by the judge presiding to R. C. Puryear and S. T. Speir to state an account of the administration of the defendant James W. Williams on the estate of Offa Williams, so as to show whether the personal estate was sufficient to satisfy the debts of the estate, and to show the amount of the debts if any were not satisfied out of the personal estate. The account was taken by the commissioners and reported. Both parties filed exceptions to the report, and the following issues were submitted to a jury in regard to the fraud alleged to have been practiced by the defendant in procuring a sale of the land in controversy, and the inadequacy of the price paid by the defendant for the same.

First. Did the defendant by fraudulent contrivance, and with intent to defraud the heirs of Offa Williams, procure a judgment to be rendered in his favor and a sale of the land in controversy in order to purchase the same for himself at an under value? Answer. Yes.

Second. What was a fair value of the land in 1850? Answer. $1,800.

Upon this finding of the jury and the report of the commissioners and the ruling of His Honor upon the exceptions filed by both parties, the court adjudged that the sale of the land in dispute by the sheriff of Iredell county be vacated, and the deeds made by him to the defendant, James

W. Williams, be surrendered by said Williams and cancelled, and that he be forever enjoined from setting up the same, or deriving any benefit under them to the prejudice of the heirs at law of the said Offa Williams, &c. The defendants appealed from this judgment.

Messrs. J. M. Clement and *W. H. Bailey,* for plaintiffs.

Messrs. D. M. Furches and *Reade, Busbee & Busbee,* for defendants.

ASHE, J., after stating the facts. The bill seems to be filed in the alternative with a double aspect, either to have the deeds made by the sheriff of Iredell to the defendant surrendered and cancelled, or to have the defendant declared a trustee for the plaintiffs and decreed to make title to them for a ratable portion of the lands in controversy, according to the stipulations in the bond given by the defendant to S. B. Williams, Russel Shoemaker and wife and L. B. Williams; for the prayer of the bill is that the sheriff's deeds to the said James W. Williams be cancelled, or that he be decreed to reconvey the said land to the plaintiffs and the defendants according to their respective interests therein.

In the view we take of the case, it is immaterial whether the sale of the land and the purchase by the defendant was *bona fide,* or affected by a fraudulent contrivance. If he obtained a title to the land by fraud, as the jury have found that he had done, it would be against equity and good conscience for him to hold the land; and if, on the other hand, there was no fraud, and by his purchase he had acquired a good title, he is bound by his agreement with S. B. Williams, A. L. Williams and Russel Shoemaker and wife, to make title to each of the plaintiffs, W. A. Williams, O. G. Williams, Melvin Williams and Milton Williams, for their several shares in the lands in proportion to the number of

heirs, there being eight of them at the death of O. Williams the intestate.

It is in proof by the testimony of the defendant, Shoemaker, that the defendant, J. W. Williams, proposed that if the heirs of Offa Williams would pay a debt of the estate of three hundred and forty dollars, he would make them a title for the land, and that he, A. L. Williams and S. B. Williams, the only heirs of Offa Williams, who were at the time of lawful age, executed their notes to the said James W. Williams, each for one hundred and thirteen dollars, and he executed a bond to them to make title to them for portions of the land equal to their shares, and to make title to the minor heirs for their shares. The defendant, James W. Williams, in his answer admits he gave such a bond, and in one of his depositions he says he did make a bond conditioned to make title to said land to A. L. Williams, S. B. Williams,, and either to Russel Shoemaker or his wife, "I do not recollect which, and to W. A. Williams, O. G. Williams, M. E. Williams, and M. O. Williams, he thought these were the parties to whom title was to be made, when the youngest child became of age."

In another deposition he says that he did agree with A. L. Williams, Russel Shoemaker and wife and S. B. Williams, that if they would pay him about three hundred and thirty-nine dollars, he would convey to them a part of the land, and give to W. A. Williams, O. G. Williams, M. E. Williams and M. O. Williams the balance of the land without any consideration. This agreement was made at the time the bond was given, and that the parties above named executed to him their three several bonds for one hundred and thirteen dollars each, and he says when he lifted the bond he did make deeds to Russel Shoemaker and A. L. Williams for what he considered their share of the land at the time he took up the bond.

There was other evidence in the case tending to show the agreement of the parties.

From all the evidence we think it is established, that the defendant James W. Williams did agree with Russel Shoemaker and wife, A. L. Williams and S. B. Williams, the only heirs of age at the time, that if they would pay him three hundred and thirty-nine dollars, a debt which the estate owed to one Hugh Williams, and for which he was surety, that he would give them his bond to make title to them for certain portions of the land equal to their shares, and make title to the infant heirs of their shares as they severally became of age, and that the said Shoemaker, A. L. and S. B. Williams executed their notes each for the amount he had agreed to pay, and the bond for title was executed according to the agreement. It was one entire transaction, a contract made upon a valuable consideration, and is binding upon the defendant.

The defendant now seeks to avoid that part of the contract stipulating to make title to the minor heirs, by saying, it was without consideration as to them. But it was an entire transaction, a contract made upon a valuable consideration, no matter by which of the parties paid, and the stipulation to make title to the minor heirs was as much a part of the contract as that to make title to the others.

Shoemaker has paid his note and received his deed for the part of the land agreed to be conveyed to him. A. L. Williams also received a deed for his share and resold it to the defendant for $250, in which we must presume his note was settled. The note given by S. B. Williams does not appear to have been paid, nor does it appear that he ever received a deed for his portion.

In the view we have taken of the case, we think it is unnecessary to make any further inquiry in regard to the administration of the personal estate of the intestate, as the reference for an account seems to have been made mainly

with the view of aiding the court in determining upon the question of fraud.

We are of the opinion the defendant must be declared to be a trustee for W. A. Williams, O. G. Williams, M. E. Williams, and M. O. Williams, and that he shall make a deed in fee simple to each of them for one undivided eighth part of all the lands purchased by him at the sheriff's sale under his execution against the heirs of Offa Williams, deceased. And inasmuch as the note of one hundred and thirteen dollars given by S. B. Williams to the defendant James W. Williams has not been paid, and that he is dead and his interest in the land, to-wit, the portion agreed to be conveyed to him by the defendant, has descended to his brothers and sisters and the heirs of A. L. Williams, it is declared that the said debt shall be a charge on the interest so descended, and if upon sale thereof, it shall be sufficient to satisfy said debt with interest thereon, then it shall be a lien on the land herein decreed to be conveyed to the plaintiffs, W. A. Williams, O. G. Williams, M. E. Williams, and M. O. Williams, and it is adjudged the defendant James W. Williams, be taxed with the costs.

The suit is retained for further directions.

PER CURIAM. Judgment accordingly.

W. A. BARRETT and others v. J. M. HENRY and others.

Reference and Referee.

1. Upon a consent reference to try a cause, the question as to whether *all* the issues raised by the pleadings are to be considered, depends upon the extent of the agreement of the parties, and being a matter of fact, the finding of the court below is conclusive.

2. Whatever may be the scope or character of such reference, an appeal will not lie from an order of re-reference.

3. Distinction between a reference to state an account preparatory to trial, and the trial of a cause by a referee under the Code, pointed out by RUFFIN, J.

(*Flemming v. Roberts*, 77 N. C., 415; *Mebane* v. *Mebane*, 80 N. C., 34, cited and approved.)

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

The plaintiffs allege that in 1849 Joel Rushing, the intestate of the defendant, Henry, was appointed the guardian of the female plaintiffs, Emeline P. Williams and Margaret Ann Broadaway, and took into his possession their estate which came to them from their deceased father, and died without having accounted to them therefor, and the prayer of the complaint is for an account now to be taken. The defendant Henry substantially admits the guardianship, but avers that his intestate settled with the plaintiffs in his lifetime, and died without owing them anything. That since his appointment as administrator, the said defendant and the plaintiffs, Barrett and wife, agreed to refer all matters of controversy, growing out of such guardianship of his intestate, to the final award of three arbitrators, who, after an examination into all the facts, submitted an award in writing, whereby they charged the estate of his said intestate with the sum of $427.00 as still due to the plaintiff, Emeline P. This sum the defendant paid to said plaintiff and her husband, on the 21st of November, 1874, and took their receipt in writing therefor, with the distinct verbal agreement that it was given in full satisfaction of all her demands against the estate of his intestate. The defendant also set up a counterclaim amounting to several hundred dollars as due the estate of his intestate for board and necessaries furnished the plaintiffs, which was denied in their reply.

At spring term, 1879, the court made the following order: "By consent this cause is referred to the clerk of this court, to take and state an account between the parties and report to the next term."

The clerk proceeded under the order to take the account confining it by consent to the claim of Mrs. Barrett. The defendant offered in evidence the written award of the arbitrators, and the receipt of the plaintiffs for the money paid them thereunder, which the clerk rejected upon the ground that having agreed to the reference the defendant was precluded from setting up the previous settlement. In his report, the clerk finds the amount due the plantiffs to be $462.20, and gave judgment therefor, to which the defendant took several exceptions, and amongst them to the refusal of the clerk to hear the evidence of his settlement with the plaintiffs.

At fall term, 1880, the court made the following order: "This cause coming on to be heard upon the report of the referee, and it being conceded by counsel that it was a reference by consent of parties, it is ordered by the court on motion of defendant's counsel that the case be re-referred to the clerk, with instructions to hear testimony upon all issues raised by the pleadings and make his report to the next term." From this order the plaintiffs appealed.

Messrs. Battle & Mordecai and *J. A. Lockhart*, for plaintiffs.
Messrs. Strong and *Pemberton*, for defendant.

RUFFIN, J. It is not to be denied that some confusion, as well as some conflict of authority, has arisen from a failure at times to observe properly the distinction which exists between a mere reference to state an account, as a step preparatory to the trial of a cause, and a *trial of the cause by a referee* under the provisions of the code.

Ordinarily when an action for an account is entertained

by the court, the first thing to be done, after the parties and pleadings are before the court, is, to determine the question whether the plaintiff is entitled to a decree for an account. If the defendant admitting his liability submits to the decree, then it passes as a matter of course, but if he disputes his liability or the plaintiff's right to have the account, an issue is raised which must be settled before any decree can be made, and at this stage of the case nothing beyond the mere right to have the account, is considered. If the issue thus raised should go to the full extent of the plaintiff's demand, and it should be found for the defendant, that puts an end to the controversy. But if it should only partially affect the plaintiff's demand, or should be found for the plaintiff, then the decree is rendered, and having thus established the plaintiff's right to some relief, a reference to a commisssioner as the servant of the court to state an account is generally made, as the most convenient mode of preparing the cause for a hearing by the chancellor.

After the decree *quod computet*, whether made upon the submission of the defendant or the adverse finding of the issue, the court having a regard for the orderly sequence of pleading, will not permit the defendant again to raise the question as to his liability to account with the plaintiff, but will restrict his defences to such matters as pertain to the account, and may be heard upon exceptions to it.

Upon the coming in of the commissioner's report, the court will hear the exceptions of the parties, if any, and modify it, or not, according to its judgment of the merits of the case; and if no exception should be taken, the court in its own discretion may modify it, or even set it aside, and direct a new account to be taken if deeming it just to either party to do so, and from the exercise of this discretion no appeal will lie.

This however is all a matter of *practice* which always ob-

tained in our courts before we had any Code of Civil Procedure—its object being as before stated to prepare the cause for its more convenient hearing by the court. But the Code provides three modes for the *trial of causes*, one of them being a *trial by a referee of all, or any*, of the issues in the action, whether of fact or of law, upon the written consent of the parties. C. C. P., § 244. To a reference such as this there is no limit except the will of the parties themselves. If they so agree the referee may try, as well, those issues which lie at the foundation of the plaintiff's right to have relief, as those which ascertain and fix its extent, and in such a case, nothing is presumed to be waived (except the right of a trial by a jury) and no estoppel attaches to any of the issues involved.

If the whole cause be referred, the referee acts for the time with the combined powers of both judge and jury, and as to the facts his finding has the force and effect of a special verdict, subject however to the right of either party, on notice to move the court to review his report, or to set it aside, modify, or confirm it.

The consent of a party once given to such a mode of trial of the cause, or any part thereof, cannot be recalled, and should the judge see proper to set aside a report and for any purpose recommit the trial to the same referee, his action will afford no ground for an exception to either party. *Flemming* v. *Roberts*, 77 N. C., 415.

Thus we see that whatever the character of the reference in this case may have been, the order of the judge recommitting the cause to the clerk was not the subject of an appeal.

Whether the instruction to the referee to hear testimony upon *all* the issues was erroneous, or not, depends upon the extent of the original agreement of the parties, and that seems to have been the point of contention in the court be-

low, and being a pure matter of fact the judge's determination of it is final.

As we understand it, His Honor found it to be true that the consent of the parties contemplated a trial by the referee of all the issues in the action, and this being so, the exception of the defendant to the refusal of the referee to hear the evidence tendered by him as to the alleged settlement by the arbitrators, and the receipt by the plaintiffs of the amount in full satisfaction of their demand, was properly sustained, and the only way to correct it was the one taken, to recommit the cause to the referee with the instructions given—the consent of the parties though not in writing being entered of record and still operating to bind them to a trial by the referee, according to their original intention.

And even if His Honor had found otherwise as to the intent of the parties, and the scope of the original order of reference, it seems that rather than the defendant should be precluded from establishing his main defence, justice would have dictated the setting aside, not only of the commissioners' report, but the order of reference itself—it being perfectly manifest that the defendant was *surprised* by the construction attempted to be given to it.

An ordinary order of reference to state an account is but an interlocutory order, and as such may be modified according to the exigencies of the case or vacated entirely if its enforcement should prove to be inequitable. *Mebane* v. *Mebane*, 80 N. C., 34.

No error. Affirmed.

J. R. TRULL and others v. POLLY RICE and others.

Partition among Tenants in Common.

Plaintiffs ask for sale of land for partition, defendants insist that actual partition would be more advantageous; the tract contains one hundred and forty acres encumbered with a dower interest, only fifty of which are fit for cultivation, but much worn and wasted; the supply of wood is insufficient for all the tenants of whom there are seven in number, and one of the shares to be sub-divided into seven others if actual partition be made, which witnesses testify would be an injury to all; *Held*, that the decree for sale was proper.

PROCEEDING for partition commenced in the Probate Court of BUNCOMBE County and heard by consent at Chambers on August 12th, 1881, before *Gudger, J.*

The defendants appealed from the judgment rendered.

Messrs. Reade, Busbee & Busbee and *C. A. Moore*, for plaintiffs.

No counsel for defendants.

RUFFIN, J. The plaintiffs in their petition ask for the sale of a certain tract of land owned by the defendants and themselves as tenants in common, for the purposes of partition.

The defendants, admitting the tenancy in common, resist a sale upon the ground that it is not necessary, and that an actual partition of the land would be more advantageous to the parties interested.

The judge in the court below decreed a sale to be made, and the question is, was he justified in this, upon the case as presented by the proofs taken in the cause?

In support of their case, the plaintiffs introduced about a dozen witnesses, all of whom say they are disinterested in the matter, and know the premises, and according to whose testimony the facts of the case are as follows:

The tract is composed of about one hundred and forty acres, subject to the dower, as to one-third, of the widow of the ancestor of the present owners. The land is what is called *cove land*, broken, steep, and rocky. In all some fifty acres are fit for cultivation, and of these nearly three-fourths are much worn and wasted. The wood upon the premises is barely sufficient to serve one family, and if divided would not serve them all for one year. There are but two small streams upon the land so situated that in case of a partition of the lands a larger number of the lots would be wholly without water. As one tract, it now hardly amounts to a good farm, and if divided, it would be worthless in a measure. There were originally seven tenants in common, but one has died leaving seven heirs, so that the land in case of actual partition would have to be divided into seven lots, and one of the lots subdivided into seven other shares. The defendant, Polly Rice, owns one full share in her own right, and, as the widow of William Rice who purchased of another tenant, is entitled to dower in one-seventh. The other defendants are her children and the heirs of the said William, and entitled to the share so purchased by him, subject to their mother's said right of dower. The defendant, Polly Rice, and her children have been in the actual occupancy of a portion of the land for several years, and have built a small cabin upon it, and enclosed about two acres with an indifferent fence. The cabin and fence were built of timber cut upon the premises, and most of the expense incurred in making the improvements was defrayed by selling timber from the land. The portion occupied by the defendants is much the better portion of the land, and indeed almost the only portion outside of the dower fit for cultivation. Each witness gave it as his deliberate opinion, that the land could not be divided into seven parts without doing great injury to all, and to assign to the defendants their two shares would so affect the value of the residue of

the land, as to make it impossible to sell it for anything of value, or to make an equitable partition of it amongst the other tenants in common.

It would seem that a mere statement of the facts of the case is sufficient to justify the course taken by His Honor in ordering a sale of the lands. The law gives to each tenant in common the right to have a division of the lands, and imposes on those who would have it sold the burden of showing that their interests would be better subserved by a sale, and that no injury would be inflicted upon any of the other parties interested. But like every other right recognized by the law, this one of a partition, belonging to each of the tenants in common, must be so used as not to injure another.

Whenever the court sees plainly that the common good of all will be promoted by a sale, the individual right or interest must yield to it, and one can hardly conceive of a case more urgently demanding a sale than the present one.

No error. Affirmed.

F. H. BUSBEE v. E. O. MACY and others.

Cloud upon Title— When equity will relieve.

In an action to remove a cloud upon title to land, the plaintiff asks for the cancellation of a deed, which in his complaint he alleges to be void on its face because of the uncertain description of the land therein contained, *it was held* that where the illegality of the instrument complained of appears as alleged by plaintiff, a court of equity will not take cognizance of the case, but dismiss the action; it will not declare that to be a void deed which upon its face is no deed.

CONTROVERSY without action under the Code § 315 heard

at Chambers on the 29th of September, 1881, in a case pending in WAKE Superior Court, before *Gilmer, J.*

The avowed purpose of this action is to remove an alleged cloud upon the title to a certain lot of land, in the city of Raleigh, owned by the plaintiff. In his complaint he states that in the year 1849, Mrs. Marion Hardie, being then the rightful owner of the lot in question, undertook to convey the same to one George Hardie in trust for the sole and separate use of her daughter, Ann Eliza Macy, and her children who are the defendants, but that the deed then made is void on its face because of the uncertain description of the land therein contained. That the said Mrs. Hardie afterwards, to wit, in the year 1862, made an effectual conveyance of the same land to Fendt and Hesselbach under whom the plaintiff claims by mesne conveyances and sale under execution. The prayer of the complaint is that the first deed from Mrs. Hardie to her daughter and children be declared void, and the defendants decreed to have no title to the lot by reason of its insufficient and uncertain description of the land. There was no answer filed for the defendants, but an appearance made for them by an attorney who, together with the attorney of the plaintiff, made a statement of the facts as to the situation of the lot, and the conduct and intention of Mrs. Hardie with reference thereto, and submitted the same, as a case agreed, to the judge presiding in the court below, who held the deed under which the defendants claim to be ineffectual to pass any title, and declared the same to be no cloud upon the title of the plaintiff, from which judgment the defendants appealed.

Messrs. Reade, Busbee & Busbee, for plaintiff.
Messrs. Merrimon & Fuller and *G. H. Snow*, for defendants.

RUFFIN, J., after stating the case. A question of jurisdiction meets us at the very outset of this case. The plain-

tiff alleges that the deed under which the defendants claim and against which he seeks relief, is absolutely void for uncertainty upon its face. Ought then a court of equity to take cognizance of the cause and undertake to quiet the plaintiff's fears, when upon his own showing they are utterly groundless and idle?

The courts of equity in the exercise of what is called "preventive or protective justice," have been long accustomed to relieve against deeds or other instruments, which it is feared may be used vexatiously and injuriously at some future day, when the evidence to impeach them may be lost, and against such as may presently operate as clouds upon the title of others, and cause their true interests to be suspected.

But to justify the interposition of the court for any such purpose, the difficulty complained of must *appear* to exist, and the cloud sought to be removed, present, at least, some semblance of validity. Otherwise the court will not interpose, since to do so, would be to engage in the vain effort of giving relief to one who cannot possibly be injured. Accordingly we find it said in 1 Story's Eq. Jur. § 700 a., that when the illegality of the instrument complained of appears upon its face, so that its nullity can admit of no doubt, it is the established rule of the court not to use its authority to order its cancellation, for in such a case there can be no danger that the lapse of time may deprive the party of his full means of defence, nor can it in any just sense be said that a paper can cast a cloud upon his title or diminish its security. To the same effect are the decisions of courts in the follow cases: *Scott* v. *Onderdonk*, 14 N. Y. 9; *Cox* v. *Clift*, 2 *Comstock* (N. Y.) 118; *Pierrott* v. *Elliott*, 6 Peters 95; *Gamble* v. *Loop*, 14 Wis. 466; *Head* v. *James*, 13 Wis. 641; and *Farnham* v. *Campbell*, 34 N. Y. 480.

These cases all go upon the idea that the court will not engage in a work of supererogation, by declaring that to be

a *void deed*, which upon its face, is *no deed*, and of no greater consequence than a blank piece of paper.

So it is in this case. The plaintiff's own allegations furnish a complete answer to his demand for relief, for if they be true, he has a perfect defence, manifested by the very deed under which his adversaries claim the land, and as lasting in its nature as that deed itself; and a decree of this court, declaring that deed to be void, can render it no more inoperative than it now is, according to the statement made in the complaint.

We are of the opinion, therefore, that the plaintiff's action must be dismissed, and accordingly do so adjudge.

But as the defendants seem to insist upon the validity of the deed, lest we may mislead them, or prejudice the plaintiff, we declare our judgment to be founded solely upon a consideration of the complaint, and not of the cause upon its merits.

Let the plaintiff's action be dismissed.

PER CURIAM. Action dismissed.

F. H. BUSBEE v. JULIUS LEWIS and others.

Cloud upon Title—Tax Title.

1. An action to remove a cloud upon title to land will not be entertained merely to afford protective relief, where the plaintiff is under no disability to bring suit to test the question of title. (Suggestion as to the manner of plaintiff's redress, and a review of authorities by RUFFIN, J., to the effect that where a valid legal objection is apparent upon the face of proceedings, &c., there is no such cloud upon the title as equity will remove. See preceding case.)

2. The tax title in this case is a nullity unless all the requirements of the naked power conferred by law upon the officer selling the land, were complied with.

CONTROVERSY without action under the Code, section 315, heard at Fall Term, 1881, of WAKE Superior Court, before *Gilmer, J.*

The plaintiff appealed from the judgment of the court below.

Messrs. Reade, Busbee & Busbee, for plaintiff.
No counsel for defendants.

RUFFIN, J. The object of this action is to have declared void a tax title to certain real property situated in the city of Raleigh, acquired by the city, and which the plaintiff contends is operating as a cloud upon his better title.

The case was put into the shape of a controversy without action, and the following are the facts upon which it is said to depend:

In 1863 one H. Fendt, then owning the land which is the subject of controversy, conveyed the same to one Ellen in trust for the sole and separate use of Mrs. C. A. Fendt and her children, and in the event of her death, in the lifetime of her husband (the said H. Fendt) then in trust for him.

The land consisted of two parcels (parts of lot No. 115, and of lot No. 116) and was listed for taxes due the city, for the years 1877, 1878 and 1879, in the name of Mrs. C. A. Fendt, and in August, 1880, the taxes being unpaid, the collector sold one of the parcels for the taxes due on both, when the city became the purchaser. In 1881, the other parcel was sold for the unpaid taxes of 1880, and the city was again the purchaser—notice of both sales being served in writing upon Mrs. Fendt and her husband.

Mrs. Fendt died in April, 1881, leaving her husband surviving, and in May following, the trustee conveyed the land to him in fee, and since then it has been sold under execution against him, and the plaintiff became the purchaser.

He has sold the land to the defendants, Lewis and West, who decline to pay the purchase money on account of the outstanding deed held by the city. The plaintiff insists that the collector's sale of the first lot was void, because it included the taxes assessed against both the lots, whereas each should have borne its own burden; and further, that inasmuch as Mrs. Fendt had but a life estate in the land, a sale for taxes, assessed in her name, could not affect the interests of those in remainder.

For these reasons principally, though other irregularities in the sale are suggested, the plaintiff asks that the sale to the city may be declared void, and the deed decreed to be cancelled, so that it may no longer throw a cloud upon his title, and prevent his being paid the purchase money agreed to be given him for the land.

There seems to us to be two sufficient reasons why the plaintiff cannot have the relief he demands in the present controversy.

In the first place, a court of equity will never interpose its jurisdiction in the way of a mere protective relief, when the party has an adequate and effectual remedy at law, and is so circumstanced as to be able to assert it, but will rather leave him to seek his redress in that forum, except in some states where they have statutes expressly permitting it to be done. There can be found no instance, we confidently believe, in which a court has ever entertained a bill to remove a cloud from the title of a person, who was himself out of possession, or in a condition to contest the question as to the superiority of title in a court of law. The disability to sue, and the danger and inconvenience resulting therefrom lie at the very foundation of the jurisdiction of the court in such cases, and the court will no more interpose in the behalf of one who can sue, and will not, than it will stay the statute of limitations for one who knows the danger resulting from the lapse of time, and yet delays.

In the present case the plaintiff has free access to a court of law. If his vendees refuse to pay the purchase money for the land, let him implead them, and test the question as to the sufficiency of the title conveyed to them, and if such be the desire of the parties, let the city come in by way of interpleader, so that it, too, may be bound by the judgment. But let us not introduce confusion and inconsistency into the administration of the law, by giving to one under no sort of incapacity to sue, the benefit of a remedy which was intended for those laboring under such disability, and only given because otherwise they would be wholly without any relief.

The other obstacle in the way of granting the relief sought is the principle declared at this term in the case between this same plaintiff and Macy and others, that a court of equity will not take jurisdiction of an action to remove a claim upon the ground of its being a cloud upon the title of another, when the claim is based upon a deed alleged in the complaint to be void upon its face, since if it really be so, the party has always at hand a certain defence against the deed whenever it may be urged against him.

The same principle applies to a case like the present, for though it be true that the collector's deed to the city, may as a mere formal instrument be free of any apparent defect, it is still but one link in a chain of title, which chain must be developed in all its parts before any advantage can be derived under it; and whenever that is undertaken to be done, the very defects in the proceedings upon which the plaintiff now asserts its invalidity, must be disclosed, and render harmless the claim of the city, if in fact they exist and are of such legal consequence as the plaintiff alleges.

The tax title acquired by the city is a nullity, unless all the requirements of the naked power conferred upon the officer were strictly complied with. There is no presumption in its favor, but the burden of proving such compliance

will rest upon the city whenever it shall seek to establish its claim, and this it can never do, provided the facts and the law of the case be truly averred by the plaintiff himself. Authorities in support of this position are not wanting. In the case of *Farnham* v. *Campbell*, 34 N. Y., 480, the court of appeals of that state refused to entertain an action to remove a cloud from title where a sheriff having an execution against one man sold and conveyed the property of another, upon the ground that an investigation of the record would disclose the whole matter and take away all pretence of title through the sheriff's deed. In *Ward* v. *Dewey*, 16 N. Y., 519, the same court declared that a mortgage executed by one tenant in common of a whole farm did not constitute a cloud upon the title of his co-tenant, because the very moment it was investigated the true state of the title would be discovered. And in *Van Doren* v. *The Mayor of New York*, 9 Paige 388, it is said that where a valid legal objection is to be seen upon the face of the proceedings, through which the adverse party can alone claim title to the complainant's land, there is not such a cloud upon his title as will authorize him to apply to a court of chancery to set aside the proceedings, "for," said CHANCELLOR WALWORTH, "that can never be considered a legal cloud which cannot for a moment obstruct the unaided rays of legal science when they are brought to bear upon the supposed obscurity."

Relying upon these authorities, and upon what seems to us to be the only proper, logical conclusion in such a case, we dismiss the action; and this notwithstanding it comes before us as a controversy without action, for the parties cannot by their consent, confer jurisdiction upon the court.

PER CURIAM. Action dismissed.

H. K. RHEA v. R. M. DEAVER.

Impeaching Evidence—Conversion—Issues—Judge's Charge.

1. Defendant moved for a continuance on account of the absence of a witness, and in his affidavit stated what he expected to prove by the witness; and to avoid a postponement of the trial the parties agreed that the affidavit should be read in evidence and have the same effect as if the fact stated was sworn to by the witness in open court, subject however, to plaintiff's right to contradict or explain; *Held*, that testimony was properly received to contradict the statement made in the affidavit, (the statement being upon the material issue involved, and not relating to collateral matters).
2. In an action for damages for the conversion of personal property, it is not error in the court to restrict the issues to an inquiry into the plaintiff's title, the act of conversion, and the injury; under which issues all legitimate defences to the action are susceptible of proof.
3. Nor is it error to refuse to charge that the immediate right of possession is not in the plaintiff, where the evidence tended to show that the property was used by another with the permission of plaintiff, and not as bailee.

(*State* v. *Patterson*, 2 Ired., 346; *State* v. *McQueen*, 1 Jones, 177; *Jones* v. *Jones*, 80 N. C., 246; *Glover* v. *Riddick*, 11 Ired. 582; *Carraway* v. *Burbank*, 1 Dev., 306; *Hare* v. *Pearson*, 4 Ired. 76; *Anderson* v. *Steamboat Co.*, 64 N. C., 399; *Willey* v. *Gatling*, 70 N. C., 410; *Jackson* v. *Com'rs.*, 76 N. C., 282, cited and approved.)

CIVIL ACTION tried at Fall Term, 1881, of BUNCOMBE Superior Court, before *McKoy, J.*

Verdict and judgment for plaintiff, appeal by defendant.

Messrs. C. A. Moore and *Reade, Busbee & Busbee*, for plaintiff.
Messrs. J. H. and *A. S. Merrimon*, for defendant.

SMITH, C. J. The plaintiff in his complaint alleges himself to be the owner and in possession of a certain black mare mule before and up to May 2nd, 1865, when the de-

fendant coming into possession converted and disposed of her to his own use, estimating his damages for the wrongful act at five hundred dollars. The defendant averring his want of knowledge or information sufficient to form a belief in regard to the plaintiff's title, denies the act of conversion imputed to him. The issues extracted from the pleadings were submitted to the jury as follows:

1. Was the plaintiff the owner of and entitled to the mule described in the complaint at the time of the taking, and was she converted by the defendant? and

2. How much damage is the plaintiff entitled to recover for the conversion?

Several substituted issues were proposed by the defendant which are set out in the record and which the court deemed unnecessary, as all the legitimate defences to the action were susceptible of proof under those which had been prepared. The defendant asked a continuance for the absence of certain witnesses, and stated in his affidavit that he expected to show by them that he was not present when the mule was taken, and took no part and rendered no aid to those who did take her. To avoid the postponement of the trial an agreement was entered into between the parties that the affidavit should be read in evidence and have the same effect as if the fact stated was sworn to by the witness in open court, subject however to a right reserved to the plaintiff to contradict or explain the testimony, as if the witness had been examined personally.

At the trial before the jury the defendant offered this conceded statement in evidence and thereupon the plaintiff introduced himself as a witness, and after objection for that no opportunity had been offered the absent witness for explanation, was allowed to testify that the witness had stated to the plaintiff on several occasions that the defendant did take the mule, and this evidence was received for the pur-

pose of discrediting the statement read. This is the first exception we propose to consider:

1. The rule of practice where an application is made for a continuance on account of absent witnesses and the evidence they are expected to give is recited in the affidavit, is to require the other party insisting on a trial to admit the facts thus stated, and not merely that the witnesses if present would thus testify; and then no rebutting or impeaching testimony is admissible. But the parties have made a special arrangement in this case, exposing the testimony to contradiction and discredit, and the defendant cannot complain of the manner in which this reserved right is exercised. The objection pressed here is that conflicting statements, before or since made by a witness, cannot be received to impeach his testimony under oath unless he is himself first interrogated on the subject, and his memory refreshed that he may explain or deny the imputed declarations. The objection rests upon a misconception of the well settled rule of evidence as to the admissibility of contradictory statements impeaching the truth or memory of the witness, by not distinguishing between such as relate to collateral matters and such as bear directly upon a material issue. In the latter case it is not necessary to make a preliminary inquiry of the witness as to what he may have before said, and the impeaching testimony may be introduced without the inquiry. The cases cited for the appellee are so direct and full that further discussion is useless. *State* v. *Patterson*, 2 Ired., 346; *State* v. *McQueen*, 1 Jones, 177; *Jones* v. *Jones*, 80 N. C., 246.

2. The additional or substituted issues proposed were needless and there was no error in disallowing them. Those submitted involved an inquiry into the plaintiff's title, the alleged act of conversion, and the resultant injury. These are the substantial elements of the controversy, and they were presented to the jury with instructions as to the proof

required of the plaintiff to maintain his action. The court explained that title and possession must both be in the plaintiff, and the defendant must have been an actor in the taking and conversion, directly, or in aid of others, before a recovery can be had, and thus every defence was open to the appellant. The ruling rests upon ample authority.

"A conversion," remarks Mr. Greenleaf, "consists either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it, in exclusion or defiance of the plaintiff's right; or in withholding the possession from the plaintiff under a claim of title inconsistent with his own," 2 Greenl. Evi. §642. And it may be added, all who participated in the act are equally liable. This definition is adopted as a correct statement of the law in *Glover* v. *Riddick*, 11 Ired. 582, as it had been previously recognized in *Carraway* v. *Burbank*, 1 Dev. 306, and *Hare* v. *Pearson*, 4 Ired. 76, cited in the argument of Mr. Busbee.

3. The remaining exception is to the refusal to charge the jury that if they believed the testimony of the plaintiff, the immediate right of possession was in one Sawyer, and not in the plaintiff, at the time of the wrongful act. As affecting the credit of the witness, and the supposed repugnancy of his to the testimony of other witnesses, the instruction was properly withheld, and it would have been error to give it, as has been repeatedly declared by this court. *Anderson* v. *The C. F. St. Boat Co.* 64 N. Co. 399; *Willey* v. *Gatling*, 70 N. C. 410; *Jackson* v. *Commissioners of Green Co.*, 76 N. C. 282. In *Willey v. Gatling*, READE, J., says the proper direction to the jury is that they "should consider *all the evidence offered on both sides*, and find the fact according to their convictions."

But if the proposed instruction be applied to the facts testified and not to the credibility of the witness, it should not have been given. The evidence of the plaintiff was that

Sawyer with his family lived on plaintiff's farm and had supervision of it; that he had let Sawyer work the mule that spring to make a crop; that he worked her the week in which she had been carried away; he was to have a mule or horse to work that year, and had worked her; the plaintiff sometimes used the mule in hauling and she was brought to his stable and there fed.

This testimony does not show a special property in Sawyer, as bailee, inconsistent with a legal possession and right of possession in the plaintiff. The use by Sawyer was permissive and at the will of the plaintiff so far as his testimony goes, and while the entire evidence was left to the jury under proper directions to guide them in passing upon the issues, it would have been an error to give the specific effect to the plaintiff's testimony demanded in the refused instruction. The jury were free to make the deduction favoring the defendant's construction of the plaintiff's testimony, and while this liberty allowed the jury may itself be questionable, it certainly furnishes no just cause of complaint to the defendant.

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

No error. Affirmed.

COMMISSIONERS OF FORSYTH v. W. A. LEMLY and others.

Production of Books and Papers—Usury—Removal of Cause —Trial—Appeal.

1. Where an administrator of an agent for negotiating and applying proceeds of county bonds, is sought to be examined under sections 332 —341 of the Code, and such administrator as bank cashier kept his intestate's accounts, an order to produce the books of the bank,

and also such bonds as belong to the intestate, or were found among his effects after his death, aside from pre-existing provisions of law, is regular and proper under section 331 of the Code.

2. As such books and bonds are sufficiently described in the order, they must be produced, notwithstanding any vagueness in the description of other documents, and the administrator may then defend himself against any further enforcement of the order.

3. The imputation of an attempt to charge usurious interest will not warrant the withholding information of facts for a correct account and settlement of a fund.

4. Pending the removal of a cause from one county to another and before a deposit of the transcript, it is competent for the clerk of the former county to take the examination of parties under both the Revised Code ch. 31 §72 andthe Code of Civil Procedure §332—341,—correcting the intimation in *Strudwick* v. *Brodnax*, 83 N. C. 401.

5. Although ordinarily questions arising and decided during the examination of a witness cannot be singled out and the exception made the subject of a separate appeal, yet such appeal may be sustained when a party is deprived of important testimony, and the action notwithstanding such appeal may proceed to full preparation for the trial.

(*Justice* v. *Bank*, 83 N. C., 8, citedand approved, and *Strudwick* v. *Brodnax*, *Ib.* 401, corrected.)

APPEAL from the ruling of the clerk, heard at Chambers at Fall Term, 1880, of DAVIDSON Superior Court, before *McKoy, J.*

Defendants appealed from the judgment of the court below.

Messrs. Merrimon & Fuller, for plaintiffs.

Messrs. J. M. Clement and *J. M. McCorkle*, for defendants.

SMITH, C. J. The justices of the county court of Forsyth at the term held in June, 1868, and by virtue of a provision in the act incorporating the Western North Carolina Railroad Company, authorized a subscription of one thousand shares on behalf of the county in the capital stock of the company, of the par value of one hundred dollars each, and directed the issue and sale of bonds in that amount bearing

interest at the rate of eight per cent., whereof ten thousand dollars should mature at the end of the successive years next ensuing, to provide the money to pay for said stock. At the same time the defendant's intestate, I. G. Lash, was appointed financial agent of the county to prepare and have the bonds properly executed, and to dispose of the same to the best advantage to meet the requirements of the subscription. The agency was accepted, and, as alleged in the complaint, bonds executed and properly authenticated in a sum exceeding by more than four thousand dollars the prescribed limit, placed in the hands of the intestate and managed by him for a series of years, and until his death in April, 1878, without rendering any account of his trust, or of the sale of the county securities and disbursement of the proceeds, or of the funds subsequently raised by the county and paid over to him, to meet the incurred obligations. This action is instituted against the defendants, administrators of said I. G. Lash, for an account and settlement of the terminated agency, and the plaintiffs charge that most of the bonds were never legally disposed of, but retained by him as security for advances made by him, or by the bank of which he was the president and principal owner of the stock, on his behalf, and he held at the time of his death three-fourths of said bonds in value, with a lien thereon only for such moneys as he may have advanced, in excess of what he has received and a reasonable remuneration for services rendered. It is further alleged that a claim for large and usurious interest on the moneys advanced is set up by the intestate to which he is not entitled, and a general account is demanded.

Most of these charges, and especially that of mismanagement, are controverted in the answer, and at fall term, 1879, upon the defendants' application and affidavit, the cause was ordered to be removed to Davidson county; but owing to the absence of certain papers, in the hands of defendants'

counsel, needed in completing the transcript, the cause remained on the docket of Forsyth superior court until the record was filed, and it was docketed at fall term, 1880, in the superior court of Davidson. Intermediately at August 28th, 1880, on plaintiffs' application, the clerk of Forsyth superior court issued a summons to the sheriff of his county to be served on the defendant, W. A. Lemly, to appear before him at his office on the 3rd day of September following, for examination under sections 332 to 341 inclusive, of C. C. P., and requiring him to produce "all books, papers, records and documents wherein are kept memoranda and accounts" of the intestate's "transactions as such financial agent, as well as the books of the First National Bank of Salem, in his custody as former cashier, or otherwise showing the bank account of I. G. Lash while acting as such financial agent," and also such municipal bonds of the county of Forsyth as belong to the intestate, and such as were found in his possession or among his effects after his death." The witness appeared according to the mandate of the clerk, and upon his examination, acting under advice of counsel, refused to exhibit any of the books or papers specified, assigning as reasons therefor—

1. Because of the charge of the claiming and taking usurious interest on the moneys advanced.

2. For the want of a specific designation of the books, documents and papers required.

3. For the absence of any averment that they are in possession or under control of the witness.

4. The books and papers belong to the bank.

These objections to the order were overruled and the witness required to produce them, which ruling the witness refused to obey, and appealed to the judge of the superior court. On the hearing the order of the clerk was affirmed, and the defendants excepted thereto, and to the authority

of the clerk of Forsyth to take the examination under the statute.

There are two questions raised, and they have been earnestly discussed upon the appeal taken to this court.

1. Was the ruling of the clerk requiring the production of the books and papers regular and proper?

2. Was the proceeding rightfully constituted before the clerk of Forsyth superior court?

First. The evidence sought is clearly pertinent, and in the absence of any account rendered with the answer, material to the plaintiffs' case. The intestate in his lifetime rendered none, the defendant witness kept his financial accounts as agent, is familiar with his dealings with the trust fund, and, as it is not denied, must be assumed to be in possession of the bonds, books and papers demanded. There is no reason he should be relieved of the unperformed obligation of his intestate to furnish such memorials as are in his possession, as materials essential in making up the account and ascertaining the relations of the agent to his principal. The warrant for the order, aside from pre-existing provisions of law, may be found in section 331 of C. C. P., as interpreted and enforced in *Justice* v. *Bank*, 83 N. C., 8.

The books and bonds are specified with sufficient accuracy in the notice and order. Whatever objection may be to the other papers because of the vagueness of their description, certainly it cannot excuse the failure to bring forward the others to which the objection does not apply. The witness should produce such as are sufficiently designated, and he is thus informed and required, and defend himself against any further enforcement of the order, if then pressed.

The imputation of an intention or attempt to make usurious charges will not warrant the withholding information of the facts upon which a correct and just account can be made up. The imputation is of an attempt to charge ille-

gal interest, and the purpose to eliminate usurious interest if charged on the intestate's books from the account to be taken. There will in such case be no usury taken, and consequently no penalty incurred by supplying the information. There has been no sanction given by the county authorities to the appropriation of any of its funds in the hands of its agent to the payment of usurious interest, and a claim unrecognized to retain, is not a taking of such unlawful interest.

Secondly. As to the competency of the clerk of Forsyth to take the examination after the order of removal, but before the filing of the record in the court to which the cause was removed.

It is plain that until the transcript is deposited, the removal is not consummated and the cause is not constituted so as to give full jurisdiction to the court to which the removal is ordered. In this condition of the action, it is expressly provided that subpœnas for witnesses may be issued, and commissions to take depositions may be sued out of the office of either clerk. Rev. Code, ch. 31, § 72. For the purpose of taking evidence, the jurisdiction is vested alike in the court from which as well as in that to which the cause is removed, and why does not this retained authority reach this new mode of preparing testimony, as well as those in force and prevailing when the statute was enacted? It is indeed but the taking of a deposition without commission, and to facilitate the trial, and the examination itself differs only in some of the uses which may be made of it by the parties to the suit. We see no ground for exempting an examination, thus authorized by the Code, from the operation of a statute which applies to other evidence, and is sufficiently comprehensive to include this.

But if this be not so, we are disposed to correct the intimation, not involved in the decision of the case of *Strudwick* v. *Brodnax*, 83 N. C., 401, which restricts these examinations

to the judge and clerk of the court wherein the action is at the time depending, and to extend the act to any county wherein the witness resides or where he may be found within the state. This construction is given to the statute by the courts of New York, and gives a wider and more reasonable scope to its intended beneficent provisions. Otherwise in a case like the present, the examination could not be had at all, if the witness chose to remain out of the county of Davidson. In both aspects of the matter, then, the clerk of Forsyth was in the exercise of rightful authority in proceeding to take the examination and in making the order for the production of the books and bonds, and there is no error in the ruling of the judge in relation thereto. We should have some hesitancy in sustaining the appeal, but that the plaintiffs are deprived of important evidence to sustain their action, and the cause may still proceed in making full preparation for the trial notwithstanding the appeal.

Ordinarily questions arising and decided during the examination of a witness cannot be singled out and the exception made the subject of a separate appeal, but the cause will proceed.

There is no error and this will be certified to the court below.

No error. Affirmed.

MARY SCOGGINS v. WILLIAM SCOGGINS.

Divorce and Alimony.

4. Where a wife alleges sufficient facts for a separation from bed and board, and also to obtain alimony makes the necessary affidavit

under Bat. Rev. ch. 37 § 6, in reference to the husband's removal of his property from the state; *Held* that it is not necessary, in order to get a decree for such separation, to file another complaint six months after the time the facts (upon which alone the decree could be made) are alleged to have occurred.

2. Where in such case it is alleged and the jury find, that a drunken husband cursed his wife and drove her from his house, and by demonstrations of violence caused her to leave the bed-side of a dying child and seek safety and protection at a distance of several miles, a decree *a mensa et thoro* was properly granted. Act 1871-'72 ch. 193 § 36; Bat. Rev. ch. 37.

(*Scoggins* v. *Scoggins*, 80 N. C. 318; *Gaylord* v. *Gaylord*, 4 Jones Eq. 74, cited and approved.)

CIVIL ACTION for divorce, *a mensa et thoro*, tried at Fall Term, 1880, of RUTHERFORD Superior Court, before *Seymour, J.*

The summons was issued on the 26th day of February, 1878. The plaintiff alleged numerous instances of cruel and barbarous treatment, endangering her life, and repeated indignities offered to her person, rendering her life burdensome and her condition intolerable, occurring during their married life, without stating the time, place, or circumstances. But the petition further alleged that about the last of January or first of February preceding the commencement of this action, the parties had a child at home quite sick, needing greatly the attention of both its parents, and while the child was in this low state of health from which it soon thereafter died, the defendant was drinking a good deal and abusing plaintiff, and threatening her life, and on one night about this time, he was drinking and as usual abusing the plaintiff, and ordered every person from the house who could protect her, there being several persons visiting the sick child, and abused and cursed her, threatening her life and finally told her she must leave, that he wished she was dead and in hell. He told her that she must leave that night or the next morning. That being greatly alarmed

and fearing that her life would be taken, she waited until late in the night, and until the defendant had fallen asleep, and then in the darkness accompanied by a nephew she left her little children, and her little dying boy, and sought safety in her father's house several miles away, verily believing that if she remained her life would be taken. No consideration except to seek safety from a violent death would have induced her to leave at that time and under the circumstances.

The defendant answered the complaint substantially denying the allegations thereof, and thereupon the following issues were submitted to the jury:

1. Did the defendant on a certain night in January or February, 1878, maliciously turn plaintiff out of doors?

2. Did defendant on a certain night in January or February, 1878, while a child of the parties was at home sick, and needing attention, (from which sickness it soon after died) get drunk and abuse plaintiff, threaten her life, and order every person from the house who could protect her, swear at her and order her to leave his house? and did plaintiff by reason of fear of personal violence, and of fear that her life was in danger, caused by such threats in the same night, leave defendant's house and take refuge with her father?

The defendants objected to the issues submitted on the ground that the transactions of January or February, 1878, did not occur six months before the beginning of the action. The objection was overruled.

The defendants asked the court to charge the jury that the facts in the case were insufficient to constitute ground for a divorce. His Honor refused to give the charge.

The jury responded to both of the issues in the affirmative, and thereupon the court adjudged and decreed that the plaintiff be separated from the bed and board of the defendant and be allowed alimony, &c., from which judgment the defendant appealed.

Mr. D. G. Fowle, for plaintiff.
Mr. J. F. Hoke, for defendant.

ASHE, J. The only questions presented by the record are these:

1. That the transactions alleged to have occurred in January or February, 1878, did not occur within six months before the commencement of this action; and,

2. That the facts are insufficient to constitute ground for divorce.

As to the first exception, it is provided in Bat. Rev., ch. 37, § 6, that the plaintiff shall also set forth in such affidavit, either that the facts set forth in the complaint, as grounds for divorce, have existed to his or her knowledge at least six months prior to the filing of the complaint, or if the wife be the plaintiff, that the husband is removing or about to remove his property and effects from the state, whereby she may be disappointed in her alimony.

This section has been the subject of construction by two of the decisions of the court, viz: *Scoggins* v. *Scoggins*, 80 N. C., 318, and *Gaylord* v. *Gaylord*, 4 Jones Eq., 74. In the last case Judge BATTLE, who spoke for the court, said: "The act certainly requires that in ordinary cases the facts upon which the petitioner founds her claim to relief, shall have existed to her knowledge at least six months prior to the filing of the petition, and the seventh section of the act expressly enacts that she shall so state and swear. But the eighth section makes an exception to this, whenever 'the husband is then removing or about to remove his effects from the state.' In such a case the wife may exhibit her petition at any time, and if she shall state and swear 'that she doth verily believe that she is entitled to alimony, and that by delaying her suit she will be disappointed of the same, by the removal of her husband's property and effects from the state,' any judge may thereupon make an order of

sequestration or otherwise as the purposes of justice may seem to require." And in the conclusion of the opinion the judge adds: "There is nothing in this or any other section of the act which indicates a necessity that she should file another bill, or a supplemental bill, after the expiration of six months from the time when the facts which entitled her to relief occurred."

The sections seven and eight referred to by Judge BATTLE in his opinion, are sections of chapter 39 of the Revised Code which have been brought forward, condensed, and incorporated in section 6, chapter 37, of Battle's Revisal, with some slight change in phraseology but none in substance. We think the plaintiff has brought her case clearly within the exception, and was not required to file another petition after six months from the time the facts are alleged to have occurred in January or February, 1878, and was entitled to a decree of separation, if the transactions then occurring were sufficient to warrant the court in making such a decree. And this brings us to the consideration of the second exception.

2. This case was before us heretofore on the question of alimony (*Scoggins* v. *Scoggins, supra*) and we then held that the facts alleged in the complaint to have occurred in January and February, 1878, if true, were sufficient to warrant the court in decreeing a separation from "bed and board." The jury in this case have found them to be true, and we see no reason for changing the opinion then expressed.

The conduct of the defendant was certainly very bad; it was unfeeling and especially cruel under the circumstances. While his child is in a dying condition, needing all of a mother's tender ministrations and sympathy, and while friends were on a visit to the house to assist his wife in nursing his sick one, and who might have given the plaintiff protection against his threatened violence, he drove them from his house, cursed the plaintiff, wished her in

h—ll, threatened to kill her, and ordered her to leave his house. The demonstration of violence displayed by the defendant must have been very serious to have inspired the mother with such an alarm for safety as to induce her to abandon the bed-side of her dying child, and travel several miles away in the night to seek for shelter and protection.

We think the facts alleged and found by the jury bring the plaintiff's case within the provisions of the act of 1871–'2, ch. 193, § 36.

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

No error. Affirmed.

BANK (First National of Charlotte) v. T. L. ALEXANDER, Exr.

Surety and Principal.

Where a creditor secured in an assignment of the principal debtor's property receives his share of the fund, he cannot afterwards assert the discharged part of the debt against the surety.

(*Brown* v. *Bank*, 79 N. C., 244; cited, distinguished and approved.)

CONTROVERSY submitted without action under section 315 of the Code, and heard at Fall Term, 1881, of MECKLENBURG Superior Court, before *Avery, J.*

The court adjudged that the plaintiff bank be allowed to prove the full amount of the debts mentioned in the case agreed, against the estate of the testator, and receive the *pro rata* share on the amount thereof, so as to satisfy the unpaid residue, and the defendant appealed.

No counsel for plaintiff.

Messrs. Wilson & Son, for defendant.

SMITH, C. J. The partnership firm of Walter Brem & Martin, in June and July, 1876, executed five promissory notes in the aggregate sum of $15,500 payable at 60 days to Thoms H. Brem, by whom they were endorsed to the plaintiff. The endorser died in the last mentioned month leaving a will and appointing the defendant his executor, who having completed his administration has assets to be apportioned among the creditors and insufficient to pay in full. On November 30, 1877, the principal debtors made an assignment for the benefit of their creditors, from the proceeds of which the plaintiff has received and applied to the notes a payment of 66 per cent. of the amount due. The plaintiff now proposes to prove against the testator's estate the full amount of the notes without deduction of the sum paid, and claims to share upon the basis of an unreduced debt in the *pro rata* distribution of the fund in the hands of the executor, upon the authority of the decision in *Brown* v. *The Bank*, 79 N. C., 244; and this is the matter in contest in the action. That case furnishes no support to the present demand. There, the assignors in their respective deeds conveyed property to secure the same debts, in some of which the assignors in one deed were principals and the assignors in the other were sureties; and in the other secured debts their relations were reversed. It was held that the indebtedness was equally provided for in both conveyances, and that each contemplated a distribution upon that basis, which was not disturbed by priority in date of execution or in closing the trusts. The practical results of the two-fold assignment are thus stated in the opinion: "The surety whose estate pays is at once subrogated to the rights of the creditor as to the sum paid, and thus the unpaid part would remain the property of the bank, and the the part paid would belong to the surety. But as both principal and surety owe the entire debt to the creditor, he would be entitled also to receive the part accruing to the

surety, as well as to himself out of the principal debtor's estate."

We discover no similarity in the cases. Here, funds provided by the principal debtors who are primarily liable, have been appropriated to their own indebtedness, nearly two-thirds of which is thus extinguished, and the estate of the testator, their surety, relieved of liability to that extent. The present contention is to revive the discharged indebtedness against the surety, for the purpose of obtaining a larger dividend from his estate. The measure of the provable debt is what remains of it unpaid, and as the discharged part could not be asserted against the principal, still less can it be against the surety upon his subsidiary liability. If the relations of the parties were reversed, and the surety had been compelled to pay the debt, he would thus become himself a creditor by virtue of an equitable assignment or right of action for money paid. But there is no analogy in the cases, and we can see no ground upon which the present claim can stand.

There is error in the record and the judgment will be entered here according to the case agreed, that the defendant go without day.

Error. Reversed.

G. W. LONG, Adm'r, and others v. BANK OF YANCEYVILLE.

Creditors' Bill—Parties—Practice.

1. It is error to vacate an order admitting a creditor as a co plaintiff of record in a creditors' bill for an alleged irregularity occurring before the personal representatives of certain deceased defendants had been brought in by service of process.

2. The right of any creditor to become a plaintiff in such case rests upon the same ground as his right to sue alone, and the possession of evi-

dences of debt accompanied by a verifying affidavit, makes a *prima facie* case sufficient to warrant the order of admission.

3. The practice of making one suit answer in place of many, is for the protection of the person administering the fund, and to secure a prompt settlement thereof.

(*Overman* v. *Grier*, 70 N. C., 693; *Wordsworth* v. *Davis*, 75 N. C., 159, cited and approved.)

MOTION heard at Fall Term, 1881, of ALAMANCE Superior Court, before *Gudger, J.*

From the judgment below, the petitioner, C. J. Cowles, appealed to this court.

Messrs. E. S. Parker and *Merrimon & Fuller*, for petitioner.
Messrs. Graham & Graham and *E. B. Withers, contra.*

SMITH, C. J. When this cause was before us at June term, 1879, upon an appeal from an order denying the petitioner's application to become a party plaintiff, we remarked that "the answer sets up substantially the same matters of defence to the application which are relied on in the original answers," and that the issues thus made "should have been first determined before the summary order of the court." Accordingly at spring term, 1880, the following decretal order was entered:

"This cause coming on for hearing upon the motion of C. J. Cowles to be made a party plaintiff thereto, it appearing to the satisfaction of the court upon reading and filing the affidavit of said Cowles, that he is a party in interest in this action, it is ordered that he be made and set down as a party plaintiff in this action, and that he file his complaint as of this term, said complaint to be filed on or before the first day of the next term," with a further direction to make the personal representatives of certain deceased defendants parties in their stead. At fall term, 1881, on motion of defendant's counsel, so much of this order as admitted the

petitioning creditor as a co-plaintiff of record, was vacated for an alleged irregularity in that it was made before the said personal representatives had been brought in by service of process, and from this judgment he appeals.

A creditor's suit, or action as it is now termed, instituted by some on behalf of themselves and others, is in substance the suit of all the creditors, a consolidation and union into one of what would otherwise be a series of separate and independent actions, prosecuted by each for his own relief. "As soon as the suit is begun," in the language of Mr. Justice STORY, "all the creditors are in a sense before the court." Story's Eq. Pl., § 99. In the succeeding section the author quotes the words of LORD REDESDALE in reference to this class of cases thus: "As a single creditor may sue for his demand out of the personal assets, it is rather matter of convenience than indulgence to permit such a suit by a few on behalf of all the creditors; and it tends to prevent several suits by several creditors which might be highly inconvenient in the administration of assets, as well as burthensome on the fund to be administered."

"As all the creditors are to be paid in proportion," observes another writer on equity jurisprudence, "when any creditor institutes a suit to obtain the benefit of the trust, the decree must be such that *all other* creditors may come in under it and thus the proper proportion of each may be ascertained." 2 Spence. Eq. Jur., 314; Mitford's Eq. Pl., 223.

The practice of making one suit answer in place of many is adopted for the protection of those who are charged with the administration of the fund as a means, convenient and prompt, of securing a settlement and the apportionment of their respective shares among the claimants. In the administration of the estates of deceased insolvent debtors, it is regulated by statutory provisions. Bat. Rev., ch. 45.

As each creditor can sue alone, unless restrained by the

pendency of an action on behalf of all, in which he may find a full and adequate remedy, his right to participate in the prosecution of the latter and become an associate plaintiff, rests upon the same ground as his right to bring and prosecute a separate action for himself. While none but creditors are thus admitted, the possession of evidences of debt or claims, accompanied by a verifying affidavit, makes a *prima facie* case sufficient to warrant the order of admission. The admission concludes none of the defences which would be set up to his claim in a separate suit, and any other creditor can contest his, as he can their respective claims, to participate in the distribution of the fund when it is insufficient to pay all. *Overman* v. *Grier*, 70 N. C., 693; *Wordsworth* v. *Davis*, 75 N. C., 159. In the case last cited, an applying creditor was not allowed to prove his debt, opposed by other creditors, because it was barred by the statute of limitations upon his own showing. But this application was made after the time allowed for proving the debt had expired, and two instalments had been paid to creditors,—more than five years after the interlocutory order of reference was made. The motion was, not to be allowed to take part in the conduct of an undetermined action for the common advantage of all, but to prove his own subsisting debt and right to share in the fund, and hence the application itself involved an inquiry into the validity of the claim and exposed it to every just defence. To permit the proof was to establish the debt, and it was contested *in limine*.

The rescinded order made provision for the filing of a complaint by the introduced party in order that his demand, as well as that of the suing creditor, should be open to all legal defences; and to allow resistance upon the same grounds to be made to the admission is to have the same issues and the same controversy twice tried and in the same action. The appellant was therefore properly admitted upon his own showing as a plaintiff, and the prior action

of the court ought not to have been disturbed. But his Honor put his ruling upon the ground of an irregularity in making the order during the absence of the representative defendants. This constitutes no sufficient objection to the order. A *new plaintiff* is not admitted nor the pleading amended to let him in. The applicant, as a creditor, was already a plaintiff at his election to come in and comply with the prescribed conditions, and is simply recognized and entered on the record as such on proof that he is a creditor. The enlargement of the number of those who prosecute can in no wise affect injuriously the interests, or impair the rights of the defendants. The suing plaintiff accepts him as such; the defendants are free to contest his claim and resist the action afterwards as before.

There is error in setting aside the former order for the cause assigned and the judgment vacating the same must be reversed. Let this be certified.

Error. Reversed.

M. DORSEY and wife v. SAMUEL H. ALLEN.

Injunction.

An injunction will not be granted to restrain the erection of a planing mill and cotton gin (in process of construction) upon an allegation by plaintiff that the same, when completed, will expose his premises to increased perils of fire, and that the noise, &c., will render his dwelling unfit for a residence.

(*Barnes* v. *Calhoun*, 2 Ired. Eq., 199; *Ellison* v. *Com'rs*, 5 Jones Eq., 57; *Hyatt* v. *Myers*, 73 N. C., 232; *Simpson* v. *Justice*, 8 Ired. Eq., 115; *Eason* v. *Perkins*, 2 Dev. Eq., 38; *Wilder* v. *Strickland*, 2 Jones Eq., 386, cited and approved.)

DORSEY *v.* ALLEN.

MOTION for an injunction heard at Chambers in Henderson, Vance county, on the 27th of October, 1881, before *Gudger, J.*

The motion was refused and the plaintiffs appealed.

Messrs. Edwards & Batchelor, for plaintiffs.
Mr. W. H. Young, for defendant.

SMITH, C. J. The defendant having begun the erection of the necessary buildings for a planing mill and cotton gin, to be operated by steam on his lot adjoining that owned and occupied by the plaintiffs as their place of residence, this action is instituted to arrest the farther prosecution of the work upon the ground mainly that the proposed use of the houses when completed will expose their premises to increased perils of fire, and that the noise from working the machinery will render their dwelling uncomfortable and unfit for a residence. The complaint invokes the exercise of the restraining power of the court in this early stage of the enterpise, and insists that the defendant should build upon the rear part of his lot, where there is ample space equally convenient and accessible, and thus avert the apprehended danger of fire, and lessen, if not remove the annoyance occasioned by the operations carried on in the mill and gin house through the agency of steam power. The plaintiffs state that a division fence nearly eight feet high separates the respective lots, from which the defendant's buildings are removed but about nine feet; that the planing mill and gin house are one hundred and eleven feet apart, the first being 118 feet and the latter 39 feet from their kitchen, and respectively 170 and 67 feet from their dwelling, all the structures being of wood.

Numerous affidavits were produced and read upon the application for a preliminary restraining order, upon the examination of which we find no reasons for a dissent to

the conclusion reached by His Honor upon the hearing. Much of the testimony and largely that of the plaintiffs' express the apprehensions entertained by the witness as to the probable effects of the works when in full operation, in the disturbing noise produced and the increased perils of fire, and the consequent impairment in value of the plaintiffs' premises as a residence. Other testimony is as to the public convenience to be subserved by the additional means of ginning provided, and the public needs of the mill in furnishing building materials required in the thrifty and rapidly improving town in which it is located. Many of the witnesses say that the noise and disturbance of trains running on the railroad track, from which the plaintiffs' dwelling is distant forty yards, by night and day greatly exceed any caused by the defendant's operations, and while there is a concurrence in the opinion that these erections may become annoying and a source of discomfort to the plaintiffs and their family, rendering their residence less desirable and of less market value as such, the preponderance is greatly in favor of the public advantages to be derived from both establishments.

Some of the witnesses, and among them the defendant's engineer who has charge of the engine and is superintendent of the business, testify to the superior character of the machinery and the careful provisions against accidents, and say that very little noise is made by the running of the engine and gin, which then had been in use several days.

We reproduce these leading features in the testimony to show that while the buildings erected for the purpose of dressing timber and ginning cotton by the motive power of steam, are not necessarily nuisances and may become so under some circumstances, to be determined by the jury, it was eminently proper in the judge to decline to interfere in the case before him and stop the progress of the work, before the question of nuisance has been, or could be decided.

Nor was it necessary, for before operations were commenced there was no increased danger from fire, and no disturbing noise made requiring judicial interference, and the relief could be obtained after the results were definitely ascertained if the plaintiffs should be found entitled to it.

The nuisance if incidental and not necessary to the proper conduct of the business, or inherent and inseparable from it, could then be abated, and the defendant's knowledge of the pending suit would take from him all just cause of complaint when it should be so adjudged. But it would be an unwise exercise of power, upon such uncertainty as to the practical working of an undertakened enterprise, and its consequent effects, for the court to interpose and prevent its being carried out with its promises of substantial and lasting benefits to a community, because of the discomfort and inconvenience a single family or a small number of persons may experience from its presence in their vicinity, so inconsiderable when weighed in the scale with the public interests.

While it is true that a business lawful in itself may become so obnoxious to neighboring dwellings as to render their enjoyment uncomfortable, whether by smoke, noxious and offensive odors, noises or otherwise, and justify the protecting arm of the law, yet there must be the ascertained and not probable effects apprehended. When the anticipated injury is contingent and possible only, or the public benefit preponderates over the private inconvenience, the court will refrain from interfering.

"When an injunction is asked," says a recent author, "to restrain the construction of works of such a nature that it is impossible for the court to know until they are completed and in operation whether they will or will not constitute a nuisance, the writ will be refused in the first instance." High on Injunction § 488 and 489, note 1.

So too this extraordinary remedy of prevention will not

be granted unless it shall appear that the aggrieved party has no adequate redress or reparation for his injury in an action or in a succession of actions for the recovery of damages. 2 Black Rep. 545. "Where the injury is irreparable," declares Mr. Justice STORY, "as where loss of health, loss of trade, destruction of the means of subsistence or permanent ruin to property may or will ensue from the wrongful act or erection, in every such case, courts of equity will interfere by injunction in furtherance of justice and the violated rights of property."—Eq. Juris. § 926.

In like manner GASTON, J. remarks, delivering the opinion in *Barnes* v. *Calhoun*, 2 Ired. Eq. 199: But it (a court of equity) will only act in a case of necessity when the act sought to be prevented is not merely *probable but undoubted*, and it will be particularly cautious thus to interfere when the apprehended mischief is to follow from such establishments and erections, as have a tendency to promote the public convenience."

"It is settled in respect to private nuisances," remarks MANLY, J. delivering the opinion of the court in the case of "*Ellison* v. *The Commissioners*, 5 Jones Eq. 57, the purpose of the complainant in which was to restrain the corporate authorities of the town of Washington from making use of a lot adjoining his own residence, as a place of burial for the dead, "that when the nuisance apprehended is dubious or contingent, equity will not interfere, but will leave complainant to his remedy at law?"

"If a man," says PEARSON, C. J. in *Hyatt* v. *Myers*, 73 N. C. 232, "instead of contenting himself with the quiet and comfort of a country residence, chooses to live in a town, he must take the inconveniences of noise, dust, flies, rats, smoke, soot and cinders, &c., and he cannot complain of the owner of an adjoining lot, by reason of smoke, soot and cinders (the subject of complaint in the case) caused in the use and enjoyment of his property, provided the use of it

is for a reasonable purpose, and the manner of using it is such as not to cause any unnecessary damage or annoyance to his neighbors."

We subjoin some additional references furnished by the researches of defendant's counsel in confirmation of what has been said: *Simpson* v. *Justice*, 8 Ired. Eq. 115; Wood on Nus. § § 788, 789, 791, 792; *Eason* v. *Perkins*, 2 Dev. Eq. 38; *Wilder* v. *Strickland*, 2 Jones, Eq. 386.

For these reasons it must be declared there is no error in the refusal of the restraining order and this will be certified.

No error. Affirmed.

JOHN E. BOYETT v. THAD. VAUGHAN.

Pleading—Counter-Claim.

1. A counter-claim cannot be asserted in a justice's court, the amount of which exceeds the jurisdiction of the justice.
2. A plaintiff cannot set up a counter-claim in reply to a counter-claim asserted by the defendant.

PETITION to rehear, tried at October Term, 1881, of THE SUPREME COURT.

Messrs. Mullen & Moore, for plaintiff.
Mr. Thomas N. Hill, for defendant.

ASHE, J. This is a case on rehearing the cause which was adjudicated by this court at the June term, 1878, and to be found reported in 79 N. C., 528.

It was an action brought before a justice of the peace in

the county of Halifax. The plaintiff in his complaint before the justice claimed $105 for lumber sold the defendant. The defendant in his answer set up by way of counter-claim a debt due him by plaintiff, evidenced by a note of $200. There was judgment given by the justice against the plaintiff for $69.13, the excess of the counter-claim over the plaintiff's demand. The plaintiff appealed to the superior court.

When the case was called for trial in the superior court the plaintiff suggested a diminution of the record in the transcript, and was permitted to amend the same, by interpolating therein, a replication and counter-claim to the answer and counterclaim of the defendant.

The plaintiff in his replication alleged that the note of $200, constituting the defendant's counter-claim, was given by him to the defendant, in part payment for a tract of land which he had purchased from him, and that at the time of the sale there was a parol agreement between them, that if upon a survey of the land it should fall short of four hundred acres, he would pay $4.00 per acre for the deficiency, and that the land fell short of four hundred acres by eighty-three acres, for which he set up a counter-claim to the defendant's counter-claim.

The defendant denied the counter-claim of the plaintiff. The plaintiff was permitted by the court to remit $57.06 of his claim for the deficiency in the land.

Issues were submitted to the jury, who found that the defendant did agree with the plaintiff to pay him four dollars per acre for each acre the land might fall short of four hundred acres, and that the deficiency was eighty-three acres.

The court gave judgment in behalf of the plaintiff for $200, and the defendant appealed to this court, and at the June term, 1878, the judgment of the superior court was affirmed by a majority of the court, (Chief Justice SMITH filing a dissenting opinion, which was concurred in by Mr. Justice BYNUM.)

We are of the opinion there was error in the judgment of this court.

First, because the court sustained an amendment allowed in the court below which raised the sum demanded in the action beyond the jurisdiction of the justice of the peace, and secondly, the plaintiff was permitted to set up a counter-claim to the counter-claim of the defendant.

The amount claimed by the plaintiff in his complaint was $105, and in his counter-claim $332, making $437, and deducting the $57.06 remitted, left $379.94, which was adjudicated in this court by indirectly according to the justice of the peace a jurisdiction to that amount.

We do not think the constitutional limit to the jurisdiction of justices of the peace can be so evaded. If the replication allowed in the superior court had been filed in the justice's court, we think it is clear that the court should have held that the justice had exceeded his jurisdiction, and that the case be dismissed. It is the jurisdiction of the justice of the peace which, on appeal, gives jurisdiction to the superior court, and of course if the justice had no jurisdiction the superior court could have none, and therefore, when by allowing an amendment in the transcript which enlarges the cause of action beyond the jurisdiction of the justice, it must necessarily oust itself of jurisdiction.

As to the matter of the counter-claim to the counter claim, we are of the opinion the correct doctrine and that supported by the more satisfactory authorities is enunciated in the dissenting opinion filed in the case when first before this court, and it is with reluctance we feel constrained to overrule the decision of the majority of the court then pronounced, for the reasons assigned in the dissenting opinion, which it is needless to repeat. We find that opinion sustained by the following authorities in addition to those cited in the opinion, viz: Pleading and Practice under the Code, §876, where it is said: "When the answer sets up a counter-claim, it

cannot be met by a counter-claim in reply." And to support the proposition the author refers to 2 Abb. Pr., 569; 10 Howard Pr., 148, and *Dawson* v. *Dillon*, 26 Mo., 395. The last is a parallel case. It was an action tried before a justice and carried by appeal to the "Law Commissioner's Court." The plaintiff sued for $38, and the defendant set off an account against the plaintiff for fifty dollars. On the trial in the appellate court, the plaintiff, in order to defeat the set-off of the defendant, offered to prove that the defendant owed him one hundred and six dollars for cattle, which he had purchased from the plaintiff, but the court excluded the evidence and rendered judgment in favor of defendant, for the excess of the set-off over the sum demanded in the petition. The plaintiff thereupon appealed to the supreme court, where it was held: "The plaintiff cannot reply to a set-off, a demand which he could have included in his petition, for if the plaintiff could reply to a set-off in this manner, the defendant could rejoin that the plaintiff owed him a debt not included in his set-off, to which the plaintiff could sur-rejoin, and such a practice would lead to intolerable confusion." The ruling of the court was proper for another reason; the defendant cannot assert a demand in a justice's court as a set-off which exceeds the jurisdiction of the justice, and conceding to the plaintiff the general right to reply as he proposed, the analogy of the statute at least would require that *the debt claimed in the replication should be within the jurisdiction of the court.* This decision it will be seen also supports the view we have presented in respect to the jurisdiction of the justice.

The judgment in this court at the June term, 1878, must be reversed, and a *venire de novo* awarded to the defendant, and this with a reservation to him of the right to make at the next term such motion as he may be advised, in reference to the fund collected from him under the final process issued upon said judgment.

Error. Reversed.

ANDREW SYME, Admr. v. N. B. BROUGHTON and others.

Practice—Devisavit vel non—Right to open and Conclude—Witness.

1. The trial of an issue of *devisavit vel non* is a proceeding *in rem* to which there are strictly no parties; and when upon the trial of such issue the caveators admitted the execution of the will according to the forms of law and that the testator was of age, leaving only the question of his sanity to be tried: *It was held*, that the caveators were not entitled to open and conclude the case.
2. The fact that an attorney has had an interest in the event of a suit on account of the tax-fee, does not disqualify him under C. C. P., § 343, from testifying as to a transaction or communication with a person deceased.

(*St. John's Lodge* v. *Callender*, 4 Ired, 335; *Mayo* v. *Jones*, 78 N. C., 402; *McRae* v. *Lawrence*, 75 N. C., 289, cited and approved.)

ISSUE of *devisavit vel non* tried at January Term, 1880, of WAKE Superior Court, before *Avery, J.*

On the trial the controversy was as to which of two paper writings, one dated the 17th of July and the other dated the 11th of July, 1876, was the last will and testament of W. G. Lougee, deceased.

By the paper writing of July 17th Carolina Broughton, one of decedent's next of kin, was made sole legatee, and by the paper writing of July the 11th W. R. Pepper, who was not related to Lougee, was made sole legatee.

At a former trial, the two cases had been by consent consolidated, and the court had (upon disagreement between counsel) framed and submitted the following issues to the jury: 1st. Was the paper writing of July 17th, 1876, the last will and testament of W. G. Lougee? 2nd. Was the paper writing of July 11th, 1876, the last will and testament of W. G. Lougee?

When the jurors were called for the purpose of forming

the panel for the trial of the issues, the caveators of the paper writing of July 17th, 1876, admitted the said paper writing was executed by W. G. Lougee according to the forms of law, and that W. G. Lougee was twenty-one years of age at the time of such execution. And the counsel for the caveators thereupon insisted that they were entitled to open with the evidence to the jury, but the court held that the propounders of the paper writing of July the 17th had the right to open, and the caveators excepted.

The jury found the paper writing of July 17th, 1876, to be the last will and testament of W. G. Lougee, and the court rendered judgment in favor of the propounders. There was a motion for a new trial, which was denied, and caveators appealed.

Messrs. G. V. Strong, Reade, Busbee & Busbee, Battle & Mordecai, and *G. H. Snow*, for plaintiff.

Messrs. Gilliam & Gatling and *D. G. Fowle*, for defendants.

ASHE, J. The only question of importance presented by the appeal for our consideration is, upon whom is the burden of proof, or in other words, who is to open and conclude? As a general rule the party who supports the affirmative of the issue has that right. Taylor, in his treatise on Evidence, says, "the best test to determine which party has the right to begin and conclude is to consider which party would be entitled to a verdict if no evidence were offered on either side, for the burden lies on the party against whom in such case the verdict ought to be given." Taylor on Evidence, § 338; 1 Greenleaf on Evidence, 87, Note 1. But there are exceptions to this rule, for instance, when the defendant admits at the trial the whole *prima facie* case of the plaintiff, he will be entitled to begin, provided he could not by his pleading have made this admission at an earlier period. Taylor on Evidence, 387. It was probably upon this authority that the caveators in this case, made the ad-

mission, that the paper writing offered for probate, was executed according to the forms of law, &c., with the view thereby of gaining the advantage of the opening and conclusion. While we admit the exception to the general rule, we do not think it has any application to this case. This differs from an ordinary issue in a civil action. The proceeding is *in rem*. There is strictly no parties. The inquiry is whether the deceased person died testate or intestate; and if the former, whether the paper propounded is his will or not. Both parties, the propounders and caveators, are actors for this purpose. The subscribing witnesses are the witnesses of the law, and when the will is once propounded, it is under the control and power of the court. The propounders have no right to withdraw it, or submit to a nonsuit; and on the other hand, the caveators have no such control or power in the premises, as to admit the execution of the will so as to dispense with the proof required by the statute, for the law is explicit that a written will with witnesses can only be proved by *the oath* of at least two subscribing witnesses. C. C. P., § 438.

It may be readily seen how easily the intentions of testators could be frustrated and the grossest injustice and fraud practiced, if the actors in an issue of *devisavit vel non* should be permitted to exercise unrestricted control over the issue; for instance, the propounders by collusion with the caveators might offer the will, prove its execution according to the forms of the law, and then defeat it by admitting the insanity of the testator, or that the will was made under improper influences; and on the other hand, a paper wanting in the requisites of a good will, having for example only one subscribing witness, might be established by the caveators simply admitting that it was executed according to the requirements of the statute.

The proof of the will must be under the control of the court, and it is the duty of the court to have a watchful care

over the trial of the issue, to see that the will is proved according to the requirements of the law, and it would be as great a dereliction of duty on the part of a court to permit a will to go to probate without an examination of the subscribing witnesses upon oath, as to allow a verdict of the jury to stand in favor of a will when it was attested by only one subscribing witness.

In the case of *St. John's Lodge* v. *Callendar*, 4 Ired. 335, Chief Justice RUFFIN says: "From the nature of an issue (*devisavit vel non*) he who alleges the affirmative opens the case, and for that reason the party propounding the will is commonly spoken of as the plaintiff. But it is inaccurate, for properly speaking there is neither plaintiff nor defendant; both sides are equally actors in obedience to the order directing the issue. In neither case is the party in the affirmative at liberty to withdraw and defeat a trial, more than the party in the negative." He further adds, that "the paper itself, the *res* is *sub judice*, and the judge gives his sentence for or against it without noticing particular persons."

It follows, if the will must be proved by the subscribing witnesses, that the burden is upon the propounder, and he would have the privilege of opening and concluding. And when the will has been *prima facie* established by the statute evidence, which, according to the case of *Mayo* v. *Jones*, 78 N. C., 402, does not extend to proof of the sanity of the testator, as that, it is said, is presumed, if the caveators should seek to defeat the will by proving the insanity of the deceased, the burden would be shifted to them, but that would not take from the propounder the right to open and conclude the argument. *McRae* v. *Lawrence*, 75 N. C., 289.

An exception was taken to the ruling of his Honor in admitting the testimony of Mr. Gatlin in behalf of the propounders. It was objected that he was incompetent to speak of any transaction or communication with the deceased,

because he had obtained a judgment for a tax fee. The ground of the objection is very vaguely stated, but we suppose, from the decisions in this court, that the witness had been employed as counsel for Pepper, the plaintiff's intestate, and he had an interest in a tax fee when this case was tried in 1878, but there was then an appeal to this court and a new trial granted, and the witness stated that his connection with the case had ceased before the trial. But independent of that, the tax fees had been abolished by the act of 1879, ch. 41, so that the witnesses at the time of the trial had no interest in the event of this suit, and no prior interest which had come to any party to the suit. He was therefore competent under section 343 C. C. P.

As to an exception taken to the admission of Broughton as a witness on the part of the propounders, we are unable to discover upon what ground his testimony was objected to. It is true he was one of the propounders of the will of 17th July, 1876, but he was a competent witness for all purposes except to speak of any transaction or communication with the deceased, and that he seems to have scrupulously avoided in his testimony. There is nothing in the exception, and there is no error in the proceedings of the court below.

There is no error. This will be certified.

No error. Affirmed.

W. L. HENRY v. THOMAS L. CLAYTON.

Motion to vacate judgment under § 133.

On motion to set aside a judgment under section 133 of the Code, it appeared that defendant's case among others was set for trial on

Wednesday of the third week of the term, of which his counsel had two weeks' notice by a calendar, printed and distributed among the attorneys and litigants, and also published in a newspaper in the town where defendant resided and the court was being held; on call of the case, his counsel stated that defendant had mistaken the day and was absent attending to other matters, and the trial was postponed until the afternoon to allow time for the defendant to be sent for; on the second call of the case, a trial was had, the defendant being still absent but represented by counsel, and judgment was rendered against him; *Held*, that his neglect was inexcusable.

(*Griel* v. *Vernon*, 65 N. C., 76; *Burke* v. *Stokely*, *Ib.*, 569; *McLean* v. *McLean*, 84 N. C., 366; *Bradford* v. *Coit*, 77 N. C., 72; *Sluder* v. *Rollins*, 76 N. C., 271; *Waddell* v. *Wood*, 64 N. C., 624, cited, distinguished and approved.)

MOTION by defendant to set aside a judgment heard at Fall Term, 1880, of BUNCOMBE Superior Court, before *Gilmer*, *J.*

The judgment was rendered against defendant at spring term, 1880, and he moves to set it aside under section 133 of the Code. The following are the facts found by His Honor:

1. That the action was begun before a justice on the 18th of July, 1878, and judgment rendered on the 8th of August, 1878, for $176.20, from which the defendant appealed to the superior court.

2. That at spring term, 1880, of the last named court, the cause stood for trial, and was set for trial on Wednesday of the third week of the term.

3. That a calendar of the causes was made out for said spring term, fixing a day for the causes, which was published in the town papers, and printed and distributed to the attorneys and litigants, and this cause was set for trial on Wednesday of the third week upon said calendar, two weeks before such Wednesday.

4. That the defendant had employed counsel who appears

of record in the cause, was present at spring term, 1880, and knew of the day on which the cause was set.

5. That the defendant resides in Asheville, where the court was held, and could have known the day on which his case was set for trial by enquiring of his counsel, the clerk, or by reference to the calendar, and he was sick for two weeks and confined to his house until two or three days before Wednesday of the third week.

6. That on Wednesday of the third week of the term the cause was called for trial, and upon representation of the defendant's counsel to the court, that the defendant was under the impression that the case was set for Thursday, and had gone to his mill, two miles from town, the court adjourned the case till the afternoon to allow time for the defendant to be sent for.

7. That in the afternoon after a sufficient lapse of time for the defendant to have been sent for, the cause was again called for trial, and a trial had, the defendant not being present, but represented by counsel, who urged a further postponement, which was denied by the court.

8. That on the next day, Thursday of the third week of the term, defendant moved for a new trial upon his affidavit, which was refused by the court.

9. That on Saturday thereafter, the defendant made another affidavit, and another motion made thereon for a new trial, or to set aside the verdict, which the court also refused, whereupon the defendant gave notice of appeal which was not perfected nor prosecuted beyond such notice.

It was adjudged that the defendant's motion be denied with costs to the plaintiff, and the defendant appealed.

Mr. C. A. Moore, for plaintiff.

Messrs. T. F. Davidson and *J. H. Merrimon*, for defendant.

ASHE, J. We concur with His Honor in his conclusion

that the defendant is guilty of inexcusable neglect. The facts in cases like this are so various, that it is difficult to lay down any general rule for guidance, but each case must depend upon its particular circumstances.

But though there may be some apparent conflict in the decisions, we think the distinction is well marked between those cases, where the negligence is to be imputed to the attorney and the party is not in default, and where the party himself is guilty of the negligence. So it was held in the case of *Griel* v. *Vernon*, 65 N. C., 76, that a judgment taken by default for want of a plea is a surprise upon a party under the Code of Civil Procedure, § 133, where he has employed an attorney to enter his pleas and such attorney has neglected to do so, and the neglect of the client to examine the records to see whether his pleas have been entered is an excusable neglect. This case is distinguished from that of *Burke* v. *Stokely*, 65 N. C., 569. There, an attorney was written to by the defendant, but it did not appear that he had ever received the letter. Neglect therefore could not be imputed to the attorney, but it was the duty of the defendant, either in person or otherwise, to ascertain whether the attorney had received his letter, and if he had not, to take further steps for his defence. But he did nothing of the kind. Relying upon the chances of the mail to carry his letter, he made no inquiry about his case until after judgment, and it was held not to be excusable neglect.

It is also distinguishable from the case of *McLean* v. *McLean*, 84 N. C., 366, where a summons was regularly served upon the defendant, and the counsel employed by him failed to enter his pleas, and the defendant made no inquiry as to the disposition of his case until nearly five years after rendition of the judgment; it was held that his laches were inexcusable.

Our case is rather governed by the decisions in *Bradford* v. *Coit*, 77 N. C., 72, and *Sluder* v. *Rollins*, 76 N. C., 271. In

the first, where a case was set for trial by consent on a certain day, and it appeared that a party had not determined to attend court until after the term began, and not then unless advised by counsel that it was absolutely necessary, and after correspondence with his counsel concerning the trial of the case, failed to reach court before the trial, and judgment was taken against him, it was held not to be excusable but gross neglect. In the latter case, which more resembles ours, the defendants were in the town in which a court was in session, at which a judgment was rendered against them, and they did not communicate the nature of their defence to their counsel or file an answer; it was held they were guilty of inexcusable neglect and not entitled to have the judgment vacated. To the same effect is *Waddell* v. *Wood*, 64 N. C., 624.

Here, the defendant resided in the town of Asheville where the court was being held, and his attorney was in attendance upon the court. If he had exercised the ordinary vigilance which is expected of every suitor in a court of justice, he could easily have ascertained the day when his case was set for trial. He could have done so by referring to the calendar, or by applying to his attorney, or to the clerk of the court, but instead of so doing he left the town and remained absent during the day. After calling his case for trial in the morning of the day on which it was set for trial, the court indulged his counsel until the afternoon that he might have an opportunity of sending for him. Whether he sent or not does not appear, but it was no part of the professional duty of his counsel to send into the country for him. The neglect was his, not that of his counsel. "He failed to give that amount of attention to his case which a man of ordinary prudence usually gives to his important business." *Sluder* v. *Rollins*, *supra*. This neglect is therefore inexcusable.

There is no error. The judgment must be affirmed.

No error. Affirmed.

P. R. DEPRIEST and wife v. J. L. PATTERSON, Ex'r.

Vacation of Judgment—Practice.

1. Upon a motion under C. C. P., § 133, to set aside a judgment taken by default, it appeared that the defendant was sick and unable to leave home when the summons was served and to attend court; that at the time the summons was served the defendant expressed a doubt to the officer as to whether he was the person meant, and the officer promised that if upon inquiry he found that the summons was not intended for defendant he would notify him; *Held*, the motion was properly denied.

2. It is against the practice to sever the facts of a demand in the complaint and enter judgment for one portion, and order a reference to ascertain the amount of the other portion for judgment as to that.

(*Waddell* v. *Wood*, 64 N. C., 624; *White* v. *Snow*, 71 N. C., 232; *Sluder* v. *Rollins*, 76 N. C., 271; *Bradford* v. *Coit*, 77 N. C., 72, cited and approved.)

MOTION by defendant to set aside a judgment heard at Fall Term, 1881, of IREDELL Superior Court, before *Seymour, J.*

The defendant applies to the court to be relieved from a judgment rendered for his failure to answer the plaintiff's complaint, of which motion he had given notice, and therein assigned as the reasons therefor that he did not have legal notice of the action, and furthermore was sick and unable to be from home during the months of November and December, 1879, early in the latter of which was held the term of court at which the judgment was rendered against him. Besides the illness which prevented his attendance at court, and supported by the testimony of two physicians unopposed, the defendant in his own affidavit states that when the summons was served on him by the deputy of the sheriff in November, not recognizing what demand the plaintiff could have upon him, he expressed his doubt whether he was the person meant, as there was one or more in the

county of the same name, and he understood the deputy to say that before the return of the summons he would ascertain and let him know if he was the intended party defendant, and hearing nothing further he supposed there had been a mistake in the matter.

The deputy declares in his affidavit that upon hearing the doubt expressed by the defendant, he promised if upon inquiry he found the summons was not intended for defendant, but for some other person, he would give him information of the fact, but not in any other event.

Upon hearing the motion, the court finds the facts to be as testified by the deputy who served the process, and adjudging the case not to be one of excusable negligence, denied the motion, and the defendant appealed.

Mr. D. M. Furches, for plaintiffs.
Messrs. Robbins & Long, for defendant.

SMITH, C. J. It will be noticed that while the judge accepts the version of the conversation between the defendant and the officer as given by the latter, and finds that no information was promised unless it should turn out there was a mistake as to the person against whom the process was intended to issue, he does not find whether the defendant did not labor under a misapprehension of the officer's assurance, and his failure to defend the action was a consequence of this misunderstanding. His Honor refused to set aside the judgment, at the same time declaring that, if the defendant's recollection of what transpired was correct, and the officer gave the alleged assurance, his ruling would be the same. Disregarding the hypothetical ruling suggested, we must assume the fact to be as found, that no such promise was made, and the defendant rested content upon his own misapprehension after the service of process upon him, and gave no further thought or attention to the case, neither

sending an agent, as he could not personally attend, to look after his interest in the suit, nor employing counsel to manage it and to ask for further time for the defendant to put in his answer, if his condition did not permit of its being prepared during the term. These omissions, connected with the facts accepted as truthful and contained in the affidavits offered in support of the motion, do not make out a case entitling the defendant to relief under the provisions of section 138 of the Code, because of his own culpable negligence. Concurring in the ruling of his Honor in this regard, we will only suggest that it was, in our opinion, irregular to enter any but an interlocutory judgment, as the granting of the relief asked involved the taking of an administered account, and to this end a reference was made. It is against the practice to sever the facts of a demand made in the complaint, and enter final judgment for one portion, and make a reference to ascertain the amount of the other, for a final judgment as to that portion.

But the notice does not contemplate the granting of relief upon this ground, nor is it embraced in the case accompanying the appeal, to the consideration of the exceptions apparent in which, we, as a reviewing court, are restricted. The cases are numerous and not in entire harmony upon the proper rendering of this statute, which enlarges the authority of the court over its own judgments, and permits, in specified cases, their reversal within a year after notice of their rendition at the discretion of the court. The cases mostly in point in their bearing upon that before us are, *Waddell* v. *Wood*, 64 N. C., 624; *White* v. *Snow*, 71 N. C., 232; *Sluder* v. *Rollins*, 76 N. C., 271; *Bradford* v. *Coit*, 77 N. C., 72.

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

No error. Affirmed.

W. A. LEMLY, Adm'r., v. COMMISSIONERS OF FORSYTH.

Taxation—Shares in National Banks.

1. It is not only competent but the duty of county commissioners to rescind an order improvidently granted to release one from the assessment of a legal tax upon property.

2. Remarks of SMITH, C. J., upon the right of the state to tax shares of stock in national banks, where there is no discrimination against such shares and in favor of other *moneyed* capital in the hands of individual citizens of the state.

(*London* v. *Wilmington*, 78 N. C., 109, cited and approved.)

APPLICATION for relief against assessment of taxes heard, on appeal, at Fall Term, 1881, of FORSYTH Superior Court, before *Seymour, J.*

The plaintiff's intestate, having given in for taxation 1316 shares held by him in The First National Bank of Salem, applied to the board of commissioners of Forsyth to be relieved from any assessments thereon, representing in a written communication that he listed the same, "not knowing at that time that the corporation would list" and that "the corporation or bank has since listed its effects and paid the tax thereon."

The commissioners acting upon this statement, on August 4, 1873, ordered that I. G. Lash be released from the payment of state and county taxes, for the year 1873, on 1316 shares of stock in The First National Bank of Salem, at $131,600, said I. G. Lash not knowing at the time of listing taxes that the corporation would list the property belonging to the bank. At an adjourned meeting held on August 15th, after due notice to the intestate, who appeared by counsel, the following order, preceded by certain recitals, was passed:

"It is therefore ordered by the court that the recent order

of this court, releasing the said I. G. Lash from tax on the said 1316 shares of stock be rescinded and the application made by the said I. G. Lash to be released from said tax is hereby dismissed."

From this decision of the board the intestate appealed to the superior court, where the cause remained for several terms (during which interval the intestate died, and the plaintiffs, his administrators, became parties in his stead) until spring term, 1876, when "the matters in controversy were referred to J. M. McCorkle."

The referee made his report at fall term, 1877, in which upon the accompanying evidence, his findings material to the solution of the questions presented in the appeal, are as follows:

Much of the real estate in Winston and some in Salem, (but none outside the corporate limits of these towns), is not assessed at its true value, and in some instances greatly below that value, and there is levied on the shares of stock in this national bank no greater rate of taxation "than upon other moneyed capital in the hands of individual citizens of the state." The referee holds that the unfair valuation put upon the town lots by the action of the appraisers and without warrant of law, is not an invasion of the act of congress allowing the states to tax shares in national banks formed thereunder, provided there is no adverse discrimination in favor of other moneyed capital; nor does this disregard of official duty nor the special exemptions contained in the charters of state banks, which have since ceased to exist for corporate purposes, impair or affect the validity of the tax upon the intestate's stock, or the liability of his estate therefor. The referee further finds that the commissioners possessed full power, and it was rightfully exercised, in annulling the order of exoneration adopted under false impressions produced by the intestate's own statements, that the property had been listed and the taxes thereon paid by the bank.

The plaintiffs filed exceptions to the report, which being overruled and the report confirmed, they appeal to this court.

Mr. J. M. Clement, for plaintiffs.
Messrs. Watson & Glenn, for defendants.

SMITH, C. J. In strictness the only point presented is the legal capacity of the commissioners to reverse and annul their own former erroneous action, not in reforming the tax list, but in the attempted exoneration of the intestate from a part of the taxes for which he is liable thereon, and thus to put out of the way an impediment and hindrance to their collection. It certainly requires neither reference nor argument to sustain so self-evident a proposition as the right (and we may add duty) of the board when the error is discovered, and more especially when committed by the intestate's own representation, to correct it and avert its consequences, and as little objection lies to the fair and deliberate manner in which the board retraces its steps. If the rescinding order is itself regular and proper, and we concur with the referee and his Honor in so holding, the issues into which the cause expanded on reaching the superior court, and which are considered and disposed of by the referee, are outside of, and foreign to the matter in controversy apparent upon the record. If the action of the board in withdrawing the attempted exoneration is upheld, the effect is simply to take away that defence, leaving to the plaintiffs full liberty to contest the legality of the tax, as before, when in process of enforcement by the collector. But as the parties choose to bring up and submit to adjudication the merits of the defence to the levying of the tax, we proceed to consider the case in this aspect.

The findings of the referee, affirmed by the court, are conclusive of the facts, and the clear and comprehensive pre-

sentation of the case and the points of law involved by the report relieve us of the necessity of any extended discussion in the premises.

We fully assent to the proposition, that the deviation from duty of the appraisers, in reducing the value of the town lots is not an infringement of the proviso in the act of congress (U. S. Rev. St., § 5219), which prohibits legislative discrimination against shares in national banks, and favoring any other kind of moneyed capital, and still less so when the alleged discrimination extends only to real estate, which cannot in any sense be considered as "*moneyed capital*" within the meaning and purpose of the statute. The law is settled by several adjudicated cases. *Cummings* v. *National Bank*, 101 U. S. 153; *Pelton* v. *National Bank*, *Ib.*, 143, and especially *National Bank* v. *Kimball*, 103 U. S., 732, where the previous decisions are reviewed. See Cooley Tax., 394. Nor do the exemptions, the result of special contract in the charter of the dissolved state banking corporations, interfere with the exercise of the taxing power by the states when the levies are equal and uniform, as far as they can be made so, and this is required in the state constitution as to all forms of property, while the act of congress only demands equality and uniformity in the taxes levied upon *moneyed capital.*

"But the fact," we cite from the work of Judge COOLEY, "that two banks by their charter, are specially taxed, will not preclude the taxation of the shares in the national banks by general law; neither are the shares to be excluded from taxation, because some other classes of moneyed capital are exempt from taxation by law of limited application." *Lionberger* v. *Rouse*, 9 Wall., 468; *Tappan* v. *Merch. Nat. Bank*, 19 Wall., 490; *Provident Ins. Co.* v. *Boston*, 101 Mass., 595.

The purpose of the present proceeding is not to secure a reduction of the valuation put upon the stock to that put upon other personal property, but to obtain a release from

the payment of any tax whatever, and as the referee decides, an injunction even to restrain the collection of an illegal excess of tax will not be granted unless the party pay or tender so much as is justly due. This is held in *Nat. Bank* v. *Kimball, supra,* and by this court in *London* v. *Wilmington,* 78 N. C., 109.

While to adjust the subject matter in controversy arising out of the report, and the action of the court upon the plaintiff's exceptions, we have given our opinion upon all questions deemed material, we repeat the only one directly adjudicated is the legality of the rescinding order.

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

No error. Affirmed.

HARPER WILLIAMS v. MARY C. WILLIAMS and another, Adm'x.

Docketing Dormant Judgments.

1. The docketing a dormant justice's judgment in the superior court does not have the effect of reviving it, but merely brings it within the operation of the rule applicable to original judgments in that court. Before removal a new action is necessary to revive it.
2. *Quære* as to whether the transfer to the superior court should not be made before the dormancy of the judgment.

(*Oxley* v. *Mizle,* 3 Murp., 250; *Murphrey* v. *Wood,* 2 Jones, 63; *Broyles* v. *Young,* 81 N. C., 315; *Dawson* v. *Shepherd,* 4 Dev., 497; *State* v. *Morgon,* 7 Ired., 387; *Weaver* v. *Cryer,* 1 Dev., 337, cited and approved.)

MOTION to vacate a judgment and set aside an execution heard at Spring Term, 1880, of DUPLIN Superior Court, before *Avery, J.*

The defendant appealed from the ruling of the court below.

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

SMITH, C. J. The plaintiff recovered judgment against the defendants before a justice of the peace on June 14th, 1873, for the sum of $104.57, and costs.

No execution issued thereon and in June or early in July, 1878, he brought his action on said judgment but failed to prosecute the same and submitted to a nonsuit.

Thereafter, on the 16th day of the month last mentioned, he obtained a transcript of the judgment from the justice and caused the same to be filed and docketed in the office of the superior court clerk of the county. On the same day he sued out execution returnable to fall term of the court, under which certain land of the defendant, Mary C. Williams, was levied on and sold, himself becoming the purchaser for the sum of ten dollars. On November 8th previous to the sale, the defendant served notice on the plaintiff of an intended motion to be made at the ensuing term to strike the transferred judgment from the record, and to set aside the execution under which the sheriff was then proceeding. The motion was accordingly made, and the appeal from the refusal to allow it brings up for consideration the merits of the defendant's application.

While a judgment rendered by a justice on its removal to the superior court becomes the judgment of that court, as if originally entered there, admitting of like remedies for its enforcement and subject to the same conditions, and may be revived when dormant as provided in C. C. P., §§ 255, 256, yet when not so removed, its vitality is lost after the lapse of a year from its rendition, and final process cannot then be sued out without further action on the part of the

plaintiff. Bat. Rev., ch. 63, § 20, Rule 14. As the purpose of the removal allowed by the statute is to afford the creditor "the more efficient and far-reaching executions and process of the superior court" as well as the advantage of the immediate lien on the debtor's land, as declared in the opinion in *Broyles* v. *Young*, 81 N. C., 315, it may admit of question whether if such results are to follow, the transfer should not be made before the dormancy supervenes, so that as the judgment could be enforced by process from the justice before and at the time of transfer, it was in a condition to be enforced at once upon the docketing by the appropriate remedies afforded in the court to which it is removed. But however this may be, and we intend to express no opinion on the point, the removal of the judgment rendered by the justice to the superior court and the docketing of it there, cannot have the effect of restoring its lost life and activity to a judgment which by lapse of time had become incapable of being enforced by process emanating from the tribunal in which it was rendered.

If dormant when removed, it remains dormant still, with the difference that while before, a new action would be necessary and a new judgment rendered upon the first, it becomes when docketed in the superior court essentially a judgment of that court, and falls under the provisions of the law applicable to original judgments in that court, alive for three years for the purposes of process, and after a delayed action for that period without execution, renewed in the same manner.

In the present case five years had passed since the rendition of the judgment by the justice before its removal, and had it been at once removed it would have become dormant even in the superior court; certainly the plaintiff's delay ought not to defeat the limitations prescribed for the issuing of final process in both tribunals.

But if a judgment which has become dormant can be

legally transmitted and docketed, it is still a dormant judgment authorizing execution only when on notice, motion and proof, allowed by the court as provided in C. C. P. § 256. It therefore issued irregularly and may be set aside at the instance of the debtor, *Oxley* v. *Mizle*, 3 Murp. 250; *Dawson* v. *Shepherd*, 4 Dev. 497; *State* v. *Morgan*, 7 Ired. 387, unless property sold under it has been bought by a stranger, when it will not be disturbed. *Murphy* v. *Wood*, 2 Jones 63.

When the plaintiff who sues out the process is himself the purchaser, no new rights having intervened, and the order withdrawing the execution and annulling the attempted sale under it, can be made to adjust the matter and restore the parties to their antecedent relations, the relief will not be refused. Indeed it has been declared that when a plaintiff sues out execution upon a dormant judgment and purchases property of the defendant under it, he acquires no title thereto. *Weaver* v. *Cryer*, 1 Dev. 337. In this case Chief Justice TAYLOR thus states the rule of law: "But with respect to the plaintiff in the judgment, as he sued out the execution irregularly, he cannot derive title under the sale so affected, though the exception could not be taken to it, if a stranger had become the purchaser."

In a separate opinion HENDERSON, J, also says that "as to the plaintiff in the judgment, the execution is no protection to him. He acted as a wrong doer in suing it out and is liable for the acts of the officer who acted under it, the maxim being *qui facit per alium facit per se.*

Whether the opinion of the chief justice is in harmony with the current of later decisions, which hold that process issuing upon a dormant judgment is voidable merely, and confers authority upon the officer to sell, unless set aside at the instance of the defendant, the defendant's motion made in apt time ought to have been granted and the abused process of the court recalled, so as to afford no protection, real or apparent, to the proceeding to obtain the defendant's land,

prosecuted as it was with full knowledge of the defendant's purpose to apply to the court to have it set aside.

There is error and this will be certified to the end that the execution be withdrawn and other proceedings had according to law.

Error. Reversed.

W. S. NORMENT and others v. CITY OF CHARLOTTE.

Elections—Decision of Canvassing Board of City.

Where city authorities are authorized to order an election to ascertain the sense of the qualified voters upon a question, the registry of voters is only *prima facie* evidence of the number of votes cast and the board of aldermen may hear other evidence, and their finding, sustained by the court below, that a majority of all the qualified voters of the city have given their approval of the measure, is conclusive.

(*Reiger* v. *Com'rs*, 70 N. C., 319; *R. R. Co.* v. *Caldwell*, 72 N. C., 486; *Simpson* v. *Com'rs*, 84 N. C., 136, cited and approved)

MOTION by plaintiffs for injunction to restrain collection of certain tax, heard at Chambers in Charlotte on the first day of November, 1880, before *Seymour, J.*

By the act of March 22d, 1875, the board of aldermen of Charlotte were authorized, upon the application of ten voters resident in each of the wards into which the city is divided, to order an election and ascertain the sense of the qualified voters therein upon the submitted proposition to establish and maintain by taxation a system of graded schools. An election was accordingly held under the directions of the act, on the first Monday in June, 1880, whereat were cast eight hundred and sixteen votes, all with a single

exception in favor of the measure. There was no new or revised registration made in contemplation of the election, and the books contain the names of one thousand, six hundred and seventy nine voters, of which those voting are not a numerical majority; and before declaring the result, upon a suggestion that the lists were inaccurate and did not truly represent the number of resident voters at the time of the election, the board appointed a committee of their number to examine and revise the lists and make report thereof. The committee performed this duty and reported a correction by the erasure of one hundred and thirty-three names from the registry, and a majority of all the qualified voters of the city to have voted in favor of a graded school. The report was received and adopted, and the result of the vote declared. Thereupon a tax of one-tenth of one per cent. on the value of property, and thirty cents on the poll, was levied, and the tax list placed in the hands of the city marshal for collection pursuant to the requirements of the law. The present suit, instituted by the plaintiff on behalf of himself and other tax-payers, seeks to restrain the collection of the tax thus imposed, on the ground that a majority of the legal voters, as conclusively determined by the registrar's books, and not open to disproof, have not sustained the proposition submitted to them, and that consequently the tax is unauthorized and illegal. Upon the hearing of the application for a temporary restraining order, affidavits were offered by the defendants showing errors in the registry, and reducing the number of voters as therein contained, from deaths, removals, and other causes, to an extent that leaves the votes cast for the school in excess of a majority of the whole, and His Honor finds therefrom as a fact that a majority of the entire number of qualified voters in the city had voted in favor of the school. The restraining order was refused and the plaintiffs appeal.

Messrs. Wilson & Son, for plaintiffs.
Messrs. Burwell & Walker, for defendant.

SMITH, C. J., after stating the facts. The appeal presents one, and upon its contingent solution a second question for determination.

1. Is a majority of all the voters necessary under the act, or is a majority of those voting sufficient?

2. If a majority of all the qualified voters is required, is the registry conclusive of the number, or may parol proof be heard in revision and correction?

The answer to the first enquiry has not been consistent in the adjudications in this state, nor in those made elsewhere, as to the interpretation to be put upon language, similar to that used in our statute, requiring the sanction of the electors to be first given to a proposed measure of legislation. In *Reiger* v. *Commissioners of Beaufort*, 70 N. C., 319, in construing an enactment declaring that "it shall be lawful for the commissioners of the town of Beaufort to subscribe by their agent for such an amount of stock," in the Beaufort Steam Ferry Boat Company previously incorporated, "as they shall be authorized to subscribe by a majority of the voters of said town qualified to vote for commissioners, whose sense of subscribing a particular amount shall be previously ascertained by opening a poll for that purpose," &c., PEARSON, C. J., speaking for the court, says: "We incline to the opinion that the construction contended for, to-wit, there must be a majority of all the voters of said town, qualified to vote for commissioners, is too narrow, for the act goes on to provide 'whose sense of subscribing a proposed amount shall be previously ascertained by opening a poll for that purpose after advertisement,' &c. The meaning of which is *that all of the voters of the town, who do not choose to attend at the poll are to be taken as assenting* to the result of the election according to the votes actually polled."

In the subsequent case of *Railroad Co.* v. *Caldwell*, 72 N. C., 486, the constitutional restriction imposed upon municipal corporations in contracting a debt or levying a tax, except for necessary expenses, "*unless by a vote of a majority of the qualified voters therein*," was held to require the concurrence of a majority of all the qualified voters, whether voting or not, to the validity of the county subscription to the stock of the plaintiff company; and a distinction is drawn between this and the case referred to. Const. Art. VII, § 7.

At a cotemporary session of the supreme court of the United States, a similar conclusion was reached and announced by that court in *Harshman* v. *Bates County*, 92 U. S. Rep., 569.

The constitution of Missouri prohibits the general assembly from conferring authority upon "any county, city or town to become a stockholder in or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." Const., Art. XI, § 14. The general assembly passed an act by which on application of twenty-five tax payers of a township, the county court might order an election to determine whether any and what subscription should be made to a railroad to be constructed in or near the township, and providing that "if two-thirds of the qualified voters of the township, voting at such election are in favor of the subscription," it should be made with authority to issue bonds in payment therefor. These facts appearing in the complaint, on demurrer thereto, it was declared that the statute deviating in terms from the constitution was inoperative and that a majority of those voting, when less than a majority of the whole number of voters in the township, was insufficient to warrant the subscription and loan.

The consistency of the same constitutional and statutory provisions came again before the court in *County of Cass* v.

Johnston, 95 U. S. Rep., 360, when the former decision was overruled, and it was held that the legislative enactment was in harmony with the true and proper rendering of the constitution. The subject is reviewed with great care, and the authorities fully examined by the Chief Justice, who adopts the opinion in *Reiger's case*, and thus declares the rule, in the absence of any statutory regulation to the contrary: "All qualified voters who absent themselves from an election duly called, are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted unless the legislative will to that effect is clearly expressed." Two of the justices dissented, adhering to the decision in the former case as a correct exposition of the state constitution.

In this unsettled state of judicial opinion upon the effect to be given to this and similar language when used in a law, we are not required to depart from the interpretation put upon the section of our constitution, inasmuch as it is affirmatively found that the proposition for a graded school to be maintained at public expense did receive a majority of all the voters resident in the city.

While the registry of voters is *prima facie* evidence of their number at any given time, "so that," as RODMAN, J., says in the case cited, "practically the number of qualified voters and of voters so registered is the same," "yet," he adds, "the terms, qualified voters and registered voters, are not exactly co-extensive. The former is the most extensive." The dissenting opinion of Justices BRADLEY and MILLER recognizes the admissibility of other modes of showing the number of legal voters in a district, as well as by the production of the books of registration, and declares that "the objection that some persons not entitled to vote may be registered has no force," and adds, "if any one choose to raise

that issue, it might be open to him to do so, but the registry would certainly furnish *prima facie* evidence of the number of legal or qualified voters." If the fact be established upon full proofs that the contemplated school had the support of the greater number "of the qualified voters of the city," and those who are authorized and directed to determine the result of the election have so officially declared, it seems to us plain there has been a full compliance with the provisions of the act upon any construction of its meaning, and the raising the means by taxation to sustain the schools became an imperative duty.

We have refrained from expressing an opinion upon the legal effect of the decision of the commissioners upon whom is devolved the duty of passing upon the returned vote and its sufficiency in numbers to give force to the act, and only suggest the serious inconveniences that may flow from a concession to the tax-payer of the unqualified right to call in question the ruling of those who are charged by law with the duty of collecting and ascertaining the popular will, upon which the efficiency of the act depends, and to arrest the proceedings for the enforcement of an imposed tax to give it effect.

It is of the highest importance that the under-lying condition should be definitely and conclusively settled, and not remain open to contest by any dissatisfied person who may be required to contribute his share to the public burden. The rule is very forcibly and clearly laid down in the opinion of Mr. Justice STRONG in the case of *Black* v. *Commissioners*, 99 U. S. Rep., 686, where the declared vote was sought to be invalidated by returns subsequently sent in from an omitted district, which if counted would reverse the result, in these terms: "For all legal purposes the result of an election is what it is declared to be by the authorized board of canvassers, empowered to make the canvass at the time when the returns should be made, until their decision

has been reversed by a superior power, and a reversal has no effect upon acts lawfully done prior to it."

And so this court, in construing a statute which required the commissioners to examine and declare the result of an election directed to be held, said, "their decision upon the returns of an election regularly and properly held, is final and conclusive of the question." *Simpson* v. *Commissioners*, 84 N. C., 158.

But it is unnecessary to consider and determine the point since in our opinion the finding of the court following the action of the commissioners, conclusively settles the preliminary fact that a majority of all the qualified voters of Charlotte have given their approval to the graded school.

There is no error and the judgment is affirmed. This will be certified to the court below.

No error. Affirmed.

T. H. HANCOCK, Adm'r, v. JAMES E. BRAMLETT.

Appeal Bond—Vendor and Vendee—Specific Performance.

1. Where the case states that a "bond fixed at $— is filed and approved" by the judge, the acquiescence of the appellee in its sufficiency will be assumed, and consequently a waiver of his right to make the objection in this court. (Construction of the act in reference to sureties to an appeal. C. C. P., § 303.)
2. Where in a contract for purchase of land, it is impossible for a vendor to comply strictly with his bond to make title, and the vendee waives his right to annul he must submit to the partial execution of its provisions so far as they can be carried into effect, and be content with a proper reparation in money for such as can not be performed.

CIVIL ACTION tried at Fall Term, 1881, of CLAY Superior Court, before *McKoy, J.*

The defendant appealed from the judgment of the court below.

Mr. J. H. Merrimon for plaintiff.
Messrs. Gray & Stamps and *G. A. Shuford*, for defendant.

SMITH, C. J. The plaintiff moves to dismiss the appeal for non-compliance with the directions of section 310 of the Code, in that the written undertaking required to secure the costs of the appellee by section 303 is not accompanied with the affidavit of the surety that he is worth double the amount specified therein. We do not assent to a suggested construction of this enactment which confines its force to the intervening sections 304 to 307, inclusive, by reason of its reference to the *sureties* in the plural, as mentioned in each of them, while a single surety is sufficient on appeal under section 303. But these provisions must be interpreted in their mutual relations as they existed when the Code was adopted, and then "*at least two sureties*" were necessary in the first as in the succeeding sections prescribing the conditions of appeal, so that no distinction based upon the use of the word "sureties" was admissible. The amendment made by the act of 1871–72, ch. 31, cannot change the construction which applies the clause to all the appeals before mentioned. This interpretation is supported by the direct reference and limitation of sections 308 and 309 to such appeals as are perfected under sections 304, 305, 306 and 307, while no such restriction is found in section 303, which declares that "an undertaking upon an appeal shall be of no effect unless," &c., language comprehending every form of appeal.

But we deny the motion for a different reason. The case sent up, signed by the presiding judge, states that the "bond fixed at $25" is "filed and approved;" that is, as we under-

stand, the undertaking in its present form and under seal is tendered, and there being no objection, accepted in open court. The acquiescence of the appellee in its sufficiency must therefore be assumed, and consequently a waiver of his right to make the objection in this court. The undertaking is for the security of the appellee, and if he had objection to the ability of the surety to make good the penal sum mentioned in the undertaking, and it was tendered and received by the judge in his presence, he should then have made his objection known, and not wait until the record is transmitted and the cause entered in this court. Such omission must be deemed a waiver on his part, and the motion to dismiss cannot be entertained now.

We proceed then to consider the case upon its merits.

The plaintiff's intestate in June, 1877, for the consideration of eight hundred dollars, executed a bond, signed also by his wife, wherein he covenants with the defendant on payment of the purchase money, to make a good and lawful title in fee to the tract of land therein mentioned and of defined boundaries. The defendant has paid one moiety of the debt, and for the residue given his bond to the intestate, payable on November 1st, 1878, and bearing interest after the same day of the year preceding. The action is to recover the money due on this bond, and is resisted on the ground that a lot (parcel of the premises) has been conveyed to one George W. Sanderson, and one Cheek holds a lease encumbering another portion, to neither of which could the intestate in his life time, nor his administrator, the plaintiff, now, make the title and convey the estate embraced in the contract. The defendant does not in his amended and modifying answer demand a rescission of the agreement, but insists on a specific performance, and demands compensatory damages for the loss of the lot and the impaired value produced by the superimposed lease; and he further contends that no good and sufficient deed, such

as is contemplated in the covenant, has been tendered or can be made, without which no recovery can be had of the unpaid purchase money.

Upon issues prepared and submitted to the jury, they assess the damages sustained by the defendant, upon a specific execution by reason of the vendor's inability to make title to the lot, at $20, and the encumbrance at $65.

The defendant asked that this further issue be submitted: "Did the plaintiff's intestate or the plaintiff tender a good and sufficient deed of conveyance to the defendant before bringing his suit?" This was refused for the reason that the proofs pertinent to it could be offered under the third issue, to-wit: "Has the plaintiff's intestate complied with the condition of the bond for title?" and for the further reason that an averment of such tender made in the complaint is met with the evasive denial in the answer, "that no good and sufficient deed of conveyance has been tendered to defendant and defendant is advised and believes that the plaintiff cannot make a good and sufficient deed of conveyance to the lands mentioned in the plaintiff's complaint and *contracted to the defendant*," thus not putting in issue the validity of the title to the residue of the tract, while remuneration is provided for the part to which the vendor had none, or an imperfect title. The defendant offered no evidence on the point, nor is any inquiry suggested or asked to be made under a reference, or by a jury, as to the sufficiency of the title of the intestate, which the plaintiff can convey under the enabling statute, to the entire tract outside of the parts mentioned.

We must assume then that while the defendant does not repudiate the agreement, and demands remuneration for the imperfect manner in which it can be performed, he opposes the demand for payment of the remaining purchase money, reduced by the estimated value of this very injury, upon the ground that he will not acquire a full estate in all

the land comprehended in the covenant. This cannot be allowed. When the defendant waives his right to annul, he must submit to the partial execution of its provisions so far as they can be carried into effect, and be content, with a proper reparation in money for such as cannot be performed. The judgment makes adequate provision for the protection of the defendant, in requiring the deposit of proper title deeds with the clerk before any process shall issue to enforce the judgment.

Should a sale become necessary, it should be reported for confirmation of the court, and meanwhile the cause be retained.

There is no error and this will be certified for such further proceedings as may become necessary in the court below.

No error. Affirmed.

ALBERT S. BRYSON v. HERMAN S. LUCAS.

Appeal—Bond for Costs.

Where a bond for costs of an appeal was not justified by the surety, but simply endorsed by the clerk—"the within bond is good;" *Held* not to be in compliance with the law for perfecting appeals.

MOTION by defendant for a restraining order and to vacate a judgment (rendered in MACON Superior Court) heard at Chambers on the 21st of September, 1881, before *McKoy, J.*

His Honor granted a temporary restraining order but refused to vacate the judgment and the defendant appealed to this court. There was a motion here on the part of counsel for the appellee to dismiss the appeal, upon the ground the

bond given to secure the costs in this court was not justified by the surety.

Messrs. Gray & Stamps, for plaintiff.
Mr. J. H. Merrimon, for defendant.

ASHE, J. It is expressly declared in section 303 C. C. P. that, "an undertaking upon an appeal shall be of no effect, unless it be accompanied by the affidavit of the sureties that they are each worth double the amount specified therein." "To render an appeal effectual for any purpose a written undertaking must be executed on the part of the appellant with good and sufficient surety," &c., and by section 310 C. C. P. it is declared that "an undertaking upon an appeal shall be of no effect unless it be accompanied by the affidavit of the sureties that they are each worth double the amount specified therein.

This section has been interpreted at this term of the court in *Hancock* v. *Bramlett* to bear the same construction it did before the section 303 was amended by the act of 1871–'2 ch. 31 § 1, which provided that one surety was sufficient on an appeal bond for costs.

In this case the bond was not justified by the affidavit of the surety, but bore the endorsement of the clerk, to wit: "The within bond is good." This we hold is not a compliance with the law for perfecting appeals, and is distinguished from the case of *Hancock* v. *Bramlett supra.*, for in that case the presiding judge in the case on appeal states that the bond fixed at $25 is "filed and approved," and it was presumed that the bond was taken in open court under the supervision of the judge. But this bond is approved by the clerk, it may be privately, when the appellee had no notice of its being filed or any opportunity to object to its sufficiency.

The motion to dismiss must be sustained.

PER CURIAM. Appeal dismissed.

JOHN TURPIN v. JAMES KELLY and wife.

Partition—Dividend, charge upon lot—Judgment—Execution.

In partition, where one lot is charged with the payment of a sum of money, there is no law, (except the act in reference to minors, Bat. Rev. ch. 84 § 9) suspending the payment until the lot falls into possession; and a decree confirming the report of commissioners in the proceeding is such a judgment as will warrant the court in issuing a *vend. ex.* against the lot charged.

(*Stewart* v. *Mizell*, 8 Ired. Eq. 242; *Mills* v. *Witherington*, 2 Dev. & Bat. 433, cited and approved.)

MOTION to issue execution heard on appeal at Chambers in Waynesville, Haywood county, on the 30th of July, 1881, before *Gudger, J.*

This was an application to the clerk of the superior court for Haywood county to issue a *venditioni exponas* to sell a lot of land which had been charged in a partition of lands in favor of a lot of less value for equality of partition. The clerk ordered the process to issue and the defendants appealed to the judge of the district, who heard the same by consent of counsel at chambers on the 30th day of July, 1881.

The facts are such as were agreed upon on the trial before His Honor or found by the clerk from the record on file in his office and the agreement of the parties.

They are as follows: A partition of the lands of the late Thomas S. Edwards were made by certain commissioners appointed by said clerk, among the heirs at law of said Edwards on the 8th day of January, 1875, and their report was confirmed by the clerk on the 25th day of October, 1875, and on the 2nd day of November, 1875, approved by the Hon. R. H. Cannon, judge of the then 12th judicial district. Lot No. 7 of said partition was assigned to H. J. Edwards, now the wife of the defendant James Kelly, and lot No. 8 was assigned to A. C. Edwards, the wife of one Shepherd. The

dower assigned to the widow of the said T. S. Edwards covered both of these lots, and lot No. 7 was charged with six hundred dollars in favor of lot No 8 to make them equal in value. Three hundred and forty-eight $\frac{00}{100}$ dollars of the said six hundred has been paid to the said A. C. Edwards. The plaintiffs are the assignees for value of the balance of the charge on lot No. 7, and said balance was $429.58 and due to John Turpin and G. S. Ferguson, plaintiffs, of which some $415.13 is principal and bears interest from the 25th day of February, 1881.

It is further agreed that Mrs. H. J. Kelly was a minor under the age of twenty-one years and unmarried at the time of the partition, and was represented in the proceedings for partition by a guardian regularly appointed, and that she came of the age of twenty-one years on the 5th day of May, 1877, and that while she was a minor she intermarried with the said James Kelly, and that the widow whose dower covers both lots, Nos. 7 and 8, is still living.

Upon this state of facts his Honor adjudged that the judgment and order of the clerk be in all things confirmed, and that John Turpin and G. S. Ferguson have a writ of *venditioni exponas* directed to the sheriff of Haywood county according to the tenor of their application. From this ruling the defendants appealed.

Messrs. Gray & Stamps, for plaintiffs.
Mr. Fred. C. Fisher, for defendants.

ASHE, J. The defendants insist that they are not bound to pay the charge until the land on which the charge was made comes into possession, and that they are not chargeable with interest until the said land comes into possession. And they further insist that the order of his Honor was erroneous, in that he ordered a *venditioni exponas* to issue when there was only a general decree of confirmation, which they contend is not a judgment.

We are not aware of any statute or principle of law which suspends the payment of a sum charged upon one lot in a partition in favor of another, until the lot upon which the charge is made falls into possession. That difficulty might possibly have been avoided when the petition for partition came to a hearing, by objecting to the partition of the land in reversion; but after the partition had been made and the report of the commissioners confirmed, it was conclusive upon the parties in respect to the thing in which they had, or admitted, or it was declared, they had an estate in common, and also in respect to the share to which each was entitled and to the parcel allotted to each as his share in severalty. *Stewart* v. *Mizell*, 8 Ired. Eq., 242, and *Mills* v. *Witherington*, 2 Dev. & Bat., 433.

The only suspension of the payment of the sum charged upon a lot for equality of partition is provided for in Bat. Rev., ch. 84, §9, which says: "When a minor to whom a more valuable dividend shall fall, is charged with the payment of any sum, the money shall not be payable until such minor arrives at the age of twenty-one years." The feme defendant in this case attained her majority on the 5th of May, 1877, and the sum charged on her share then became payable, but by the 8th section of that chapter, bore interest from the date of the confirmation of the report of the commissioners.

As to the last exception taken by the defendants, that the decree rendered by the clerk in the petition for partition, confirming the report of the commissioners, was not such a judgment as would warrant the court in issuing a *venditioni exponas*, we think it is untenable. The clerk did not profess to set forth a transcript of the record of the proceedings for partition, but in finding the facts states that it appeared from the records on file in his office and by the agreement of the parties, that the report of the commissioners had been confirmed by the clerk on the 25th of October, 1875, and by

Judge Cannon on the 2nd day of November, 1875. From this statement we must take it that the report was confirmed by a proper decree, under the maxim "*Omnia presumuntur rite acta esse.*"

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

No error. Affirmed.

JAMES M. WILLIAMS v. ROBERT TEACHEY.

Assignment of Mortgage, what it conveys.

An assignment of a mortgage in terms which do not profess to act upon the land, does not pass the mortgagee's estate in the land, but only the security it affords to the holder of the debt.

(*Hyman* v. *Devereux*, 63 N. C., 624; *Hemphill* v. *Ross*, 66 N. C., 477; *Ellis* v. *Hussey*, *Ib.*, 501; *Isler* v. *Koonce*, 81 N. C., 378; *Bruce* v. *Strickland*, *Ib.*, 267, cited and approved.)

CIVIL ACTION, to recover land, tried at August Special Term, 1880, of DUPLIN Superior Court, before *Schenck, J.*

The plaintiff appealed from the judgment of the court below.

Mr. D. J. Devane, for plaintiff.
Messrs. Allen & Isler, for defendant.

SMITH, C. J. The land for the recovery of which the action is prosecuted was conveyed on April 4th, 1873, by the defendant's deed to one Harper Williams in trust to secure the debt therein recited, and alleged in the complaint to embody a large usurious interest, with a power of sale in

default of payment. The mortgagee subsequently executed two assignments, the first being endorsed upon the deed as follows:

[1.] For value received, I transfer the within mortgage to A. F. Williams, his heirs and assigns, this January 1st, 1876. (Signed and sealed by Harper Williams, and witnessed by J. D. Stanford.)

[2.] For value received, I sell and transfer to Albert F. Williams, all my right, title and interest in and to the following mortgages executed by the parties mentioned, namely, one mortgage executed by Robert Teachey for one thousand acres of land lying on Island Creek and Rockfish Creek, near Teachey's Depot; also one mortgage executed by Thos. K. Murphy for one tract of land containing one hundred and ninety-nine acres, one tract containing fifty-one and one half acres, one tract containing sixty acres; also all my interest in three mortgages executed by Grady Outlaw for several tracts of land described in said mortgages. As witness my hand and seal this June 14th, 1876. (Signed and sealed by Harper Williams, and witnessed by J. D. Stanford.)

Both of these instruments were proved and registered, the latter on the day after the execution, and the first on August 6th, 1880, after the institution of the suit.

The assignee, A. F. Williams, being also the holder of the secured note and claiming the mortgagee's estate in the land, proceeded under the provisions of the deed to advertise and make sale of the land, and on October 9th, 1878, executed a deed therefor to the plaintiff.

Under a title thus derived, he asserts his right to recover, and the question is presented as to the legal effect and operation of the assignments in divesting the estate of the mortgagee and transmitting it to his assignee. His Honor ruled that they were ineffectual as conveyances, because there is not "a thing granted," whatever equities may arise out of their execution.

We concur that they do not pass the legal estate of the mortgagee. The assignments do not in terms profess to act upon the land, the subject matter of the mortgage deed, nor upon any estate or interest which the assignor may have therein, but upon the *mortgage* itself in the one, and upon the assignor's "*right, title and interest*" *in the mortgage* in the other, words of equivalent import. It is the mortgage deed, the written instrument of conveyance, and the security it affords to the holder of the debt that is undertaken to be transferred, not the land, nor any estate in it vested in the mortgagee.

It then leaves his estate undisturbed, held in trust for the benefit of the creditor to whom the note belongs, with his equities to have the land sold and the proceeds applied to its payment. The grant is not synonymous with the thing granted. The one is the legal agency whereby property is transferred and a change of ownership produced; the other is that property thus transferred. It is just as necessary to the operation of a conveyance that its subject matter should be specified, as the names of the parties between whom it operates. The assignment of a note secured by mortgage carries with it the mortgage security, the mortgagee being then a trustee for the owner of the note, the trusts of which may be enforced, and we are not prepared to say that an assignment of the mortgage deed is more than an expression in terms of what is implied in law from the act of assigning the debt secured. *Hyman* v. *Devereux*, 63 N. C., 624; 1 Jones on Mortg., §805.

We are aware that in many of the states the strict legal relations of the parties resulting from the making of a mortgage have been changed, "for the most part by statute," remarks a recent author, "so that a mortgage is regarded as a mere pledge, and the rights and remedies under it are wholly equitable, so that a second system has grown out of the first." 1 Jones on Mortg., §17.

It is held that the mortgage though conveying land passes but a chattel interest, incidental to, and partaking of, the nature of the debt intended to be protected, and hence upon the death of the mortgagee may be assigned by his personal representative. *Ibid.*, 796.

Such is not the law in this state, and the distinction is maintained between the legal estate in the mortgagee and the equitable estate in the mortgagor created by the execution of the mortgage deed, while the latter is subject to dower and to sale under execution. *Hemphill* v. *Ross*, 66 N. C. 477; *Ellis* v. *Hussey*, *Ib.*, 501; *Isler* v. *Koonce*, 81 N. C., 378.

Our construction of the assignments as intended to pass whatever equitable rights were necessary to the full enjoyment of the security provided for the note and none other, is confirmed by the absence of words of inheritance in the last, thus cutting down the estate if applied to it, to an estate for life instead of an absolute estate. The issues involving the *bona fides* of the assignments, and of the sale and conveyance to the plaintiff, and their effect upon the defendants' right to redeem, thus become immaterial as well as alleged errors committed on their trial, and may be put out of view.

Upon the findings of the jury, if their verdict is not vitiated by error (and the exception of the plaintiff to any rulings we do not propose to consider) the defendant would be entitled, were all necessary parties before the court, to a judgment allowing him to redeem and directing a sale after a reasonable time upon his failure to do so, as he asks in his answer. But in order thereto, Harper Williams should be made a party, and as the defendant does not object to the judgment putting an end to the action, nothing remains for us but to affirm it. We do not express any opinion upon the defendant's claim to the homestead, referring only to what is said in *Bruce* v. *Strickland*, 81 N. C., 267, since if

valid it may be hereafter asserted. The plaintiff having no title cannot disposses the defendant.

No error. Affirmed.

P. M. MULL and others v. GEORGE MARTIN and others.

Witness—Interest—Communication with deceased Person.

1. An interest in the thing in controversy does not disable a witness to testify as to a communication with one deceased; the disqualifying interest is an interest in the event of the action.
2. The rule as to interest is, that if the verdict in the case cannot be given in evidence in another suit to which the witness may be a party, he shall be deemed disinterested.

(*Harrison* v. *Harrison*, 2 Hay., 355, cited and approved.)

CIVIL ACTION to recover land tried at Spring Term, 1881, of BURKE Superior Court, before *McKoy, J.*

The following issues were submitted to the jury:

1. Are the plaintiffs the owners of and entitled to the possession of the lands described in the complaint? Answer, they are.

2. Were the defendants in possession of the land and wrongfully withholding the same? Answer—they are in possession thereof. (The same is admitted by the answer.)

The jury found a verdict for the plaintiffs, judgment, appeal by defendants.

Messrs. Jones & Avery and *Battle & Mordecai*, for plaintiffs.
Mr. George N. Folk, for defendants.

ASHE, J. This case is encumbered with a considerable

mass of superfluous matter that has nothing to do with the points involved in the appeal. We have time and again admonished clerks and counsel that it is only necessary to send up so much of the record as is necessary to show the grounds of the exceptions, but in this case which is an appeal assigning errors in the charge of His Honor to the jury and his ruling in excluding evidence on the trial, the transcript contains all the affidavits and rulings of the court on a motion for an injunction, which have nothing to do with this appeal.

There was exception taken to His Honor's ruling in excluding the testimony of one Vanhorn, who claimed the land on the north and west of the land in controversy, and when it was proposed to be proved by said Vanhorn that in a conversation with Mull, the ancestor of the plaintiffs, and under whom they claim title, that the line of marked trees from C to D in the plat of survey—being the fourth line of the plat, was 500 yards south of the line claimed by the plaintiffs, the court excluded the testimony on the ground that the plaintiffs claimed the land under Mull with whom the witness had the conversation, and that he was dead, and that the witness had an interest in the thing in controversy.

We do not understand the rule to be that an interest in the thing in controversy is sufficient to exclude testimony; but to make a witness incompetent under the Code, section 343, it is necessary that he should have an interest in the event of the action. Here, the witness Vanhorn had an interest in locating the line claimed by the plaintiffs as far south as possible, but that was an interest only in the question which would not disqualify him. The witness had no interest in the event of the action. No judgment in the action in which he was offered to prove this fact, could be used as evidence against him in any controversy that might

hereafter arise between either the plaintiffs or defendants in this action, and the witness or his alienees.

In the case of *Harrison* v. *Harrison*, 2 Haywood 355, Judge HALL says, the rule is, if the verdict in the case cannot be given in evidence in a suit against the witness, he shall be deemed disinterested. It could not be given in evidence against him because it would be "*res inter alios acta.*"

There is error. Let this be certified.

Error. Reversed.

JOHN CAPPS and others v. ABRAHAM CAPPS and others.

Jurisdiction—Practice.

When a case, commenced wrongfully before the clerk, gets into the superior court by appeal or otherwise, and the latter has jurisdiction of the whole cause and can proceed to its determination, it will do so, and make all amendments of process needful to give effectual jurisdiction; but where a complaint which states matters properly triable in the probate court is amended in the superior court on appeal by engrafting new matter cognizable only by the superior court in term, a demurrer by a defendant averring a defect of jurisdiction over such matter, was properly sustained.

(*Jones* v. *Hemphill*, 77 N. C. 42; *Brandon* v. *Phelps*, *Ib.* 44; *McBryde* v. *Patterson*, 73 N. C, 478; *Hoff* v. *Crafton*, 79 N. C. 592; *Cheatham* v. *Crews*, 81 N. C. 343, cited and approved.)

SPECIAL PROCEEDING for sale of land for partition commenced in the probate court, and heard at Fall Term, 1881, of HENDERSON Superior Court, before *McKoy, J.*

The demurrer of the defendants to the amended complaint of plaintiffs was sustained by the court upon the ground that the probate court had no jurisdiction of the

subject matter it contained, as set out in the opinion of this court, from which ruling the plaintiffs appealed.

Messrs. Gilliam & Gatling and *J. J. Osborne*, for plaintiffs.
Mr. Armistead Jones, for defendants.

SMITH, C. J. An action for partition of real estate held by tenants in common, whether by a separation into parts or by a sale and conversion into money and the apportionment of their several shares among them, is denominated a special proceeding and properly originates before the clerk of the superior court, acting in his capacity of probate judge. Acts 1868-'69, ch. 93 and 122. If a controversy arises out of the pleadings which raises a question of law, a copy of the record must be certified and sent to the judge of the court for hearing and decision, and if a question of fact, a copy of the pleadings is to be transferred to the civil issue docket for trial at term time. C. C. P. §§111, 113; *Jones* v. *Hemphill*, 77 N. C. 42; *Brandon* v. *Phelps*, *Ib.* 44; *McBryde* v. *Patterson*, 73 N. C. 478; *Hoff* v. *Crafton*, 79 N. C. 592.

The present proceeding was thus commenced, and the plaintiffs in their complaint demand partition by means of sale of five distinct tracts of land particularly described and numbered, which it is alleged descended from one Cornelius Capps upon his death and intestacy, in June, 1860, to the plaintiffs and defendants as heirs at law, in the several proportions therein mentioned. The answer of the defendant, Ambrose, the other defendant not answering, asserts a sole seizin in himself in the tract, number 4, and in part of tract number 2, the title to the residue of it being in one McLaughlin, and does not controvert the tenancy in common of the other tracts. The plaintiffs might thereupon, to avoid delay, have stricken out the disputed tracts and had partition of the remaining tracts and thus disencumbered the case of the embarrassing difficulties encountered

in the course pursued. They were at liberty however according to the established practice to remove the issues, as to the ownership of the two drawn in question, for a jury trial before the judge, and consequently suspend further action, until they were determined. The jurisdiction thus acquired in the superior as distinguished from the probate court, was restricted to the controverted matters transferred, and to the exercise of the powers incidental to their determination, with the right of appeal by either to this court.

The inquiry to be solved by the verdict was as to the then existing title, and it admitted any *evidence* to invalidate that set up by the defendant in opposition to the alleged tenancy in common in those lands also. *McBryde* v. *Patterson, supra.*

Instead of this, the plaintiffs were permitted to engraft upon their complaint a new cause of action impeaching for fraud and upon other grounds a decree rendered in the court of equity in 1843, and the proceedings preliminary and subsequent thereto, under which the defendant is supposed to derive his asserted separate and sole estate, while the cause in the probate court awaits the result before any further progress can be made. This new cause of action is of exclusive cognizance in the superior court presided over by the judge, and if allowed to be annexed to a proceeding for partition in the manner proposed, would produce the anomalous result of dividing the action into parts, one remaining in each court, and this when the latter court has jurisdiction to try and determine an issue only arising and incidental to granting relief in the probate court. The amendment is in legal effect the institution of a new action, and in our view inconsistent with the retention of the other.

The cases cited for the plaintiffs in the elaborate and carefully prepared argument of their counsel, of which *Cheatham* v. *Crews*, 81 N. C., 343, seems most in point, sustain the proposition that when a case commenced wrongfully before

the clerk gets into the superior court by appeal or otherwise, and the latter has jurisdiction of the whole cause and can proceed to its termination, it will do so, and make all needful amendments of process to make the jurisdiction effectual. But they do not apply to a case where detached issues are sent up to be followed by a *procedendo*, if necessary for the further prosecution of the cause in the court below.

We concur, therefore, with his Honor, and sustain his ruling in support of the demurrer.

No error. Affirmed.

C. H. BRONSON v. WILMINGTON N. C. LIFE INSURANCE CO.

Creditors' suit against Corporation—Parties—Pleading.

1. A judgment creditor of a corporation caused an execution to issue which was returned unsatisfied, and he then brought a suit for himself and all other creditors against the corporation and its stockholders, demanding an account to ascertain the amount due upon unpaid stock, to pay debts of the corporation: *Held* to be a new and independent action, and not demurrable on the ground that his remedy was by proceeding supplementary to execution, or that complaint fails to specify the number of shares held by defendants.
2. Where it is averred in the complaint that the defendants and others whose names are not known are stockholders, and that it is impracticable from their great number to bring them all before the court: *Held* not demurrable for defect of parties. In such case one may sue or be sued for all the others.

(*Rand* v. *Rand*, 78 N. C., 12; *McCaskill* v. *Lancashire*, 83 N. C., 393; *Hughes* v. *Whitaker*, 84 N. C., 640; *Glenn* v. *Bank*, 72 N. C., 626; *Long* v. *Bank*, 81 N. C., 41; *Von Glahn* v. *DeRosset*, *Ib.*, 467, cited and approved.)

CIVIL ACTION tried at January Special Term, 1881, of SAMPSON Superior Court, before *McKoy, J.*

The suit is brought by Charles H. Bronson and Edmund B. Owens, administrators of John E. Spearman, deceased, against the Wilmington North Carolina Life Insurance Company and its stockholders. The facts appear in the opinion. Demurrer overruled, judgment, appeal by defendant.

Messrs. J. L. Stewart and *E. W. Kerr*, for plaintiffs.
Mr. D. J. Devane, for defendant.

SMITH, C. J. The plaintiffs having recovered judgment against the defendant corporation upon a debt due their intestate, and caused an ineffectual execution to issue to the county wherein is their principal place of business, on behalf of themselves and its other creditors, institute this action against the corporation and a large number of its stockholders to enforce payment out of such assets as it may possess, not accessible to the ordinary process of law, and especially out of the sums due for unpaid stock. The complaint alleges the organization of the company under an act of the general assembly, and a subsequent amendment fixing its capital stock at a minimum of $300,000, divided in shares of $100 each, whereof one fifth was required to be paid in within nine months after its first meeting, and the residue in the form of stock notes secured by mortgage on real estate, or with adequate securities to be approved by the president and directors, and payable in sixty days after demand. It avers a failure of the stockholders for many years to elect directors, and the refusal of those last elected to make any assessment on the stock notes to meet the liabilities of the company, and discharge the said judgment due the plaintiffs, and that the defendants, and perhaps others whose names are unknown, are, and at the time of the recovery, were, stockholders in the company, and that it is impracticable, from their great number, and removals by death, to bring them all before the court, and the cause to a trial.

The relief asked is that an account may be taken, and the amount due by the several stockholders for unpaid stock ascertained, and so much be required to be paid in as will be sufficient to discharge the indebtedness of the company, and for the appointment of a receiver.

To the complaint a separate demurrer is put in by the corporation, and a joint demurrer by the enumerated stockholders, on whom process has been served, more than eighty in number, and both assign as causes therefor:

1. For that the remedy by a new action is misconceived, and lies in proceedings supplementary to the execution in the original suit.

2. For that the complaint fails to specify the number of shares held by the respective stockholders who are made defendants, and whether any sum or how much is due from each on his subscription.

3. For that there are other stockholders, not made parties by the due service of process.

These objections to the prosecution of the action we proceed to consider.

I. The proceeding supplementary to the execution provided in sections 264 to 274 inclusive in the Code, is intended to perfect the creditor's remedy *in the same action* and to supersede that which in a divided jurisdiction was attainable before by a bill in equity. But this is not the prosecution of the same cause of action and between the same parties as the other. It is a new and independent suit instituted and conducted for the benefit of all the creditors against additional defendants whose indebtedness it proposes to call in and subject to the demands of creditors. *Rand* v. *Rand*, 78 N. C., 12; *McCaskill* v. *Lancashire*, 83 N. C., 393. A precedent for this mode of procedure will be found in *Hughes* v. *Whitaker*, 84 N. C., 640.

II. The second assigned ground of demurrer is the omission of the complaint to set out the number of shares pos-

sessed by each defendant, and what residue of their subscriptions remains unpaid. This objection is equally untenable, and for reasons sufficiently declared in the complaint. The plaintiffs say they are unable to give the information, and demand a discovery by means of the reference. It is sufficient to charge that each owes upon his stock subscription, and should pay up what is still due, at least so far as to satisfy the claims of creditors of the corporation.

III. The last objection is to the absence of some of the stockholders, and the necessity of their presence as co-defendants in order to a full adjustment of the equities among themselves, while contributing to discharge the indebtedness of the company. The exception to the general rule that all persons interested in, and to be affected by the determination of the suit, must be made parties on one or the other side, obtains when they "may be very numerous and it may be impracticable to bring them all before the court," a rule prevailing in the former equity practice, and recognized in express terms by the Code. Story's Eq. Pl., §122; *Glenn* v. *Bank*, 72 N. C., 626; C. C. P., §62.

"The construction of this section of the Code," remarks a very careful and accurate author, "has been established by the courts, and the rule is settled, as already stated, that where the question to be decided is *one of common or general interest* to a number of persons, the action may be brought by or against one for all the others, even though the parties are not so numerous that it would be impracticable to join them all as actual plaintiffs or defendants; but on the other hand, when the parties are so very numerous *that it is impracticable to bring them all into court, one may sue, or be sued for all the others*, even though they have no common or general interest in the question at issue, and the necessary facts to bring the case within one or the other of these conditions must be averred." Pom. Rem., §391. The cases of *Glenn*

v. *Bank, supra*, and *Von Glahn* v. *DeRosset*, 81 N. C., 467, are cases sustaining the proposition in our own courts, and in the first, the very objection here made was overruled.

We do not undertake to say whether the absent stockholders will be bound or any of their rights impaired by the adjudication, nor whether the creditors can compel the defendants to contribute more than their ratable parts of the sum required, as if all were before the court. These questions may hereafter arise, and we now only determine that the action may be prosecuted against those who are defendants.

We therefore sustain His Honor in overruling the demurrer, while we reverse so much of his judgment as imposes costs upon the defendants as the condition of their being permitted to answer the complaint.

The right to put in an answer after the overruling of a demurrer is conferred in section 131 of the Code, as amended by the act of 1871–'72, (ch. 172, § 1,) "if it appears that the demurrer was interposed in good faith," of which no question seems to have been made.

Thus modified, the judgment rendered in the court below must be affirmed. Let this be certified.

PER CURIAM. Modified and affirmed.

NANCY LONG v. DANIEL LONG.

Judgment nunc pro tunc—Statute of Limitations—Amendment—Widow's Year's Support—Interest.

It is competent to the court to allow judgment *nunc pro tunc* to be entered in favor of a widow against the personal representative of her

deceased husband, for an amount covering the deficiency of personal estate, so as to make up the total sum allowed as her year's support; and there is no statute limiting the power of the court in thus amending its record. The widow is also entitled to interest on such judgment.

(*Bright* v. *Sugg*, 4 Dev., 492, cited and approved.)

MOTION for judgment *nunc pro tunc*, heard at Fall Term, 1881, of YADKIN Superior Court, before *Eure, J.*

The plaintiff is the widow of Isaac Long, who died in 1873, and the defendant is his administrator. In October, 1873, the plaintiff made due application to the defendant for an assignment of a year's support for herself and family. The defendant immediately applied to a justice of the peace, who together with two persons qualified according to law, proceeded to ascertain the number of persons constituting the family of the plaintiff, and make the allotment required. They ascertained her family to consist of six children under fifteen years of age, and assessed her allowance at nine hundred dollars.

The personal property assigned to her, they valued at $651.20, thus leaving a deficit to be paid her in money of $248.80. The justice, as required by law, filed a list of the articles assigned to her, stating the value of each and the deficiency to be paid the plaintiff, with the clerk of the superior court, who received and filed the same, but omitted to enter judgment against the defendant for said deficiency. The defendant has made payments to the plaintiff on account of said allotment, the last in 1880.

Finding that no judgment had been entered in her favor, the plaintiff after giving the defendant notice, on the 7th day of July, 1881, moved the court to enter judgment against the defendant for the amount due her according to the assessment of the commissioners, subject to credits for the amounts that had been paid her thereon, making an affidavit that there was a balance still due to her on account

of the same. The defendant filed an affidavit also, in which he substantially admits the facts as above stated, but says he is advised that the plaintiff's claim against him is barred by the statute of limitations, and he pleads the same.

The clerk of the superior court allowed the plaintiff's motion and gave judgment in her behalf, from which the defendant appealed to the superior court, and the judgment of that court being also against him, he appealed to this court.

Messrs. Watson & Glenn, for plaintiff.
Messrs. Gray & Stamps, for defendant.

RUFFIN, J. Treating the plaintiff's motion as the clerk and the court both seem to have done, as a motion for a judgment *nunc pro tunc*, it was correctly allowed. "The court will in general permit a record to be amended and a judgment to be entered *nunc pro tunc* when it has been delayed by the act of the court or the clerk." *Bright* v. *Sugg*, 4 Dev., 492. And we know of no statute that limits the power of the court, or its *duty* to do this, for a duty it becomes whenever necessary to prevent injustice to an innocent party.

Our only doubt has been with reference to the interest allowed the plaintiff on her judgment, but as the statute (Rev. Code, ch. 31, § 90) declares that every judgment or decree, except for costs, rendered or adjudged in *any kind* of action, shall bear interest till paid, we do not see why this one should be made an exception.

No error. Affirmed.

GEO. McD. THOMPSON and others v. J. H. PEEBLES and others.

Executions—Priorities—Equality of Partition.

1. Where land is sold under several executions, some issuing for the collection of personal debts of the land-owner, some to enforce a lien for equality of partition, the latter claims are entitled to priority in the distribution of the proceeds.
2. Until the discharge of such lien for equality of partition, the share of the debtor in the land liable to the satisfaction of his general engagements cannot be known.

(*Williams* v. *Washington*, 1 Dev. Eq., 137, cited, distinguished and approved.)

APPLICATION of a sheriff for advice, &c., heard at Fall Term, 1881, of DAVIDSON Superior Court, before *Eure, J.*

The sheriff of Davidson county applies to the court for its advice and direction in the disposition of money in his hands raised by a sale under several executions, and the creditors claiming become parties to the proceeding and submit the following agreed statement of facts:

In the year 1873, certain land descended to the heirs at law of one J. H. Thompson, as tenants in common, and was divided among them and the shares assigned to the tenants. William L. Thompson and Joseph H. Thompson, for equality of partition were charged with certain sums of money to be paid to the shares assigned to the tenants, George McD. Thompson and Cynthia Tatem, whose dividends were of inferior value. D. W. C. Benbow and others recovered judgments on debts contracted in 1875 against the said William L. and Joseph H., and also J. H. Peebles and N. A. Peebles, (the appellants), all principals; and in 1881, sued out executions thereon. Executions also issued and were delivered to the sheriff at the instance of the said George McD. Thompson and Cynthia Tatem, under all which executions the sheriff proceeded to have the homesteads laid off to the

said William L. and Joseph H., and made sale of the excess, the money arising from which is the fund now in his hands to be appropriated as the court may determine.

The court held, and so ordered, that the money must first be applied in satisfaction of the sums assessed upon the more valuable dividends in the proceeding for partition, and from this order the said J. H. and N. A. Peebles appealed.

Mr. M. H. Pinnix for plaintiffs.
Messrs. J. M. Clement and *W. H. Bailey,* for defendants.

SMITH, C. J. The argument for the appellant assumes the facts of this case to be within the principle declared in *Williams* v. *Washington*, 1 Dev. Eq. 137, by which a creditor having a lien upon two funds may be compelled by another creditor, who has recourse upon but one, to exhaust that upon which he has the sole lien, before resorting to the other to which the latter creditor can alone look for the satisfaction of his debt. But the principle has no application to the facts of the present case. The inquiry is as to the preferable right of payment among the contesting execution creditors, and it is manifest that the sums assessed upon the more valuable of the divided tracts, when an estate in severalty vests in the tenants to whom they are assigned, must be paid to ascertain what property belongs to the tenant and can be subjected to his debts. This assigned tract in its entirety when the attaching charge is paid by other means of the debtor, or the residue when a portion is sold for the same purpose, is alone accessible to the demands of creditors, and hence the fund must be appropriated to the executions sued out to enforce the claim due the tenants, George McD. Thompson and Cynthia Tatem, to the exclusion of the others. Between the creditors who have a personal judgment and the defendants' right

of exemption, the latter must prevail, and the argument for the appellants would subvert these relations, and in effect subject the homestead to a debt for which it cannot be sold under the constitution and law.

Again, the plaintiffs, Benbow and others, are not parties to this controversy, but two of their judgment debtors, principals equally with the two other judgment debtors, who own the land sold, are contesting the application of the fund for their own exoneration, not by an action in the nature of a bill in equity where the right of subrogation when it exists is recognized and enforced, but in the summary proceeding of the sheriff to obtain the advice and direction of the court.

We therefore sustain the ruling of the court, and affirm the judgment below.

No error. Affirmed.

JOSEPH G. NEAL v. COMMISSIONERS OF BURKE.

Costs—Insane Person.

The expenses of carrying to the asylum a prisoner found by the jury to be insane and unable to plead to the indictment, are no part of the costs of the prosecution against him.

APPEAL from a judgment rendered by a justice of the peace heard at Fall Term, 1881, of BURKE Superior Court, before *Seymour, J.*

The following is the case agreed: One Hoke C. Secrest, a citizen of Union county, North Carolina, in passing through Burke county was charged with the murder of his wife and child. A bill of indictment was found against him by the

grand jury of Burke county. Afterwards the case was removed to McDowell county for trial, and at the next term of the superior court held for McDowell, the said Hoke C. Secrest was tried and convicted. An appeal was prayed and granted, and a new trial awarded by the supreme court. 80 N. C., 450. When the case was called at the next term for trial, the counsel for the prisoner suggested that on account of insanity their client was unable to know his rights or make a proper defence. His Honor (Judge Shenck) ordered a jury to be summoned to try the question of insanity. The jury sworn and impaneled to try the issue, for their verdict, said, "the said prisoner, Secrest, is a lunatic." Thereupon his Honor ordered the sheriff of McDowell county to convey the prisoner to the insane asylum and deliver him to the superintendent at Raleigh, and summon a sufficient guard to insure his safe delivery there. Accordingly the sheriff (J. G. Neal, plaintiff,) with a sufficient guard carried the prisoner and delivered him to the superintendent.

It is admitted that the sheriff's costs and charges for conveying the prisoner to Raleigh amounted to the sum of $77.50.

If the court should be of opinion that the board of commissioners of Burke county are liable for said costs and charges, judgment shall be rendered in favor of plaintiff for the same, otherwise for defendant for costs.

There was a judgment in favor of the plaintiff, and the defendant commissioners appealed.

Mr. J. M. Gudger, for plaintiff.
No counsel for defendants.

ASHE, J. If the expenses of carrying the prisoner to the asylum were a part of the costs of the prosecution, the county of Burke would only be liable to pay the plaintiff's claim

upon the acquittal of the prisoner, or upon his conviction and inability to pay the costs, or if a *nolle prosequi* should be entered, or the judgment arrested; and not then until the bill of costs should be "audited, approved and adjudged" according to the requirements of the act of 1879, ch. 264. But this expense incurred by the plaintiff is no p rt of the costs of the prosecution. It is an expense growing out of a police regulation of the state.

The prisoner was sent by order of Judge Shenck to the asylum as an insane person, after having submitted the question of his sanity to a jury, who found him to be insane. This is one of the modes prescribed by the legislature for the removal of insane persons to the asylum. One who is insane and in prison and not charged with a criminal offence, may be sent by the order of the clerk of the superior court; if in jail charged with a criminal offence, he may be removed to the asylum by the order of the presiding judge; and in other cases by the order of three justices. Bat. Rev., ch. 6, §§ 15, 16, 17, and chap. 57, § 9.

It was under the provisions of this last section that the prisoner was removed to the asylum.

The act of 1868, Bat. Rev., ch. 6, as amended by the act of 1879, ch. 264, points out by whom the expenses of the transportation of the prisoner to the asylum are to be paid. But Burke county is in no way responsible for them.

There is error. The defendants must have judgment for the costs.

Error. Reversed.

G. W. CHALK & CO. v. CHARLOTTE, COLUMBIA & AUGUSTA RAILROAD COMPANY.

Negligence—Damages—Railways—Warehousemen.

In an action for damages against a railway company to recover the value of goods lost by the alleged negligence of the defendant, it appeared that after the arrival of the goods they were placed on a platform at the depot for the convenience of delivery to consignees, and remained there for nearly two days; notice of their arrival was given the plaintiff who paid the freight charges with full knowledge of the place of deposit, but failed to remove them on account of his inability at the time to procure the services of city draymen for that purpose, and in the afternoon of the second day they were destroyed by fire, together with much of defendant's property; *Held*,

(1) There was a delivery in law of the goods to the plaintiff consignee, which exonerated the defendant company from liability as warehousemen.

(2) The fact that the fire originated in a steam cotton compress, erected on the company's premises with its permission but not under its control, does not constitute negligence in the defendant, the permission to erect the same not being the proximate cause of the injury sustained by the plaintiff.

(*Hilliard* v. *R. R. Co.*, 6 Jones, 343, cited and approved.)

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

Judgment for plaintiffs, appeal by defendant.

Messrs. Bynum & Grier, Hinsdale & Devereux, Walter Clark and *T. M. Pittman*, for plaintiffs.

Messrs. Wilson & Son, for defendant.

SMITH, C. J. The action is to recover from the defendant company compensation for damages to one hundred barrels of flour which had been transported from St. Louis, and over its railroad from Augusta in Georgia to Charlotte in this state, and was a part destroyed and the rest injured by

fire while on the city platform at the latter terminus before removal. The flour arrived at Charlotte on defendant's train on the evening of April 14th, 1875, and was unloaded and put on the platform, the usual place for the deposit and delivery of freight to consignees, the next morning.

Notice of the arrival and of the freight charges, which were required to be paid before the removal of goods by the consignee, was conveyed on a postal card of the date of April 14th, which the general agent testifies he directed his office clerk to give on that day, but which the plaintiff, Chalk, testifies he took from the post-office on the morning of the 16th, being himself absent on the day preceding, though his two co-partners remained in the city. The company's agent also testified to his impression that a clerk or employee of the plaintiffs came to the depot and made inquiry about the flour on the day of the transfer from the cars to the platform but he certainly did call on the morning of the 16th about 8 o'clock, according to his recollection, and with a bank check paid the charges for freight in full. The city platform, containing the flour, for convenient delivery and removal, and where it was the custom of the plaintiffs and other consignees in Charlotte to receive their goods, none of whom made any exception thereto, was in width 30 feet and in length 400 feet, and built by the city upon land of the defendant, for the convenience of the cotton trade and the railroads converging at that point. This platform was not under the defendant's control, and its eastern part on the south side was connected by a gang-way with the defendant's brick and tin covered depot building, and at the west end of the platform was erected a cotton press, moved by steam, and 350 feet distant from the depot building on land of the defendant, and put up with its consent, but not under its control or supervision.

The plaintiff, Chalk, testifies that on being advised of the arrival of the flour, he was unable to procure transportation

from a city drayman to whom he applied, and made ineffectual efforts to obtain the means of removing it, and that before the return of their clerk who had been sent to pay the charges, he heard the alarm of fire, and the defendant's agent fixes the hour at 2:30 p. m., on his return from dinner. There was a large quantity of cotton lying on the city and N. C. Railroad company's platforms, and from this latter place the fire was communicated to the defendant's cars on the tract by the depot, and thence to its depot building, which was entirely consumed. A very high wind was blowing from the southwest, and the fire spread with such rapidity that it was impossible to arrest its progress after its commencement, until the damage was done to the plaintiffs' goods. The cotton press was built to compress cotton for railroad transportation, the different companies paying therefor according to certain *pro rata* rules entered into between them and connecting roads and steamship companies, and was in operation just before the fire which came from the direction of its location. A witness stated that his impression was that the smoke-stack had no spark arrester attached to it.

A series of instructions were asked to be submitted to the jury on behalf of the defendant, which may be condensed in the following propositions:

1. The payment of freight with a knowledge of the situation of the flour is a delivery in law and exonerates defendant from further liability for loss.

2. Notice to the consignee of the arrival of the goods is not necessary.

3. If the plaintiff had such a notice on the 15th, the day before the fire, reasonable diligence in removing them was required and was not exercised.

4. If negligence can be imputed to the defendant in permitting the construction and working of the compress upon

their premises, it is not the proximate cause of the injury and imposes no liability on it therefor.

5. Upon the facts proved, the defendant is not chargeable with negligence, and the burden of proof rests upon the plaintiffs in this respect.

The court charged as requested as to the *onus probandi*, but declined to give the other instructions, and directed the jury, that the defendant's *liability as a common carrier* ceased, if not before, on the payment of freight, and thereafter their liability, if any, was that of a *warehouse-man* of whom ordinary care only is required, and this continues until the consignees have had a reasonable time after the arrival of their goods to take them away, and if it was the custom of the defendant to notify consignees of the arrival of their goods and this notice only reached the plaintiffs on the 16th and they thereafter used due diligence in attempting to get them away, and were prevented by the fire, then the defendant would be responsible for the damage; that if the platform was rendered dangerous by reason of the proximity of the compress, so that a person of ordinary prudence would not have exposed his property there, then the plaintiffs would be entitled to recover.

The directions given the jury that the liability of the defendant as a common carrier passed into that of a warehouseman at, if not before the time when the freight bill was paid if it did not then terminate by delivery and acceptance, though not subject to review in this appeal, is in our opinion a correct exposition of the law governing that class of public agencies in their relation to those whose goods they transport, and is warranted by well settled decisions in this and other states, and the rule itself reasonable and just. Chief Justice SHAW in an elaborate opinion quoted with approval by an eminent author in his work on railroads, thus announces the measure of liability of such companies: They are responsible as common carriers until the goods are removed from the cars and placed on the platform, and

if on account of their arrival in the night, or at any other time when by the usage or course of business the doors of the merchandise depot or warehouse are closed, or for any other cause, the consignee is not then ready to receive them, it is the duty of the company to store safely, under the charge of careful and competent servants, ready to be delivered, and actually deliver them when duly called for by parties authorized and entitled to receive them, and for the performance of these duties after the goods are delivered from the cars, the company are liable as warehousemen, or keepers of goods for hire. 2 Red. Railroads p. 52 § 157. So in *Hilliard* v. *Railroad Company*, 6 Jones 343, RUFFIN, J. declares that "after the goods are placed in the warehouse, the owner's interest is protected by another responsibility of the company which arises—that of a warehouseman, bound to take ordinary care of the goods. See also Whart. Neg. § 569.

Applying the principle to the facts of the present case, it will be seen that the flour placed on a platform, (as usual with others and the plaintiffs themselves theretofore, and without objection or complaint from either) accessible to the owners and convenient for delivery to them, remained there for nearly two days, and on the second, the transportation paid for with full knowledge of the place of deposit and without any suggestion of an exposure to peril, until in the afternoon they are destroyed by the fire with much property of the defendant. Wherein lies any negligence? If what occurred is not in law a delivery to the owner so as to make future risks his own, the goods were where they would have been required to be placed had he procured the means of transportation, and the doing this in preparation for their removal, shows no want of prudence or care in the company, and the suddenness and fierceness of the advancing flames permitted no removal to a place of greater safety afterwards.

But the charge imputes a culpable carelessness and want of foresight in allowing the construction of a compress so dangerous in the vicinity of such inflammable materials as cotton, under the conditions from which the jury were left at liberty to infer a legal liability in the defendant upon that ground. There is, of course, danger from fire in the use of steam power for transportation and for the compression of cotton bales to a smaller size, and yet the public interests demand the use of it for both purposes. The compresses reduce largely the costs of carriage in the storage of a larger number of bales in the cars used in transportation. Steam cannot be dispensed with, notwithstanding the perils of its use, without great detriment to the agricultural and commercial prosperity of the country, and all that can be required is the employment of such means as are calculated to remove or reduce the perils encountered in the employment of the dangerous but most valuable agent. But this question which might arise if the owners of the compress were sued and charged with neglect in not providing their smoke-stack with a spark-arrester, or in the careless management and working of the machinery itself, is not presented in this appeal, since the permission to put it up on defendant's premises is not the proximate cause of the injury, or as it is sometimes said, there is no causal connection between them.

A negligence followed by liability to others is defined as "the judicial cause of an injury when it consists of such an act or omission on the part of a responsible person, as in ordinary natural sequence immediately results in such injury." Whar. Neg., § 73. It must be the natural and proximate consequence of the act complained of. 2 Greenl. Evi., § 256.

Measured by this rule, the damage is too remotely connected with the imputed negligence to expose the defendant

to the action. The redress, if any, must be pursued against the owners of the compress.

As upon ascertained facts, negligence is a question of law to be declared by the court, in which the defendant was entitled to the instruction that the evidence disclosed no neglect in the company for which it is liable.

This view is fully sustained by the ruling in a case not dissimilar in the facts to which our attention has been called, *Knapp* v. *Curtis*, 9 Wend., 60.

There is error, and must be a new trial. Let this be certified.

Error. *Venire de novo.*

NOTE.—The decision in *Erie City Iron Works* v. *R. & D. R. R. Co.*, at this term, is the same as in above case.

GWYN, HARPER & CO. v. RICHMOND & DANVILLE R. R. CO.

Vendor and Vendee—Liability of Carrier—Agent and Principal—Stoppage in transitu.

1. Goods bought and paid for were delivered to a railway company, whose bill of lading was executed to the vendor acknowledging the receipt of the goods to be conveyed to the vendee; *Held*, that the contract for transportation is in legal effect with the vendee, and the company liable to him for non-delivery of the goods. In such case the title vests in the vendee purchaser, and a delivery of the goods to the carrier is a delivery to the purchaser himself.

2. Where one through his agent sells goods to another, and they are shipped to the purchaser, the agent has no right to stop the goods *in transitu*, because his principal owes him on account of money advanced in the purchase of the goods.

(*Jenkins* v. *Jarrett*, 70 N. C., 255; *Ober* v. *Smith*, 78 N. C., 313, cited and approved.)

GWYN *v.* R. R. Co.

CIVIL ACTION removed from Caldwell and tried at Fall Term, 1881, of BURKE Superior Court, before *Seymour, J.*

The action was brought to recover the value of a certain lot of cotton. Judgment for plaintiffs, appeal by defendant.

Messrs. Armfield, Folk and *Cilley*, for plaintiffs.
Messrs. Reade, Busbee & Busbee, for defendant.

SMITH, C. J. On March 10th, 1880, J. P. Harper, one of the plaintiffs, acting for the plaintiff firm, bought from McAuley & Meacham, at Charlotte, forty-nine bales of cotton of which twenty were then in possession of their agents, Neely & Bro., at Linwood, on the line of the defendant's road, and paid for the same. By direction of the vendors, Neely & Bro. on the next day delivered the cotton to the defendant company, taking therefor a shipping receipt in the name of their principals for the transportation and delivery of it to the plaintiffs at Icard, a station on the Western North Carolina railroad. The receipt was retained and at the same time Neely & Bro., drew on the said McAuley & Meacham for a sum over $700, a balance due for moneys advanced in their purchases of cotton. Receiving a telegram from the latter that the draft would not be paid, M. Neely pursued and overtook the cotton at Salisbury, and presenting the receipt to the defendant's agent at that place with a demand for a re-delivery, was allowed to take it from the custody of the company and afterwards converted it to his own use.

M. Neely testified that there was "a universal custom among cotton buyers, when they had not been paid in full for their advances, upon shipping cotton, to hold on to the bill of lading as evidence of their title."

The defendant requested the court to instruct the jury:

1. That if the custom testified to prevailed, and McAuley & Meacham were indebted for moneys so advanced by their

agents, the latter had still a lien on the cotton and a right to resume possession from the defendant.

2. That the existence of this usage put the plaintiffs upon inquiry as to the lien, and there was no evidence of their having made such inquiry.

The court charged that when the defendant signed the bill of lading it undertook to carry safely and deliver the cotton to the plaintiffs at Icard, and failing to do so, is liable, unless some sufficient excuse is shown; that the contract of the plaintiffs with McAuley & Meacham vested in the former such title as the latter had in the cotton; and that while M. Neely & Bro. could retain possession until repaid their advances, yet when they marked the bales with the plaintiffs' name and transferred them to the custody of the defendant for carriage and delivery to the plaintiffs at the place of destination, they parted with their lien, and the plaintiffs having thus acquired full title could recover, notwithstanding the vague and indefinite custom governing the dealings between principals and their agents as shown in evidence.

The law applicable to the facts of the case has been, in our opinion, correctly explained in the instructions to the jury. The sale of a specific chattel by words operating *in presenti* transfers the vendor's title to the vendee, with a right to retain possession until the purchase money is paid, in the absence of any contrary intent expressed or implied. When the purchase money is paid, the title vests absolutely in the purchaser, and a right to immediate possession. Hilliard Sales, §§ 2 and 4; *Jenkins* v. *Jarrett*, 70 N. C., 255. So a delivery of goods, bought and paid for, to a carrier for transportation and delivery to the purchaser, is a delivery to the purchaser himself. The carrier is in such a case the vendee's agent to receive and accept the goods. Hilliard Sales, § 42.

The authorities are numerous, say the court, in *Ober* v. *Smith*, 78 N. C., 313, "to the effect that a deliveryof goods to a carrier designated by the purchaser is of the same legal

effect as a delivery to the purchaser himself, and that it is not necessary that he should employ the carrier personally or by some agent other than the vendor," and the some result follows when the mode of transportation is the usual or only one existing. It is equally true that the agent's right to retain until reimbursed what he may have paid out for his principal in purchasing the goods, may be surrendered and lost by his execution of his principal's contract of sale in making a delivery to the vendee.

A lien is defined to be "a right to hold possession of another's property for the satisfaction of some charge upon it." 3 Pars. Cont., 234. The right of lien cannot exist without possession, and is an inseparable incident to possession. The surrender of the one is the extinction of the other; and this applies with greater force when the surrender is to a purchaser from the vendor against whom it exists in favor of his factor. Hill. Sales, ch 16, p. 198.

The bill of lading itself executed to the vendors and acknowledging the receipt of the cotton from them to be conveyed to the plaintiffs, so far from evidence of title in the agents, shows it to be in the plaintiffs, and that the carrier's contract is in legal effect with them. The re-delivery to the agents upon their demand was a breach of the defendant's contract, and rendered the company directly liable for the value of the surrendered goods.

The "*usage*" relied on is wholly unavailing to affect or defeat the rights of the true owners, and is foreign to the issue between the parties to the action.

The doctrine of stoppage *in transitu* furnishes no analogy favoring the defendant's exemption from liability, and is but a limitation upon the general rule which deems delivery to a carrier to be delivery to the consignee purchaser. It exists only when the purchase money has not been paid and the purchaser becomes insolvent, and is but an extension of the right of lien existing previous to the delivery to

the carrier. The vendor is in such case permitted to regain possession before the goods reach the hands of the consignee. Actual as distinguished from constructive possession acquired by the consignee, puts an end to the right of stoppage. Hilliard Sales, pp. 209, 216, *et seq.* The principle governing the relations of these parties has no application to the present case.

The plaintiffs have bought and paid for the goods and the delivery vests in them the title and right of action against the defendant for the value of them.

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

No error. Affirmed.

BANK (FIRST NATIONAL) v. CITY OF CHARLOTTE.

Corporations—Stock Subscriber.

Any fundamental change in the charter of a corporation relieves a non-assenting subscriber from liability upon his stock.

(*R. R. Co.* v. *Leach*, 4 Jones, 340, cited and approved.)

CIVIL ACTION tried at Fall Term, 1881, of MECKLENBURG Superior Court, before *Avery, J.*

The suit is brought by the First National Bank of Charlotte and the Atlantic, Tennessee and Ohio Railroad Company, plaintiffs, against the City of Charlotte, defendant, to recover the amount of coupons of certain bonds issued by the defendant city. The facts are set out in the opinion of this court. The defendant appealed from the judgment of the court below.

Messrs. Jones & Johnston, for plaintiffs.

Messrs. Wilson & Son and *Dowd & Walker*, for defendant.

SMITH, C. J. On February 15th, 1855, the general assembly passed the act incorporating the Atlantic, Tennessee and Ohio Railroad Company wherein are recited the provisions of an act of the legislature of Tennessee passed on February, 26th, 1853, authorizing the formation and organization of a company of the same name, which should have a corporate existence in the states of North Carolina, Tennessee, Virginia and Kentucky, for the purpose of establishing a communication by railroad between the waters of the Atlantic and the Ohio river, and passing through these states, which are re-enacted and a body corporate created in this state, with like powers and privileges as those conferred in the said recited act. Acts 1854–'55, ch. 227.

This legislation contemplated the formation of a single company, sanctioned by the concurring and independent enactments of the other enumerated states through which the road was to run, so that while the corporations remained in law distinct and separate entities, there should be a union of interest, property and official management as in a single organization over the entire proposed line.

To this company and in furtherance of its declared object, the town of Charlotte (its name changed by chapter 7 of the Private Acts of 1865–'66 to that of the city of Charlotte) subscribed for four hundred shares of the capital stock and executed and delivered to the company forty of its bonds, each in the sum of $500, and bearing date July 1st, 1860, the coupons from which are the subject of the present action. The subscription was authorized by law (Private Acts 1854–'55, ch. 263), on certain prescribed conditions, requiring the consent of the town commissioners and the concurring approval of a majority of the citizens, to be ascertained by submitting the matter to a popular vote at an election to be held and conducted as is therein directed, and contemporary with the issue of the bonds a tax was levied to meet the accruing interest represented in the coupons, and

the principal when it became due, and the bonds were held by the company prior and until the change produced by the act of February 23, 1861. Private Acts 1860--'61., ch. 127.

This enactment professing in its title to amend the former act of incorporation, and which if not an abrogation and substitution of a new company in its stead, effects such fundamental changes as are equivalent in their legal consequences, incorporates the stockholders resident in this state under the name of "The Atlantic, Tennessee and Ohio Railroad Company in North Carolina," dissolves the association produced by the joint and similar legislation of this and the state of Tennessee, with the expected co-operation of the other interested states. It empowers the new organization to collect and use the money due from subscriptions to its predecessor, places it under the exclusive control of the North Carolina stockholders, and directs the fund to be expended in the construction of the road within this state, until its intersection with the line of the East Tennessee and Virginia Railroad, giving the profits to the new company, and requiring the gauge of its track to be "neither that of North Carolina nor South Carolina, but an independent gauge."

The 5th section is as follows: "The Atlantic, Tennessee and Ohio Railroad Company in North Carolina" shall have no authority to bind the faith and credit of the Atlantic, Tennesse and Ohio Railroad Company for the acts and contracts of the first named company, or any of the stockholders thereof be bound for the acts and contracts of the last named company, nor shall the last named company receive or collect any of the installments of subscriptions by stockholders in North Carolina, nor shall it receive or demand any profits arising from the said road in North Carolina.

Section 8 declares that when the road is completed to the East Tennessee and Virginia Railroad, the Atlantic, Tennessee and Ohio Railroad Company shall by such name be

an incorporated company in North Carolina, subject to the regulations and restrictions imposed in the act of February 23rd, 1861, except that said company shall hold its annual, as well as its occasional meetings, at any point in North Carolina, which the stockholders in general meeting, or the directors shall designate, as well as at Jonesboro, in Tennessee.

Section 7 continues this amendatory act in force until the proposed connection is formed, and section 10 provides that the acceptance of this amendatory act by a majority of the stockholders in this state, shall be deemed and taken as a valid acceptance of it by the Atlantic, Tennessee and Ohio Railroad company.

Under the directions of the act a meeting of the stockholders was held at Statesville April 8th, 1861, at which a majority of the stock being represented in person or by proxy, a resolution was adopted declaring that it is "accepted by the stockholders of the Atlantic, Tennessee and Ohio Railroad Company in North Carolina, and an organization effected under its provisions, and they agreed to adopt the gauge of the Western North Carolina Railroad. The bonds then passed into the hands of the new company, the same treasurer acting in that capacity for both, and were deposited for safe keeping in the plaintiff bank, and held by it for several years, until February, 1876, when they were hypothecated to the bank, to secure a debt of the railroad company due it for about $18,000, and since reduced to $12,000.

The record sets out a series of exceptions to the rulings of the court in rejecting evidence, the general scope of which was to show that the restrictions contained in the ordinance authorizing the issue of the corporate bonds in payment of the subscribed stock had been in several particulars disregarded, that the authorities of the town had given public notice of these irregularities and their refusal to pay or rec-

ognize the obligation as binding, and that these matters were well known to the bank when it took them as collateral security for the railroad debt.

But in the view we take of the case, it becomes unnecessary to pass upon the sufficiency of these exceptions, and we shall confine our attention to a single one, the determination of which must result in another trial, and if supported by facts must prove fatal to the plaintiff's recovery.

The defendant asked, and the request was denied, to submit two issues to the jury:

1. Did the town of Charlotte ever assent as a stockholder to the act of the general assembly ratified February 23rd, 1861, amending the charter of the Atlantic, Tennessee and Ohio Railroad Company?

2. Did said company ever deliver, or offer to deliver, any certificate of stock to the said town?

We have quoted largely from the amendatory act to show its fundamental and essential deviation from the plans and purposes of the original charter and their relations to each other. The first contemplates the construction and operation under one management of a continuous road passing from its eastern terminus through several other states to the Ohio river, and by the close association of companies chartered by each, practically and for all useful purposes consolidated into a single company. This great enterprise, so fruitful in promises of advantage to the sections of the states the road was to penetrate, and especially to the town of Charlotte, to which their rich and abundant agricultural and other products were to be brought, was to be and could only be accomplished by funds contributed by stockholders in all of these states.

To this organization and for these objects the defendant, with the approval of the tax-payers' vote, subscribed for its stock and issued its municipal obligations.

The amended charter lops off the road at its junction with

the East Tennessee and Virginia Railroad, and creates a distinct and separate company, and undertakes to appropriate the funds raised for the former to the construction and completion of a fragmentary part, which may never be extended farther.

The defendant proposed to show under the suggested issues, that while no certificate of stock in either road was ever issued to the defendant, it declined to assent to the change or to participate in the action of the stockholders who did accept, and has since ceased to have any connection with the new organization.

There was error in refusing issues which would have let in the defence, and hence we must consider the effect of this change in the character and scope of the amended charter.

If the defence is available against the one plaintiff, the rejected evidence becomes material to fix the other with notice and put the bank assignee upon the same footing with the assignor.

We are clearly of opinion that subscribers to the stock of the first company who have not assented, and do not assent to the amendatory statute and the modifications it makes in the original charter, are relieved from liability to the superseding railroad company. The authorities to this effect are numerous and decisive, and the principle is a clear deduction from the relations of the corporators to the corporation in which they hold stock. These relations involve a contract not only between them but *inter sese*, and among the separate corporations themselves whose inviolability is secured against interfering legislation from the states by the federal constitution. Some of the adjudicated cases we will briefly consider.

If a corporation procure an alteration in its charter, by which a new business is superadded to that originally contemplated, the non-assenting stock-subscribers are absolved

from further payments. *Sparrow* v. *E. and C. R. R. Co.*, 7 Ind., 369.

All authorities concur in stating the rule to be, says PAINE, J., that a radical fundamental change in the character of the enterprise releases the stock-subscriber who does not assent. *K. R. and R. I. R. R. Co.* v. *Marsh*, 17 Wis., 13.

So a change in the course and termini of a plank road by an act of legislation accepted by the company exonerates the non-assenting stockholder. *Plank Road* v. *Arndt*, 31 Penn. St. Rep., 317.

"It must be conceded," observes Mr. Justice STRONG, speaking for the court, "as a general rule, that a subscriber to the stock of a railroad company is released from obligation to pay his subscription by a fundamental alteration of the charter." *Nugent* v. *Supervisors*, 19 Wall., 241.

In *Supervisors of Fulton Co.* v. *Miss. and Wab. R. R. Co.*, 21 Ill., 338, the facts in which are not very unlike those before us, a railroad originally chartered to run from the Mississippi river to the eastern boundary of Illinois, was by an act of legislation severed in three divisions "for the purpose of facilitating and more effectually securing the early construction of the road," and the court uses this language, forcible and appropriate to the question before it: "When the vote of Fulton county was taken to subscribe stock, the charter provided for one continuous road across the state from the Mississippi on the west to the state line on the east, 230 miles in length, and traversing by far the most beautiful and fertile part of the state, an enterprise it must be confessed of great magnitude, and furnishing facilities for a vast and extended commerce and inter-communication with distant markets, an object well calculated to claim and receive the favorable regard of the people of a county lying in its track. This may be safely taken as one of the inducements for the subscription to its stock of the people of Fulton county. * * * As to Fulton county the enter-

prise originally contemplated has dwindled down to a mere local road, fifty miles in length, having no important termini, the stock in which, as appears by the record, would be of nominal value only. We cannot but think in this view *that the alteration of the original charter by dividing this great road, was fundamental, and the stockholders released from their subscriptions.*" See also *H. and N. H. R. R. Co.* v. *Crosswell*, 5 Hill (N. Y.), 383.

The same doctrince is announced in *Railroad Co.* v. *Leach*, 4 Jones, 340, by BATTLE, J., who states the true ground for this exemption of the non-concurring stockholder to be, "that when called on to pay his subscription for the building of such a road, he may truly say, *non hæc in fœdera veni.*"

The defendant called on, as it now is, after the lapse of many years to meet its assumed obligations, may well say that the subscription was made to construct a line of interior communication with the great grain producing states of the west, whose completion would have conferred important and lasting benefits upon the people and city of Charlotte. Its successor or associate company is quite a different project, and with it we have entered into no contract, and are under no obligation.

There is error and must be a new trial, and it is so adjudged.

Error. *Venire de novo.*

J. G. NEAL v. B. F. FREEMAN and others.

Surety and Principal—Forbearance—Diligence—Agent and Principal—Interest—Demand.

1. A creditor is not bound to a surety for active diligence against the principal, for it is the contract of the surety that the principal shall pay the debt; and the surety will not be discharged upon mere forbearance to sue, even if accompanied by a failure on the part of the creditor to inform him of the principal's want of punctuality. Due diligence is a question for the court, and it is not error to refuse to submit an issue involving it to the jury.
2. A principal is entitled to interest on money collected by his agent only from demand (date of summons here) and default of agent.

(*Pipkin* v. *Bond*, 5 Ired. Eq., 91; *Thornton* v. *Thornton*, 63 N. C., 211; *Deal* v. *Cochran*, 66 N. C., 269; *Hyman* v. *Gray*, 4 Jones, 155, cited and approved.)

CIVIL ACTION tried at Spring Term, 1880, of McDOWELL Superior Court, before *Gilmer, J.*

The plaintiff, being the sheriff of McDowell county in 1874, employed the defendant Freeman to aid him in the collection of taxes for that year, and took from him as principal and the other defendants as his sureties, a bond, dated September 14, 1874, the condition of which was that, if the said Freeman should collect or cause to be collected, and pay over unto the said sheriff, the taxes committed to him, in amount $1086.21, "within the time prescribed by law," then the same to be void, &c.

The plaintiff alleges that the defendant Freeman had collected and failed to account for, of the taxes committed to him, the sum of $551.23; and it is to recover this amount that this action is brought. The defendants Flemming and Ledbetter admit the execution of the bond by them as sureties, but say, it was expressly limited to the payment of taxes, "in the time prescribed by law," and that the plain-

tiff without notice to them, and without their consent or knowledge, extended the time for collecting and paying over, from time to time, and made no demand on said defendants; that it was expressly agreed that the time for collecting should be limited to four months, and that the said Freeman should be required to settle within that time; but that instead thereof the plaintiff had extended the time, and had aided and encouraged the said Freeman in his delay and failure to comply with the conditions of their bond, and not only did not inform them of his failure but concealed it, and misinformed the defendants with reference to it, by stating to them that it would be "all right," and that he continued to so aid the said Freeman, and conceal his failure for more than a year after he had knowledge of it, and in so doing had lost his remedy against the defendant sureties; and that if plaintiff had given the defendants prompt notice of such failure, and had not extended the time for collection, they could have saved, to the plaintiff, the greater part of the amount not accounted for; but, that instead of so doing, he concealed the default until the time for collecting had passed.

On the trial the following issue was agreed to:

"What amount of taxes, if any, did Freeman collect and fail to pay over to the plaintiff, of the taxes placed in his hands for 1874?"

The plaintiff testified that he entrusted Freeman with the collection of taxes for two townships amounting to $1088.20, of which he had paid, at different times, $555.77, leaving a balance of $532.43. This amount the witness had accounted to the state for, so that the amount was due to himself. He put no tax books into Freeman's hands, but gave him a memorandum book, in which a list of the tax payers, and amounts due from them, were entered. On one occasion he called on Freeman for a settlement, but none was made—only some calculations—the defendants, Freeman and Flem-

ming, being present. At the instance of the former he wrote a letter to Ledbetter stating the amount he thought to be due from Freeman, which however turned out to be less than was really due. The following is a copy of the letter, written at Marion, January 11th, 1876, and addressed to Thomas Ledbetter:

"The report I have heard about B. F. Freeman I find is incorrect. I am sorry it got out, but I am not to blame for it. I have seen Freeman and am satisfied he will do what is right, and never intended to leave. He has made arrangements to settle up everything by court. I don't think you need be uneasy." (Signed J. F. Neal.)

"N. P. I find on examining my books, Freeman is behind only about $350 for the year 1874. J. F. N."

The *arrangement* referred to in said letter was a promise made by Freeman to Flemming to bring down some corn and bacon to be applied to the amount due from the former. At said settlement Freeman said something about offering a horse, or mortgaging one, but no horse was produced. Witness offered to take the horse, but none was offered. The amount found due at the settlement was about the amount claimed in the action, and was admitted by the parties present to be due. Freeman said at that time that he would send some corn or bacon down.

Witness gave Freeman a receipt, of which the following is a copy: "Received of B. F. Freeman, Dep. Shff., eleven hundred and thirty-four $\frac{48}{100}$ dollars on taxes due by him for the year 1873. This receipt includes the whole amount of taxes collected and amounts paid me in Freeman's townships, and also the amount of taxes exempt by commissioners. February 18th, 1874."

The defendant Freeman testified that the foregoing receipt covered all the taxes paid to the plaintiff and all the receipts heretofore given, but not all the taxes placed in his hands; that he had paid over all the taxes collected in 1873

and 1874. Witness further testified that, at the instance of the defendants, Flemming and Ledbetter, he came to the court house, and had a settlement in which the books were looked over, and three hundred and fifty dollars found to be due.

The note from plaintiff to Ledbetter was then procured by witness, who wished a statement to show to Ledbetter. At that time witness made a payment of $150.

Another calculation was made at Flemming's house but witness could not remember the result, but thought it about $350.

The defendant Flemming testified that in January, 1876, the plaintiff came to him and informed him that he had heard Freeman was about to leave, and advised witness to see him. Witness went to Ledbetter's the same day, and from there went to the plaintiff's office where they left Freeman. Witness afterwards went with the plaintiff to look at Freeman's horse, and suggested to him to take the horse, but plaintiff said he did not think it was necessary, and if deprived of the horse it might cripple him. Ledbetter said he would look after some bacon and corn which Freeman said he would deliver and turn over to them.

At the conclusion of the argument the defendants' counsel asked the court to instruct the jury, that if the plaintiff knew of the default of Freeman, it was his duty to use all reasonable diligence to obtain satisfaction of Freeman before the sureties could be held liable, and to determine the question of diligence the jury might look to the length of the delay, the negotiations with Freeman and all the circumstances of the case.

2. If the plaintiff as a creditor had done any act injurious to the sureties, or inconsistent with their rights, or if he had omitted to do anything which the law enjoined upon him, and the omission was injurious to the sureties, then, in either of such cases, the sureties would be discharged.

3. If the plaintiff had done any act which injuriously affected one of the sureties, so as to discharge him, it would serve to discharge all.

His Honor suggested that while the law asked to be charged might be very good law, it did not seem to be pertinent to the issue agreed to be submitted. Thereupon the counsel asked the court to submit the following issue: "Has the plaintiff used reasonable diligence?" His Honor being of opinion that the evidence did not call for any such issue, declined to do so, and the defendants excepted.

The court instructed the jury to allow interest on the plaintiff's demand from the 10th day of January, 1875, that being the day upon which the plaintiff was required by law to settle the taxes of the previous year with the public treasurer. The defendant excepted to this instruction and insisted that the interest should be allowed only from the commencement of the action.

In response to the issue submitted, the jury found that the defendant Freeman had collected and failed to pay over the sum of $395 of the taxes committed to him, which sum the plaintiff remitted to $372. Judgment was rendered for that amount with interest from the 10th of January, 1875, and defendants appealed.

Mr. G. W. Folk, for plaintiff.
Mr. W. W. Flemming, for defendants.

RUFFIN, J. Several points were argued at the bar in this case, but as the record presents two only, we shall confine our consideration to them, the first being the exception to the refusal of the judge to submit the issue proposed as to the diligence used by the plaintiff; and the second, to the allowance of interest upon the claim of the plaintiff.

As to the first: A creditor is not bound to a surety for active diligence against the principal, for it is the contract of the surety that the principal shall pay the debt,

and it is his business therefore to see that he does so. Consequently, a forbearance to sue, even if accompanied with a failure to inform the surety of the principal's want of punctuality, will not discharge the former. *Pipkin* v. *Bond*, 5 Ired. Eq., 91; *Thornton* v. *Thornton*, 63 N. C., 211; *Deal* v. *Cochran*, 66 N. C., 269.

Eliminate from the case before us the single feature of the delay on the part of the plaintiff to sue, and what else is there in the case that could possibly go to support the issue rejected by the court?

There was no release of any security; no change in the terms of their contract; no *contract* to forbear for a stipulated time; no tender of the amounts due and refusal; nothing in short which could imply bad faith on the part of the creditor, or a disregard, or even indifference to the rights and interests of the sureties.

In the argument much stress was put upon the plaintiff's failure to state the exact amount of their liability in the letter to the defendant Ledbetter. But it is perfectly manifest that this failure did not proceed from any fraudulent intent, and that it could not, and did not work any injury to any one; and as to the confidence in the principal, and in his doing what *what was right*, expressed in the letter, it was but an opinion (so intended and so understood) given to aid the surety in determining what was best for all parties to be done. So too with the treaty as to the horse. It was had with the full knowledge of the defendant, Flemming, and with his full concurrence as to every step taken in regard to it. And as to the other articles "to be turned over" by the principal in discharge of his indebtedness, that was the result of an "arrangement," not between him and the creditor, but between him and the sureties themselves, and so deposed to by the defendant Flemming. Due diligence was a question for the court, and seeing that the whole evidence taken together and supposing it all to be

true, did not establish a want of it in the plaintiff, his Honor properly refused to submit the issue to the jury.

In regard to the question of interest: We concur in the view taken by the defendants' counsel, at least, so far as to say, that it was error to have charged the defendants with interest so early as the 10th of January, 1875, at which time it does not appear that the defendant Freeman had collected any part of the amount he failed to account for. Collecting the money as agent of the plaintiff, he was not chargeable with interest until default made in payment after demand. *Hyman* v. *Gray*, 4 Jones, 155. Whether the bringing the action was such a demand as to entitle the plaintiff to interest from that date, is a question we have not considered, as it was conceded, both in the court below, and in the argument in this court.

As the sum allowed as interest was distinguished in the judgment rendered from the principal sum due, it is not necessary that we should direct a new trial, as the correction can be made here.

Accordingly it is adjudged that the plaintiff recover of the defendants the sum of $372 as principal money, with interest thereon from the date of the summons, and that the clerk of this court make the correction in the judgment in conformity with this opinion.

Thus modified the judgment of the court below is affirmed.

PER CURIAM. Modified and affirmed.

M. T. LEACH v. S. H. FLEMMING.

Notes and Bonds.

An obligor in a bond pledged himself to be responsible for the payment of a note, setting out in said bond the names of the payer and payee,

the amount and date of the note and for what it was given, when due and payable and the rate of interest; *Held* (upon demurrer that no obligee is named), the payee is pointed out with sufficient certainty as the obligee with whom the contract is made.

(*Phelps* v. *Call*, 7 Ired., 262; *Green* v. *Thornton*, 4 Jones, 230; *Shewel* v. *Knox*, 1 Dev., 404, cited, distinguished and approved.)

CIVIL ACTION tried at Fall Term, 1880, of WAKE Superior Court, before *Graves, J.*

The case was tried upon complaint and demurrer. The demurrer was overruled and the defendant appealed.

Messrs. Reade, Busbee & Busbee, for plaintiff.
Mr. Walter Clark, for defendant.

SMITH, C. J. On the 8th day of July, 1873, J. P. Hyams and C. A. Dale in payment of a stock of goods bought by the former from C. F. McKesson, executed to him their promissory note in the sum of $760, payable at nine months with interest from date, and it was accepted on condition that the debt was to be further secured by the defendant. Accordingly a few days thereafter the defendant entered into the following covenant, executed at Marion, N. C., on July 12, 1873:

Whereas John Hyams and Augustus Dale (meaning said C. A. Dale) have purchased of C. F. McKesson a lot of goods, *i. e.*, merchandise amounting to seven hundred and sixty dollars, and have executed their note for the same, dated July 8th, 1873, and payable in nine months after date at six per cent. interest. Now if the said Hyams and Dale fail to pay said note (amounting to $760) at maturity, I pledge myself to be responsible for the same. Given under my hand and seal this 12th day of July, 1873. (Signed S. H. Flemming).

In or about the month of September following, the payee, McKesson, becoming indebted to the partnership firms of

Leach Bros. and A. G. Lee & Co., to the former in the sum of $185.27, and to the latter in the sum of $131.06, assigned by parol, and delivered to the plaintiff the said promissory note and covenant obligation in trust to provide for and secure the sums owing by him. Several payments have been made on the note, reducing the amount still due to $335 with interest from July 10th, 1875. All proper diligence has been employed to collect the balance of the indebtedness from the makers of the note and without success, they possessing no property in excess of the exemptions allowed by law. Of this failure notice was given to the defendant and payment demanded in August, 1876.

This is the case made in the complaint to which the defendant demurs and assigns as the grounds thereof:

1. That no obligee is named in the covenant.
2. The covenant obligation is not assignable.
3. There is no consideration for it.
4. The facts alleged discharge the defendant.
5. McKesson is a necessary party to the action.

The last assigned cause of demurrer has been removed by an amendment making the payee a co-plaintiff in the action.

The first and principal objection directed against the validity of the bond, is the alleged absence of the name of an obligee. The obligation assumed by the defendant is that he will be responsible for the amount due on the note, identifying it by an accurate description of its terms, "if the said Hyams and Dale (the debtors) fail to pay said note (amounting to $760) at maturity." With whom does he covenant when he says, "I pledge myself to be responsible for the same?" Of course it is with the person to whom the note to be paid is payable. McKesson is the designated creditor to whom the money is due, and he is as distinctly pointed out by the reference to the note wherein he is payee,

as if his name had followed the words quoted, upon the maxim *id certum est quod certum reddi potest.*

Suppose instead of a separate instrument reciting the provisions of the guaranteed note, the defendant had endorsed upon the note the words, "I guaranty the within," would there be any difficulty in enforcing the liability for any uncertainty either as to the person with whom, or the sum for which, the contract is made? The reference in each case incorporates the provisions of the secured note with the undertaking, and makes them one whole contract. A guaranty is but a subsidiary and collateral assumption of another precedent, or contemporary obligation, and is annexed to and becomes part of it, when sufficiently described for identification, as much as if written upon the obligation itself. If in such case parol evidence were admissible, as it is not to aid a defective description, it is furnished in the agreement at the time of the execution of the note, that this very additional security for the debt should be given.

We are not without authority in sustaining the bond in suit as a valid and enforcible obligation. In *Langdon* v. *Goode*, 3 Lev., 21, the bond declared on was this: "I, Phillip Goode, do stand bound (not saying to whom) in the sum of 16 pounds, and is to be paid to the said John Gaines, the elder's executors, for which payment to be made, I bind myself, my heirs and executors," (not saying to whom) &c. On demurrer the bond was held good. In a case almost identical and upon the same exception to the insufficient designation of the obligee, judgment was given for the plaintiff, the court saying that "an obligation cannot be made to executors in the life-time of the testator, because he cannot have an executor in his life-time. And this obligation was sealed and delivered to the testator, and it shall not be void if by any means it can be made good." *Lambert* v. *Branthwaite*, 2 Strange, 945.

Our attention was directed to several cases in the argu-

ment in support of the demurrer, to one of which as most directly bearing on the point do we deem it necessary to advert—*Phelps* v. *Call*, 7 Ired., 262. In this case the defendant executed a forthcoming bond in which are these words. In this case the defendant executed an instrument not under seal in which the intended obligatory words are: "I, the undersigned, bind myself in a bond of ninety dollars for the forthcoming of a wagon in the possession of Samuel Drake, executed and levied on as the property of A. Sheets, deputised, to the use of A. Taylor." A. Sheets was the officer deputised by a magistrate to act under the execution. The court say the paper writing "is not a bond; it is payable to no one. It is of the essence of a bond to have an obligee as well as an obligor; it must show upon its face to whom it is payable." The decision does not at all conflict with the views we have expressed, the manifest distinction being that while the one instrument does not, in direct terms or by reference to another writing, point out the obligee, and this imperfection is not removable by parol proof, the other does designate the obligee with whom the contract is made with sufficient certainty, and who can enforce the payment of the note as well as the performance of the subsidiary undertaking of the defendant.

2. If the note was assignable, so must be the accompanying security as incident thereto. Besides the point does not arise as the obligee is a co-plaintiff.

3. The absence of a consideration does not affect the obligation incurred by a sealed written instrument, and if it did the transfer of the note was to be followed by the defendant's guaranty, as part of the same transaction. *Green* v. *Thornton*, 4 Jones, 230.

4. The facts set out in the complaint do not show such laches as exonorates the defendant from liability; on the contrary, the plaintiff avers that the guarantee or his assignee "made all due exertions to collect the amount due

from Hyams and Dale, and used all *possible diligence*, but was unable to do so because neither of them at any time since the maturity of the said note, as plaintiff is informed and believes, was worth above the exemptions by law."

There is no statement from which it can be inferred that damage has resulted from delay, or that any efforts to make the money out of the principal debtors which they still owe would have been successful. *Shewell* v. *Knox*, 1 Dev., 404.

The demurrer must, therefore, be overruled, and this will be certified.

No error. Affirmed.

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*JOHN L. HOLLOWAY v. UNIVERSITY RAILROAD COMPANY.

Condemning land for Railways—Mode of assssing Damages.

The statutes relating to the appropriation and assessment of the value of lands for railway uses, have taken away the common law remedy of trespass *q. c. f.*; and the damages alleged to have been sustained by the owner of lands thus appropriated, must be assessed in the manner prescribed in the general law, as contained in the Revised Code, ch. 61, § 10, unless special provision is made in the charter for that purpose.

CIVIL ACTION heard upon complaint and demurrer at Fall Term, 1881, of ORANGE Superior Court, before *Gudger, J.*

This was an action in the nature of trespass *quare clausum fregit*, brought by the plaintiff against the defendant for an injury to his land by entering thereon and appropriating and occupying the same for constructing a railroad under a charter granted by the legislature, by which entry and oc-

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

cupation it was alleged the plaintiff had sustained great damage.

The defendant demurred to the complaint and assigned as grounds of demurrer, that the common law remedy by trespass is taken away by the statutory remedy, and the plaintiff has no right to maintain his present action. The demurrer was sustained and the plaintiff appealed.

Messrs. Strayhorn, Fuller and *Roulhac*, for plaintiff.
Mr. John W. Graham, for defendant.

ASHE, J. The University railroad company is in the act of constructing a railroad from a point on the North Carolina railroad, the route of which passes over the land of the plaintiff, and they have under the provisions of their charter entered upon and appropriated for the purposes of their road, a portion of the land of the plaintiff one hundred and fifty-six feet long and one hundred feet wide, and the plaintiff has instituted this action to recover the damages which he alleges he has sustained by reason of the trespass.

And the question is, can the action be sustained, or is the plaintiff confined to the remedy given by statute.

By section 10, chapter 61 of the Rev. Code, it is provided: "If such corporation (railroad) cannot agree with the owner of the land which is entered on, or is desired by the corporation for the purposes aforesaid, in the price to be paid for the same, then either the company or the owner, five days previous notice thereof being given to the other party, may apply by petition to the county or superior court of the county in which the land or some part thereof may be situated, and the court shall appoint five disinterested and impartial freeholders to assess the damages to the owner for the occupation and use of the land." The object of this statute was to facilitate railroad companies in the construction of their roads, by removing obstacles to their location,

and remedying the mischief of vexatious suits at common law.

The legislature in the year 1872 passed an act, styled "An act to authorize the formation of railroad companies and to regulate the same," (Bat. Rev., ch. 99,) in which it is provided that, in case any company formed under that act should be unable to agree for the purchase of any real estate required for the purposes of its road, it should have the right to acquire title to the same by presenting a petition to the superior court, praying to have commissioners appointed to appraise the land described in the petition, &c.

The University railroad company was first chartered in the year 1873, (Act of 1872-'3, ch. 51,) under the name of the "Iron Mountain Railroad Company," and by that act it was provided that the company might acquire title to lands for the purposes of its road, "subject, however, to the valuation and appraisement of value and damage, to be determined under the provisions of the 'Act to authorize the formation of railroad companies and to regulate the same.'"

This act of 1873 was amended by the act of 1879, ch. 100, which changed the name of the corporation to that of the "University Railroad Company," and provided that the said company might appropriate and occupy as much land as might be necessary for the construction of its road, "subject, however, to the valuation and appraisement of value and damage to be determined under the provisions of chapter 99 of Battle's Revisal, entitled 'Railroad Companies.'"

We are of the opinion the proper construction of the several statutes in relation to the appropriation and assessment of the value of lands for railroad uses, is, that they have taken away the common law remedy.

In order to encourage the building of railways, and facilitate their construction, it has been the purpose and policy of the legislature to provide these statutory remedies to pro-

tect railroad companies against vexatious and dilatory litigation. In that view was enacted section 10, chapter 61, Rev. Code, which gave the statute remedy to both the company and the party injured. Then was passed the act of 1871–'72, ch. 138, (Bat. Rev., ch. 99,) in which is prescribed the mode of proceeding to condemn land by companies organized under its provisions. The statute remedy in this act is given exclusively to the company. The two acts incorporating the University railroad company provide that the company may appropriate and occupy land for the uses of its road, subject to the valuation and appraisement of value and damage to be determined under the provisions of that act—Bat. Rev., ch. 99. There is no repealing clause in this last act. There can be no doubt that the University railroad company, if it takes the initiative in the assessment of value and damages, must pursue the remedy prescribed in the charter; but there being no provision for a remedy in behalf of the plaintiff, the injured party, either in the acts of incorporation or Bat. Rev., ch. 99, to which they refer, we must look elsewhere for his remedy. Section 10 of chapter 61 of the Revised Code was intended as a general law to apply to all cases, where there were not other and special provisions made. It was not repealed by the act of 1871–'72, (Bat. Rev., ch. 99,) but is still in force, except so far as it comes in conflict with, or is repugnant to subsequent legislation. It is repealed on this ground so far as it relates to the University railroad company, but is not repealed and is in force in regard to the plaintiff, who is the injured party. We hold that his remedy is under that section of the Revised Code, and that this action cannot be maintained.

The demurrer was properly sustained.

No error. Affirmed.

J. W. TUTTLE and an other v. R. M. HARRILL.

Estoppel—Res Adjudicata—Union of Law and Equity.

1. Where two or more successive actions are identical as to the parties, the alleged cause of action, the defences relied upon and the relief demanded, a judgment upon the merits in the first action will estop any and all parties from maintaining the subsequent ones.
2. Except in special cases, the plea of *res adjudicata* applies not only to points upon which the court was actually required to pronounce judgment, but to every point which properly belonged to the subject of the issue, and which the parties, exercising reasonable diligence, might have brought forward.
3. Under our present system of pleading and practice, a party is conclusively presumed, when sued in a second action on matters before litigated, to have set up in the former action all the equitable defences of which he might have availed himself to defeat the legal title.

(*Farmer* v. *Daniel*, 82 N. C., 152, cited and approved.)

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

This action was brought to enforce the specific performance of a contract for the purchase of land alleged to have been entered into between the plaintiff Tuttle and the defendant, and for the possession of the same land.

The action was originally brought in the name of the plaintiff Tuttle alone, the plaintiff Logan being entered as his attorney of record. During the progress of the cause a motion was made at the instance of the plaintiff Tuttle to dismiss the action, the attorney who made the motion producing a power of attorney from him authorizing the same to be done, and thereupon the plaintiff Logan filed an affidavit claiming to be the owner, and to have purchased the land under execution against his co-plaintiff, and was allowed to become a party plaintiff. In the complaint it is alleged, without giving any date, that the plaintiff Tuttle

purchased of the defendant a tract of land known as a part of the Achilles Baker tract, and containing eighty-six acres, for which he paid the purchase money in full and took a written assignment of his interest with a promise to convey the same in fee, which written assignment has been lost. That the defendant having gotten the possession of the land retains the same, and though requested to make plaintiff a deed, refuses to do so. The relief asked is that the defendant may be adjudged to make the plaintiff a deed, and deliver the possession of the land, and for damages for waste and occupation.

The defendant in his answer says that the plaintiff Tuttle did not purchase the land mentioned in the complaint, but that in the year 1860 the defendant did agree with the plaintiff Tuttle to exchange lands, and to let him have the 86 acre tract mentioned in the complaint for another which he owned adjoining it. This agreement however was by parol, and was afterwards revoked by mutual consent, without anything being paid, or done under it. Subsequently a second and different agreement was made between the same parties, also by parol, which the plaintiff Tuttle has failed to comply with, and as to this last agreement the plaintiff pleads the statute of frauds.

For a second defence, the defendant alleges that the same matters of fact alleged in the complaint and relating to the same land, had theretofore been tried and adjudicated between these same parties in interest at fall term, 1873, of McDowell superior court, the defendant Harrill being then the plaintiff and Logan the defendant, against whom there was a verdict and a judgment. Also that the same matters of fact and relating to the same land had been adjudicated and determined in still another action tried at spring term, 1878, of Rutherford superior court, wherein the said Tuttle and Logan were plaintiffs and the said Harrill defendant, and in which there was a verdict and a judgment in his

favor. In the action last named there was an issue submitted and found by the jury that the matters of fact then alleged had been tried and determined in the action before referred to as having been tried in McDowell superior court. The defendant pleads the estoppel upon the plaintiffs, one or both, growing out of the verdicts and judgments in said actions.

On the trial in the court below, the defendant put in evidence a transcript of the record of the superior court of McDowell county, in an action wherein the present defendant Harrill was plaintiff and the said Logan was defendant, and in which all the issues were found for the then plaintiff, now defendant.

This action begun in the court of Rutherford county, but was removed, by consent of the parties, to McDowell county for trial. In his complaint filed in the action, the plaintiff (now the defendant) alleged that he was the owner in fee of a tract of land containing 86 acres (describing it as is done in the present action) of which the defendant had possession, claiming to have the title thereto, and refused to surrender the same, and judgment asked that he recover the land and for rents, &c.

The defendant Logan by his answer denied the title of the plaintiff to the land, and averred that any claim which he might pretend to under Tuttle (his co-plaintiff in the present action) was fraudulent and void. That Logan himself had the title derived by deed from the sheriff of Rutherford county under sale made by virtue of two executions against the said Tuttle—one in favor of L. Lineberger & Co., and the other in favor of one W. H. Bostick. The record in this action showed the final judgment to be in favor of the then plaintiff, that he recover possession of the land, &c.

The defendant also offered the record of an action tried at spring term, 1878, of the superior court of Rutherford, in which the present plaintiffs, Tuttle and Logan, were the

parties plaintiff, and said Harrill defendant, and by the complaint in which it was alleged that the defendant being seized of a certain tract of land containing 86 acres (being the same with that which is the subject of the present action) agreed with the plaintiff Tuttle sometime in the year 1860 to interchange lands with him and to give him the 86 acres for an adjoining tract of 150 acres then owned by him. That relying on this agreement, and at the defendant's request, the said Tuttle conveyed the 150 acres to one W. H. Bostick and gave him the possession thereof, and took the possession of the other tract, which he continued to hold until 1867. That the defendant, notwithstanding his promise to do so, had refused to convey to Tuttle the 86 acres by deed sufficient to convey the legal estate, but had by a writing signed under his hand assigned to him an equitable interest therein, which interest the plaintiff Logan had purchased at execution sale, under judgments in favor of Lineberger & Co., and W. H. Bostick, and immediately thereafter had taken the possession of the land and placed one Knipe thereon as his tenant.

The relief sought was that the defendant Harrill be declared a trustee as to the 86 acres for the plaintiff Tuttle, or Logan as having acquired his title; or that the agreement to interchange lands be rescinded in case the defendant relies on the statute of frauds, and he be directed to reconvey the 150 acres, and for such other relief, &c.

The answer of the defendant Harrill as exhibited in this last mentioned record was the same in substance with that filed in the present action, so far as it related to the facts of the case, and there was a special plea of the estoppel growing out of the adjudication of the same matters in the action between the defendant and the plaintiff Logan, tried in the county of McDowell. In response to an issue submitted at the trial of this cause the jury found the matters in litigation had been theretofore adjudicated between the parties in

interest to the controversy, and it was adjudged that the plaintiffs take nothing by their action.

Upon the introduction of the foregoing records and the identity of the subjects of litigation in all being unquestioned, His Honor instructed the jury that upon the evidence the defendant was entitled to their verdict. The plaintiffs excepted, and being allowed to state the ground of their exception, did so as follows:

That the two actions between the parties, tried, one in McDowell court at fall term, 1873, and the other in the Rutherford court at spring term, 1878, were pure actions at law, being nothing more than ordinary actions of ejectment, whereas the present action is one purely for equitable relief. After judgment against them the plaintiffs appealed.

Messrs. Reade, Busbee & Busbee, for plaintiffs.
Mr. J. F. Hoke, for defendant.

RUFFIN, J., after stating the facts. It is to be observed in the first place that the assumption of the plaintiffs as to the differences existing in the character, scope and purposes of the several actions waged between the parties in regard to the land in question, is not strictly accurate. So far as the present action and that which terminated in a verdict and judgment for defendant at spring term, 1878, of the same court, are concerned, they seem to be identical as to the parties, the alleged causes of action, the defences relied upon, and the relief demanded; and it being admitted that they both related to the same subject matter, and the judgment in the prior action being rendered upon the merits of the case, it must follow that such a judgment is a bar to the second action.

In such a case the judgment operates as an estoppel upon parties and those in privity with them, not only as to such matters as were actually urged to sustain or defeat the claim

asserted in the action, but as to every possible matter that might have been so urged.

The two actions now referred to were purely equitable in their nature. They both allege the existence of an agreement between the parties with reference to the same land, the promise of the defendant to convey the same to the plaintiff Tuttle, the performance of his part of the agreement by said plaintiff, and the refusal of the defendant to perform his promise. The effort of the plaintiff Logan to establish the validity of his purchase at sheriff's sale, is the same in both, and the prayer that the defendant may be directed to execute a deed for the premises made in both, is such as only a court of equity can give. Thus it is that the scope of the two actions so far as they relate to the 86 acres, is identically the same. It is true that in the prior action there was a prayer for the reconveyance of the 150 acres to the plaintiff Tuttle, in case the defendant should not be held to perform his contract as to the smaller tract, but the plaintiff Logan sets up no claim to that land, and as this action is prosecuted solely for his benefit, and in spite of the effort of his co-plaintiff to dismiss it, that difference cannot enter into this case.

Having reached this conclusion, which fully supports the instructions given by his Honor to the jury who tried the cause, we might stop all further consideration of the question, but we are of the opinion that if the defendant's plea of the estoppel had been confined to that growing out of the judgment of the McDowell court, the consequences to the plaintiff would have been the same. That was an action at law, it is true, being for the possession of the land upon the strict legal title of the then plaintiff (now defendant). Still, constituted as our courts now are, it was open to the defendant in the action to set up any equitable defences he might have, and if able to show a perfect equitable right in himself (such as he seeks to assert in his present action), to de-

feat a recovery upon the legal title of the plaintiff. It was his folly not to have asserted this claim, (if, indeed, he did not do so,) and he must be concluded by the judgment rendered in the cause.

Except in special cases, says Taylor in his work on Evidence, the plea of *res adjudicata* applies not only to points upon which the court was actually required to pronounce judgment, but to every point which properly belonged to the subject of the issue, and which the parties, exercising reasonable diligence, might have brought forward. 2 Taylor Ev., § 1513. As to the right of a party to defend upon an equitable right and to defeat the legal title, and the reasons for permitting the same to be done, we refer with satisfaction to the able opinion delivered by Mr. Justice DILLARD in the case of *Farmer* v. *Daniel*, 82 N. C., 152.

No error. Affirmed.

C. L. McPETERS v. G. D. RAY.

Account—Evidence—Value of Services—Practice—Reference.

1. When the plaintiff has exhibited an account for services rendered the defendant, it is competent for him to prove that he was in the service of the defendant for a longer period than that charged in the account, and to explain that the excess was the equivalent of time lost while he was in such employment.
2. It is also competent for a witness who testifies as to the value of the plaintiff's services, to assign in support of his estimate that he had himself previously employed the plaintiff and paid him at that rate.
3. This court cannot consider exceptions to findings of fact as being against the weight of evidence.
4. An order of reference to state the accounts of a co-partnership between its members will not be reversed, as having been prematurely made before the existence of such co-partnership had been established,

when no exception was taken at the time when the reference was made; when the right to a jury trial as to the existence of such association was expressly reserved in the order of reference; the co-partnership being admitted in the answer, as to a single transaction, and the verdict afterwards rendered on the question reserved being in affirmance of the plaintiff's claim as to the existence of the co-partner ship.

(*Schehan* v. *Malone*, 71 N. C., 440; *Brumble* v. *Brown*, *Ib.*, 513; *Chester R. R. Co.* v. *Richardson*, 82 N. C., 343; *Mitchell* v. *Kilburn*, 74 N. C., 483, cited and approved.)

CIVIL ACTION tried at Spring Term, 1881, of YANCEY Superior Court, before *McKoy, J.*

Judgment for plaintiff, appeal by the defendant.

Mr. J. M. Gudger, for plaintiff.
Messrs. Gilliam & Gatling, for defendant.

SMITH, C. J. This action is for an adjustment of the affairs of an alleged co-partnership in the purchase and sale of mica, and for a claim for personal services rendered outside the joint business. The defendant in his first answer denies the existence of a partnership for any purpose and his liability to any demand of the plaintiff, but in his subsequent amendment admits a restricted co-partnership between themselves and C. F. Young in buying and disposing of, for their common benefit, a single lot of that material obtained from one McWm. Young in the year 1876.

Upon the trial of the cause at spring term, 1879, and before the answer was amended, the jury rendered a verdict (if in response to prepared issues the record does not disclose them) finding for the plaintiff, and awarding unascertained profits in certain joint transactions, which was set aside at the cost of the plaintiff and an order of reference entered in these terms:

On motion of the plaintiff, the defendant not consenting thereto, it is ordered that E. W. Goolsby proceed after notice

to the parties to take and state an account of all the dealings and matters in this action, according to the pleadings, and report to the next term of this court. This order of reference is made without any prejudice whatever to the defendant's right to contest before a jury the existence of any partnership as set out in the answer, and in the event of the failure of the plaintiff to establish such partnership by a verdict of a jury, the cost of the reference to be borne by the plaintiff, otherwise to be paid as directed by the court.

The referee proceeded to hear the evidence and reported the same with his findings of fact and conclusions of law at fall term, 1880, from which it appears there was due the plaintiff on the 4th day of August, 1880, the sum of $560.20\frac{1}{2}$ whereof $459.85\frac{1}{2}$ is principal money, and to bear interest thereafter.

Several exceptions were taken to the report by the defendant, which were overruled, and the amended answer put in; and thereupon in response to issues submitted, the jury say that the parties were during the year 1876 engaged as copartners in the mica trade, and the joint business extended to other transactions outside the material bought of McW. Young. The exception being overruled, the report confirmed and judgment rendered for the plaintiff, the defendant appealed.

These exceptions and the rulings thereon are now before us for review.

For that the referee admitted and acted on illegal and irrelevant evidence: There was but a single witness examined besides the parties to the action. The exception is vague and indefinite, and could not be noticed except by reference to the objections made to testimony admitted during the examination of the plaintiff's witnesses, and which were properly overruled. It was entirely competent for the plaintiff to prove that he was in the service of the defend-

ant for a longer period than that charged in his account, and to explain that the excess was the equivalent of time lost while he was in the defendant's employment, and equally so for the independent witness to be allowed to assign in support of his estimate of the value of the services, that he had himself previously employed the plaintiff and paid him at that rate. These and other exceptions noted during the taking of the testimony are so entirely untenable, if not frivolous, that they were not insisted on in argument. *Schehan* v. *Malone*, 71 N. C., 440 ; *Brumble* v. *Brown Ib.* 513.

The several exceptions to the findings as being against the evidence or its weight are not reviewable, and if they were, derive no support from a consideration of the testimony taken.

The only remaining exception, the substance of which is not embodied in the preceding, is to the making the order of reference before the disputed fact of partnership was settled by the verdict. This is the only matter pressed on us in the present hearing and has but little if any more merit.

1. While the record shows it was not a reference by consent, no exception was then taken and noted to the ruling, the proper practice, when it is intended to be relied on, as pointed out in *Mitchell* v. *Kilburn*, 74 N. C., 483, and *Chester R. R. Co.* v. *Richardson*, 82 N. C., 343.

2. The order was made with special reservation of the right to a jury trial of the asserted and denied copartnership, and if rendered unnecessary by reason of the finding, at the plaintiffs' costs.

3. The amended answer admits a copartnership in a single transaction, and this admission though posterior in time is a confirmation of the order before made, and removes the objection.

4. The verdict sustains the reference as the previous confused findings point out, and we presume suggested the propriety of making it.

5. No harm has come to the defendant by reason of the reversed usual course of procedure in cases where a defence to the action is set up which if valid puts an end to it, and dispenses with the taking of an account, and we are not prepared to say that the order is not within the scope of section 245, C. C. P., and sanctioned by it, nor that the departure from the usual and orderly course of procedure in giving precedence to the reference when every right of a defendant is secured to him, would constitute error and vitiate the trial. There is no error, and the judgment must be affirmed.

No error. Affirmed.

F. O. MORING, Treas., &c. v. JOHN DICKERSON, and others.

Mortgage—Priorities—Instantaneous Seizin.

Where a mortgage on land is given to one who has advanced the purchase money therefor, and executed at the same time with the deed which confers title on the mortgagor, the making of the two deeds is considered as but one transaction; the seizin of the mortgagor is but an instantaneous one, to which prior encumbrances on his estate will not attach; but the mortgage to secure the purchase money will take precedence of all other liens or encumbrances.

(*Howell* v. *Howell*, 7 Ired., 491; *Bunting* v. *Jones*, 78 N. C., 242, cited and approved.)

CIVIL ACTION, tried at Spring Term, 1881, of WAKE Superior Court, before *Schenck, J.*

This was an action to foreclose a mortgage. After the pleadings were made up there was a reference under the Code to R. T. Gray, Esq., who found the facts to be as follows: The Raleigh Co-operative Building and Loan Association, owning the land mentioned in the pleadings, on the 14th day of June, 1869, contracted to sell the same to the

defendant, John Dickerson, at the price of $400, and gave him a bond for title when the purchase money should be paid. On the 16th day of November, 1874, Dickerson and wife gave their bond to the firm of Thompson & Whitaker for the sum of $275, and at the same time executed a mortgage upon the land as a security for the debt, which mortgage was immediately registered. Soon thereafter Thompson assigned to his partner, Whitaker, his interest in said bond and mortgage. On the 8th of February, 1877, Whitaker borrowed money of the plaintiff, F. O. Moring, as treasurer of the Merchants' Protective Association, and assigned his interest in said bond and mortgage as a collateral security therefor. In 1878 said Whitaker was adjudged a bankrupt, and the defendant Fray was appointed his assignee.

On the 14th day of May, 1876, in order to complete the payment of the purchase money for the land, and procure a deed from the said Raleigh Co-operative Building and Loan Association, the defendant Dickerson agreed to purchase of the defendant Viney Farrar four shares of stock, which she owned in said association, of the market value of $100 per share, and to pay therefor the sum of $600, to be secured by a mortgage on the land. That no certificates of stock were ever issued by said association to its stockholders, and all transfers of stock were therefore made upon the books of the company.

In pursuance of said agreement the parties met with the treasurer of said association, when the four shares of stock, then owned by the defendant Viney, were surrendered and cancelled; and in consideration thereof the association then executed a deed to Dickerson, who at the same moment, and through the aid of the same draughtsman, executed a mortgage upon the land to the said Viney for $600.

Upon the basis of these facts, the referee concludes, as matters of law, that the defendant Dickerson had an equitable interest in the land capable of being transferred by his

mortgage to the firm of Thompson & Whitaker. That the defendant Viney Farrar had constructive notice of such mortgage at the time she took her mortgage on the 4th of May, 1876; and therefore the lien of her mortgage is junior to the other, and he recommends a sale of the premises and an application of the proceeds in the manner indicated. To this report the defendant Viney Farrar excepted, and insisted upon her right to have her mortgage first satisfied out of the proceeds of the sale of the land, but the court overruled her exception, and gave judgment according to the recommendation of the referee, from which the said defendant appealed.

Messrs. Reade, Busbee & Busbee, for plaintiff.
Messrs. Battle & Mordecai, for defendants.

RUFFIN, J. Two questions only are presented for consideration. First, whether the two instruments, consisting of the deed from the Building and Loan Association to the defendant Dickerson, and his mortgage to the defendant Viney Farrar, executed as they were simultaneously, are to be construed as one instrument, and to operate as one assurance to her of the land which is the subject of controversy? And if so, then whether her mortgage is to have precedence over that, under which the plaintiff is seeking to sell the land—the same being prior in point of time.

The true rule in the construction of deeds and all other written instruments is to give effect, if possible, to the intent of the parties thereto, by which is meant, that where it is clearly the intent of the parties that the land shall pass, the form of the conveyance is not material, but the intent shall be effectuated by every legal means. Accordingly this court declared in the case of *Howell* v. *Howell,* 7 Ired., 491, that if necessary to give effect to the intention of the parties, they would not hesitate to treat several instruments, execu-

ted at the same time, and relating to the same subject, as forming but one, that is, to construe the several instruments as component parts of one and the same instrument.

So too in *Bunting* v. *Jones*, 78 N. C., 242, speaking of a deed to the purchaser of land, and a mortgage to secure the purchase money, executed by him at the same time, it is said that the two were *intended* by the parties to be concurrent acts, and should therefore be construed as one act. Looking to the decision of other courts we find them without an exception, so far as we are informed, all pointing to the same conclusion.

In *Holbrook* v. *Finney*, 4 Mass., 566, where a father conveyed land by deed to his son, who at the same time gave a mortgage to the father to secure the purchase money, the supreme court of that state held that the two instruments were to be considered as parts of one and the same contract between the parties; in the same manner as a deed of defeasance forms with the deed to be defeated but one contract though engrossed on several sheets. To the same effect is the decision of the same court in the case of *Clark* v. *Munroe*, 14 Mass., 351, and that of the supreme court of the state of New York in the case of *Stow* v. *Tift*, 15 Johnson, 458, and also in *Jackson* v. *McKenny*, 3 Wend., 233.

In the case now before us the two deeds bear the same date, are consistent with each other, relate to the same property, and are manifestly parts of one agreement evidenced by different instruments, and as to the intention of the parties it is clear that finding himself unable to discharge his debt due to the association for the purchase money of the land, the defendant Dickerson sought the aid of the defendant Farrar, who agreed to give it, by surrendering her shares of stock for cancellation, provided she were made secure by a mortgage on the land, and that this was thoroughly understood and assented to by all the parties, including the officer of the association. If then by any possible

legal construction of the two instruments this intention of the parties can be carried into effect, it is the duty of the courts to adopt it.

This brings us to the other question, viz: whether the defendant Farrar, having advanced the money to pay for the land to the Building and Loan Association, and upon the conveyance thereof to the defendant Dickerson, having *eo instanti* taken a mortgage from him to secure the money so advanced, is entitled to precedence over the other mortgage notwithstanding it is of an older date. In many of the states they have undertaken to regulate this matter of precedence between conflicting mortgages and liens, by statutes which declare that whenever lands are sold and conveyed, and a mortgage is given by the purchaser, at the same time, to secure the purchase money, such mortgage shall be preferred to, and exclude any claim, or lien, arising through the mortgagor. Here we have no such statutory provision, and must needs therefore consider the point in the light of the common law alone. It is impossible to conceive of a decision furnishing a stronger analogy, determining as it does a principle which must govern this case, than that rendered in the case of *Bunting* v. *Jones* before cited from our own reports. There, the facts were that the plaintiff, purchasing the land and paying for it, had the conveyance made to the defendant, who immediately executed a mortgage to the plaintiff to secure the purchase money, and the question was as to the right of the defendant's wife to have dower in the premises. If *any right*, accruing through the mortgagor, could under the circumstances attach to the land, it must have been that of dower, since that, of all rights, is most favored by the law, and yet so observant was the court of the intention of the parties, and so careful to give effect to it, that it would not allow it to be defeated, even by the wife's claim of dower. To the very same import are the other authorities cited, of *Holbrook* v. *Finney*, *Clark* v. *Munroe*,

and *Stow* v. *Tift*. These cases all proceed upon the idea that the seizin of the husband was but for an instant, and that it was not intended to be in him beneficially at all, or for his own use, but that the real purpose was to put the title in the mortgagee as a security for his money advanced, and that the husband was a mere conduit pipe or medium of conveyance. But we are not left to reason from analogy merely in regard to the point; on the contrary, we have to guide us, the decisons of several courts of eminent respectability. In *Jackson* v. *Austin*, 15 John, 477, and *Haywood* v. *Nooney*, 3 Bart. (N. Y.) 643, the facts were almost identical with those of the present case, except that the older incumbrances, for which priority was claimed, were judgment liens instead of mortgages; and in both cases, it was held that the preference was due to the mortgage given to secure the payment of the purchase money to the party who had advanced it. It is true, that in that state there was a statute on the subject; but the same court in the case of *Stow* v. *Tift supra*, held it to be declaratory merely of the common law, and indeed the preamble to the statute itself, so declares.

Again the supreme court of Illinois (in which state they have no such statute) declared in the case of *Curtis* v. *Root*, 20 Ill., 53, that it was a principle of law too familiar to justify a reference to the authorities, that a mortgage given for the purchase money of land and executed at the same time the deed is executed to the mortgagor, takes precedence of judgments previously existing against him. The reason given is that the execution of the deed and of the mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands, and without stopping, vests in the mortgagee, and during such instantaneous passage no lien of any character can attach to the title. True it is, that in the case just cited the mortgage was to the vendor of the land, but in point of right and principle it can make no difference whether it be

given to the vendor, himself, for the purchase money, or to one who actually advances the means to pay the purchase money to the vendor, and it was so expressly ruled in the case of *Kaiser* v. *Lembeck*, 3 Iowa, 520.

Impelled by these authorities and convinced as we are of their correctness, we are constrained to hold that His Honor in the court below, erred in declaring that the preference should be given to that mortgage under which the plaintiff claims. In our view of the case the mortgage given for the purchase money stands upon the higher ground and is entitled to precedence—not upon the ground of any supposed equity in the vendor as such to have the purchase money of the land sold or any right of subrogation in the defendant Farrar to his lien upon the land, but purely and simply upon the ground that the two instruments being executed at the same moment of time are to be treated as one, and construed as if the association had conveyed the land directly to her, and had not made use of the defendant Dickerson as an instrument to that end. If there had been an interval of time between the two transactions during which the title to the land had rested in Dickerson, then this right of priority would have been lost to her and attached to the elder mortgage.

It is therefore declared by this court that the mortgage executed to the defendant Farrar on the 4th day of May, 1876, constituted the first and highest lien upon the land, to the extent of $400, that being the amount of the purchase money then actually due and paid, together with the interest thereon from the day of such payment. We have thus restricted her right to the actual amount of the purchase money because of her offer made at the bar of this court to accept that sum, and have not at all considered her right to have the whole of her debt secured in the mortgage in case she had seen fit to demand it.

As to the suggestion of usury made in this court by the

plaintiff, it is sufficient to say, that no such point appears by the record to have been taken in the court below, and if it had been it could not avail in a court of equity whose aid the plaintiff himself had sought.

There is error. Let judgment be entered in this court according to the rights of the parties as herein declared.

Error. Reversed.

W. C. STRONACH & CO. v. M. A. BLEDSOE.

Practice—Right to Open and Conclude—Note—Consideration.

1. Plaintiff alleges non-payment of note; defendant admits its execution and avers that the consideration thereof was an article bought of plaintiff and warranted by him to be good, but which turned out to be worthless, and sets up counterclaim for alleged losses in its use; *Held*, the admission in the answer established a *prima facie* case for plaintiff, and the *onus* rested on defendant, thereby giving him the right to open and conclude.
2. An unsealed note which upon its face states a consideration, or to be for "value received," furnishes proof *prima facie* of a consideration to support it.

CIVIL ACTION tried at Spring Term, 1881, of JOHNSTON Superior Court, before *Gudger, J.*

The defendant appealed from the ruling of the court below.

Messrs. D. G. Fowle and *A. M. Lewis*, for plaintiff.
Messrs. Reade, Busbee & Busbee for defendant.

RUFFIN, J. Of the several exceptions taken by the appellant, it is necessary that we should notice but one, since that entitles him to a new trial; and the other exceptions

being addressed to matters touching the evidence and the judge's charge, may not again arise.

The point to be considered is, upon which party did the *onus probandi*, as developed upon the record, lie? and as a corollary to that, which of the counsel had the right to open and conclude in the argument?

If this question were *res integra*, I, for one, should not hesitate to declare that it ought to be left, as a matter of discretion, to the judge presiding at the trial, to be determined by him as he may think most likely to speed and facilitate the cause, by a presentation of the facts in that order most easily to be apprehended by the jury.

But it has been too long recognized as a *positive legal* right, a denial of which would furnish ground for an exception on an appeal, to admit of our taking any such position at this late day.

To present the point intelligently, it is necessary to state the substance of the pleadings which constituted *the record*.

The plaintiff complains of the non-payment of an unsealed note of which the following is a copy: "On or before the 1st day of November, A. D. 1870, I promise to pay W. C. Stronach & Co., or order, nine hundred and thirty-five dollars, for 17 tons of O. P. Merryman's Raw Bone Superphosphate, it being understood and agreed that this fertilizer is to be used and paid for out of the crop upon which it is used, on the said Bledsoe's plantation near the city of Raleigh the present year; this note to bear interest from date and the crop pledged for its payment," (signed Feb. 17, 1870, by M. A. Bledsoe,) and alleges the same to have been executed and delivered to the plaintiff, and that no part thereof had been paid.

The answer admits the execution and delivery of the note, but says, that the consideration thereof was a sale by the plaintiff of a certain amount of so-called fertilizer, which after its delivery proved to be utterly worthless, and without

mercantile value. That the plaintiff represented the article for which the note was given to be the cheapest article of the kind in the market, and equal to the highest priced guano; and relying on such representations the defendant purchased without having seen and examined it, at a certain price per ton, and plaintiff ought not, therefore, to recover more than the article was really worth, and being nothing but a fraudulent mixture of bone, sand and dirt, it was worthless. That the plaintiff warranted the article sold to be the cheapest and best in the market, and relying upon such warranty, the defendant went to great expense in distributing the spurious article upon his farm, and was prevented from using a genuine article, such as would have insured him a good crop; and a demand as a counterclaim is made for the amount lost in distributing the article, and by the failure in the crop.

In reply the plaintiff denies all the causes of defence and the counterclaim set up in the answer, and alleges that the entire consideration of the note did not consist of the fertilizer sold, but that it also included a commission of three dollars per ton, which the defendant agreed to pay the plaintiff for purchasing the article for him and the freight upon the same.

The following issues were agreed to as raised by the pleadings:

1. Is the plaintiff entitled to recover the amount of the note sued on, the execution and delivery of which is admitted by the defendant, or if any part thereof, how much?

2. How much is the defendant entitled to recover, if anything, in excess of the plaintiffs' demand?

At the trial the defendant insisted that the burden of proof was upon himself, and proposed to take the initiative, which upon the objection of the plaintiff he was not allowed to do, and thereupon excepted, and the same point was

made and overruled, as to the right of defendant's counsel to open and conclude the argument.

The admissions of the answer certainly establish a *prima facie* case for the plaintiff, and especially is this so if regard be had to the form of the first issue agreed to be submitted, and which is the only one material to the point before us.

By this issue, as well as by the pleadings, the execution and delivery of the note sued on was admitted, and upon its face it purported to be founded upon a consideration. What duty then rested upon the plaintiff, further to establish his right to recover? His counsel says that it was incumbent on him to show affirmatively a consideration, for that, not being under seal or negotiable, the note did not of itself, and though its execution be admitted, import a consideration; and for this he cites us to Smith on Contracts, pp. 82 and 99. There is no doubt that such is the general rule, that in an action upon an unnegotiable instrument a consideration must be both averred and proved. But the exception to the rule is, when on its face the instrument expresses the consideration, or purports to be given for "value received," in which cases, says 1 Daniel on Neg. Instruments, § 161, a *prima facie* case of a consideration is established. So, too, in *Averett* v. *Booker*, 15 Gratt., 163, it is said that an unnegotiable instrument furnishes proof *prima facie* of a consideration to support it, when a consideration is stated in it, or it is stated to be for "value received."

Tested by any rule, whether by looking to see which party should succeed if no evidence were given on either side, or on the other hand, which party would fail, in case every allegation necessary to be supported by proof was stricken from the record, the *onus* rested upon the defendant in this case, in the existing state of the pleadings, to say nothing of the form given to the issue.

Error. *Venire de novo.*

W. S. BROWN and wife v. T. S. COOPER, Adm'r.

Issue—Repleader—Practice.

When, upon a review of the record sent up to this court, the contending allegations of the parties in the court below do not appear to have evolved any issue, a *venire de novo* will be awarded in order that there may be a *repleader*.

(*McKee* v. *Lineberger*, 69 N. C., 217, cited and approved.)

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

The complaint states that in May, 1857, A. F. Sadler (the defendant's intestate) and one William Clanton executed a note under seal to Eliza Cathey, for two hundred and thirty dollars, payable one day after date, and in July, 1864, the feme plaintiff purchased the note from said Cathey for a valuable consideration, and no part of the same has been paid, except the interest for one year; that in April, 1865, the dwelling of the feme plaintiff was destroyed by fire, together with said note and other valuable papers belonging to her, and she has demanded payment of the intestate during his lifetime, and also of the defendant administrator, offering full indemnity in the premises; and that judgment has been obtained against Clanton, but that for the reason that he has no property the sheriff has returned the execution issued thereon, unsatisfied. The defence set up in answer to the plaintiffs' allegation is sufficiently stated in opinion. Verdict and judgment for plaintiffs, appeal by defendant.

Mr. Clem. Dowd, for plaintiffs.
Messrs. Wilson & Son, for defendant.

SMITH, C. J. The feme plaintiff's claim to the note de-

scribed in the complaint and the money due thereunder is derived from an alleged purchase for value and a transfer from the payee to her in the year 1864. This is not met with any denial in the answer, and the defence set up is the substitution of the intestate's individual note, and its acceptance in payment by the payee of the original, on which he was a surety only, and the discharge of the former by successive payments begun in 1869 and ending in 1871. There was therefore no issue allowable upon an undisputed averment, and none was submitted to the jury, whose only finding bearing upon the point is that the note when destroyed was the property of the plaintiff, and without ascertaining by what means it had been acquired.

The objectionable part of the charge to the jury in relation to this subject is as follows:

"If Sadler went to Eliza Cathey and took up the Clanton note by substituting his own therefor, he had a right afterwards to give or assign the Clanton note to the plaintiff, and so far as he was concerned he would still be liable therefor, and if the jury believe such to be the facts in this case the plaintiff would be entitled to recover."

The instruction is predicated upon the assumed surrender of the original obligation to the intestate when he executed his individual note in its place, and its subsequent disposition and delivery to the feme plaintiff, and the legal effects resulting from the transaction. But this is not the case made in the complaint, nor the source from which she deduces her right, and the repugnance between the allegations and proofs is apparent. The discrepancies are obvious and insurmountable. In the one case the note is given up, in the other retained. The uncontroverted statement in the complaint is that the payee in possession (and the apparent owner) has transferred the original note for a valuable consideration, and the answer sets up a subsequent payment of the renewed obligation to the payee. The evidence on which

the charge is made tends to show that the intestate took into his possession the secured note when he gave his own, and after its transfer by him voluntarily paid off the latter.

With this incongruity upon the face of the record, no judgment can be pronounced, and we have no alternative but to remand the case for a new trial and a more consistent record. The allegations and proofs must correspond. *McKee* v. *Lineberger*, 69 N. C., 217.

There would be little hesitancy in holding the intestate liable if the transfer was made as stated in the complaint, and he afterwards with full knowledge thereof discharged the second note, and it may be that the equitable estoppel arising out of his own act in dealing with and disposing of a discharged bond as a valid and subsisting security, will prevent him from showing its nullity, and thus escaping personal responsibility upon it. The very act of disposition with the undisclosed antecedent facts affecting its continued validity, carries with it an implied warranty that the moneys specified are due, and that the note is in force so far as his personal accountability is involved.

But we do not undertake to decide a question altogether hypothetical, and which may not arise upon another trial. The judgment must be reserved and a new trial awarded, and it is so adjudged.

Error. *Venire de novo.*

O. B. EDWARDS v. JOHN TIPTON and others.

Mortgagor and Mortgagee—Possession by—Presumption.

Although a mortgage deed with unexecuted trusts is not color of title so as to give effect to a seven years' adverse possession under it, yet the morgagee's actual possession of the land for ten years after default

raises a presumption of a release of the equity of redemption—and a discharge of the secured debt and a reconveyance would be presumed by a similar possession in the mortgagor.

(*Barnes* v. *Brown*, 71 N. C., 507; *Ray* v. *Pearce*, 84 N. C., 785, cited and approved.)

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

Verdict and judgment for the defendants, appeal by plaintiff.

Messrs. W. H. Malone and *Gilliam & Gatling*, for plaintiff.
Mr. J. M. Gudger, for defendants.

SMITH, C. J. The land in controversy belonged to William Edwards, who, on May 8th, 1841, executed a deed of mortgage therefor to Samuel Flemming, and the latter on the same day made a lease of the premises for five years to the morgagor. Near the expiration of that time he made a second lease for the same term to the said Edwards and his son John. The land was also sold under execution against the mortgagor and by the coroner's deed executed in October, 1856, conveyed to the said Flemming, and the defendants claim under Flemming.

The plaintiff's title is by virtue of a deed for the premises executed to them by the said Edwards on January 24th, 1861. The court ruled against the claim of title under the execution sale and the alleged continuous possession in its support, for the reason that exclusive of the time during which the statute of limitations was suspended, seven years had not elapsed before the suit was brought.

As to the deficiency of the title derived through the mortgage deed, the court was requested by the plaintiff's counsel to charge "that the mortgage to Flemming, being an unexecuted trust and its conditions not complied with or performed, gave no color of title to Flemming and those

claiming under him." The court refused to give the instruction, and directed the jury that although a mortgage with unexecuted trusts would not be color of title, so as to give effect to a seven years' continued adverse possession under it, yet considered in connection with the leases of 1841 and 1846, if William Edwards thereby became tenant to the mortgagee, abandoning his right as mortgagor, attorning to Flemming and acknowledging him as owner, the mortgage deed would be color of title and perfect it after such possession, and the plaintiffs could not recover.

The appellants present in the record an exception to some playful and harmless remarks indulged in by counsel, to correct which the interference of the court was not asked and no objection made until after the rendition of the verdict; and also to the sufficiency of the descriptive words employed to identify the land conveyed as that mentioned in the complaint. These exceptions are so obviously untenable as to need no comment.

We are unable to understand from the statement of facts the matter in controversy. It would seem from the deeds, both that of the mortgagor and of the coroner, being prior in time to the conveyance to the plaintiff, that the legal estate was vested in Flemming, and his deeds were not color merely, requiring the aid of possession, but conveyances of the estate in the land. But aside from the effect of the sale under execution of the mortgagor's equity of redemption, in making the title of Flemming complete, the possession of the mortgagee and his exercise of full ownership over the land for ten years after default and without payment of any part of the secured debt or claim to the land, raises under the statutory rule a presumption of the abandonment or release in some legal way of the right of redemption, as would a similar possession in the mortgagor, presume the discharge of the debt and a reconveyance. Rev. Code ch. 65 § 19; *Barnes* v. *Brown*, 71 N. C. 507; *Ray* v. *Pearce*, 84 N. C. 485.

It does not appear that the plaintiff has had possession, or when, or how, if at all, that of the defendants and Flemming under whom they hold was interrupted after the termination of the leases in 1851, and these leases, significant merely of the legal relations created by the mortgage deed itself, serve to strengthen the inference deduced from the lapse of time under the statute.

In no aspect can we discover error in the charge of which the plaintiff can complain, and this error must be shown by the appellant, or the ruling of the court below will not be disturbed.

The judgment must therefore be affirmed.

No error. Affirmed.

E. D. HAWKINS, Adm'r, v. J. H. CARPENTER and others.

Evidence under Section 343—*Transaction with Person Deceased.*

A party to an action is not incompetent under section 343 of the Code to testify to a transaction between the witness and a person deceased at the time of such examination, where the representative of the deceased is not a party to the suit. *Held further:* where the defendant opens the door by his own evidence as to such transactions, the matter is set at large, and the plaintiff's contradictory testimony becomes competent.

(*Bryant* v. *Morris*, 69 N. C. 444; *Shields* v. *Smith*, 79 N. C. 517; *Murphy* v. *Ray*, 73 N. C. 588, cited and approved.)

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

Judgment for plaintiff, appeal by the defendants.

Mr. J. F. Hoke, for plaintiff.

Mr. D. G. Fowle, for defendants.

SMITH, C. J. The plaintiff, administrator *de bonis non* of Robert Scruggs, brings this action against the defendants, the sureties to the administration bond of M. Durham, the former administrator, to recover a balance of $112 in his hands ascertained and reported by auditing commissioners. The defendants in their answer, not denying the indebtedness of their principal, allege that it has been paid, and they are no longer liable therefor. To sustain this defence they introduced as a witness W. C. Durham, one of the heirs at law of the intestate, M. Durham, and proved a conversation with the plaintiff, in which he stated that he had taken the note of Plato Durham, another heir at law and since deceased, in full discharge of what was due upon the said administration account.

In reply the plaintiff was allowed, after objection made and overruled, to testify and say, that Plato Durham gave him *no note but an obligation* to pay him one hundred dollars when his ancestor's lands should be sold, and it was not accepted in discharge, but on condition of full payment; that no payment had been made, and the estate of Plato Durham was insolvent.

The exception to the competency of the plaintiff to thus testify presents the only matter for consideration upon the appeal.

The declaration is offered and received as an admission of the alleged pre-existent fact of payment, and relates to a *transaction between the plaintiff and a deceased heir at law of the intestate*, whose sureties only are sued, and the evidence comes from another heir at law. The case does not come within the operation of the disabling proviso of section 343 of the Code. The act prohibits the examination of a party to the action, and certain others specified, "in regard to any transaction between such witness and a person at the time deceased, insane or lunatic, as a witness against a party then prosecuting or defending the action, as executor, adminis-

trator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person, or lunatic, when such examination," &c., neither of which relations do the defendants sustain towards the deceased party with whom the transaction deposed to occurred. If the sureties, "not within the letter," but within the spirit of the statute, possess the same right as does the representative of their deceased principal when sued, to make the objection, as is held in *Bryant* v. *Morris*, 69 N. C., 444, the objection would not prevail, because the transaction was, not between the witness and the intestate, but between the witness and one of his heirs at law, and is not embraced in the prohibitory proviso. The very point is decided in *Shields* v. *Smith*, 79 N. C., 517, and the testimony declared admissible because the representative of the deceased person between whom and the defendant testifying, the transaction took place, was not a party to the action.

The competency of the explanatory and rebutting evidence may be considered in another aspect. The defendants offer the plaintiff's admissions to show that the indebtedness upon the former administration had been discharged by his acceptance of the personal obligation of one of the heirs, and thus they open the door for a full inquiry into the facts of the transaction, and render the plaintiff a competent witness in regard to them, by the concluding clause of the section. This is ruled in *Murphy* v. *Ray*, 73 N. C., 588. There, the defendant had proved cruel acts of mistreatment, and undue influence practiced by the plaintiff towards his intestate, and the plaintiff was permitted to explain and contradict the testimony. "When the defendant thus opened the door by his own evidence," say the court, "the matter was set at large and the plaintiff's rebutting and contradictory testimony became competent by the express provision of section 343." There is no error, and the judgment is affirmed.

No error. Affirmed.

MARK YOUNG v. W. W. ROLLINS.

Jurisdiction—Pending of Former Suit—Receiver—Corporation—Affidavit—Verification.

1. The prior jurisdiction acquired by the pendency of a former action in which an injunction and receivership are sought, will exclude the interference of the court in another suit of which the principal object is the same provisional remedies.
2. When a corporation has become extinct by legislative enactment, and its powers and property transferred to a new corporation substituted for it, the courts have no power, on an *ex parte* application, to appoint a receiver of the assets of the defunct corporation.
3. An order appointing a receiver of the extinct corporation cannot properly be made except in a proceeding to which its successor or substitute is a party.
4. The office of receiver should not be conferred upon a party to the cause.
5. An affidavit upon which an application for a provisional remedy is based, is sufficiently verified when made before a commissioner for this state resident in another state, and authenticated by his official signature and seal.
6. When the defendant in an application for a provisional remedy meet the plaintiffs' allegations by counter affidavits, it is competent for the plaintiffs to support their original affidavits by others to the same effect and in reply to those offered by the defendants.

(*R. R. Co.* v. *Rollins*, 82 N. C., 523; *Childs* v. *Martin*, 69 N. C., 126; *Haywood* v. *Haywood*, 79 N. C., 42; *Page* v. *Price*, 78 N. C., 10, cited and approved.)

APPEAL from an order appointing a receiver and granting a restraining order made at Chambers in a suit pending in McDOWELL Superior Court, by *Gilmer, J.*

By virtue of the act of the general assembly passed on March 13th, 1879, the corporate existence of the Western Division of the Western North Carolina railroad was terminated, and its property and effects vested in the Western North

Carolina railroad company, of which it was the offshoot, to be collected and administered in trust for the benefit of the creditors and stockholders. The validity of the enactment and its force and operation were declared in the action brought by the legislative representative appointee against the late president of the defunct organization on an appeal from the judgment of the superior court of Buncombe, rendered at fall term, 1879, heard and determined at January term following by this court. *W. N. C. R. R. Co.* v. *Rollins*, 82 N. C., 523.

While the cause was pending in the court on February 10, 1880, the present suit was commenced by summons against the several directors, by name, of the said Western Division, the Western Division itself (as a still existing corporation,) and the said Western North Carolina railroad company, issuing from the same superior court, on behalf of the plaintiff and other stockholders, for the purpose of withdrawing the funds of the said Western Division from the said directors, and placing them for greater security under the control and management of a receiver, in order to their ultimate disposition among the parties entitled thereto. On the same day a preliminary motion for the appointment of a receiver and an injunction was made, which after successive postponements protected by a temporary restraining order, during which the cause was removed to McDowell, was heard at Chambers on June 15th, and allowed, an injunction directed to operate until the hearing, and Benjamin Long designated as receiver to take charge of and manage the property of the extinct corporation. From this interlocutory judgment the defendants appeal.

Messrs. J. M. McCorkle, W. H. Malone and *G. N. Folk*, for plaintiffs.

Messrs. Merrimon & Fuller, for defendants.

SMITH, C. J., after stating the case. In the mean time G. M. Roberts, an alleged judgment creditor on March 31st, 1880, also brings suit against the said Western Division for the like purpose of securing its assets by the appointment of receivers, the summons issued in which is returnable to fall term of Buncombe superior court, and was served on the next day on W. W. Rollins, its late president. The complaint put in on April 5th, was followed immediately by an answer in the name of the said Western Division, filed by him and signed by C. M. McLoud, attorney, both direc tor and defendants in the preceding suit, and on the 9th of that month an interlocutory order was made by the judge appointing those two directors receivers with the usual and necessary powers for the effectual discharge of the duties of their offices, upon their entering into the bond with surety which has been given. The general assembly by another act passed March 29th, 1880, appointed commissioners on behalf of the state to sell and transfer "all the right and interest of the state in and to the railway, stock, property and franchises of the Western North Carolina railroad company," on certain terms and conditions therein set out, to certain persons named as grantees, who on compliance therewith were required to form and "reorganize the company as a new corporation by the name of the Western North Carolina railroad company, the details whereof are specified and set out in the act, and the holders of private stock in the former were to be allowed a *pro rata* share of the capital stock in the new and substituted corporation. This enactment has been accepted and its provisions were carried into effect by the formation and organization of the new company without dissent from the private stockholders, as appears from the evidence of S. McD. Tate, previous to the making the order and appointment now under review.

With this brief narrative of the material facts, it is quite unnecessary to look into the voluminous testimony and ex-

hibits, accompanying the transcript, for the purpose of ascertaining the past management of the affairs of the Western Division, since its extinction puts an end to the function of its board of directors and other officers, and renders imperative the duty of providing a proper person to take possession of the resources and to manage them in the interest of creditors and stockholders, and this is done in the act dissolving the corporation.

But the effect of subsequent legislation is also to destroy the administering corporation itself, by its absorption with all its property, effects and franchises into the successor company of the same name, formed under the act, and the consequent extinction of the corporate life of the former.

So then at the time when the order under consideration was made, there was no receiver or representative in existence, and it was both necessary and proper that one should be appointed.

We thus meet the question of the effect of the prior action of the court in making the appointments for a similar purpose in the subsequent suit brought by Roberts, upon the power of the court to make the order in the present case. We have no hesitancy in declaring it inoperative to affect the present proceedings and for reasons we shall briefly assign.

1. The order was *ex parte*, the corporation defendant having ceased to exist, and no one being competent to act in its behalf and represent it.

2. The living trustee, the Western North Carolina railroad company in whom the rights of the Western Division were then vested, *was not a party and yet was a necessary party to the attempted action.*

3. The prior jurisdiction over the subject matter acquired by the present action and the pending and undecided motion for an injunction and a receiver, exclude the interference of the court in another, and especially at the instance

of one who is competent to become a party in the first and to obtain adequate redress in that. The authorities are decisive on the point, and the conflicts and perplexities attending the prosecution of several actions having the same object in view, are an ample vindication of the principle. *Childs* v. *Martin*, 69 N. C., 126; *Haywood* v. *Haywood*, 79 N. C., 42.

4. The receivers attempted to be appointed are defendants in this case, and will not be allowed to frustrate and defeat the present action of the court.

Without recurring to the unseemly haste with which the suit of Roberts is instituted and prosecuted without showing the defence of a previous acquired jurisdiction, and the inferences which might be thence drawn of collusion, it is sufficient to say it cannot be allowed to impair the full exercise of that jurisdiction or affect the legal proceedings thereunder.

I. An objection appearing on the record is interposed by the defendants to the competency of the two officers before whom, in the District of Columbia, on two separate occasions, the verification of the complaint is made by the plaintiff, to administer the oath and to the sufficiency in form of the verification of the plaintiff's attorney before the judge who entertained the motion. The plaintiffs swear to the truth of the allegations contained in the complaint, used as an affidavit to support them, put in on February 7th, 1880, before a notary public, and then on March 19th, following, before a duly appointed commissioner of the state for the district. It is supported by the oath of his attorney before the presiding judge on February 11th, and again more fully on the 16th of that month.

Without pausing to inquire whether the same strictness in the form of verification is required in an affidavit to be used in obtaining some ancillary protection or relief in the progresss of the cause, which may or may not be met by

opposing evidence at the will of the other party, as in a complaint which entitles the plaintiff to a discovery of the facts charged, which are known to the defendant, or on information believed to exist, (and the written statement here, though in form a complaint, is in legal contemplation an affidavit only for the purposes it is intended to subserve in obtaining the order) we are of opinion that the oath before the state commissioner is fully sufficient, authenticated as it is with his official signature and seal. Bat. Rev., ch. 20, § 3; *Paige* v. *Price*, 78 N. C., 10. Hence it is needless to consider the affidavits of the attorney.

II. The defendants also except to the admission of further proofs additional to the affidavit offered in support of the motion, in response to the numerous proofs and exhibits introduced by themselves in opposition to the motion. We do not see the force of the objection, nor any just reason for excluding what the plaintiff proposed to show in rebuttal, upon an inquiry in which the facts material to the judgment ought to be fully developed and understood, under the exercise of a sound discretion in the premises, and in order that His Honor may be thus intelligently advised and enabled to act upon the whole case presented by both parties, and this is consistent with the practice under the Code.

III. It is also insisted that the plaintiff is not a stockholder by virtue of the assignments of shares, until the transfer is made upon the corporation books, and has no status on which, as such assignee, to prosecute the suit. We shall not enter into a discussion of the question raised by this exception, whether such assignment, previous to and without a transfer by the surrender of the old and the issue of a new certificate (a mode necessary to enable a corporation to know who are its share-holders, and may participate, as such, in its management) does not vest in the assignee, as between the assignor and himself, an interest which will be recognized and protected in the exercise of its equitable

jurisdiction by the court, since the law is well settled by authority and numerous adjudications. 1 Potter Corp., 342, 260; Angell and Ames Corp., 564, 565; Thomp. Liab. Stock., § 217; *Duke* v. *Catawba Nav. Co.*, 10 Ala. (N. S.), 82; *Johnson* v. *Underhill*, 52 N. Y. (Ct. Appeals), 203; *Bank* v. *Bank*, Cir. Ct. U. S., decided May, 1881; *Dickinson* v. *Bank*, 129 Mass., 279.

We have felt some difficulty in sustaining the judgment on account of the absence of the present Western North Carolina railroad company, as a party to the cause, since the assets of the Western Division, or some of them, may have been recovered by the legislative appointee during its subsequent life, and thence passed to the successor corporation, and an order may become necessary for the surrender of such to the receiver.

But as it does not appear that any assets were recovered and reduced to possession under the judgment in the case first referred to in the opinion, and no suggestion to this import is made, we assume, in determining this appeal that the assets remain with the late directors and other officers, who are defendants, and the order can thus reach them and be made effectual without the presence of the new corporation in the record.

The judgment below must therefore be affirmed, there being no error in the ruling. This will be certified for further proceedings in the court below.

No error. Affirmed.

JAMES I. KEMP and wife v. JOSEPH R. KEMP and others.

Jurisdiction—Judicial Sale—Married Woman.

1. Where land has been ordered to be disposed of at a judicial sale it is *in custodia legis* until title has been made to the purchaser under the sanction and direction of the court.

2. A married woman will be considered as discovert *quoad* her separate estate, only to the extent of the powers expressly conferred upon her in the deed of settlement, and her powers will not be extended by implication.

3. Where the purchaser of the land of a *feme covert* sold under an order of court has satisfied the trustee of her separate estate by surrendering a claim held by him against the trustee individually, and the latter has agreed by parol with his *cestui que trust* to convey her a tract of land in discharge of the purchase money which should have come into his hands, and put her in possession of such land, the contract is not enforceable against the *feme covert*—especially when the separate estate is limited over to other persons after the *feme covert's* death.

4. In such case, if the purchaser acted in good faith as regards his actual intentions in paying the trustee by a cancellation of the latter's indebtedness, he will, upon paying to the married woman the amount of his bid, be subrogated to her title to the tract of land acquired from the trustee.

(*Lord* v. *Beard* and *Merony*, 79 N. C., 5 and 14; *Hardy* v. *Holly*, 84 N. C., 661; *Frazier* v. *Brownlow*, 3 Ired. Eq., 237; *Knox* v. *Jordan*, 5 Jones Eq., 175; *Bunting* v. *Ricks*, 2 Dev. & Bat., 130, cited, commented on and approved.)

MOTION in the cause heard at Fall Term, 1879, at BLADEN Superior Court, before *Seymour, J.*

This cause comes to this court upon the appeal of James I. Kemp and wife Elizabeth, from the ruling of the superior court of Bladen county upon their petition for relief, filed in a proceeding theretofore had in the old court of equity, under which the interest of the said Elizabeth in certain lands had been sold. The facts necessary to be known for a proper understanding of the case are as follows:

The feme plaintiff (whose maiden name was Fitz Randolph) by her guardian, George Cromartie, filed her petition in the court of equity at fall term, 1849, asking that her one-fifth interest in certain lands might be sold, and at the same term an order was made directing the clerk and master to sell the same upon a credit of one, two and three years, and to reserve the title until the purchase money was paid.

The master reported a sale to spring term, 1850, to Benj. Fitz Randolph, one of the defendants in the present motion, and that he had taken his bond for the purchase money, with the defendant Joseph R. Kemp as surety. There seems to have been no order confirming the sale made at that time, but at fall term, 1854, it was ordered that upon the payment of the purchase money, with compound interest, or the guardian's acceptance of the bond given for the purchase money in lieu thereof, the clerk and master should make title to the purchaser.

At this stage of the case, the said Elizabeth having become of full age, intermarried with the plaintiff James I. Kemp, and in pursuance of an ante-nuptial agreement to that effect, the two joined in a deed on the 10th day of November, 1856, whereby they conveyed, together with other property belonging to the wife, her interest in the bond given for the purchase money of the land, to the defendant Joseph R. Kemp (he being the father of the husband) in trust for the sole and separate use of the said Elizabeth, free from all incumbrances of her said husband, and in case of her death, leaving him surviving, then in trust for him during his life, and after the death of both, then in trust for the children of the said Elizabeth; or in the event of her dying without children, in trust for her rightful heirs; which trusts were accepted by the said Joseph R.

At spring term, 1857, of the said court of equity, it was ordered that upon the payment of the purchase money into court, or upon the exhibition of a duly authenticated receipt of the said Elizabeth, with her private examination taken according to law, the clerk and master should convey the land to the purchaser, the same order providing for the costs, and the cause was dropped from the docket.

At spring term, 1858, it was ordered that the cause be reinstated, and the husband be made a party, and that the

clerk and master collect the purchase money and make title to the purchaser.

At spring term, 1859, the court directed that the clerk and master should proceed forthwith to collect the whole amount of the purchase money without any deduction or allowance, on account of any payment made to, or receipt given by, the trustee of the said Elizabeth under the marriage settlement, or any other person, and hold the same subject to the order of the court.

No further order was made in the cause until fall term, 1863, when the court decreed that the purchaser, Benj. F. Randolph, should pay the amount due the plaintiff Elizabeth, to Joseph R. Kemp, her trustee in the marriage settlement, to-wit, the sum of twelve hundred dollars, with interest thereon from spring term, 1858, out of which sum the costs of the proceeding should be paid; and that the clerk and master so soon as, by the receipt of the said Joseph R. as trustee, he shall be advised and assured that the money has been so paid to him, shall proceed to convey the land to the purchaser.

About the year 1860, as the judge's case states, the trustee, Joseph R. Kemp, agreed with the plaintiff James I. and his wife to give her a tract of land, upon a bargain then made between them, that the land should be taken in full payment of all her claims upon him as her trustee, of which land the plaintiffs took immediate possession, and have continued in the same up to the present time. At the time of such agreement (which was altogether by parol) the said Joseph R. was solvent, and so continued to be up to the close of the war. No deed was ever executed to the said Elizabeth for the land, but the said Joseph R. now proffers to make her one. Some judgments have since been recovered against him, and are yet unsatisfied and docketed. Subsequently to the agreement between the plaintiffs and the trustee about her taking the tract of land from him, but

at what exact time does not appear, the purchaser Benj. F. Randolph settled with the trustee, without paying him any money towards the purchase of the land, but by surrendering to him a bond of date the ..... day of April, 1859, which he the said Randolph held against the trustee individually—this settlement being also made before the insolvency of the trustee. No deed was ever made to the purchaser by the clerk and master or other officer of the court, but in 1878 the said Joseph R., as the trustee of the plaintiff, executed a deed for the interest of the plaintiff Elizabeth to the said Randolph—this was after the plaintiffs had given notice of their motion in the cause.

A receipt from Joseph R. Kemp as trustee, purporting to have been given to the clerk and master, on the 4th day of February, 1859, for the purchase money of the land, was put in evidence, but his Honor finds that it was not given at the time it bears date, and there is nothing in the statement to fix its true date.

Upon the foregoing facts, his Honor ruled, as conclusions of law, that upon the coming of age of the plaintiff Elizabeth the purchase money of her land became personalty and was so treated by the parties at the time of the marriage settlement and ever since; that the agreement made between the plaintiffs and Joseph R. Kemp in 1860, whereby the latter agreed to convey a tract of land to the feme plaintiff in satisfaction of all her demands upon him, as her trustee, was made in good faith on his part, and was a valid agreement binding upon the said plaintiffs; that the payment of the bond by Benj. F. Randolph to said trustee, made as it was by surrendering a bond which the former held on the latter, and without passing any money, was sufficient to discharge the same; and that as the defendant Joseph R. proffered to make title to the substituted land, thus waving the statute of frauds, and as no one but himself could claim the advantage of the statute in the matter, the plaintiffs were bound

to accept the deed, and that their title would be protected by a decree of the court rendered in this proceeding, from the liens of any judgments outstanding against the said Joseph R.

Thereupon his Honor overruled the plaintiffs' motion, which was that the wife might be decreed to have the purchase money of the land as never having been paid to her, and that the same might be declared a lien on the land in the hands of the purchaser Benj. Fitz Randolph. From which judgment the plaintiffs appealed.

Mr. C. C. Lyon, for plaintiffs.

Messrs. Stedman & Latimer and *D. K. McRae*, for defendants.

RUFFIN, J., after stating the case. We think the cases of *Lord* v. *Beard*, 79 N. C., 5, and *Lord* v. *Merony Ib.*, 14, settle definitely, the question of jurisdiction in this case. There is no pretence that any deed has been executed to the purchaser of the land, sold under the order of the court, by any authorized servant of the court and under its permission, and until that be done, the land continues to be *in custodia legis*, and any relief that may be needed in reference to it, or the purchase money, must be sought in the original proceeding. Conceding it to be true as declared by his Honor that upon the coming of age of the plaintiff Elizabeth, and by reason of the manner of treating her interest in the bond, given for the purchase money of her land, at the time of the execution of the marriage settlement, it ceased to be realty, and became personal property, it is still true, that it was her *separate estate, settled* upon her by expressed deed, and capable of being disposed of only under some power bestowed upon her in that deed.

In the case of *Hardy* v. *Holly*, 84 N. C., 661, the court held it to be the law of this state, that a married woman is to be

deemed a feme sole, as to her separate estate only to the extent of the power conferred upon her in the deed of settlement, and that if no power of disposition be given in that instrument, she is altogether without such power. It is not necessary that we should go so far in this case, for, granting, upon the strength of the authority of *Frazier* v. *Brownlow*, 2 Ired. Eq., 237, as explained, in *Knox* v. *Jordan*, 5 Jones Eq., 175, that the agreement made between Mrs. Kemp and husband on the one part, and her trustee on the other, and under which she was to take from the latter a tract of land in discharge of her demands upon him, could have had the effect to create a charge upon the *income* to be derived from her separate estate, still, we suppose, that such a result would hardly under the circumstances have given effect to the intention of the parties.

By the terms of the deed, making the settlement, her interest in the property is expressly limited to a life estate, and beyond that (even if to that extent she may do so) she has no power to charge the property itself, or to anticipate its profits. So much is due to the will of the parties as expressed in the deed, and to the rights of the ultimate remaindermen, whether they be her children or those who may, at the time of her death, stand in the relation of heirs at law to her.

We take it that it was this regard to the rights of such remaindermen which dictated the order of fall term, 1859, directing the master to collect *forthwith the whole amount* of the purchase money and inhibiting any deduction therefrom, on account of payments made to, and receipts given by the trustee, and also the succeeding order of fall term, 1863, which was so careful to express the exact amount of $1200, with interest, to be paid by the purchaser, to entitle him to have a conveyance of the land. But whether or not this be so, and supposing that the rights of the parties ultimately to be interested, may have been then overlooked,

they are now brought to the attention of the court and must be protected.

This does no injustice to any one, for the defendant Fitz Randolph had notice of the settlement, since it is expressly referred to in the said order of fall term, 1863, whereby he was himself directed to pay the amount of the purchase money to his co-defendant Joseph R. Kemp, as her trustee under her marriage settlement, and this surely was enough to put him upon inquiry as to the terms of the settlement.

To take in payment of a debt due him as trustee, the surrender of a debt due from himself individually, was a breach of trust on the part of the defendant Joseph R., and the defendant Fitz Randolph knowing the relation he bore the parties, and the origin of the note, must be deemed to have co-operated in that breach, and in such case, much less than actual and particular knowledge in detail will be sufficient to convert him into a trustee for the party attempted to be defrauded. *Bunting* v. *Ricks*, 2 Dev. & Bat. Eq., 130. It may be however that he acted without any actual dishonest intent, but that relying upon the relationship and good feeling then subsisting between the parties, and the ability of the trustee to make good the amount to his *cestui que trust*, he acted without giving that scrutiny to the transaction which otherwise he might have done, and perhaps should have done.

Taking this view of the case, we do not feel at liberty to withhold from the defendant Fitz Randolph all aid in the premises, as we should do, if satisfied that he had purposely co-operated with a dishonest trustee in a breach of his trust. But we rather hold that he is entitled to be subrogated to the claim of the plaintiff Elizabeth, upon the tract of land agreed, in 1860, to be conveyed to her by her said trustee, and of which she has been possessed since that time.

The result of our deliberations as to the rights of the parties in this cause is, that the plaintiff Elizabeth is enti-

tled to have the purchase money due her, for the land sold under the decree of the court, declared to be a lien upon that land, in the possession of the defendant Fitz Randolph, or any one claiming under him. That the rents of the land occupied by her husband and herself since 1890, under the parol agreement of purchase from her trustee, be treated as a charge upon the income, arising from her separate estate, which is or ought to be in the hands of her said trustee, but not to exceed said income, so as to be a charge upon the principal of such separate estate; and that the land, so agreed to be conveyed to her be sold by virtue of such agreement, and its proceeds applied in exoneration of the land purchased at the clerk and master's sale by the defendant Fitz Randolph.

As to the amount of annual income that ought to be due the plaintiff, and the rental value of the land occupied by her since 1860, the necessary inquiries will be made, and the cause will be remanded to the end that the proper accounts may be taken and other proceedings had in accordance with this opinion.

In taking the account, the amount of principal and interest due on the bond for the purchase money at the date of the marriage settlement, shall be treated as the true interest bearing principal.

It may be that the superior court will deem it most prudent to select a new trustee for the plaintiff Elizabeth.

PER CURIAM. Judgment accordingly.

HARRY BURKE and wife v. J. M. TURNER and others.

Appeal—Parent and Child—Guardian—Commissioners—Disbursements—Attorney's Fees—Negligence—Confederate Currency.

1. The findings of the judge of the superior court on questions of fact properly submitted to his decision, in a cause of purely legal cognizance, are as inviolable as the verdict of a jury, and cannot be reversed on appeal.
2. A father, though he be the guardian of his minor child's estate, is not ordinarily permitted to charge for its maintenance, and, if able, he is himself bound to maintain his child; if not so, he must before applying any of his ward's income to that end, procure the sanction of the proper court.
3. A guardian is not entitled to commissions on money collected and used by him in his own business, nor on debts of his ward paid to a firm of which the guardian is a member.
4. He should be allowed reasonable attorney's fees, paid in good faith.
5. Where one who is aware of the misapplication of trust funds by a guardian afterwards succeeds to that office, he is guilty of *laches* if he fails to charge the first guardian in his settlement with him with the sum so misappropriated.
6. Even though the circumstances be such as to justify a guardian in receiving confederate currency for his ward in 1862, yet he is chargeable with its value if he neglects to invest it, uses the greater part of it in his own business, and mixes it all with his own funds.

(*Cummings* v. *Mebane*, 63 N. C., 315; *Greensboro* v. *Scott*, 84 N. C., 184; *Walker* v. *Crowder*, 2 Ired. Eq., 478; *Whitford* v. *Foy*, 65 N. C., 265; *Shipp* v. *Hettrick*, 63 N. C., 329, cited and approved.)

CIVIL ACTION on a guardian bond tried at Fall Term, 1881, of IREDELL Superior Court, before *Seymour, J.*

The defendant J. M. Turner was appointed the guardian of the feme plaintiff in the year 1866, and the other defendants are the sureties to the bond given by him as such. Prior to such appointment, one Benjamin Turner, her father, had been her guardian and had received por-

tions of her estate. In 1866, in contemplation of a resignation of his guardianship, he applied to the county court for the appointment of commissioners to audit his accounts, which was done, and after an examination into the accounts, the commissioners made their report to the court, the same being altogether an *ex parte* settlement.

Upon his appointment the new guardian settled with his predecessor upon the basis of such *ex parte* settlement, but the plaintiffs in this action allege that there was really due her a much larger sum than was thus ascertained and accounted for, and the object of the action is to fix the new guardian with a liability on account of his negligence in not calling the former to a stricter account.

After the pleadings in the case were completed, there was a reference to a commissioner to ascertain and report as well what the defendant guardian ought to have received, as what he did actually receive of the estate of his ward. The commissioner made his report, and it was upon exceptions to that report that the case was heard in the court below, and from the rulings of the court thereon both parties appealed to this court.

In their argument counsel treated the two appeals as one, and for the sake of convenience, they are so considered.

The commissioner finds that the former guardian received for his ward prior to the war, as the proceeds of the sales of lands belonging to the estate of Garrett Pickler, deceased, a sum which, with interest to the 1st of September, 1866, that being the time of the settlement, amounted to $3,477.56. That he also received from one Adams, administrator of David Pickler, deceased, on the 19th of December, 1862, in confederate money, the sum of $3,475.60, with the scale value of which he charges him, as of that date and interest, $1,725.36, which, added to $3,477.56, makes $5,202.92.

Credit was given him (as was done in the *ex parte* settlement of 1866) for the board and clothing of his daughter and ward from 1859 to 1866, amounting with interest to	$1,024	19
For commissions on his receipts of $5,202.92,	260	15
And on his disbursements of $1,024.19,	51	10
Making a total of credits	$1,335	44
Leaving a balance due the ward from former guardian,	$3,867	48

As to the first item of charge—to-wit, the sum of $3,477.56—arising from the sale of the lands of Garrett Pickler, his Honor finds that the lands so known belonged to the mother of the feme plaintiff who was living and covert at the time of the sale thereof for partition, and as she died without having converted the proceeds into personalty, leaving her husband (the said Benjamin) surviving her, he is as tenant by the courtesy, entitled to the use of the money during his life, and therefore the defendant guardian is not chargeable with the amount, and the plaintiffs appealed.

Mr. J. M. Clement, for plaintiffs.
Messrs. D. M. Furches and *Robbins & Long*, for defendants.

RUFFIN, J., after stating the case. This ruling of his Honor was acquiesced in by the counsel who argued the cause for the plaintiffs in this court, and we have not therefore at all considered the question as to what might have been the liability of the new guardian for failing to secure the ultimate payment of the fund. The 2nd, 3rd, 4th, 5th and 6th exceptions of the defendants all related to this one item, and need not therefore be again adverted to.

Most of the exceptions to the commissioner's report had reference to the amount received from the administrator of

David Pickler in confederate money and the rulings of the court below, and those exceptions furnish the principal grounds for the appeals taken by both parties.

The facts relating to the matter, as found by his Honor, are as follows: David Pickler died in 1862, leaving the feme plaintiff as one of his heirs at law and next of kin, and the said Adams having previously been his guardian, became his administrator. On the 19th day of December, 1863, he paid to Benjamin Turner, then acting as the guardian of said plaintiff the sum of $3,475.60 in confederate money, in full of her interest in said estate.

In December, 1862, confederate money was current amongst business men, and was taken in payment of debts by prudent trustees. The said guardian made no investment of the amount received, nor did he keep it as a separate fund for his ward, and in August, 1863, he used $2,250 of the amount in hiring a substitute for himself in the confederate service. The defendant, J. M. Turner, had notice at the time of such misuse of the fund.

The first exception on the part of the plaintiff, was that the former guardian should have been charged with the whole amount of $3,475.60 received from the administrator of David Pickler in good money, and not at its scaled value, as it was negligence to have received it in a depreciated currency in December, 1862, and especially as he was prompted to receive it, by a desire to use it for his own benefit, in the employment of a substitute. His Honor finding it to be a fact that the amount was received in good faith and the exercise of ordinary prudence, and relying upon the case of *Cummings* v. *Mebane*, 63 N. C., 315, overruled this exception.

This being an action on the guardian bond, such as under the old practice would have been a pure action at law, this court has no power to pass upon the facts involved, but is as much concluded by the finding of his Honor as by the

verdict of a jury. *City of Greensboro* v. *Scott*, 84 N. C., 184. And taking the finding to be true the exception was properly overruled.

So too with regard to the plaintiffs' second exception, his Honor finding that the confederate money was received in December, 1862, precludes all further enquiry into the matter, and the scale was properly applied as of that date. The plaintiffs' third exception was that the commissioner erred in allowing the former guardian credit for the various sums charged for the board and clothing of his ward—she being his own child whom he was bound to maintain. His Honor, upon the authority of *Walker* v. *Crowder*, 2 Ired. Eq., 478, sustained this exception, and the defendants assign this as one of the grounds of their appeal.

The case referred to fully sustains the ruling of the court. A father though he be the guardian of his child is not ordinarily permitted to charge for its maintenance or education. If able, he is himself bound to maintain his child, and if not so, he must, before being permitted to apply any portion of his ward's income to that end, procure the sanction of the proper court.

Their fourth exception was to the allowance of commissions to the defendant J. M. Turner, on the ground that he had failed to file his annual returns as guardian, and had been negligent of the interests of his ward in the settlement made with his predecessor, and even if allowed some commissions, it was insisted that he ought not to have them upon the sum of $1,000, which it is conceded he used of his ward's money in his own business of manufacturing tobacco. This exception should have been sustained as to the commissions on so much of his trust fund as the guardian employed in his own business. Commissions are given as compensation for the labor and care bestowed on the management of his ward's estate, or where debts are paid or money expended on the ward's account for the exercise

of such skill and discretion as may be needed for the protection of the ward's interest in the transaction.

Should the guardian employ the fund in purposes of his own, seeking to make profit for himself (apart from any question of fraud that may arise) there is in such case no such labor performed, or skill exerted in behalf of the ward as needs to be compensated.

For the same reason commissions should not have been allowed on the several store bills paid to the firm of J. M. and A. Turner—the guardian being a member of that firm and acting as well for himself as for his ward in the matter. As to the credit allowed for the sum of $113.00 paid to attorneys, his Honor finds that amount to have been paid in good faith, and if so, it does not seem to be excessive. *Whitford* v. *Foy*, 65 N. C., 265.

For the defendants it was excepted:

First, That the commissioner erred in going behind the settlement made by the former guardian with the commissioners appointed to audit his accounts by the county court, so as to charge the defendant guardian with a larger sum than was accounted for in that settlement—there being nothing to show that the said defendant knew, or had reason to believe, that such settlement was not fairly and honestly made. Even if we should concede that there could be any exception made to the rule, that a guardian is liable not only for what he actually receives, but for what he ought to receive for his ward, we could not give defendants the benefit of it in this case. The defendant J. M. Turner, as found by his Honor and as is manifestly true, had full notice of the misapplication of the ward's estate by his predecessor with reference to its use in the employment of a substitute, and having such notice it was his duty to demand, and have a strict and true account.

Second, That it was error to charge the defendant with any part of the sum of $3475.60, received by the former

guardian in confederate money, in 1862, or if with any part thereof, with more than was actually used by said former guardian in hiring the substitute.

His Honor overruled this exception upon the strength of the rule laid down by this court in the case of *Shipp* v. *Hettrick*, 63 N. C., 329, and was fully warranted in so doing. Though not liable for receiving the confederate money in 1862, the guardian Benjamin Turner rendered himself chargeable with its value, by reason of his failure to invest it, and by his subsequent use of the greater part of it, as well as by his failure to keep it as a seprate fund unmixed with other money.

There were some other exceptions filed by both parties which his Honor pronounced as too vague and indefinite to be properly understood by the court, and therefore overruled them. As they appear to us in the same light we make a like disposition of them.

The judgment of the court below is affirmed as to all matters, except as to the allowance of commissions to the defendant J. M. Turner upon the sum of $1000, of his trust fund, used in his own business, and upon the amounts paid, as store-bills to the firm of which said defendant was a member, and with reference to these two items the account of the commissioner must be corrected by the clerk of this court, to whom this cause is referred for that purpose.

PER CURIAM. Judgment accordingly.

STATE v. WESLEY SULLIVAN.

Abduction.

An indictment for abduction of a female of the age of fifteen years, with intent to defile her cannot be supported at common law or under the act of 1879, ch. 81, (which relates to abduction of children under the age of *fourteen* years.)

STATE *v.* SULLIVAN.

INDICTMENT for abduction, tried at Spring Term, 1881, of ASHE Superior Court, before *McKoy, J.*

The indictment was found in the inferior court of Ashe county, and charges that the defendant did unlawfully take one Rebecca Thompson, an unmarried female of the age of *fifteen* years, out of the possession and against the will of her father, with the intent to defile her, and concludes against the form of the statute. After verdict and judgment against the defendant, he appeals to the superior court where the judgment was arrested, and thereupon the solicitor for the state appealed to this court.

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

RUFFIN, J. We know of no statute that governs this case; certainly the act of 1879, ch. 81, does not, for that has exclusive reference to the abduction of children under the age of *fourteen* years. Neither do we find any authority for such a prosecution as this at common law; and in the absence of all precedent, and from the fact that it has been found necessary, as well in England as in many of the states in the Union, to pass statutes upon the subject, we must conclude that the indictment cannot be supported.

It is true that in a note to 2 Archbold's Criminal Practice, 301, to which our attention was called by the Attorney General, it is said that the abduction, or the enticing, or carrying away of any person by force or fraud, is an indictable offence at common law; and as authority for the position, reference is made to 1 East P. C., 458, and 1 Russell on Crimes, 569. But upon looking to EAST, we find no sort of sanction given to such a position. On the contrary, it is there said that by virtue of the general prohibitory clause of the statute of 4 and 5 Phil. & M., ch. 8, an indictment for

he abduction of a child will lie by the rule of the common law, which rule, as explained, is that where a thing is prohibited to be done by a statute and a penalty is affixed to it by a separate and distinct clause, the prosecutor is not bound to pursue the latter remedy, but may proceed under the prior general clause by indictment for a misdemeanor. Not a single suggestion however is made that such indictment, in the absence of all statutory provision, can be maintained by force of the common law alone.

And still less support is given to the proposition by RUSSELL. He says that the only reported case of a prosecution at common law for such an offence, is that against LORD GRAY, to be found in 9 (3) State Trials, 127. Upon examining into that case, we find it to be, not an indictment for abduction at all, but an information lodged against that lord and five others, by which they were charged with a *conspiracy*, the unlawful purpose of which was to entice the LADY HENRIETTA BERKLEY to quit her father's house and custody and live in secret adultery. And even in that case the court never proceeded to judgment, but a *nolle prosequi* was entered after a verdict of guilty, as to all the defendants.

In this state of the authorities, we feel compelled to sustain the judgment of the superior court.

No error. Judgment arrested.

STATE v. JOHN R. MARTIN.

Assault.

Defendant being about twenty steps distant, advanced towards prosecutor with knife and stick, cursing and threatening to do him bodily harm, in consequence of which the prosecutor went into a store and re-

mained until a warrant was obtained, the defendant walking in front of the store saying he would whip prosecutor if he came out; *Held* an assault.

(*State* v. *Shipman*, 81 N. C., 513; *State* v. *Rawles*, 65 N. C., 334; *State* v. *Hampton*, 63 N. C., 13; *State* v. *Church*, *Ib.* 15; cited and approved.)

INDICTMENT for an assault with a deadly weapon, tried at Fall Term, 1881, of BURKE Superior Court, before *Seymour, J.*

The state introduced one W. E. Powe as a witness, who testified that as he was on a sidewalk of a street in the town of Morganton (near the store of one Brittain) the defendant, who was on the other side of the street some twenty steps distant, commenced cursing him, and told him he intended to cut his throat and kill him. At the same time the defendant advanced towards him, uttering these threats with an open knife in one hand and a stick in the other. That in consequence of these threats, and of the approach towards him of the defendant, he, the witness, went into Brittain's store and remained there two or three hours, during which time the defendant walked to and fro in front of the store cursing him and threatening to whip him if he came out, and that he remained in front of the store until a warrant was obtained against him. On cross-examination witness said defendant had also a greenback in his hand.

The defendant in his own behalf testified that he crossed the street, not with the intention of attacking Powe, but to deliver to an officer who was with Powe, five dollars to pay him for laying off a homestead in an execution he held against Powe, and he stated that he had a barlow knife in one hand, and a piece of a broom stick in the other, and also a five dollar bill in one hand, and admitted that he had previously told a man that if Powe took the "homestead" he would whip him.

The defendant's counsel asked the court to charge the jury that the facts testified to by Powe did not constitute an

assault. This the court declined to do, and charged the jury that if the defendant crossed the street with an open barlow knife and threatened to whip and kill Powe, and while he was advancing upon him, although he did not get within striking distance, and through fear of violence caused by the conduct of defendant, Powe retired for safety into the store, the defendant was guilty of an assault with a deadly weapon.

There was no question made by the counsel for the defendant as to the barlow knife, whether it was a deadly weapon. The court charged that it was.

The jury found a verdict of "guilty," and the defendant was sentenced to pay a fine of fifty dollars. From this judgment the defendant appealed, assigning as ground therefor the charge of the judge and the amount of the fine.

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

ASHE, J. The principle governing this case has been decided by several adjudications on the subject by this court. The principle is, that no man by the show of violence has the right to put another in fear and thereby force him to leave a place where he has the right to be. In the case of *State* v. *Shipman*, 81 N. C., 513, the defendant after using threatening language with reference to the prosecutor and in his hearing, advanced upon him with a knife, continuing the use of violent and menacing expressions. The evidence left it doubtful as to whether or not the knife was open, and when the defendant got within five or six feet of the prosecutor, the latter said, "I shall have to go away," and withdrew from the work upon which he was engaged. It was held that the defendant was properly convicted of an assault. And in *State* v. *Rawles*, 65 N. C., 334, it has been decided that if a person be at a place where he has a right to

be, and four other persons with a pitchfork, gun, &c., by following him, and using threatening and insulting language put him in fear, and induced him to go home sooner than, or in a different way from the one he would otherwise have gone, the four are guilty of an assault, although they do not get nearer than seventy-five yards, and do not take the weapons from their shoulders. See also *State* v. *Hampton*, 63 N. C., 13; *State* v. *Church*, 63 N. C., 15.

There is no error. Let this be certified to the superior court of Burke county, that further proceedings be had according to this opinion and the law.

No error. Affirmed.

STATE v. JAMES N. COLLINS.

Proceeding in Bastardy—Perjury—Variance.

1. It is not proper to join the mother of a bastard child with the state in a proceeding to fix the paternity upon the putative father.
2. Where the putative father is indicted for false swearing on his own behalf in such proceeding, under a bill which describes the cause as constituted between "the state as plaintiff and the said J. C. as defendant," and the record of the cause, put in evidence by the solicitor, shows that the mother of the child was joined with the state as a party, there is no material variance.

(*State* v. *Brown*, 79 N. C., 642; *State* v. *Davis*, 69 N. C., 495; *State* v. *Pate*, Busb., 244; *State* v. *Beatty*, 66 N. C., 648, cited and approved.)

INDICTMENT for perjury tried at Fall Term, 1880, of NASH Superior Court, before *Gudger, J.*

Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.

No counsel for defendant.

SMITH, C. J. The defendant is charged with perjury committed upon his examination as a witness on his own behalf on the trial of an issue of bastardy in a cause described in the bill as constituted between "*the state as plaintiff and the said James N. Collins as defendant,*" in the superior court of Nash. The defendant's counsel moved to quash the bill, upon what ground does not appear, and the motion being denied, a plea of not guilty was put in.

On the trial before the jury, the solicitor introduced the record of the proceeding in which the false oath is alleged to have been taken, which is there entitled, "the state and Cornelia Burnett v. James N. Collins."

In the course of the argument, his counsel urged as proof of the defendant's innocence, that he had not fled from justice—there having been no evidence offered on the point. In the charge, the court calling the attention of the jury to this part of the argument, told them "that they had nothing to do with the question whether the defendant had fled or not, but the question for them to consider was whether upon the proofs, the defendant was or was not guilty." The court was asked and refused to instruct the jury that the record produced did not sustain the charge in the bill in describing the cause wherein the imputed offence was perpetrated, and for this variance they should acquit the defendant.

These are the exceptions brought up for review:

1. The denial of the motion to quash: We have not had the aid of counsel for the appellant to suggest objections to the form of the indictment, nor are any defects pointed out in the record, upon which the preliminary motion is based. We have consequently given it a careful examination, and our scrutiny of its provisions has failed to detect any fatal defect. The bill is full and explicit in making all the necessary averments to constitute the offence charged, and fully

meets the requirements of the statute in this behalf. Bat Rev., ch. 33, § 62.

2. The court was entirely correct in directing the jury to discard what was urged in argument upon the assumed existence of an unproved fact, and to confine their attention to an inquiry as the defendant's guilt upon the evidence adduced and before them.

3. The variance between the allegation and proof: His Honor did not err in holding the discrepancy immaterial and the exception untenable. The proceeding referred to in the bill is designated according to its legal import, and the cause is prosecuted only by the state. The sole aim of the proceeding in bastardy is to ascertain the paternity of the child, and impose upon the father the burden of its support, such as he would incur even if his lawful instead of illegitimate offspring, and to indemnify the county against the expense of its maintenance. The mother is no proper party to the action, and her name in association with the state does not change the essential nature of the proceeding. Bat. Rev., ch. 9, § 1, 3; *State* v. *Pate*, Busb., 244; *State* v. *Beatty*, 66 N. C., 648. But the cases cited by the Attorney General are so entirely in point, and decisive, as to render further discussion useless,—*State* v. *Brown*, 79 N. C., 642; *State* v. *Davis*, 69 N. C., 495.

There is no error. Let this be certified that the court below may proceed to judgment.

No error. Affirmed.

STATE v. THOMAS J. WILKIE, Junior.

Proceeding in Bastardy—Appeal.

A proceeding in bastardy being a civil action, either party has the right of appeal as a matter of course, under the rules prescribed for perfecting appeals in other civil cases.

(*State* v. *Pate*, Busb., 244, cited and approved.)

STATE *v.* WILKIE.

PROCEEDING in bastardy commenced in a justice's court and heard on appeal at Spring Term, 1881, of CHATHAM Superior Court, before *Avery, J.*

As appears by the return of the justice of the peace, the warrant against the defendant issued on the 11th day of February, 1881, and it was returned and a trial had on the 22nd of the same month. The jury found the issue in favor of the defendant, and the state appealed to the superior court. The defendant was recognized for his appearance at the next term of the superior court, but not until the first of March following. When the case was called for trial in that court, the defendant's counsel moved to dismiss the appeal on the ground: (1) That as the jury in the justice's court had found the issue of paternity in favor of the defendant, he could not again be tried upon the same charge. (2) That as the recognizance given by defendant for his appearance bore date the first of March, the court must infer from that circumstance that the appeal was taken after the day of trial and the discharge of defendant. The court declined to allow the motion, and the defendant excepted, and after verdict and judgment against him, appealed to this court.

Mr. John Manning appeared with the *Attorney General*, for the State.

Mr. J. H. Headen, for defendant.

RUFFIN, J. Proceedings in bastardy are mere police regulations, and so far as they constitute any action at all, it is a civil action. This has been so often decided and seemed to be so well understood by the profession and the country, that we had not supposed it would ever again be called in question.

Being a civil action, an appeal lies, as a matter of course, at the will of either party; and that the state has such right is shown by the case of *State* v. *Pate*, Busb., 244, in which

two juries, the one in the county court and the other in the superior court, had found the issue in favor of the defendant.

The return of the justice states that the appeal was in fact taken at the trial, and we cannot see the propriety of permitting his statement in this regard to be controlled by the date of the defendant's recognizance. But if we should, it could not change the result in this case; for, as in all other civil cases, the party appealing has ten days to serve notice of and perfect the appeal; and there is no pretence that it was not done within that time.

Several other exceptions were argued by counsel in this court, but as they do not appear by the record to have been taken in the court below, we have not felt at liberty to consider them. There is no error. Let this be certified to the superior court of Chatham to the end that the cause may be proceeded with according to law.

No error. Affirmed.

STATE v. JOHN INGRAM.

Proceeding in Bastardy.

The act of 1879, ch. 92, does not apply to proceedings pending at the date of its ratification; hence in a bastardy proceeding pending in 1878 and tried in 1881, the superior court was not restricted to the fine imposed by that act upon a defendant against whom the issue was found.

(*State* v. *Lee*, 7 Ired., 265; *State* v. *Ledbetter*, 4 Ired., 245; *State* v. *Carson*, 2 Dev. & Bat., 368; *State* v. *Robeson*, 2 Ired., 46, cited and approved.)

PROCEEDING in bastardy tried at Spring Term, 1881, of HENDERSON Superior Court, before *Bennett, J.*

The jury found that the defendant was the father of the child, and thereupon the court adjudged that an allowance

of the two hundred dollars be made for its support and maintenance to be paid by the defendant in certain instalments, and that he give bond in the sum of three hundred dollars to keep the child from becoming a public charge. From this judgment the defendant appealed.

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

ASHE, J. As no bill of exceptions accompanies the transcript, we are unable to discover from the record upon what ground the appeal is taken. Possibly the counsel for the defendant may have supposed there was error in the judgment rendered, in making an allowance of two hundred dollars for the support of the child, and that the court was restricted by the act of 1879, ch. 92, to an allowance of fifty dollars, and ten dollars to the use of the school fund. But there was no error in the judgment.

This case has been pending in the superior court of Henderson county since fall term, 1878, (as appears by the record) and although the act of 1879 does provide that the allowance made to women in bastardy proceedings, when the putative father admits the paternity of the child or the issue has been found against him, shall in no case exceed fifty dollars, and a fine of ten dollars which shall go to the school fund, yet in the 12th section of the act, it is provided "that this act shall not apply to proceedings now pending in the superior, criminal, or inferior courts." The verdict of the jury upon the issue in this case constitutes evidence of the paternity, legally complete, and upon the finding the defendant stands, by force of the statute, charged with the maintenance of the child, and all the court can do is to pass the prescribed orders. See *State* v. *Lee*, 7 Ired., 265; *State* v. *Ledbetter*, 4 Ired., 245; *State* v. *Carson*, 2 Dev. & Bat., 368. If the defendant wished to avail himself of any de-

fects in the warrant or other proceedings before the magistrate, he should have made his objection *in limine* before tendering an issue upon the matter charged. By tendering the issue he waived all objection to defects in the preliminary proceedings. *State* v. *Robeson*, 2 Ired., 46.

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

No error. Affirmed.

STATE v. JOSEPH WATTS.

Criminal Jurisdiction—Review of Statutes.

The act of 1879, ch. 92, does not apply to proceedings pending at the date of its ratification; hence the superior court was not restricted in its jurisdiction and power to punish by fine or imprisonment or both, defendants convicted of assaults, &c., upon indictments found prior to that act. (Review of the statutes in reference to criminal jurisdiction, by ASHE, J.)

(*State* v. *Heidelburg*, 70 N. C., 496, cited and approved.)

INDICTMENT for an assault with intent to commit rape, tried at Fall Term, 1879, of HAYWOOD Superior Court, before *Graves, J.*

The defendant was convicted of the simple assault but not of the assault with intent to commit rape. Upon judgment being pronounced against him he appealed to the supreme court, when, at the January term, 1880, it was held there was no error in the proceedings had in the superior court. 82 N. C., 656.

At fall term, 1880, of said superior court the defendant appeared before the court (Judge Gilmer presiding) and on motion of the solicitor for the district, judgment was pro-

nounced against him that he be imprisoned twelve months in the county jail and pay a fine of fifty dollars. From which judgment the defendant appealed to this court, insisting that no punishment could be inflicted upon his conviction for this offence greater than a fine of fifty dollars and thirty days imprisonment, and the court was restricted to these limits, and this is the only question presented by the appeal.

Attorney General, for the State.
Mr. Geo. A. Shuford, for the defendant.

ASHE, J. In considering the question raised by the appeal, we have thought it might clear up some doubts by giving a full history of the jurisdiction of the courts over the subject of assaults, and assaults and batteries.

The act of 1869, ch. 178, sections 1, 2 and 6, gave justices of the peace final jurisdiction of assaults, and assaults and batteries, under certain circumstances (see Bat. Rev., ch. 33, § 119, and sub-sections 1, 2 and 3), but these sections in relation to these offences were repealed by the act of 1870–'1, ch. 43, § 2 (Bat. Rev., ch. 32, § 111,) which says, that "in all cases of an assault with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment or both at the discretion of the court." This act effectually deprived justices of their jurisdiction, for although the constitution of 1868, article 4, section 33, gave justices of the peace jurisdiction of criminal actions where the punishment could not exceed a fine of fifty dollars or one month's (now 30 days) imprisonment, as soon as the legislature removed the limit on the punishment prescribed by the act of 1868–'9, and left it discretionary with the court to transcend that limit, the jurisdiction of justices of the peace was taken away. *State* v. *Heidelburg*, 70 N. C., 496.

This act then gave exclusive jurisdiction to the superior,

criminal and inferior courts, of assaults, and assaults and batteries, and was followed by the act of 1873–'4 making further changes in the law in this respect. It is provided in section 6 of that act, "that section 111, Bat. Rev., ch. 32, (act of 1870–'1), shall be made to read as follows: In all cases of assaults without intent to kill, and where no deadly weapon has been used, and no serious damage done, and when the party injured shall make complaint before a justice of the peace for the county in which the offence shall have been committed, and shall ask the justice finally to determine the action, in such case the punishment shall not exceed a fine of fifty dollars or imprisonment for one month." It will be seen that this act only puts a limitation on the punishment, when the justice at the instance of the party injured has taken cognizance of the offence. When he had not done so, the jurisdiction was left as before and the punishment was discretionary with the court.

It was whilst the law established by these acts was in operation, giving the indisputable jurisdiction to the superior courts over assaults, and assaults and batteries, except in the case above mentioned, that this bill of indictment was found by the grand jury.

Then came the act of 1879, ch. 92, making still further changes in section 111, chapter 32, of Battle's Revisal, providing that where no deadly weapon was used and no serious damage done, the punishment shall not exceed a fine of fifty dollars or imprisonment for thirty days. It was the purpose of the legislature by this provision in the act to give jurisdiction of all simple assaults, and assaults and batteries, to justices of the peace, still leaving the jurisdiction in the courts, if some justice of the peace should not within six months after the commission of the offence take official cognizance of the same. Section 11.

But these provisions of the act of 1879 do not affect our case, for there is a saving in the act of just such cases as

this. It is declared in section 12 of the act, that, "this act shall not apply to proceedings now pending in the superior, criminal, or inferior courts." This bill of indictment was found by the grand jury in October, 1878, and has been pending ever since. It comes clearly within the saving of the act, and there can be no question as to the jurisdiction of the superior court and its power to punish by fine or imprisonment, or both, at its discretion.

There is no error. Let this be certified to the superior court of Haywood county that proceedings may be had according to law.

No error. Affirmed.

STATE v. DAVID HAMLETT.

Criminal Law—Witness.

On a trial for an affray prior to the act of 1881 allowing defendants to testify in their own behalf, one defendant could not oppose the testifying of his co-defendant for himself—the state's counsel not objecting. (*State* v. *Cowan*, 7 Ired., 239, cited and approved.)

INDICTMENT for an affray tried at January Term, 1881, of WAKE Superior Court, before *Graves, J.*

This is an indictment for an affray and for mutual assaults against the defendant and one Young.

On the trial Young offered himself as a witness in his own behalf, and no objection was then made; but after he began to testify, the defendant Hamlet interposed the objection that he could not testify in his own behalf. The solicitor said he had no objection to the testimony of the witness in his own behalf, and was willing for him to tell all

about the matter. The court allowed the witness to proceed, and the defendant Hamlet excepted. Both defendants were found guilty by the jury, and there was judgment accordingly. From which judgment the defendant Hamlet appealed.

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

ASHE, J. The ground of the exception taken by the defendant to the ruling of his Honor upon the admission of the testimony of his co-defendant, Young, was, that by section 16, chapter 43 of Battle's Revisal, a defendant in a criminal action is declared incompetent to testify in his own behalf, and this case was tried before the act of 1881, allowing them so to testify.

That is all so; but with whom lies the right of objection to such testimony? Of course with the party against whom it is offered, and who is likely to be prejudiced by the admission of the testimony.

In this case it was exclusively the right of the state to object, against whom the testimony was offered, and we can see no reason why the solicitor might not waive the objection.

The defendant certainly had no right to raise the objection, for the reason that no rights of his on the trial could possibly be affected by its introduction; for the state, under the then existing law, had the right to introduce the co-defendant, Young, to testify against him. So his only ground of complaint is that Young was allowed to testify, not against him, but for himself. But that was a matter entirely between the state and the co-defendant Young. If the state was willing he should be examined in his own behalf, it was no affair of the defendant, unless it can be shown to operate in some way to his prejudice on the trial. We are unable to see how he could be more prejudiced by his co-defendant

being admitted to testify in his own behalf in a case like this, than in being introduced by the state as a witness to testify directly against him.

Admitting the witness was incompetent and it was error to receive his testimony, yet if it did not operate to the prejudice of the defendant it is no ground for a *venire de novo*. *State* v. *Cowan*, 7 Ired., 239.

There is no error. Let this be certified to the superior court of Wake county, that further proceedings may be had agreeably to this opinion and the law of the state.

No error. Affirmed.

STATE v. J. T. EDENS.

Juror—Nuisance—City Ordinance.

1. One is not disqualified under section 229*g* of the Code to act as a grand juror in the criminal court of New Hanover county, by reason of his having a civil suit pending in another court of the county; and it was not error to refuse to quash an indictment found by the grand jury of which he was a member.
2. The defendant was charged in a common law indictment with a nuisance by obstructing a street, in that, he kept a market cart standing in the street for an hour and a half, and the jury rendered a special verdict finding that he was notified to remove the same but refused; that he and numbers of other persons were accustomed to occupy places on the street with their carts, selling vegetables, &c., but that it was contrary to the municipal regulations, and that notwithstanding the alleged obstruction, there was the usual passing of vehicles and foot-passengers: *Held* not to be a nuisance *per se*.
3. *Held further*, that where one is indicted for violating a city ordinance, the terms of the ordinance and the particular breach alleged, should be set forth.

INDICTMENT for a nuisance tried at August Term, 1881, of NEW HANOVER Criminal Court, before *Meares, J.*

The indictment charges the defendant with having committed a nuisance by obstructing a public street of the city of Wilmington. The particular nuisance complained of is that he kept a market cart standing in the street for the space of one and a half hours.

The prosecution originated in the criminal court of New Hanover county, and when called to answer, the defendant first pleaded in abatement that one of the grand jurors who passed upon the indictment had a civil suit pending and at issue in the superior court of said county, and was therefore disqualified.

His Honor overruled the plea and the defendant excepted.

The jury rendered a special verdict, upon which they asked the instruction of the court, in substance as follows: The defendant kept his mule and cart, on the day mentioned in the bill of indictment, in said position continuously for one and a half hours, (the position being found to be at the corner of Market and Second streets, near a crossing, as represented on a diagram accompanying the case) after being notified to remove the same, which he declined to do; that within the two years next preceding the finding of the indictment, the defendant put his cart and mule at different places on Market street, backing up his cart to the sidewalk, for the purpose of selling vegetables and other farm products, at least twenty-five times during the period aforesaid, and remained so situated from one to two hours each time; that other persons were in the habit of occupying similar positions on said streets with their carts and mules, to sell vegetables, &c., under the directions of the municipal authorities, as this defendant did; that it was contrary to the municipal regulations to occupy as aforesaid the position as shown on the diagram during said period; while the defendant was occupying said position, there was no other cart standing in the open space between the four corners of

the streets, and during the time there was the usual passing of vehicles and foot-passengers every way, up and down the street; the city ordinance prohibiting persons from placing carts at the corner indicated on the diagram (where the defendant's mule and cart were standing) was passed because of the public inconvenience in causing the collection of a crowd at the point adjacent to the sidewalk, which was usually so great as to require a policeman to keep the way clear, but on the particular occasion mentioned in the indictment, there was no such crowd; and that there were numbers of persons occupying similar positions on the street, with their carts backed up to the sidewalk, selling vegetables, &c.

Thereupon the court being of opinion that the defendant was guilty, gave judgment accordingly, and the defendant appealed.

Attorney General, for the State.
Mr. D. J. Devane, for defendant.

RUFFIN, J. First, as to the question touching the qualification of the grand juror who aided in finding the indictment. The act of 1876-'7, ch. 242, is the one which estabtablished the criminal court for the county of New Hanover, and after prescribing a manner of drawing the jurors for that court, differing somewhat with the mode ordinarily used in drawing those who are to serve in the superior courts, it provides in the 8th section that the jurors so drawn shall "be subject to the same rules and regulations and possess the same qualifications as are provided by law in regard to jurors in the superior court."

On looking at the statute (C. C. P., § 229*a*,) which is the only one that prescribes the qualifications of jurors for the superior court, we find that they are required to be such as have paid their taxes for the year preceding that in which

they may be drawn, and as are of sufficient intelligence and good moral character.

It is true that by section 229*g*. of the same Code, it is provided that if any juror drawn from the superior court should at the time have a suit pending therein, the scroll containing his name shall be returned to the box and he shall not be permitted then to serve. But this is no disqualification of the person as a juror for that court; so far from it his name is expressly directed to be returned to the box that he may be drawn on some other occasion after the determination of his pending action.

This is simply a precaution (an important one it is true) of the law growing out of its great regard for seemliness and perfect fair play, and whenever the reason ceases the rule itself ceases.

In view of the spirit of this statute, and as coming within the *rules and regulations* prescribed for jurors of the superior court, we should have no doubt that a person against whom there may be a prosecution pending in the criminal court would be temporarily disabled, though otherwise qualified, from serving as a juror in that court, but certainly this cannot be the consequence of his having an action at issue in another court. In fixing the qualifications for jurors in the criminal court, and declaring them to be the same with jurors of the superior court, the law had in view the general qualifications of such jurors, and not a particular disqualification growing out of the accidental pendency of an action in that court. The defendant's plea in abatement was therefore properly overruled.

The next enquiry is whether the judgment rendered by the court is justified by the special findings of the jury. In this connection it must be borne in mind that the indictment, though concluding against the statute, is in fact but at common law. It alleges no violation of any city ordinance, or breach of any police regulation. The charge is

simply that of a common law nuisance, alleged to have been committed by the obstruction of a public highway.

We cannot therefore in anywise refer to the copy of the city ordinances filed in the case, and to which our attention was called in the argument, especially as they make no part of the case certified to this court.

The statute makes the violation of an ordinance of the city a misdemeanor punishable by indictment, and if the defendant in this case has been guilty of that offence, he may and should be prosecuted therefor. But in that case the indictment should truly set forth the terms of the ordinance and the particular breach alleged, in order that the defendant might know certainly to what he is called to answer. According to the only view of the case which we feel at liberty to take, the conduct of the defendant on the occasion referred to in the verdict, cannot be aggravated by the fact as found by the jury, that it was contrary to the municipal regulation, since the verdict does not disclose what the regulation was, or the authority by which it was ordained, and these are matters of which we cannot take judicial notice as matters of law.

Strip the case then of all that is said about the city regulation and the causes which led to its adoption, and what does the conduct of the defendant, as found by the jury, amount to? Nothing more than that on a day certain he stood with his cart and mule near the angle made by two streets, one of which was ninety-nine, and the other sixty-six feet wide, for the space of one hour and a half, during all of which time "there was the usual passing of vehicles and foot-passengers every way up and down the streets."

We cannot think that conduct such as this is deemed by the law to amount to a nuisance *per se*.

Any permanent obstruction to a public highway, such as would be caused by the erection of a fence or building thereon is *of itself* a nuisance, though it should not operate

as an actual obstacle to travel, or work a positive inconvenience to any one. It is an encroachment upon a public right, and as such is not permitted by the law to be done with impunity. But the very object of a highway is that it may be used, and though travel be its primary use, it still may be put to other reasonable uses; and whether a particular use of it which does not of itself amount to a nuisance is reasonable or not, is a question of fact to be judged of by the jury according to the circumstances of the case.

Unlike the case of a permanent obstruction just referred to, it is not the manner of using the highway which constitutes the nuisance, but the inconvenience to the public which proceeds from it, and unless such inconvenience really be its consequence, there is no offence committed.

We have made careful reference to the leading English cases on this subject (which are admitted by all the authors to be *Rex* v. *Russell*, 6 East, 427; *Rex* v. *Jones*, 3 Camp., 230, and *Rex* v. *Cross*, *Ib.*, 224) and in each and every one of them, the use of the highway which was the subject of prosecution was shown to be not such as *might*, but such as actually did obstruct travel therein, and impair its enjoyment by the public. And so it is in every case decided by the courts of the several states, which have come under our observation, and it must needs be so, since the question as to which is a proper and reasonable use of a highway must depend in a great measure upon its locality, its accustomed usage, and the exigencies of the public, it being apparent that what would obstruct travel and work an inconvenience to the public in the crowded streets of London, or on Broadway in New York, might be harmless in the streets of a less populous place.

Understanding the verdict of the jury to be, that the defendant by occupying with his mule and cart the position he did, and for the space of time he did, interposed no obstacle to travel and caused no actual inconvenience to the public,

we are of the opinion that it was error in the court below to give judgment against him in the premises.

Let this be certified to the criminal court of New Hanover county, to the end that the defendant may be discharged.

Error. Reversed.

STATE v. LAFAYETTE CHRISP.

Nuisance—Profane Swearing.

The continued and public use of profane oaths, frequently and boisterously repeated, though on a single occasion and but for the space of five minutes, is indictable as a public nuisance.

(*State* v. *Kirby*, 1 Mur., 254; *State* v. *Ellar*, 1 Dev., 267; *State* v. *Baldwin*, 1 Dev. & Bat., 195; *Jones*, 9 Ired. 38; *Pepper*, 68 N. C., 259; *Powell*, 70 N. C., 67; *Barham*, 79 N. C., 646; *Brewington*, 84 N. C., 783; cited and approved.)

INDICTMENT for a nuisance tried at Fall Term, 1880, of GREENE Superior Court, before *Gudger, J.*

This prosecution commenced in the inferior court of Greene county, where the defendant was tried and convicted. Upon his motion to arrest judgment being overruled, he appealed to the superior court, and on the hearing the judge affirmed the ruling below, and the defendant appealed to this court.

Attorney General, for the State.

Mr. W. C. Munroe, for the defendant.

RUFFIN, J. The indictment, under which the defendant stands convicted, in effect, charges that on a day certain, in the county of Greene, in the public streets of the town of

Snow Hill, and in the presence and hearing of divers citizens of the state then and there assembled, and in the presence and hearing of divers other citizens then and there passing and repassing, the defendant did curse and swear in a loud voice, and did utter the profane words set out in the indictment; and did then and there and for the space of five minutes continue to utter and frequently repeat the said words in the presence and hearing of the said citizens then and there being, and passing and repassing to their great annoyance, &c., and the common nuisance, &c.

Every intendment is to be made in favor of the verdict of the jury, and we must presume that every material allegation of the indictment was fully established to their satisfaction.

The question then arises, did the conduct of the defendant, supposing it to have been just as charged in the bill, amount to an indictable offence under the law of this state?

Under the earlier decisions of our courts, there could be no sort of doubt upon the point. In the case of the *State* v. *Kirby*, decided in 1809, and reported in 1 Mur., 254, the indictment charged that the defendant swore several oaths on a court house square to the great disturbance and common nuisance of citizens attending the court. After a submission, the defendant moved in arrest of judgment upon the ground that the facts alleged against him did not constitute an indictable offence, but the court declared that it did. The next case, in point of time, was that of the *State* v. *Ellar*, decided in 1827 and reported in 1 Dev., 267, where the indictment charged that the defendant did profanely curse and swear, in the public streets of Jefferson, to the evil example, &c.; and after a verdict for the state, he too moved in arrest of judgment upon exactly similar grounds, and his motion was allowed in the superior court; but upon an appeal to this court that ruling was reversed, and it was expressly declared that when the acts of profanity are so pub-

lic and repeated as to become an annoyance and inconvenience to the citizens at large, no reason could be perceived why they should not be indictable as a common nuisance.

Sustained by decisions, so directly to the point as these, we should feel loth to hold that the loud and continued use, even but for the space of five minutes, of profane and blasphemous language, in one of the public streets of a town, did not constitute an indictable offence under the laws of our state, unless satisfied, as defendant's counsel says is the case, that they have been overruled, either expressly or by a necessary implication, in subsequent and better considered cases.

As we understand it, the position assumed by the counsel is, that the use of profane language *on a single occasion*, however public the place, and long continued, or often repeated the words may be, cannot amount to an offence cognizable in the superior court, but is punishable only by a penalty of fifty cents, to be imposed in a magistrate's court.

The case most pressed upon us, in support of this position, is that of the *State* v. *Baldwin*, 1 Dev. & Bat., 195, decided in 1835, and being next to those cases already cited, in the series of cases that have arisen on the point. There, the indictment charged that the defendant, with others assembled at a certain meeting house, did loudly and profanely, and in the hearing of divers good citizens of the state there assembled, curse, swear and quarrel, whereby a certain singing school there held and kept was disturbed and broken up, to the common nuisance, &c.; and it was held to be so defective that no judgment could be pronounced thereunder against the defendants.

As laid in the indictment, the offence consisted of a single and distinct act of cursing, without any averment that it was continued for any space of time, or that the words were many times repeated; and as it seems to us, that was the point on which the decision turned. Here is what

the judge said expressly: "The act *as charged* is not made up of a number of acts frequently repeated. It is an act *single* and *distinct* and committed on a particular occasion." And then he adds that "it is possible that the frequent and habitual repetition of acts, which singly are but private annoyances, may constitute a public or common nuisance, but if so, this frequent and habitual repetition should be appropriately charged." The stress of the opinion, from first to last, is laid upon the frame of the indictment, and first one of its defects and then another pointed to, and suggestions made as to how they might have been remedied. And may we not ask why all this pains was taken in the case, if it could have been disposed of by a simple declaration, that no indictment, however drawn, would lie? for that, the conduct of the party did not, and could not under the circumstances, amount to an indictable offence. We concur with counsel, to the extent that the decision made in that case goes to the length of saying that *no single act* of profanity is an indictable offence. But we have looked through it in vain for any support to the further proposition, that the continued and public use of profane and indecent words, and their frequent repetition, *though on a single occasion*, may not become a common, public nuisance, cognizable in the superior court.

So far from that, and while conceding that certain expressions used seem to look that way, it strikes us as manifest, taking the whole of the opinion together, that Judge Gaston himself entertained no doubt but that such conduct might properly be made the subject of prosecution by indictment, provided it was *charged* and *proved* to have been so publicly committed and so long continued as to become a source of annoyance to the citizens at large.

And so it is, in all the cases to which we have been referred by counsel as bearing on the point—*State* v. *Jones*, 9 Ired., 38; *State* v. *Pepper*, 68 N. C., 259; *State* v. *Powell*, 70 N.

C., 67, and *State* v. *Barham*, 79 N. C., 646. These were all cases turning upon the sufficiency of the indictment, and the opinions delivered were directed exclusively to that point; and it is a mistake made to apply what is said, in the way of criticisms upon the bills, to the conduct of the parties accused, and the question of their guilt or innocence.

Arguendo, in *Jones'* case, Judge NASH expressly says that, while a single act of profanity is only punishable in a justice's court, yet, if the acts be so public and repeated as to become an annoyance and inconvenience to the public, they then constitute a public nuisance, without once intimating that the repetition requisite to complete the offence need be on several or distinct occasions. In *Powell's* case the indictment charged that the defendant did "publicly and profanely curse and swear and take the name of Almighty God in vain, in the streets of Lumberton, to the common nuisance;" and it was held insufficient, because the court could not tell, from reading it, "whether the swearing was done in a whisper or in a loud voice; for a moment or an hour; *once or repeatedly;* or, whether heard by few or many."

But the case discloses what the proof in the cause was, and, that the accused had cursed so loudly as to be heard several hundred yards and from dark until eleven o'clock at night; and that the citizens in their houses, and passing and repassing the streets heard and were annoyed by him; and Judge READE, who delivered the opinion of the court, declares unhesitatingly that, if the allegations of the bill had been co-extensive with the proofs, the defendant might have been properly convicted.

The conduct there held to be a nuisance, differs from that charged upon this defendant and of which he stands convicted, in a single particular as to the time of its continuance; and that difference cannot involve any legal principle, but, only a question as to the sufficiency of evidence.

To become a public nuisance, the conduct of a party must pass beyond the point of being injurious to individuals, and be hurtful and offensive to the community; and it may be difficult to prove that the use of profane words but for the space of five consecutive moments, could so inconvenience the community as to amount to a nuisance; yet we can suppose such cases, and surely, the fact that it may be difficult to establish an offence, and punish the offender, cannot be a valid reason for relaxing the law with regard to it. But, in this case, the jury have said that such was the consequence attending the defendant's conduct, and the door is therefore closed as to him, against any further inquiry into that question.

We have gone, thus at length, into a review of the cases bearing on the point, notwithstanding we have so recently gone over nearly the same ground in *Brewington's* case, 84 N. C., 783, because, there seems to be, in some quarters, an interpretation given to them, which we do not think is warranted.

Thus far we have considered the case merely in the light of express authority. Finding none which we think militates against the right of the state to maintain the prosecution against the defendant, we feel at liberty to look to the well established principles of common law as applied in other offences, and reason from analogy.

In his commentaries on the law, SIR W. BLACKSTONE distinguishes between the absolute duties of men and their relative duties as members of society, and says that it is with respect to the latter only that municipal law assumes to control their conduct. Let a man therefore, says he, be ever so abandoned in his principles or vicious in his habits, he is out of the reach of the law, provided, he keeps his wickedness to himself. But if he makes his views public, though they be such as seem principally to affect himself (as drunkenness or *the like*) they then become, by the bad example they set, pernicious to society, and it is

the business of the law to correct them. Upon the strength of this authority, it is said in 1 Russell on Crimes 270, that all open lewdness and grossly scandalous conduct is *punishable by indictment at common law*, and that whatever outrages decency, or is injurious to public morals, is a *misdemeanor*.

These principles of the common law have been everywhere recognized, and the reports of England and this country abound with cases in which, upon their authority alone, and without the aid of any statute, convictions have been enforced for offences against public morality and decency.

In this state, by virtue of the common law simply, convictions have been had in cases of public drunkenness and the indecent exposure of the person, and their correctness have never been questioned. Why should not the same rule apply to conduct such as this defendant has been convicted of? conduct which not only wounds every sense of decency, but greatly tends to debauch and corrupt the public morals.

In the case of *Brewington* just referred to, we held the use of profane and vulgar words, in a public place *on several occasions*, whereby the public at large were offended and annoyed, amounted to a public nuisance. We now hold that the use of such words, on a *single occasion*, may do the same provided it be attended with like consequences.

No error. Affirmed.

STATE v. ISAIAH RESPASS.

Criminal Procedure—Plea of former acquittal and not guilty.

1. Where a defendant is charged in a warrant (on appeal from a justice's court) and in a bill of indictment for the same offence, the solicitor

may elect to proceed upon either, and if he proceed upon the indictment, it has the effect of a *nolle prosequi* as to the warrant.

2. A defendant may plead both former acquittal and not guilty, but the jury cannot try the issues raised at the same time. After verdict against the defendant on plea of former acquittal, the court should proceed to trial on that of not guilty. There being no final determination of the prosecution before the justice in this case, the plea of former acquittal cannot be sustained.

(*State* v. *Dixon*, 78 N. C., 558; *State* v. *McNeill*, 3 Hawks, 183; *State* v. *Pollard*, 83 N. C., 597, cited and approved.)

INDICTMENT for assault and battery, tried at Spring Term 1880, of BEAUFORT Superior Court, before *Graves, J.*

This proceeding was commenced by a warrant and tried before a justice of the peace in Beaufort county. The warrant "charged that the defendant did on or about the second day of April, 1879, at or near Broad creek in said county, violently assault and beat him, the said J. P. Brooks, with a large stick and strike him two blows with said stick on the head and produced a dangerous wound, of which he may not recover, contrary to law and against the peace and dignity of the state." The warrant was executed and returned on the 17th of May, 1879, when the justice proceeded to trial and submitted the case to a jury, who returned a verdict that defendant was "not guilty;" and thereupon the justice adjudged that "the complaint be dismissed at the complainant's costs," from which judgment the prosecutor appealed to the superior court, and at spring term, 1880, to which the transcript of the proceedings before the justice was returned, a bill of indictment was found by the grand jury against the defendant for an assault and battery upon J. P. Brooks, the complainant in the prosecution before the justice. Upon the call of the case for trial in the superior court, the defendant offered to enter the pleas of "not guilty" and "former acquittal," but the court held that he must rely upon one plea, and under that ruling he

pleaded "former acquittal." To sustain his plea, the defendant offered in evidence the transcript of the proceeding and trial before the justice, together with the evidence taken before him on the trial, which evidence was allowed. And the solicitor admitted that the indictment was for the same offence as that tried before the justice.

The defendant then offered to prove by one Eborn that in the evidence before the justice, it was proved "that no deadly weapon was used and no serious damage or injury was done in the assault upon said Brooks." The court excluded this testimony and the defendant excepted. Nothing further being offered, the court directed the verdict of the jury to be entered, viz: "there is no record of former acquittal by a court of competent jurisdiction." Thereupon judgment was pronounced on motion of the solicitor and the defendant appealed.

Attorney General, for the State.

The defendant was not represented in this court.

ASHE, J. In the view we take of this case, there was no error in the ruling of the court in excluding the testimony of the witness, Eborn, as to the proof before the jury in the justice's court. When the appeal from the justice's judgment was returned to the superior court and the bill of indictment was subsequently found by the grand jury, there were then two criminal actions pending in that court against the defendant for the same offence. The solicitor had his election to proceed upon either. *State* v. *Dixon*, 78 N. C., 558. He chose to proceed upon the bill of indictment, which had the effect of a *nolle prosequi* as to the warrant, and was no defence to the indictment. *State* v. *McNeill*, 3 Hawks, 183. So in that view of the case there was no final determination of the prosecution commenced before the justice, without which the plea of "former acquittal" could

not be sustained. What evidence there was offered before the justice was an immaterial injury.

We are of the opinion however that the judgment rendered against the defendant by his Honor was erroneous. The point has been expressly decided in *Pollard's case*, 83 N. C., 597, where the defendant pleaded "former acquittal" and "not guilty," and the Chief Justice in a careful and well considered opinion, concurred in by his associates, held that the two pleas may be pleaded, and though the jury cannot be impaneled to try the issues raised by both pleas at the same time, the difficulty is obviated by allowing the second plea and a jury trial of it, after the verdict on a preceding plea. And it is held that no final judgment can be rendered on the finding of the jury upon the plea of "former acquittal," for the reason that such a judgment is only interlocutory, and that when both pleas are entered, it is the duty of the court after the finding of a verdict against the defendant upon the issue raised by the plea of "former acquittal," to proceed to trial upon the plea of "not guilty." But in this case the court refused to allow the defendant to plead both pleas, and there the error commenced.

Holding there is error, the judgment of the superior court is reversed and the case remanded that the defendant may be allowed to plead "not guilty" and go to the jury upon that issue.

Error. Reversed.

STATE v. W. W. MIDGETT.

Criminal Law—"Church"—Selling Liquor Near.

An indictment under the act of 1879, ch. 232, for selling spirituous liquor within a certain distance of a church in Hyde county, cannot be supported by evidence of such a sale within the prescribed distance of a house conveyed primarily for educational purposes, with permission to hold divine service therein on suitable occasions, which is ordinarily used for a school-house, but in which there is preaching at stated intervals.

(*Smithwick* v. *Williams*, 8 Ired., 268; *Coble* v. *Shoffner*, 75 N. C., 42, cited and approved.)

INDICTMENT for a misdemeanor, tried at Spring Term, 1881, of HYDE Superior Court, before *Gilmer, J.*

The defendant was indicted (under act of 1879, ch. 232,) for selling spirituous liquors withing one and a half miles "of the free *church* for all denominations to worship, commonly known as Rush academy," and on the trial the jury found a special verdict in substance as follows: That the defendant, within two years of the finding of the indictment, did sell spirituous liquors at a place in Hyde county called Nebraska, situate about two hundred yards from *Rush academy*, which said "Rush academy had, in 1841, been conveyed by deed from Joseph Swindell to William Selby and others, trustees in trust of Rush academy, for the use and purpose hereinafter mentioned," that is, "for the purpose of removing thereon the Rush academy house, for the purpose of an academy of the same name, and for the convenience of preaching, which is not to be prohibited on all suitable occasions;" that ever since the date of said deed the building upon said land has been used, with short intervals, as a school-house and a place for preaching, different denominations using the same without let or hindrance as

a place for holding divine service and for preaching; and that the ministers of the Methodist denomination have, for more than twenty years, been accustomed to have preaching there on stated Sabbaths in every month;" and upon the facts thus found they prayed the advice of the court whether the defendant was guilty as charged in the indictment; and if the court should be of opinion that he was, then the jury found him guilty, and if otherwise, then they found him not guilty.

The court being of the opinion that upon the foregoing facts the defendant was guilty, proceeded to judgment and the defendant excepted and appealed.

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

RUFFIN, J. The statute under which the defendant is indicted declares it to be a misdemeanor, punishable with fine or imprisonment, to sell spirituous liquors within one and a half miles of any "*church* in Hyde county;" and the question is, can this be made to apply to a building which, like the "Rush academy," was intended by its donor, to be used "for the purpose of an academy and for the convenience of preaching," and which has in fact, and for a series of years been used as a school-house, and a place for public worship.

Could we feel at liberty, even, to construe a penal statute so liberally as to make it applicable to conduct which, though beyond its literal import, we might conceive to be within its mischief, we should still feel ourselves forbidden, by every fair rule of construction, to do so in this instance.

The deed from the donor itself contains intrinsic evidence of his intention, and that while "preaching" was to be allowed in the building, its *primary use* was to be for school purposes. We can thus account for his declaration that

"*preaching should not be prohibited on all suitable occasions,*" which must, otherwise, seem out of place—for who would ever incorporate such a provision in a deed for a building intended to be a church, and to be used as such.

The verdict of the jury, too, ascertains that its actual use has corresponded with its donor's intention, and that from the date of the deed it has been regarded, and chiefly used, as an academy, that is to say, as a place of education, and that its use for worship, though occurring at stated periods, has been exceptional.

Such being the use to which it has been applied, it may be asked, does it not come within the spirit of the statute? and nothing else appearing, we might, perhaps, say that it does. But when, upon looking farther into the same statute, we find that in it express mention is made of "*Ashton academy*" situate in Pender county; of "*Draughan's school-house and church*" situate in Edgecombe county; and of divers *places of public worship* as distinguished from churches, we are forced to the conclusion that the "Rush academy" was not intended to be embraced within its provisions; or else, it too would have been expressly mentioned—it being a rule of construction that "*expressio unius, exclusio alterius.*"

The distinction between "*churches*" and "*places of public worship*" is known to our law, and has been, many times, recognized in our statutes, as for instance in the act of 1846 (Bat. Rev., ch. 32, § 93,) it is declared to be a misdemeanor to burn, deface, or injure any *church*, uninhabited house, &c.; and by the act of 1785 (Bat. Rev., ch. 101, § 5,) it is forbidden to obstruct the way leading to any *place of public worship*; and by the act of 1807 (Bat. Rev., ch. 101, § 8,) it is enacted that if any person shall be intoxicated at a *church*, or *place appointed for divine worship*, he shall forfeit and pay twenty dollars, &c., thus showing that the two terms are by no means synonymous.

Suppose a pupil, while attending school in the academy

in question, should deface the walls thereof, would it be contended that he could be properly indicted under the act of 1846 mentioned above? and if not embraced in that statute, how can it be said to be in the one under which the defendant is prosecuted, when, exactly the same term is used in both?

But, as intimated in the outset of our opinion, the statute under which this prosecution proceeds, being purely a penal one, should not be extended by construction beyond its strict words and plain signification. Laws, which define offences and prescribe punishments, should always be clear and explicit in terms, and taken strictly and literally by the courts.

It is not permitted to construe them by implication; nor to extend their provisions by any equitable construction that may be put upon them. *Smithwick* v. *Williams*, 8 Ired., 268; *Coble* v. *Shoffner*, 75 N. C., 42; Dwarris on Statutes, 737.

If this were not so, then the fate of accused persons would depend, not upon the express authority of law, but upon the discretion, and often-times the conjecture of judges.

We are therefore of the opinion that it was errror in the court below, to proceed to judgment against the accused upon the verdict as found by the jury. This will be certified to that court to the end that the defendant may be discharged.

Error. Reversed.

STATE v. J. W. SNUGGS.

Indictment—Issuing Marriage License—Penalty.

The issuing a marriage license by a register of deeds in violation of the statute (Bat. Rev., ch. 69, § 5, 7) is not an indictable offence. A penalty of two hundred dollars to any person suing for the same, is prescribed,

and this particular mode of proceeding excludes that by indictment, unless the illegal act be done *mala fide*. (Section 107, chapter 32 of Battle's Revisal discussed.)

(*State* v. *Loftin*, 2 Dev. & Bat. 31; *State* v. *Tatom*, 69 N. C., 35; *State* v. *Glasgow*, Conf. Rep., 38, cited and approved.)

INDICTMENT for illegally issuing a marriage license tried at Spring Term, 1881, of STANLY Superior Court, before *Eure, J.*

The indictment was quashed upon the ground that no indictable offence is charged in the bill, and the solicitor for the state appealed.

Attorney General, for the State.
Mr. S. J. Pemberton, for defendant.

RUFFIN, J. The charge against the defendant, who is a register of deeds, is that of issuing a marriage license for a female of the age of fifteen years, without the written consent of her father, in violation of the statute (Bat. Rev., ch. 69, §§ 5 and 7) and the only question is whether under the law such conduct amounts to an indictable offence.

The fifth section referred to authorizes registers upon application to issue a license for the marriage of any two persons, provided nevertheless that when either party to the proposed marriage is under eighteen years of age and shall reside with the father, &c., the register shall not issue a license for such marriage, until the written consent of the father shall be delivered to him; and the seventh section declares that every register who shall knowingly and without inquiry issue a license for the marriage of any two persons, where either of the parties is under the age of eighteen years, without the consent required by the fifth section, shall forfeit and pay two hundred dollars to any person who shall sue for the same.

The offence is entirely dependent upon the statute. With-

out its enactment there is no law to govern the case, for by the common law, "a female at seven years of age may be betrothed or given in marriage; at nine, is entitled to dower; at twelve, is at years of maturity, and may therefore consent or disagree to marriage." 1 Blk. Com., 463.

The statute not only creates the offence but fixes the penalty that attaches to it, and prescribes the method of enforcing it, and the rule of law is that wherever a statute does this, no other remedy exists than the one expressly given, and no other method of enforcement can be pursued than the one prescribed.

The mention of a particular mode of proceeding excludes that by indictment, and no other penalty than the one denounced can be inflicted. 1 Russell on Crimes, 49; *State* v. *Loftin*, 2 Dev. & Bat., 31.

But it is said that the defendant is a public officer of such a character that upon entering into office he was required to take an oath of office, and that the statute (Bat. Rev., ch. 32, § 107,) declares that every such officer shall be guilty of a misdemeanor who *omits*, *neglects* or *refuses* to discharge any of the duties of his office. Very true, but it does not help the prosecution, for all the offences there spoken of are those of omission only, and it will not do to hold that for every illegal act done by virtue of his office, every officer is amenable to the criminal law. To do so would be to put every officer in a state of constant and imminent peril, or as said in the case of the *State* v. *Tatom*, 69 N. C., 35, "between two fires, one in front and the other in the rear." In that case it was held that a sheriff who levied upon property belonging to a person other than the defendant in the execution, was not liable to indictment, there being nothing to show that he acted *mala fide*.

On the other hand, we have not the least doubt that any officer who perverts his authority and uses it for the sake of oppression, or fraudulent gain, or any other wicked mo-

tive, is guilty of an offence highly criminal in its nature and punishable by indictment, and this whether he is expected to take an oath of office or not, or whether there be any statute so declaring or not. It was so held in this state at a very early day in the case of the *State* v. *Glasgow*, Conf. Rep., 38, and seems never to have been doubted since.

These two cases seem to us to point to the true distinction. If the illegal act be done *mala fide*, then it becomes a crime, and the officer liable both civilly and criminally, but if free of any wicked intent, then he is civilly liable only.

But we need not press this point to a decision, since we are convinced that his Honor's ruling in quashing the indictment is correct, in view of the fact that the statute creates the offence, affixes the penalty, and prescribes the mode of proceeding—the mention of the particular method operating to the exclusion of every other.

No error. Affirmed.

STATE v. GRAYSON JENKINS.

Judge's Charge—Witness.

Where there is a severance on the trial of defendants, and another party charged in the bill testifies in behalf of the accused, it is error, as indicating the opinion of the court on the facts, to charge that the very fact that the witness is included in the same indictment will impair his testimony, and that his testimony should not be placed on the same plane or footing with that of a witness of undoubted character who is disinterested.

(*Noland* v. *McCracken*, 1 Dev. & Bat., 594; *State* v. *Jones*, 67 N. C., 285; *State* v. *Ellington*, 7 Ired., 67; *State* v. *Nash*, 8 Ired., 35; *State* v. *Nat*, 6 Jones, 114, cited and approved.)

STATE *v.* JENKINS.

INDICTMENT for larceny, tried at February Term, 1881, of the Criminal Court of New Hanover, before *Meares, J.*

The defendant Grayson Jenkins together with William Lee, who was examined as a witness in the case, and four others were indicted for larceny and receiving stolen goods. Three only of the defendants had been arrested, viz: Grayson Jenkins, William Lee, and Reed Devane, and upon the case being called for trial, the solicitor asked for and obtained a severance, and thereupon the defendant, Grayson Jenkins, was put upon his trial alone. The state introduced several witnesses and concluded its testimony, when the defendant introduced as a witness in his behalf Willam Lee, who was one of the defendants included in the bill of indictment and whose case had not been called. This witness contradicted some important statements made by at least two of the state's witnesses. In his remarks to the jury the solicitor argued that the witness, Lee, was one of the defendants, that his trial had not taken place, that he was an interested witness and ought not to be believed. The counsel for the defendant on the other hand contended that he had told the truth and should be believed. The court, after recapitulating the evidence in the case to the jury, and speaking in its charge of the legal rules of evidence by which the degree of credibility is to be tested, proceeded to comment on the attitude the witness Lee bore to the case, about whose testimony an issue of veracity had been raised, and remarked among other things, "that the jury should remember that the witness (Lee) for the defendant is included in the same bill of indictment, on a charge of larceny, and this very fact will impair his testimony, and that his testimony should not be placed on the same plane or footing with that of a witness of undoubted character who was disinterested."

The jury returned a verdict of guilty. There was a motion for a new trial based upon the exception taken by the

defendant to the remarks of his Honor touching the credibility of the witness Lee. The motion was overruled, judgment pronounced, and the defendant appealed.

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

ASHE, J. While it is competent for a judge in charging a jury, in his discretion as a precautionary measure to call their attention to any fact or circumstance proved on the trial, which affects the credit of a witnees, it is incumbent on him to do so, without conveying to the jury his opinion on the weight of the testimony, otherwise it is error. *State* v. *Jones*, 67 N. C., 285; *State* v. *Ellington*, 7 Ired., 61, (opinion p. 67).

The competency of witnesses and the relevancy of their testimony are exclusively within the province of the court; the credit of witnesses and the sufficiency of their testimony are as exclusively matters for the determination of the jury. This was so at common law and is made especially so under our act of 1796. *Noland* v. *McCracken*, 1 Dev. & Bat., 594.

In those cases where the judges on the trial of cases in the superior courts have undertaken as a caution to the jury to comment upon the credibility of witnesses as affected by their connection with the case, or relationship to the parties, and the exceptions to the charges have been overruled by this court, it is where the remarks of the judge have been accompanied by instructions to the jury that it was their province to determine upon the credibility of the witnesses.

In the case of the *State* v. *Ellington, supra*, where the credibility of the mother and sister, examined as witnesses for the defendant, was attacked by the state on account of their relationship, the court charged the jury that it was their

province to determine it, and it was for them to say whether these witnesses had testified truly.

In *Nash's case*, 8 Ired., 35, where the credibility of the mother of the prisoner, who was examined in his behalf, was attacked on similar grounds, the court charged that the law regarded with suspicion the testimony of near relatives when testifying for each other; that it was the province of the jury to consider and decide upon the weight of her testimony. And in the case of the *State* v. *Nat*, 6 Jones, 114, where the witnesses were fellow-servants, and the court below instructed the jury that the relationship affected the credit of the witnesses, this court sustained his Honor, observing whether that was communicated to the jury in the one form of expression or another, it did not violate the law when they were told at the same time that they were to be judges of the extent to which the credit of the witnesses was impaired by such relationship.

In our case his Honor told the jury "that the witness for the defendant, William Lee, is included in the same bill of indictment on a charge of larceny, and this very fact will impair his testimony, and that his testimony should not be placed on the same plane or footing with that of a witness of undoubted character who was disinterested." It does not appear from the record that there was any explanation or qualification of these remarks. In giving them thus unqualified to the jury, we think his Honor transgressed the limits of his duty and invaded the province of the jury. We think it was a clear intimation of an opinion upon the weight of the testimony, and the jury might reasonably have drawn from the expressions of his Honor the inference that in his opinion they should give more credit to the state's witnesses than to the witness Lee.

We think his Honor overstepped his limits when he told the jury that the *very fact of the witness being included in the bill of indictment impaired his testimony.* It could not neces-

sarily impair his testimony, for if he had testified against his interest, so far from impairing his testimony, it would have strengthened it.

Holding as we do, that his Honor in his remarks to the jury intimated an opinion upon the weight of the evidence, this court will not hesitate to grant a new trial for such an irregularity. *State* v. *Jones, supra.* 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. *Venire de novo.*

STATE v. WILLIAM NICHOLSON.

Judge's Charge—Appeal.

An omission of the judge to charge that there is no evidence on a controverted point, where there is no prayer for instructions, and no exception to the charge until after the jury have have rendered a verdict adverse to the appellant, is not assignable for error.

(*State* v. *Caveness*, 78 N. C., 484; *State* v. *Austin*, 79 N. C., 624; *Bynum* v. *Bynum*, 11 Ired., 632; *Burton* v. *R. R. Co.*, 84 N. C., 192, cited and approved.)

INDICTMENT for larceny and receiving tried at June Term, 1881, of WAKE Superior Court, before *Shipp, J.*

The facts necessary to an understanding of the exception made by the defendant are stated in the opinion of this court. The jury returned a verdict of guilty of receiving, &c., judgment, appeal by defendant.

Attorney General, for the State.

Messrs. Bledsoe & Bledsoe, for defendant.

SMITH, C. J. No complaint is made of any ruling of the court upon the trial, and as the record expressly states, no exception taken to the charge given the jury. After the rendition of the verdict acquitting the defendant of the larceny imputed in the first count of the indictment and convicting him of the offence of receiving the goods knowing them to have been stolen contained in the second count, the motion for a new trial was made upon the ground that there was no evidence to support the finding upon the latter, and the court should have so directed the jury.

The rule is well settled in the practice of this state, that the omission of the judge to instruct the jury upon a point on which if he had been so requested it would have been the duty of the judge to advise and direct the jury, cannot for the first time be assigned for error in this court; and it would seem equally reasonable to require the appellant, in the language of BYNUM, J., delivering the opinion 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. Fairness to the judge, as well as the due and orderly administration of justice, requires that his attention should be called to all errors and omissions in stating the evidence before it is too late to correct them—that is, before the jury retire from the box, and certainly before the verdict is returned." The same proposition is reiterated in terms not very dissimilar in *State* v. *Austin*, 79 N. C., 624, recognizing the same rule laid down in *Bynum* v. *Bynum*, 11 Ired., 632, and approved in *Burton* v. *R. R. Co.*, 84 N. C., 192.

But aside from this difficulty in reviewing the exception as presented, we are clearly of opinion that it has no force, and that the case was properly submitted to the jury upon both counts. The owner of the goods described in the bill

testified that hearing of the larceny he returned to his store and these articles were missing, the store having been entered about 4 o'clock in the afternoon; that with another he pursued and arrested the defendant about one hour and a half thereafter, and that he had the four shirts which the witness identified as his own, "wrapped up in his coat so as not to be seen at all." Another witness, who accompanied the prosecutor to make the arrest, testified that he saw the defendant passing down the railroad, some two hundred yards from the store with the shirts under his arm, "covered up all but one end by his coat," and that the arrest was made about a half mile from Clayton in Johnston county, five miles from the store. It does not appear that the defendant then made any explanation of the manner in which he came into possession, but on his trial and examination on his own behalf, he swore that he met an Irishman, a stranger whom he had never met before, who had the articles and offered him successively the hat, the shoes and the shirts; that he refused the two former because he would not wear a wool hat, and did not wear brogan shoes, but accepted the shirts because his own was dirty; that he paid nothing and was asked nothing for them, and they were given him.

We think the evidence warranted the verdict of guilty on the second count, as if believed it would have justified a similar verdict upon the first. The concealment and the absence of any explanation of his possession when he was arrested, were evidence of the *scienter* or guilty knowledge, the weight of which the jury alone were to determine, even if credit was given to so much of the defendant's testimony as related to the manner in which the stolen articles passed into his possession. It belongs exclusively to the jury to say whether any and how much of the testimony of a witness is entitled to belief. In the exercise of this right, when there is any evidence, this court will not interfere.

There is no error. Let this be certified to the end that judgment may be pronounced upon the verdict.

No error. Affirmed.

STATE v. E. W. GAYLORD and another.

Practice—Appeal.

1. To have the effect of vacating or suspending a judgment in a criminal action, an appeal must be perfected during the term—whether by giving bond for the costs or procuring an order dispensing with such security.

2. An appeal will be dismissed on motion when, in the transcript sent up, there is no record of any trial, verdict or judgment, no errors assigned, or statement of the case for appeal, and no appeal bond or order dispensing with one.

(*State* v. *Dixon*, 71 N. C., 204, cited and approved.)

INDICTMENT for a misdemeanor, heard at Fall Term, 1881, of BEAUFORT Superior Court, before *Gilmer, J.*

Attorney General, for the State.

No counsel for defendant.

RUFFIN, J. On the calling of this case, the Attorney General moves the court to dismiss the appeal; and his motion must be allowed.

In looking to the papers we find that the transcript sent up contains only a copy of the indictment against the defendants found at fall term, 1878, of Beaufort superior court, and of an order made at spring term, 1881, to the effect that whereas "no statement of the case of appeal is on

file in the case, and the solicitor moving to dismiss the appeal of the defendants, it is ordered that the clerk of the court transmit to the supreme court a full and complete transcript of the record in the case."

There is no record of any trial, verdict or judgment; no errors assigned or statement of the case for appeal; and no appeal bond, or order dispensing with one.

To have the effect of vacating or suspending the judgment of the court, an appeal must not only be prayed for, but perfected during the term—whether by giving bond for the costs or procuring an order dispensing with such security. *State* v. *Dixon*, 71 N. C., 204.

If there has been a trial and judgment in the case and appeal prayed, the court rendering the judgment should have seen that the appeal was perfected during the term or else its sentence executed; and if for any reason this was not done, it was the duty of the court at the succeeding term, or as soon as informed of the failure of its officers to execute its sentence, to peremptorily order the same to be done.

But as it is impossible for this court to know the true condition of the case, it is ordered that it be remanded to the superior court of Beaufort county, to the end that the same may be proceeded with according to law, and that the state recover of the defendants the costs of this court.

Error. Remanded.

STATE v. M. R. REAVES.

Criminal Jurisdiction.

1. The superior, inferior and criminal courts have jurisdiction of all offences, whereof exclusive jurisdiction is given to justices of the peace, if some justice shall not within six months after their commission have proceeded to take cognizance of the same. Act 1881, ch. 210. And if the prosecution originated in any of said courts before the expiration of the six months, objection to the jurisdiction must be taken as matter of defence upon plea of not guilty.

2. Although, on trial of an indictment for assault with intent to commit rape, the jury find the defendant guilty of the assault only, yet the superior court having jurisdiction of the offence charged, can proceed to judgment upon conviction of the subordinate misdemeanor.

(*State* v. *Moore*, 82 N. C., 659; *Hooper*, *Ib.*, 663; *Taylor*, 83 N. C., 601; *Berry*, *Ib.*, 603; *Slagle*, 82 N. C., 653; *Watts*, *Ib.*, 656; *Perkins*, *Ib.*, 681, cited and approved.)

INDICTMENT for assault with intent to commit rape, tried at Spring Term, 1881, of JOHNSTON Superior Court, before *Gudger*, *J.*

The defendant is charged with an assault and battery upon the body of one Margaret D. Stephenson with intent to commit rape, and found guilty of the assault and battery only.

At the trial the court was asked to charge the jury that the defendant could not be convicted under the bill of indictment, unless the intent alleged was shown by the state. The court refused to give this direction, and instructed the jury that they could convict of the offence imputed, or of the assault only, as the evidence satisfied them.

To the refusal and to the instruction given the defendant excepts. Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.

No counsel for defendant.

SMITH, C. J. After the rendering of the verdict, a motion in arrest of judgment was submitted on the ground of a want of jurisdiction in the court over the minor misdemeanor included in the charge, it appearing in evidence that the assault was made within six months preceding the finding of the bill, and was not attended with serious damage. The testimony heard by the jury, it is stated, did not show that any serious injury had been inflicted upon the person of the prosecutrix.

The restricted original jurisdiction conferred upon the superior, inferior and criminal courts over inferior misdemeanors by the act of 1879, ch. 92, defining "criminal jurisdiction of justices of the peace," has been enlarged by the amendatory act of 1881, ch. 210, and they may now take original cognizance "of all offences whereof exclusive jurisdiction is given to justices of the peace, if some justice of the peace shall not within six months after the commission of the offence have proceeded to take official cognizance of the same."

The only objection then which can now be taken to the exercise of original jurisdiction over offences committed to the cognizance of a justice, is, that the prosecution originated in the superior and other specified courts before the expiration of six months after their perpetration, and this is matter of defence upon the trial before the jury of the plea of not guilty. *State* v. *Moore*, 82 N. C., 659; *State* v. *Hooper*, *Ib.*, 663; *State* v. *Taylor*, 83 N. C., 601; *State* v. *Berry*, *Ib.*, 603.

But we do not interpret the statute which suspends the exercise of the admitted jurisdiction over these inferior offences for a limited period, in order that they may be brought before a justice for adjudication and punishment, as prohibiting the court from proceeding to judgment upon a criminal charge exclusively committed to it, where the verdict acquits of the higher and convicts of the subordinate included criminal act. Having acquired cognizance of the im-

puted crime, the court may proceed to dispose of the subordinate misdemeanor, of which it could not have taken jurisdiction as a distinct substantive offence, until after the lapse of the specified time without judicial action commenced before a justice.

It is not a case of denied jurisdiction, but a suspension of its exercise in an original proceeding; and in our opinion the legislation was not intended to arrest further proceedings when the assumed jurisdiction was rightful, and neither offence is outside of that jurisdiction ultimately.

There have been several adjudications warranting a verdict which finds a defendant charged with an assault with intent to commit rape, guilty of an assault only. *State* v. *Slagle*, 82 N. C., 653; *State* v. *Watts*, *Ib.*, 656; *State* v. *Perkins*, *Ib.*; 681.

There is nothing that we discover in the bill to sustain the motion to arrest the judgment.

There is no error, and this will be certified to the end that the court proceed to judgment.

No error. Affirmed

STATE v. CLARKE and HERMON.

Misdemeanor under Revenue Act—Jurisdiction—Penalty.

One who fails to obtain license to carry on a trade, &c., is guilty of a misdemeanor under section 32, schedule B, of the revenue act of 1879, punishable by fine not exceeding twenty dollars, or imprisonment not exceeding thirty days; and a penalty not to exceed twenty dollars is also imposed, to be recovered by the sheriff before a justice of the peace. And in such case the superior court has jurisdiction of the misdemeanor under the act of 1881, ch. 210, (see *State* v. *Reaves*, *ante*, 553,) but the punishment must not be greater than that prescribed by said section 32.

(*State* v. *Moore*, 82 N. C., 659; *State* v. *Taylor*, 83 N. C., 601, cited and approved.)

STATE v. CLARKE.

INDICTMENT for a misdemeanor, tried at Spring Term, 1881, of UNION Superior Court, before *Eure, J.*

This indictment was found by the grand jury of the superior court of Union county at spring term, 1881, for a violation of section 32 of schedule B, of the act of 1879, ch. 70.

The bill of indictment contained four counts:

The first charged that the defendants, Louise Clarke and Harry Hermon, on the 5th day of March, 1881, unlawfully and wilfully did practice the profession of elocutionists without having first paid the tax, and without having obtained the license required by law.

The second count was for exhibiting as elocutionists without having obtained the license so to do.

The third charged that they exhibited as elocutionists for reward, the said exhibition not having been given for the promotion of religious, educational or charitable objects, and for which exhibition the said defendants were liable to pay a tax of five dollars and obtain a license.

The fourth charged that defendants, without having first paid a tax of five dollars and without having obtained a license from the sheriff, did exhibit for reward as elocutionists, &c.

When the case was called for trial, the defendants' counsel moved to quash the bill of indictment for want of jurisdiction. The motion was sustained by the court and the solicitor appealed.

Attorney General, for the State.
Mr. A. W. Haywood, for defendants.

ASHE, J. The offence charged in the indictment is for a violation of the act of 1879, ch. 70, § 32. The section reads as follows: "Every person who shall practice any trade or profession, or use any franchise taxed by the laws of the state

of North Carolina, without having first paid the tax and obtained a license as herein required, shall be deemed guilty of a misdemeanor, and shall also forfeit and pay to the state a penalty not to exceed twenty dollars at the discretion of the court, and in default of the payment of such fines, he may be imprisoned for not more than thirty days, at the discretion of the court, for every day on which he shall practice such trade or profession, or use such franchise, except in such cases where the penalty is specially provided in this act, which penalty the sheriff of the county in which it has occurred shall cause to be recovered before any justice of the peace of the county."

The section is very obscurely expressed, and it is difficult to arrive at the intention of the legislature. It is laid down in Dwarris on Statutes, as a maxim of construction, that 'the office of interpretation is to bring the sense out of the 'words, and not to bring a sense into them." We have met considerable difficulty in this case in doing either, but after a careful consideration of the provisions of the section and by the application of the established rules of interpretation, we think it was the intention of the law-makers to make a violation of the provisions of the section a misdemeanor punishable by a fine, not to exceed twenty dollars, or an imprisonment not to exceed thirty days; and in addition to that, to impose a penalty, not to exceed twenty dollars for every day the trade or profession shall be practiced, or the franchise used, which are prohibited by law, to be recovered in an action by the sheriff before a justice of the peace. This construction makes the provisions of the section harmonious, and *brings some sense out of its words.* Any other construction would lead to an absurdity, without rejecting some parts of the section as surplusage; as for example, if it should be so construed as to make a violation of the provisions of the statute a misdemeanor, and leave the punishment in the discretion of the court, then the pun-

ishment of the fine and imprisonment would apply to the action before the justice for the penalty; but it would be absurd to hold that a justice of the peace could pronounce a judgment of imprisonment in an action for a penalty, for imprisonment for debt in this state is abolished, except in cases of fraud. Such a construction then would make it necessary to reject as surplusage the provision in regard to the imprisonment.

But "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 harmonious, 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." Potter's Dwarris on Statutes, 144. And "words in a statute are never to be construed as unmeaning and surplusage, if a construction can be legitimately found which will give force to and preserve all the words in the act." —— v. *Reynolds*, 13 Iowa, 310; *Hartford Bridge Co.* v. *Union Ferry*, 29 Conn., 210. The provision in the section with regard to the imprisonment then, can only be preserved by referring it to the misdemeanor, and then it must follow, that as the imprisonment cannot exceed thirty days, the offence created by the statute is cognizable before a justice of the peace.

But for aught that appears, the superior court may have jurisdiction of this particular case. The act of 1879, ch. 92, § 11, is so amended by the act of 1881, ch. 210, as to give jurisdiction to the superior courts of all offences whereof exclusive original jurisdiction has been given to justices of the peace, if some justice of the peace shall not, within six months after the commission of the offence, have proceeded to take official cognizance of the same. And it has been decided in the case of *State* v. *Moore*, 82 N. C., 659, that in indictments for an affray, it was not necessary to aver in the bill of indictment that the offence was com-

mitted more than six months before the finding of the bill, and that no justice of the peace had taken official cognizance thereof; and in *State* v. *Taylor*, 83 N. C., 601, it is held that the time charged in the bill to have been within six months before indictment found, furnishes no sufficient reason for arresting the judgment, for the averment of the time when the act was done, unless essential to its criminality, is not traversable. Here, it is charged in the bill that the offence was committed on the 5th day of March, 1881, but as that is matter lying in proof, there is no way to ascertain the fact, but by a trial before the jury. It was matter of defence to be proved under the plea of not guilty. If no such proof shall be made in this case, the superior court may proceed to trial and judgment.

But it is urged that the act 1881 is an *ex post facto* law. It is not so. The legislature has absolute control over the remedies. It may abolish courts and create new ones, and may after the commission of the offence authorize a change of the venue to another county of the district. Cooley Const. Lim., 331; 9 Wall., 35.

The act of 1881 would very clearly be unconstitutional, if the superior court was authorized to impose a greater punishment than that prescribed in section 32 of the act of 1879, but the superior court is restricted to the same limit of punishment.

We are of the opinion the indictment ought not to have been quashed, but that the superior court should have been allowed to proceed to trial, when the question of jurisdiction would have been determined by the evidence offered in the defence.

There is error. Let this be certified to the superior court of Union county that further proceedings may be had according to law.

Error. Reversed.

STATE v. SAMUEL ADAMS.

Prosecutor taxed with Costs.

Where the prosecutor is taxed with the costs of a criminal proceeding, it was held, that as to the want of public necessity for the prosecution and the malicious motives prompting it, the finding of the court in which the trial was had, is conclusive; and it is immaterial whether the judgment against prosecutor be rendered at the instance of the solicitor or the judge *ex mero motu*. Act of 1879, ch. 49.

(*State* v. *Lupton*, 63 N. C., 483; *State* v. *Hodson*, 74 N. C., 151, cited and approved.)

APPEAL from a judgment of the inferior court, heard at Fall Term, 1881, of WILSON Superior Court, before *Shipp, J.*

The defendants of record (Adams and Penny) were indicted in the inferior court of Wilson county upon a charge of larceny, and one Whitley was marked as prosecutor on the bill. A jury acquitted the defendants, and thereupon the court, finding that the prosecution was not required by the public interest, but that it was instituted to subserve the private interests of the prosecutor, and to gratify his malice towards the defendants, who were witnesses against him in another court, adjudged that he pay the costs of the prosecution, from which judgment the prosecutor appealed to the superior court, where his appeal was dismissed, and thereupon he appealed to this court.

Attorney General, for the State.
Messrs. Murray & Woodard, for appellant.

RUFFIN, J. As to the want of public necessity for the prosecution and the malicious motives that prompted it, the finding of the court in which the trial was had, is conclusive upon all parties. The statute commits the discretion to that tribunal and to no other, and being a matter of

sound discretion, its exercise cannot be reviewed in any appellate court. There being no suggestion of any error of law committed in reference to the matter, by the inferior court, the dismissal of the prosecutor's appeal in the superior court was correct.

As to the position taken, that the court could not proceed with the matter, and render judgment against the prosecutor of its own motion, but only at the instance of the solicitor, we do not see the force of it. Depending, as it did, and must necessarily have done, upon developments made openly in the the progress of the cause, the court was possessed of the same information with the solicitor, and was as competent to act upon its own information, as in the case of a contempt committed in open court. The cases of the *State* v. *Lupton*, 63 N. C., 483, and the *State* v. *Hodson*, 74 N. C., 151, furnish instances in which similar judgments were rendered against the prosecutors, on the motion of counsel of the acquitted defendants, and surely if allowable at the instance of a person wholly unofficial in his character, it must be in the power of the judge himself to act in the premises.

There is no error. Let this be certified to the superior court of Wilson county, to the end that the matter may be proceeded with according to law.

No error. Affirmed.

STATE v. ALEXANDER MORRISON.

Larceny and Receiving—Election.

On trial of an indictment for larceny and receiving, &c., the two counts relating to the same transaction and varied to meet the probable proofs, the court will not order the solicitor to elect upon which count he will proceed.

(*State* v. *Eason*, 70 N. C., 88; *State* v. *Baker*, 70 N. C., 530; *State* v. *Speight*, 69 N. C., 72; *State* v. *Jones*, 82 N. C., 685, cited and approved.)

STATE *v.* MORRISON.

INDICTMENT for larceny tried at Fall Term, 1881, of CABARRUS Superior Court, before *Avery, J.*

The indictment contains two counts—one for the larceny of some wheat, and the other for receiving the same wheat, knowing it to be stolen. After the evidence was in, the defendant's counsel moved the court to require the solicitor to elect upon which count he would proceed, but his Honor refused the motion, and the defendant excepted, and this was the only exception taken for defendant. After verdict and judgment against defendant he appealed to this court.

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

RUFFIN, J. The common law rule is, that if an indictment contains charges distinct in themselves and growing out of separate transactions, the prosecutor may be made to elect, or the court may quash. But when it appears that the several counts relate to one transaction, varied simply to meet the probable proofs, the court will neither quash nor enforce an election. *State* v. *Eason,* 70 N. C., 88.

In this case, it is the same wheat which is alleged to have been stolen, and to have been received, so that there can be no doubt that the two counts relate to the same transaction, and that the charge is diversified only out of an abundance of caution, and in order to be prepared for the result of the proofs.

At common law, a joinder of a count for a misdemeanor (which receiving is) with one for a felony, was not permitted, because the defendant's rights, in regard to challenging jurors, differed as to the two offences—though there are some old cases, both in England and this state, in which it was done previous to any statute.

But to remove all doubt about it, statutes were passed as well there as here, allowing such a joinder to be made, not-

withstanding the discrepancy as to the grade of the two offences. Their statute (24 and 25 Vict., c. 96,) is fuller than ours, and in terms provides that in case of such a joinder of the two counts, "the prosecutor shall not be put to an election." Ours contains no such provision, but ever since the day of its adoption has been construed to mean the same thing.

In the case of the *State* v. *Baker*, 70 N. C., 530, it is said that under an indictment containing two counts, one for larceny and the other for receiving stolen goods, the jury may bring in a general verdict of guilty, and in discussing the question, PEARSON, C. J., admits that it could not be done at common law, and bases his decision wholly on the *statute*, and cites the case of *State* v. *Speight*, 69 N. C., 72, as authority for the position.

In the case of the *State* v. *Jones*, 82 N. C., 685, the point was made, that a joinder of the two counts would no longer be allowed, now that the constitution imposes upon all persons convicted of infamous offences, a disqualification for office and the right of suffrage, thereby, as it was said, creating a difference in the mode of punishment between the two offences. But this court held that the disqualification was the effect, but no part of the sentence denounced by the law, and the sentence being now, as it was before the adoption of that article in the constitution, there was no detraction from the right of the state to have both counts in the same indictment, and to try under both before the same jury.

Conceding that at common law a joinder of the two counts would not be allowed, it is too late now after the repeated decisions upon the point, and all pointing in the same direction, to revive the question as to the effect of the statute.

There is no error. Let this be certified to the superior

court of Cabarrus county, to the end that the matter may be proceeded with according to law.

No error. Affirmed.

STATE v. THOMAS A. LOWDER.

Insufficiency of a Justice's Warrant.

A justice's warrant charging the defendant with an offence punishable by statute, which concludes "contrary to law" is defective. The particularity required in indictments cannot be dispensed with in warrants, and hence in this case the conclusion against the statute was necessary.

(*State* v. *Luther*, 77 N. C., 492, cited and approved.)

CRIMINAL ACTION heard on appeal at Spring Term, 1881, of STANLY Superior Court, before *Eure, J.*

The charge against the defendant is that of trespassing upon lands after being forbidden to enter by the owner thereof. Bat. Rev., ch. 32, § 116. The prosecution began in a justice's court, and the only exception is as to the sufficiency of the warrant upon which the defendant was arrested and tried. After setting out the offence charged, the warrant concludes, "contrary to law, and against the peace and dignity of the state." In the superior court, after a verdict of guilty the defendant moved in arrest of judgment, on the ground that the warrant should have concluded *against the statute*, but the court overruled the motion and pronounced judgment, from which the defendant appealed.

Attorney General, for the State.

Messrs. J. A. Lockhart and *S. J. Pemberton*, for defendant.

RUFFIN, J. It is the well established law of this state,

that every indictment which is founded on a statute must conclude against the statute, otherwise it is at common law, and if the offence be not punishable by that law, there can be no judgment against the accused.

This is no mere arbitrary rule to be dispensed with at the will of the courts, but is founded upon the soundest reasoning and a due regard for the safety of the party to be tried. It is intended to give him notice of the law against which it is alleged he has offended. There is no other means established by law through which this intelligence can certainly be conveyed to him, important as it may be, to enable him to prepare for his defence.

We cannot sympathize with that disposition, which seems to be growing, to dispense with the strict requirements of the law in the courts of justices of the peace, because of their supposed want of professional learning and skill. To do so, is to admit that such requirements are purely technical, and intended only to *catch* the unlearned and unskillful; whereas there is not one of them that is not sensible, and which may not at some time be needed to help the innocent. And very certain it is, that the greater the hazard to the party accused, growing out of the lack of legal learning on the part of the tribunal which tries him, the more exacting should the law be in its demands for precision and certainty in the mode of proceeding. It is due alike to the dignity of the law, and the security of the accused.

The case of the *State* v. *Luther*, 77 N. C., 492, is the last of many, in which the omission of the conclusion "against the form of the statute" has been held to be a fatal defect in an indictment, and in that case it was made to apply to the warrant of a justice of the peace.

The effect of the warrant against the present defendant was actually to mislead him, as its conclusion "contrary to law," if it means anything, would most naturally be taken

to refer to the common law, by which law the offence was not punishable, and therefore the judgment should have been arrested.

Error. Reversed and judgment arrested.

STATE v. SOLOMON WHITAKER.

Justice's Warrant—Entering on land without License.

The omission of the words, "unlawfully and wilfully," in a justice's warrant charging the defendant with a violation of the act in reference to entering on land of another after being forbidden, is a fatal defect.

(*State* v. *Simpson*, 73 N. C., 269; *State* v. *Parker*, 81 N. C., 548, cited and appproved.)

WARRANT for trespass on land heard on appeal at Fall Term, 1881, of HENDERSON Superior Court, before *McKoy, J.*

This was a criminal action against the defendant, tried before a justice of the peace in the county of Henderson, upon the following warrant: "Information having been made to me, the undersigned justice of the peace for said county, by the oath of James Bowen, setting forth that some time during the month of March, 1880, in this county, Solomon Whitaker entered on his premises without a license therefor, after being forbidden by the said James Bowen so to enter, against the laws of the state, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state: This is therefore to command you to arrest the said Solomon Whitaker if to be found in your county, and bring him before me or some other justice of said county to answer the said charge, and be further dealt with as the law directs," &c.

STATE *v.* WHITAKER.

The defendant was found guilty by the justice and sentenced to pay a fine, from which he appealed to the superior court, where at fall term, 1881, he was found guilty by a jury, and the judgment thereon was arrested by the court, from which the solicitor for the state appealed.

Attorney General, for the State.
Mr. J. J. Osborne, for defendant.

ASHE, J. There is no bill of exceptions or statement of the case, as there should be, sent with the transcript, but in looking into the record we presume the judgment was arrested, upon the ground of a defect in the warrant, in not charging the act to have been *unlawfully* and *wilfully* done. The act under which the defendant was warranted, reads: "No person, after being forbidden to do so, shall enter on the premises of another without a license therefor; and if any person after being thus forbidden shall so enter, he shall be guilty of a misdemeanor." Bat. Rev., ch. 32, § 116.

As a general rule, it is sufficient in draughting bills of indictment under statutes, to follow the very words of the statute, but there are some exceptions to this rule, as for instance, where the legislature by inadvertence has omitted words which are necessary to constitute a criminal offence. In such a case, it is proper that the words should be supplied by construction in order to express the meaning of the act. *State* v. *Simpson*, 73 N. C., 269. The indictment in that case was for a violation of the provisions of section 95, chapter 32 of Battle's Revisal, which made it a misdemeanor for any one to kill or abuse live stock in an enclosure, not surrounded by a lawful fence, and the words *unlawfully* and *wilfully* are omitted in the act, and Chief Justice PEARSON in speaking for the court, says: "It is apparent from the nature of things that these words (the literal words) are too broad and go beyond the meaning of the law-makers. The

statute by necessary construction must be qualified by the addition of the words *unlawfully* and *wilfully*." Common sense, he says, forbids the idea that it was the intention of the legislature to send to jail every person who by accident kills his neighbor's cow by his permission. So in the case of *State* v. *Parker*, 81 N. C., 548, which was an indictment under the same section, the court commented upon and approved the decision in *Simpson's case*, and Mr. Justice DILLARD, in delivering the opinion said: "The abuse charged on the defendant may have been the result of carelessness or accident, without any assent or guilty participation of the mind of the defendant therein, and if so, the case is not one designed by the act to be punished. And we hold, therefore, in order to limit properly the general words of the statute, it is necessary to allege in the bill, the injury or abuse as done unlawfully and wilfully, or by some equivalent words."

The reasons assigned by the court in these cases for the construction of the section, so as to make it necessary in a bill of indictment for a violation of its provisions to charge the act to have been done *unlawfully* and *wilfully*, applies with equal if not greater force to indictments under section 116, for the conclusion that the omission of those words in that section was through inadvertence on the part of the legislature, is strongly supported by the fact that in the very next paragraph of the same section (a part of the same act of 1866, ch. 60,) it is provided, that, if any person not being the present owner or *bona fide* claimant of such premises, shall wilfully and unlawfully enter, &c. If it was not an inadvertent omission, we can see no reason for making the distinction. But the application of the construction to section 116 (act 1866, ch. 60,) is further supported by the title of the act, which is, "An act to prevent *wilful trespasses* to land and stealing any kind of property therefrom." It is true the title is no part of the act, and is usually an unsafe guide in

ascertaining the scope and purport of an act, but "when the mind labors to discover the design of the law-makers, everything which can aid this object may be resorted to, and even the title of the act, in such case, may receive a due share of consideration." *United States* v. *Fisher*, 2 Cranch. 386; Potter's Dwarris on Statutes, 103. Giving then to the title of the act a due share of consideration in its construction, we can come to no other conclusion, than that it was the intention of the legislature to embrace in it only such persons as may unlawfully and wilfully violate its provisions. This is the construction which has been almost uniformally given to the act by the prosecuting officers of the state; for in almost every case in which appeals have come to this court from judgments in indictments under the two sections above cited, the offences have been charged to be done *unlawfully* and *wilfully*. See the cases of *State* v. *Hill*, *State* v. *Allen*, *State* v. *Painter*, and some others.

There is no error. The judgment must be arrested.

No error. Affirmed.

STATE v. WILLIAM TYLER and others.

Larceny—Receiving—Accessories—Costs—Appeal.

1. All felonious stealing being now reduced by statute (Bat. Rev., ch. 32, § 25,) to the grade of petit larceny, that offence no longer admits of accessories.

2. A receiver of stolen goods not being an accessory after the fact in the present condition of our law, the solicitor is not entitled under the act of 1873-'4, ch. 170, to a fee of ten dollars upon his conviction.

3. Where, upon application of the defendant to retax the costs, the solicitor's fee is reduced from ten dollars to four, the solicitor has no right to appeal, the state having no interest in the result.

State v. *Groff*, 1 Murph., 270; *State* v. *Gaston*, 73 N. C., 93, cited and approved.)

STATE *v.* TYLER.

INDICTMENT for larceny, tried at May Term, 1881, of NEW HANOVER Criminal Court, before *Meares, J.*

The question in this case is one of costs arising between the solicitor for the state and the defendants who were indicted in two counts, one for larceny and the other for receiving stolen goods. There was a general verdict of guilty, and judgment was suspended upon payment of costs. After the verdict, the clerk of the court, at the suggestion of the solicitor, taxed a fee of ten dollars for the solicitor against each defendant. The defendants then moved to re-tax the bill of costs on the ground that the solicitor was only entitled to a tax fee of four dollars for each defendant. The solicitor insisted he was entitled to a tax fee of ten dollars under the act of 1873–'74, ch. 170, where a defendant is convicted on an indictment containing a count for receiving stolen goods, but the court sustained the motion to re-tax and gave judgment accordingly, from which the solicitor appealed.

The Attorney General submitted the case for the solicitor in this court, and asked for a construction of the act.

ASHE, J. As this is a question of costs that may arise again on some of the circuits, we proceed to consider it, without conceding the right of the solicitor to appeal in such a case, and without regarding the maxim, "*lex non curat de minimis.*" We are of the opinion the costs in respect to the fees of the solicitor were properly taxed under the ruling of his Honor. He is only entitled to a fee of four dollars for each of the defendants. The appellant insists that under the first section of chapter 170, of the acts of 1873–'74, he is entitled by a proper construction of that act, to a fee of ten dollars from each defendant. The section declares "that the solicitors for the state, in addition to the general compensation allowed them, shall receive the fol-

lowing fees and no other, namely: For every conviction upon an indictment which they may prosecute for a capital crime, twenty dollars; perjury, forgery, * * * misdemeanors of accessories after the fact to felonies, in each of the above cases, ten dollars; for frauds, maims, deceits and escapes, five dollars; for all other offences, four dollars."

Receiving stolen goods is no where mentioned in that part of the act prescribing a fee of ten dollars, unless it is embraced in the class of offences described by the terms, "misdemeanors of accessories after the fact to felonies" If so, then the solicitor is entitled to a fee of ten dollars for every conviction for such an offence. But the question arises, is a receiver of stolen goods an accessory after the fact? By section 25, chapter 32 of Battle's Revisal, all distinction between petit larceny and grand larceny, where the same hath now the benefit of clergy, is abolished, and the offence of felonious stealing, where no other punishment shall be specifically prescribed therefor by statute, shall be punished as petit larceny is. And the construction put by this court upon that act is, that grand larceny is thereby reduced to the grade of petit larceny; but in petit larceny there are no accessories; all are principals. *State* v. *Gaston*, 73 N. C., 93.

We think it is evident the legislature did not intend to embrace receivers of stolen goods in the words, "misdemeanors of accessories after the fact;" for by section 53, chapter 32 of Battle's Revisal, the offence of being an accessory after the fact to any felony is declared to be a misdemeanor, and the act goes on to prescribe in the same section how they are to be prosecuted. This act very clearly had reference to such persons as were accessories at common law, such for instance as concealed or harbored a felon, supplied him with money, a horse, or other necessaries in order to enable him to escape, or furnished him with instruments to break prison and effect his escape. And as proof that

the legislature did not consider receivers of stolen goods as comprehended in this class of offenders, express provision is made for their prosecution, in the subsequent section 55 of the same chapter.

But there is another view of this question. Receivers of stolen goods were not accessories after the fact at common law. The receipt of stolen goods at common law was a distinct misdemeanor punishable by fine and imprisonment. Archbold Cr. Law, 10; 1 Hale P. C., 619, 620. Receivers were made accessories after the fact in England, first by the statute of 3 and 4, W. & M., and afterwards by the statute 5 of ANN, of which last statute our act of 1797 is a copy, and expressly provided that "*receivers of stolen goods shall be taken as accessories after the fact*;" and this act was in full force when *Groff's* case (1 Mur., 270) was decided, and receivers held to be accessories. But when the act of 1797 (Rev. Stat., ch. 34, § 54,) was brought forward into the Revised Code (ch. 34, § 56,) the words "*such person or persons shall be taken and received as accessories to such felony*" were omitted. Thus it will be seen that since the adoption of the Revised Code, receivers of stolen goods are no longer to be taken as accessories after the fact, but are left in that respect as they stood at common law.

Our conclusion is that the solicitor is only entitled under the act of 1873–'74 to a four dollar tax fee upon the conviction of a defendant for receiving stolen goods knowing them to be stolen. But as the state has no right to appeal in this case and has no interest in the question, the case is dismissed.

PER CURIAM. Appeal dismissed.

STATE v. WILLIAM LLOYD.

Forcible Trespass.

1. To constitute the offence of forcible trespass, there must be actual demonstration of force in excess of a bare civil trespass, as with arms, or a multitude of attendants, so as to create or make imminent a breach of the peace,—approving *State* v. *Covington*, 70 N. C., 71.

2. Whether the general doctrine, that ownership of land bounded upon a highway giving the owner the right to the soil to the center of the way, applies to the streets of a city—*Quære.*

(*State* v. *Covington*, 70 N. C., 71; *State* v. *Hinson*, 83 N. C., 640, cited and approved.)

INDICTMENT for forcible trespass tried at June Term, 1881, of WAKE Superior Court, before *Shipp, J.*

The defendant was charged with having forcibly and with a strong hand "entered the *premises* of one P. L. Spencer, and there remaining for one hour in the public road in front of the house of said Spencer, using profane and menacing language towards him in the hearing of his wife and daughter, against the will of said Spencer, and refusing to leave when ordered so to do, the said Spencer being present and forbidding him so to enter," &c.

The evidence in the case is substantially as follows: The prosecutor, Spencer, was *in possession of a house and lot in the city of Raleigh.* Being so in possession and at home with his family on the day in question, the defendant, between whom and himself there had been bad blood for some time, drove up in a wagon immediately opposite the gate and called, when he went out to the gate where he found the defendant still sitting in the wagon in the middle of the road a few yards from the gate. The defendant asked a question in reference to the subject of their differences, to which he made a reply. Whereupon the defendant cursed him and called him a liar, and charged him with endeavoring to cheat his

step-daughter out of her property. Hearing the noise the wife of the prosecutor came out to the gate, when he ordered the defendant to leave, to which he replied that he would leave when he got ready, and called the prosecutor a "damned rascal." The prosecutor's wife then told him to leave, when he again said he would leave when he got ready, and continued to use insulting, violent and menacing language. The prosecutor finally told defendant to leave or else he would get his gun from the house and shoot him, in reply to which he dared the prosecutor to come into the road, which however he did not do. After remaining some ten or fifteen minutes the defendant drove off. The wife of the prosecutor testified that she prevented her husband from getting his gun and going into the street to defendant.

Verdict of guilty, judgment, appeal by defendant.

Attorney General, for the State.
Mr. T. R. Purnell, for the defendant.

RUFFIN, J. There seems to us to be several difficulties in the way of the state's maintaining this prosecution. Conceding it to be true generally, that the ownership of land bounded upon a highway carries with it the ownership of the soil to the center of the way, and that the law, nothing else appearing, will presume the one right from the other, we are still not entirely clear that the doctrine applies at all to the streets of a city, in which not only has the public for so long a time enjoyed the right of travel, but the city itself, the right to dig and construct sewers, lay pipe, and the like, thus appropriating to its use the *land* as distinguished from an easement. And supposing that the principle would ordinarily embrace persons owning lands lying in a city and bounded by the streets, we are not sure that we ought to allow the presumption to prevail against a defendant in an indictment, when the only description given, in the case,

of the possession of the prosecutor, is the above statement "that he was in possession of a house and lot in the city of Raleigh, and occupied the same with his family," without a word of explanation as to the situation of the house, or the character of his possession. These points however we do not decide, as there is another which in our opinion disposes of the case.

As has been repeatedly decided in this court, to constitute the offence of forcible trespass, there must be such force used as to exceed a bare civil trespass. There must be an actual demonstration of force, as with arms, or a multitude of attendants, so as to create or make imminent a breach of the peace. *State* v. *Covington*. 70 N. C., 71, and the cases there cited. After a careful examination of all the cases in our own state reports, and others, we have not found a single case in which the use of words however violent, insulting, and menacing they may have been, has been held sufficient to complete the offence, unless accompanied by some display of weapons, unusual numbers, or other outward sign of force; while on the other hand, we meet with several cautions from judges of the highest repute, against the growing tendency to magnify civil trespasses into public wrongs.

We cannot do better than refer to the opinion delivered by Judge BYNUM in *Covington's* case just cited. In a few words it covers the whole ground—stating the law and supporting it by just reasoning. In the conclusion of it he says, the law does not allow its aid to be invoked by indictment, for rudeness of language, or even slight demonstrations of force, against which ordinary firmness will be a sufficient protection.

In the case of this defendant, there was not a show of force, either actual or intended. Without leaving his wagon, standing in the middle of the street, he engaged in a mere war of words with the prosecutor, and nothing more.

The case of *State* v. *Hinson*, 83 N. C., 640, more nearly

resembles the present case than any to be found in our reports, and that, as I learn from my associates, turned upon the fact that the defendant, *armed*, *rode* with great rudeness into the yard and up to the door of prosecutrix who was alone, and though ordered to leave, refused to do so, but continued to curse and insult her until she threatened to call for assistance. It was considered that the act of *riding* into the yard was under the circumstances such a show of force as warranted the conviction, especially as it was proved by her very threat to call for assistance that she was put in actual fear. Here, there was no force used, and nothing said or done which ought to have intimidated a man of ordinary firmness. Judgment reversed and *venire de novo*.

Error. Reversed.

STATE v. PETER L. NOLAND.

Comments of Counsel—New Trial.

Where counsel in addressing the court upon a motion for a mistrial on the ground of alleged fraud in selecting the jury, said, that two of the jurors had gone into the box "with souls blackened with perjury and bribery," &c., in the presence and hearing of the jury then impaneled, the opposing counsel objecting, and persisted in the use of abusive language towards the jurors during the trial, without being stopped by the court; *Held* to constitute ground for a new trial. After such errors are committed in the conduct of a cause as are set out in this case, they cannot be cured by the judge in his charge to the jury.

INDICTMENT against the prisoner and others for rape, tried at Fall Term, 1881, of HAYWOOD Superior Court, before *McKoy, J.*

Verdict of guilty, judgment, appeal by prisoner.

Attorney General and *Mr. Fred. C. Fisher*, for the State.

Messrs. George A. Shuford and *Reade, Busbee & Busbee*, for the prisoner.

RUFFIN, J. The prisoner with two other persons was charged with having committed a rape upon the person of one Margaret L. Rogers. In consequence of a relationship existing between one of the parties charged and himself, the solicitor of the district at his own request was relieved of the duty of conducting the prosecution, and two other gentlemen of the profession were appointed for that purpose by the court. The trial resulted in a verdict of guilty as to the prisoner Noland only, and after judgment pronounced he appealed to this court. Of the several matters assigned as errors in his behalf, it is necessary that we should consider but one, and as regards that one, a brief statement of facts will suffice.

The trial extended through several days, and on the third day, the counsel who represented the state made a motion to withdraw a juror and make a mistrial, on the ground that fraud had been practiced in organizing the jury, and in support of the motion read in the hearing of the jury (then impaneled) the affidavits of a brother of the prosecutrix, and one Hayner. These affidavits in substance set forth that the affiants were informed and believed that two of the jurors (John James and J. W. Milliner) were related to the prisoners, and yet when interrogated in regard thereto, had disclaimed the relationship in order that they might be taken on the jury, and thus have the opportunity to acquit the accused; and also that the juror, James, when asked by the state's counsel, had denied having formed and expressed an opinion that the prisoners were not guilty, when in fact he had done so, and as affiants were informed and believed, had declared that he had come to the court house at the instance of their friends, and for no other purpose than to get

on the jury; and that the juror, Milliner, had as they were informed and believed, agreed with the friends of the accused to acquit them, and had been instructed what arguments to use, so as to inform his fellow-jurors.

In arguing the motion, the state's counsel, in the presence and hearing of the whole jury, charged the two jurors named with having perjured themselves, and with having corruptly gotten upon the jury with a view to acquit the parties accused. The counsel for the prisoners constantly protested against the reading of the affidavits and the speeches of the counsel in the hearing of the jury, and disclaimed for themselves and the accused all knowledge of any fraud or corrupt practice in selecting the jury.

The court declined to allow the motion on the ground the affidavits did not directly connect the prisoners with the alleged fraudulent conduct and practices of the jurors, and were based, not upon the actual knowledge of the parties making them, but upon information derived from others.

On the day following, the state's counsel renewed the motion for a mistrial, offering in the hearing of the jury the same affidavit of the brother of the prosecutrix, as before, except that it was so amended as to charge that the juror James had not only formed and expressed the opinion the prisoners were innocent, but as affiant was informed and believed had been diligent in his efforts to influence the minds of others, and induce them to adopt the same opinion; and further, that witnesses whose evidence was material for the state were kept back by the prisoners or their friends, and amongst them one Scott, who had not only been subpœnæd, but unsuccessfully searched for under a *capias*. The affidavit of one Cagle was also read, setting forth that he had heard some one (but whom he did not know) say, that the juror James had declared that he would not believe the evidence of the prosecutrix, even if she swore to it until she grew as black as his hat.

In arguing the motion the second time, the case states that the counsel for the prosecution were more impassioned in their utterances, *and abusive of the jury*, than on the previous day, and that amongst other things it was said by them, that the jurors, James and Milliner, "had gone into the jury box with souls blackened with perjury and bribery, and that all hell could not change their minds;" and this in the presence and hearing of the entire jury.

In opening the closing address to the jury, one of the counsel representing the state said to them, that he desired to offer them some reasons why the prosecutrix should be believed, in spite of the fact that one of their body had declared that he would not credit her statement, if sworn to until she was as black as his hat; and during the progress of his remarks he approached the jury box and stepped upon the foot of the juror James, saying to him "I beg your pardon, I only wanted to wake you up"—the juror, as the case states, not only being awake, but demeaning himself in a manner altogether proper.

It is not possible that the law can give its sanction to a proceeding conducted with so little regard to regularity and decorum, as was the trial of the prisoner in this case. Neither will it permit a verdict to stand and the sentence under it to be executed, which has been rendered under such stress of force and dictation as was brought to bear upon two of the twelve jurors employed, and especially upon the juror James.

To secure for the administration of the law that general respect and confidence, which it is of the highest public interest it should enjoy, it is absolutely essential that the business of the courts should be conducted with becoming gravity and dignity; that their judgments should be seen to be temperately considered and impartially delivered; and above all, that the verdict of the juries concerned should be known to be the result of serious convictions after dis-

passionate and free deliberations. Appreciating this great necessity, extending alike to the public interests and the individual security, our courts have been constant in the purpose to protect the juries of the country from the approach of every circumstance which might tend unnecessarily to excite their minds or inflame their prejudices. And if so, how much more important is it to preserve for them a freedom of thought and an independence of action. The treatment of the juror assailed was altogether without excuse, and happily, without a parallel in the history of our courts, and it was a grave error in the presiding judge to have allowed it. Its effect must have been to fill the juror's mind with resentment or subdue him with moral fear, and in either event, he was disqualified as a juror in the cause, since he could no longer be capable of giving it an unimpassioned or a just consideration. The error consists in allowing such a course of conduct to be pursued and so long persisted in. After its commission under the circumstances it admitted of no cure by anything that could be said in the charge. The subjection of the mind of the juror, his loss of self-respect, and his apprehension of responsibility to public opinion, could not be relieved. The prisoner is entitled to a trial by another jury, because he has not been fairly tried by twelve independent, competent, jurors.

This opinion must be certified to the superior court of Haywood county to the end that a *venire de novo* may be awarded by the court.

Error. *Venire de novo.*

STATE v. RICHARD MORGAN.

Indictment—Murder.

It is an indispensable requisite to an indictment for murder by a stroke or blow, that it should allege the infliction of a *mortal wound*, of which the deceased died.

(*State* v. *Baker*, 1 Jones, 267; *State* v. *Moses*, 2 Dev., 452, cited and approved.)

INDICTMENT for murder, tried at Fall Term, 1881, of WAKE Superior Court, before *Shipp*, *J.*

The indictment upon which the prisoner was tried is as follows: "The jurors for the state upon their oath present that Richard Morgan, in Wake county, on the third day of January, 1881, feloniously, wilfully and of his malice aforethought, did discharge a gun loaded with gun powder and leaden bullets, against the right side of the head, a little above the ear of one Berry Bunch, inflicting a wound which produced instant death. And so the jurors for the state upon their oath do say, that the said Richard Morgan, the said Berry Bunch in manner and form aforesaid, and by the aforesaid means feloniously, wilfully and of his malice aforethought, did kill and murder, against the peace and dignity of the state."

The prisoner was found guilty by the jury, and sentence of death pronounced by the court, from which judgment the prisoner appealed.

Attorney General and *A. M. Lewis*, for the State.

Messrs. D. G. Fowle, Bledsoe & Bledsoe and *R. G. Lewis*, for the prisoner.

ASHE, J. On the trial the prisoner's counsel took several

exceptions to the ruling of the court in excluding evidence offered by the prisoner, all of which were untenable.

Certain special instructions were asked by the prisoner's counsel to be given to the jury, which were either properly refused or substantially given by the court as prayed for.

There was no error in the ruling of the court upon the points of evidence nor with regard to the instructions asked.

But as was our duty to do, we have carefully looked into the record, and are of opinion the bill of indictment upon which the prisoner was tried is fatally defective.

The prisoner has been charged with a heinous crime and found guilty by a jury of his country, and it is with some degree of reluctance that we have come to a conclusion which opposes an obstacle to the course of justice. But we have been sworn to do our duty, and must discharge it according to the law as we find it written, and understand it.

This case shows the impropriety of draughtsmen departing from established precedents and attempting to simplify legal pleadings. The form of the indictment adopted here has probably been taken from some English precedent used since the statute of Victoria, by which the common law strictness in criminal pleading was greatly relaxed, but no such statute has been passed in this state.

The defect in this bill of indictment is, that it fails to charge that a *mortal wound* was given of which the deceased died. The bill does allege that a wound was given, but it does not aver that the wound was mortal. This averment is so essential that it is to be found in all the precedents of indictments for murder, where death was alleged to have been caused by blows, shooting, stabbing, &c., and the omission has been held to be fatal to the prosecution. It is a material averment and one that must be proved.

To make a good indictment, every fact and circumstance which constituted the offence must be stated, and stated with such precision and certainty that the defendant may be en-

abled to judge whether they constitute an indictable offence or not; that he may know what line of defence to adopt; that he may be enabled to determine the species of offence they constitute in order that he may prepare his defence, and that the court may know what kind of judgment to render, if the defendant be convicted. Archbold Cr. Pl., 42.

The day of the stroke and the day of the death must be stated in every indictment for murder, that the court may see that the death ensued within a year and a day after the stroke. One not a lawyer would suppose that they were sufficiently stated in this indictment, for the reason it is stated the wound produced *instant* death, but the word *instant* has no such legal import as is inconsistent with proof of the death at a later period, and therefore cannot aid a defective description of the nature and character of the wound, and so it is held that although it is charged that a death *instantly* ensued from a blow or strike, yet it would do to show that the death occurred twenty or more days after the stroke. *State* v. *Baker*, 1 Jones, 267.

The character of the wound and time of the death should be so specifically charged, as to leave no room for argument or inference that the death may have been produced by any supervening causes.

Hence it is that the averment that the wound was mortal has been held to be an essential requisite in the form of an indictment for murder by shooting, &c.

In 2 Bishop, Cr. Pro., it is laid down that every indictment of this sort must state that the wound was "*mortal.*" In the case of *Rex* v. *Ladd*, reported in 1 Leach, Crown Law, a case submitted to all the judges for their decision upon the points of law involved, they held that the indictment was bad because it did not state that a *mortal wound* had been given.

"In all cases the death by the means stated must be positively alleged, and cannot be taken by implication; and

therefore, where the means of death is alleged to be by any stroke, the indictment should proceed to aver that the prisoner thereby gave to the deceased a *mortal wound* or *bruise*, whereof he died; or where by poison, after stating particularly the manner of the poison being administered, that the party died of the poison so taken and the sickness thereby occasioned. Merely stating the death to be by means of ravishing an infant (waiving the question whether such a means of death could be deemed murder) without any allegation that the wound, bruise or hurt was *mortal*, was holden not to be sufficient." 1 East. P. C., 343.

In this state Chief Justice RUFFIN in the case of *State* v. *Moses*, 2 Dev., 452, in discussing the question whether the length and breadth of a wound is a necessary averment in an indictment for murder, and while expressing the opinion that it was one of the "formalities" cured by the act of 1811, observed, that, "the substance is, that the prisoner gave the deceased *a mortal blow of which he died.* A stroke, a mortal wound inflicted thereby, and the averment of death by that wound, are essential. To those points proof has at all times been required." And he further adds: "The wound, its mortality, and its actual causing the death, are the substantial parts, and the rest the refined formalities." So that according to the opinion of this eminent jurist, the charge of giving the *mortal wound* was not one of these formalities or refinements, the omission of which is cured by the act of 1811, but is an essential averment in every bill of indictment for murder, when the death is alleged to have been caused by a stroke or blow.

We feel constrained by these authorities to hold that this bill of indictment is defective. The judgment of the court below is therefore arrested.

Let this be certified to the superior court of Wake county.

Error. Judgment arrested.

STATE v. STEPHEN EFLER.

Juror—Challenge—Defendant, witness for himself—Declarations—Trial.

1. On a trial for murder, a juror stated, in reply to the question whether he had formed and expressed an opinion as to the *guilt or innocence* of the prisoner, that he had, and the prisoner challenged him for cause; thereupon the court suggested to prisoner's counsel to ask the juror, whether the opinion expressed was that the prisoner is guilty, which counsel declined to do, and the challenge was disallowed: *Held* no error. In such case an opinion expressed constitutes good cause of challenge for that party only against whom the bias exists, and it is incumbent on him who challenges to show himself to be the party likely to be prejudiced.
2. Where the defendant in a criminal action avails himself of the act of 1881, ch. 110, and becomes a witness in his own behalf, he thereby subjects himself to all the disadvantages of that position, in the same manner as any other witness, and may be discredited by proof of his general bad moral character.
3. Whether the declarations of a prisoner are voluntary or induced by hope or fear, is a question of fact to be decided by the court below, whose finding is conclusive. And the mere fact of the prisoner's making them while under arrest, is not in law sufficient to exclude his declarations otherwise freely made.
4. Evidence was received without objection, and on the next day of the trial, a motion to strike it out upon the ground of irrelevancy was refused; *Held* no error. It is matter within the discretionary power of the judge, and its exercise is not reviewable.

(*State* v. *Benton*, 2 Dev. & Bat., 196; *State* v. *Arthur*, 2 Dev., 217; *State* v. *Boswell*, *Ib.*, 209; *State* v. *O'Neale*, 4 Ired., 88; *State* v. *Dove*, 10 Ired., 469; *State* v. *Parks*, 3 Ired., 296; *Butlinger* v. *Marshall*, 70 N. C., 520; *State* v. *Vann*, 82 N. C., 631; *State* v. *Davis*, 63 N. C., 578; *State* v. *Jefferson*, 6 Ired., 305; *State* v. *Houston*, 76 N. C., 256; *State* v. *Cruse*, 74 N. C., 491, cited and approved.)

INDICTMENT for murder tried at Fall Term, 1881, of McDOWELL Superior Court, before *Seymour, J.*

The prisoner was charged with the killing of Peggie

Efler, his wife, on the 6th of January, 1881. The jury having found him guilty, he appealed from the judgment pronounced upon the verdict.

Attorney General, for the State.
Mr. J. M. Gudger, for the prisoner.

RUFFIN, J. Impressed as we were with the earnestness of counsel who argued this cause before us, and realizing the immense importance to the prisoner of the issues involved, we have bestowed upon them our most earnest consideration. Having done so, and detecting nothing, in the matters assigned as errors, which in our opinion entitle the prisoner to another trial, it is our duty so to declare.

The first error assigned is based upon the action of the court with reference to the juror, Hunter. As appears from the record the facts connected with that matter are as follows: When the juror was called, he was challenged *for cause* by the prisoner's counsel, and in response to a question whether he had formed and expressed an opinion as to the *guilt or innocence* of the prisoner, said, that he had. The counsel insisted that this constituted good cause of challenge, either principal or to the favor. His Honor held to the contrary, inasmuch as it did not appear that the opinion of the juror was unfavorable to the prisoner, but suggested to counsel to ask the juror directly whether he had formed and expressed the opinion that the prisoner was guilty. This the counsel declined to do, and excepting to the disallowance of his challenge for cause, peremptorily challenged the juror.

When a full jury was procured, there had been only eleven peremptory challenges made on the part of the prisoner.

An opinion fully made up and expressed, touching that which is the subject matter of an action, whether civil or criminal, constitutes a good cause of principal challenge for that party only against whom the bias supposed to be crea-

ted by such a declaration operates, and it is therefore incumbent on him who challenges, to show himself to be the party likely to be prejudiced. *State* v. *Benton*, 2 Dev. & Bat., 196. The prisoner had the opportunity by putting to the juror the question suggested by the court, to ascertain certainly whether the preconceived opinion of the juror was against himself, and failing to do so, his mere apprehension that such might be the case, gave him no good cause of challenge. Apart from this, the prisoner sustained no injury by the action of the court, admitting it to have been an error to disallow his challenge. He had the full benefit of a trial by a jury free from all exception, and this is all that the law intends to secure for him. The juror objected to, was not forced upon him, and the peremptory challenge used to get rid of him, was not needed for any other purpose. *State* v. *Arthur*, 2 Dev., 217.

Second exception: The prisoner was examined as a witness in his own behalf, The state, for the purpose of discrediting him as a witness, and for no other purpose, offered evidence of his general bad character, and it was admitted by the court though objected to.

The statute of 1881, ch. 110, § 2, provides that in the trial of all indictments against persons charged with the commission of crimes in the several courts of the state, the person charged shall at his own request, but not otherwise, *be a competent witness*, and the question is as to the effect upon the rights of a defendant who sees proper to avail himself of the privilege. In declaring him to be "a competent witness," we understand the statute to mean that he shall occupy the same position with any other witness, be under the same obligation to tell the truth, entitled to the same privileges, receive the same protection, and equally liable to be impeached or discredited. Unless willing to become a witness, he is invested with a presumption of innocence, such as the law makes in favor of every person accused of

crime, and evidence cannot be offered to impeach his character, unless he voluntarily puts it in issue. But by availing himself of the statute, he assumes the position of a witness and subjects himself to all the disadvantages of that position, and his credibility is to be weighed and tested as that of any other witness.

This much seemed to be conceded by the counsel for the prisoner, but he insisted that the impeaching testimony should have been confined to an inquiry into the prisoner's general character for truth, and not permitted to extend to his *general moral character*, and for this position he cited us to the case of the *State* v. *Fletcher*, 49 Ind., 124. That case does draw the distinction suggested by counsel, but it proceeds, not at all upon any idea that a difference is to be made between a defendant who testifies for himself, and any other witness who might be examined in the cause; on the contrary, it distinctly recognizes the right of the prosecution, to impeach the testimony of the defendant, *as a witness*, by proof of his general character, to be the same as in the case of any other witness, and the inquiry was limited to the reputation of the defendant for veracity merely, because such was understood to be law in that state with reference to every witness.

In this state a different rule prevails, and has done so for a long series of years. In the case of the *State* v. *Boswell*, 2 Dev., 209, it is said that ever since the year 1804, it has been an established rule of practice in this state, to discredit a witness by making proof of his general bad moral character, and that the question need not be restricted to his reputation merely for veracity. That such continues to be the law of evidence as administered in the courts of this state, is shown by the following cases—*State* v. *O'Neale*, 4 Ired., 88; *State* v. *Dove*, 10 Ired., 469; *State* v. *Parks*, 3 Ired., 296—and as the prisoner assumed the character of a witness, he must needs come under the same law.

As was said in *Bullinger* v. *Marshall*, 70 N. C., 520, by the the late Chief Justice with reference to the statute by which parties to civil actions were made competent witnesses, we have to yield to the change made in the law of evidence, and without expressing any opinion as to its wisdom, to carry it out with all its corollaries.

The next exception was to the admission in evidence of certain declarations made by the prisoner on the evening of the coroner's inquest—he being then under arrest: When a tender of this evidence was made, the prisoner objected to its reception upon the ground that the declarations were made under circumstances of duress, and he was allowed to examine witnesses as to those circumstances. One witness testified that the declarations were made in a room next to that in which the inquest had been held, and in which there were at the time about a dozen persons including the prisoner's mother. That no inducements either of fear or hope were held out to the prisoner, but that he, the witness, sought the conversation with him. Another witness testified that there was a considerable crowd assembled about the place where the inquest had been held, and much excitement amongst them, and that something had been said in the crowd, though not in the presence or hearing of the prisoner, about mobbing him.

Upon this evidence the court found as a fact, that the declarations had been voluntarily made, free from the influence of any threats, promises, or duress, and admitted the evidence.

Whether the declarations of the prisoner were voluntary, or induced by hope or fear, was a question of fact to be decided by his Honor, and his finding in regard thereto is conclusive. *State* v. *Vann*, 82 N. C., 631; *State* v. *Davis*, 63 N. C, 578. And that the mere fact of his being under arrest at the time of making them, is not of itself, and as a legal conclusion, sufficient to exclude his declarations, otherwise

freely made, is the well established law of this state. *State* v. *Jefferson*, 6 Ired., 305; *State* v. *Houston*, 76 N. C., 256; *State* v. *Cruse*, 74 N. C., 491.

The last exception taken for the prisoner is thus stated in the case sent up: The alleged homicide occurred on Thursday night. When found, the deceased was lying on a bed with her neck broken, her shoulder dislocated, bruises on her abdomen, and an incised wound three inches long and one inch deep on the right shoulder; she had on no under-clothing, but two wet garments were hung up in the room to dry. There was no blood found upon her person, save some in her mouth and nostrils. The theory of the state was that after slaying his wife, the prisoner washed her clothing and concealed the water used for that purpose under the house. In support of that theory, the state introduced a witness who testified that being at the house on the Saturday following the killing, she saw some pigs come from under the house with blood upon their noses. There was no objection made to this evidence at the time it was received, but on the next day the prisoner moved the court to strike it out as being irrelevant, which motion was refused. The evidence strikes us as being both pertinent and material. But conceding it to be as insisted upon for the defence, it was received without objection, and its reception cannot therefore be a just ground for exception. As for his Honor's refusal to strike it out on the next day when asked, we much doubt the legal propriety of such a course. Inadmissible evidence unless objected to or be forbidden by some positive law, may become competent evidence, so that the party offering it may acquire a right to it as such. But whether so or not (and we do not mean to determine the point) the motion to strike out the evidence thus received without objection, was certainly a matter addressed to the discretion of the judge, the exercise of which we have no power to review.

As before stated we find nothing in the case of which the prisoner can justly complain. He was tried by a jury fairly selected, and the law governing his case rightly administered.

No error. Affirmed.

STATE v. WILLIAM TAYLOR.

Murder—Affirmation of Judgment.

Where there is no statement assigning error on a trial for murder, and none is to be found in the record, the judgment below will be affirmed.

(*State* v. *Orrell*, Busb., 217; *State* v. *Spurtin*, 80 N. C., 362; *Stat* v *Gallimore*, 7 Ired., 147, cited and approved.)

INDICTMENT for murder, tried at Spring Term, 1881, of BURKE Superior Court, before *McKoy, J.*

The jury found the prisoner guilty of the charge, and from the judgment pronounced he appealed to this court, where the state moved to affirm the judgment below, upon the ground that no error is assigned.

Attorney General, for the State.

No counsel for prisoner.

ASHE, J. There is no statement of the case, in the nature of a bill of exceptions, and upon a careful examination of the record, we find no errors. It is the long established practice of this court, where no bill of exceptions accompanies the transcript and no error s to be found in the record, to affirm the judgment of the court below. *State* v. *Orrell*, Busb., 217; *State* v. *Spurtin*, 80 N. C., 362; *State* v.

Gallimore, 7 Ired., 147. There is no error. Let this be certified to the superior court of Burke county that that court may proceed with the case in conformity to this opinion and the law of the state.

No error. Affirmed.

In *Twitty* v. *Logan*, from Rutherford:

ASHE, J. This is an appeal from a judgment rendered at a special term held for the county of Rutherford, in January, 1880, by *McKoy, J.* A motion was made in this court by the appellee to dismiss the appeal on the ground that the defendant has failed to prepare a *statement of the case*, and transmit the same with the transcript to this court.

It is the uniform practice in this court to confirm the judgment in every such case, except where the record shows a written agreement of counsel waiving the lapse of time, or where the alleged agreement is oral and disputed, and such waiver can be shown by the affidavit of the appellee rejecting that of the appellant. *Walton* v. *Pearson*, 82 N. C., 464. There is nothing appearing in this case to bring it within either exception. The judgment of the court below is therefore affirmed.

No error. Affirmed.

In *Young* v. *Greenlee,* from McDowell:

SMITH, C. J. The cause to rehear which the present application is made was determined at June term, 1879, (82 N. C., 346,) as the report shows, without argument for the appellant, and the petition was filed on May 12th, 1881, near the end of the second session thereafter. The modified rule of June term, 1879, promulged in that number of the reports, restricts such applications in time, and requires them to be filed before the end of the next ensuing term after judgment, and this may be done in the clerk's office. The relaxation of the rule is now asked upon the ground of a misunderstanding between the counsel originally retained and the counsel employed to prosecute the appeal in this court, in consequence of which the merits of the plaintiff's case were not argued, nor the authorities relied on called to our attention, and because of the former's want of information of the shortening of the time, as also for certain considerations personal to counsel which caused the delay.

We know of no case in which an application to rehear has been made after the lapse of the limited time allowed for that purpose, and we should be reluctant if we possessed full power to do so, to set a precedent for departing from a rule of practice prescribed by ourselves and so convenient and useful in the discharge of official duty.

The rule ought to possess a force scarcely less binding on the court than the limitations prescribed for bringing actions by the statute. Formerly the adjudications of the court were conclusive and beyond the reach of disturbance for any errors in law, supposed or real, and the rights of parties became fixed at the expiration of the session when they were rendered. They are now open to revision and correction, when erroneous, provided the re-hearing is asked within a limited period and the prescribed conditions are

observed. After it has passed, the respective rights and obligations of the parties are fixed to the extent stated by the operation of the rule, and an interference afterwards may disturb vested interests acquired in faith of the permanency of the decision. If the rule is of value, it must be enforced for its general beneficial results, though in special cases, and as in statutes of limitation, its operation may involve hardships.

The plaintiffs also invoke the aid of section 133, C. C. P., in support of their application. To this it is a sufficient answer to say that it is not made within a year from the rendition of the judgment and this objection is fatal to the motion.

We have not considered the alleged errors, as, by reason of this preliminary obstacle, they are not reached, and we will only add that the conclusions announced in the decision were reached after a careful consideration and examination of the law and in the light of the recent case of *Crews* v. *Bank of Charlotte*, 77 N. C., 110, both of which cases are declared erroneous in the petition.

The application must therefore be denied with costs.

PER CURIAM. Petition refused.

In *Smith* v. *Reeves*, from Buncombe:

RUFFIN, J. In this cause there was judgment for the defendant in the court below and the plaintiff appealed. A motion is made here to dismiss that appeal upon the ground that no undertaking upon the appeal was given within the time prescribed by law. In support of the motion, the defendant offers the affidavit of the deputy clerk of the superior court of Buncombe county, to show the time and circumstances under which the instrument which purports to

be such an undertaking was brought to that office, and in opposition to the motion the plaintiff offers the affidavit of his attorney, C. A. Moore, Esq., upon the same points.

It is only necessary that we should consider the latter, for taking the facts to be as there stated, we are obliged to hold that the requirements of the law have not been complied with.

Mr. Moore states that on the 19th day of September, 1881, (that being the last day on which the undertaking could be given in order to perfect the appeal in the cause) he took the instrument signed by himself alone to the clerk's office, and procured the deputy clerk to enter the date of filing, remarking that he did this in order to be certainly in time. He then asked, and was permitted to take the paper away, that he might get other parties to sign it. In consequence of his being called away from home, he left the paper with another person with instructions as to procuring the signature of another party. Upon his return sometime afterwards, he ascertained that Mr. A. H. Baird had signed it, and meeting with him they went together to the clerk's office when Mr. Baird intended to justify the undertaking, but finding the door locked, they left without its being done at that time, but afterwards Mr. Moore, himself, justified it.

To render an appeal effectual for any purpose, a written undertaking must be filed by the appellant. C. C. P., § 303. The respondent may except to the sufficiency of the sureties within ten days after notice of the appeal. § 310.

The statute evidently contemplates that when filed the undertaking shall be complete in all its parts. To permit an unfinished instrument to be filed, and immediately withdrawn for any purpose, is to do away with all restrictions upon the will or discretion of the appellant. An appeal is no longer a matter of favor but of strict right, *provided* the party will comply with the requirements of the law, but if this be not done, then the right of the respondent to have

the appeal declared ineffectual and dismissed is an absolute one secured to him by the same statute—leaving nothing to the discretion of the court.

The respondent in this case insisting that the undertaking, alleged to have been given, was neither of the character, nor filed within the time prescribed by the statute, demands his strict legal rights, and the court has no power to withhold them.

The plaintiff's appeal is therefore dismissed.

PER CURIAM. Appeal dismissed.

In *Applewhite* v. *Fort*, from Wayne:

ASHE, J. This was a petition filed in the court of probate by the plaintiff as administratrix of Mary Applewhite against the defendant as administrator of John Coley, guardian, for an account and settlement of the guardianship of said Coley. There was a reference to the clerk and report. The report was confirmed and judgment rendered against the defendant, from which he appealed to the superior court, where a final judgment was rendered against the defendant on the 14th day of June, 1880, and the appeal bond was not filed by the defendant until the 26th day of August ensuing.

There was a motion submitted in this court to dismiss the appeal on the ground the appeal bond was not filed within the time prescribed by law. But it is insisted that the judgment was rendered at chambers and the defendant was entitled to notice, and had under C. C. P., § 300, until ten days after notice to file his bond.

The plaintiff says, there is no sufficient evidence that the notice was not given, and let that be as it may, the defend-

ant failed to give notice of the appeal, and moves that the appeal be dismissed on that ground.

Either is a good ground for dismissing the appeal, and there have been so many decisions made by the court upon these points that it is needless to cite any authorities.

The plaintiff's motion is sustained and the appeal dismissed with costs.

PER CURIAM. Appeal dismissed.

In *Jones* v. *Mial*, from Wake:

In this case a motion was made by defendant to retax costs. The judgment against plaintiff on appeal to this court was affirmed. See 79 N. C., 164. The plaintiff then filed a petition to rehear, and upon consideration thereof, the supreme court modified its former ruling—reversing the same in so far as it affirmed the judgment of nonsuit. See 82 N. C., 252.

SMITH, C. J. No sufficient cause has been assigned, and we are not inclined to disturb the disposition made of the costs of the appeal and of the application for a rehearing upon the final adjudication of the cause. The plaintiff submitted to a nonsuit in deference to the opinion of the judge, that upon his unamended complaint he could not recover. It would be unreasonable to charge the plaintiff, put out of court by the erroneous ruling, with the costs necessarily incurred in its correction. While they may be apportioned among the parties where, as in this case, a new trial is awarded, by the express provision of the statute (C. C. P., § 278), we should be reluctant to charge the wronged party with any portion unless under peculiar circumstances which do not here exist.

We suggest also that in cases where this discretion may be exercised, the appropriate time to call our attention to the matter is during the sitting wherein the opinion is filed, if sufficient time thereafter be allowed for the purpose. The motion must be denied.

PER CURIAM. Motion denied.

In *State* v. *Woodfin*, from Buncombe:

SMITH, C. J. The defendant is charged with the offence created by the act of 1879, ch. 127, of carrying a pistol concealed about his person and off his premises, and on the trial was found guilty. Upon the rendition of the verdict, his counsel moved for a new trial, and being refused, appealed to this court. The record does not show that any judgment was pronounced by the court below, and it has been too often ruled in this court, to need a reference, that an appeal will not lie in a criminal proceeding until final judgment has been rendered, and none appearing in the present case, the appeal was improvidently taken and must be dismissed.

Let this be certified to the superior court of Buncombe.

PER CURIAM. Appeal dismissed.

In *State* v. *Murdock*, from Lincoln:

RUFFIN, J. John Murdock, the defendant of record, was tried in a court of a justice of the peace upon a charge of removing crops from certain lands, whereof he was a tenant, without paying rents, or giving the notice required by law.

The warrant, under which he was tried, was based upon

the oath of the prosecutor Michal. On the trial before the justice he was acquitted, and thereupon that court adjudged that the prosecutor pay the costs.

An appeal was taken by the prosecutor to the superior court, where the defendant Murdock moved to dismiss the appeal as to himself, on the ground that having been once tried and acquitted in the justice's court, he could not be tried a second time for the same offence in the superior court. The presiding judge allowed the defendant's motion, and refused to put him on trial anew in that court, but affirmed the justice's judgment against the prosecutor for costs, and from that judgment both the state and the prosecutor appealed to this court.

We do not feel at liberty to consider the question as to the right of the state, or the prosecutor, to have an appeal from the judgment of the justice to the superior court; for conceding such right to exist by virtue of the statute (Bat. Rev., ch. 33, § 124,) there can still be no pretence of any right on the part of the state to appeal to this court from a judgment of the superior court, such as was rendered in this cause. There is no statute that confers such right on the state, and neither is it given by the common law.

The extent to which the right of appeal enures to the state in criminal actions, has been twice recently thoroughly considered and elaborately treated of by this court, in the cases of the *State* v. *Lane*, 78 N. C., 547, and the *State* v. *Swepson*, 82 N. C., 541, and as we can add nothing to what is there said, it is sufficient to refer to them as authority for our action in dismissing, as we do, the appeal brought here on the part of the state.

We can detect no error in the judgment rendered against the prosecutor, Michal, for the costs of the prosecution. The statutes (for there are two of them expressed in almost the same words, Bat. Rev., ch. 33, § 132, and acts of 1879, ch. 92, § 3,) provide that "the party convicted before a jus-

tice shall always be adjudged to pay the costs, and if the party charged be acquitted, the complainant shall be adjudged to pay the costs."

The first of the two statutes referred to was the subject of review in this court in the case of the *State* v. *Cannady*, 78 N. C., 539, and its conformity with the constitution definitely settled. The appeal on the part of the state is therefore dismissed, and the judgment of the superior court against the prosecutor Michal is affirmed.

PER CURIAM. Judgment accordingly.

In *State* v. *Green*, from Wayne:

ASHE, J. This is a *certiorari* to bring up from the superior court of Wayne county, the record of the trial of the defendant before *Eure, J.*, had at the January term, 1878, of said court, in which it is alleged there is error, and to have the same reviewed by this court.

It appears from the record that the defendant was tried upon an indictment containing two counts, first for larceny in stealing a horse, and secondly, for receiving the same knowing it to have been stolen. The count for larceny concluded at common law. The defendant pleaded guilty and his Honor sentenced him to fifteen years imprisonment at hard labor in the state penitentiary. There is error. The question presented has been expressly decided by this court in the case of *State* v. *Lawrence*, 81 N. C., 523. The court below, for the reason assigned in that case, has no power to sentence the defendant to a longer term of imprisonment than ten years. The judgment rendered is therefore reversed, and the case remanded to the superior court of Wayne county, that the defendant now confined in the state prison may be brought before said court by writ of *habeas corpus*

to the end that a proper judgment may be entered against him; and in pronouncing judgment, the time already spent by the defendant in confinement under the erroneous sentence, should be taken into account, so that the duration of his imprisonment should not extend beyond ten years from the date of the original sentence.

Let this be certified to the superior court of Wayne that proceedings may be had in the case agreeably to this opinion and the law of the state.

Error. Reversed and remanded.

In *State* v. *Scanlan*, from Beaufort:

The solicitor for the state appealed from the judgment of the superior court reversing that of the inferior court, where the prosecution commenced, and awarding a *venire de novo*. It was held that the state has no right of appeal in such case, and the appeal was dismissed—approving the ruling *State* v. *Lane*, 78 N. C., 547; *State* v. *Swepson*, 82 N. C., 541; *State* v. *Padgett*, *Ib.*, 544; *State* v. *Moore*, 84 N. C., 724, and directing that the decision of the superior court of Beaufort county be certified to the inferior court of that county, to the end that the case may be proceeded with according to law. Opinion by ASHE, J.

In *State* v. *Patterson*, from Orange:

There being no statement of the case assigning errors, and none appearing on the record, the judgment below was affirmed.

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ACTION TO RECOVER LAND :

1. Evidence of the value of a tract of land adjoining that retained by the donor in a deed of gift, is incompetent to show that the donor did not retain property fully sufficient and available to satisfy existing debts. *Warren* v. *Makely*, 12.
2. One hundred acres "lying in Currituck township near the head of Smith Creek, it being the eastermost portion of the farm purchased from my brother and known as the Russell land," is sufficiently described to identify the part cut off, as a distinct tract. *Ib.*
3. When the plaintiff's title to land is based on a seven years' adverse possession under a colorable claim, the law does not require that such possession should be for the seven years next preceding the commencement of the action. *Christenbury* v. *King*, 229.
4. When the title to land is out of the state, the adverse possession of the same, with color of title, by the occupant and those under whom he claims (the adverse claimant not being under disability) will vest in him the title against all the world, which cannot be divested except by a subsequent continued adverse possession for seven years with color of title, or twenty years' adverse possession without color. *Ib.*

5. It is a rule of justice and convenience, adopted to relieve the plaintiff in ejectment from the necessity of going behind the common source of title, that when both parties claim under the same person, neither of them can deny his right, and the elder title must prevail, unless the defendant can connect himself with a better title outstanding. *Ib.*

6. If the defendant who derives his title from the same source as the plaintiff, can show that a deed in the chain of the plaintiff's title was never delivered, save as an escrow, he may *then* build up his own title under a junior grant, by proper evidence. *Ib.*

7. The actual title to land will draw to it such a constructive possession as will ripen, by lapse of time, into an independent title, in the absence of evidence of an adverse possession by some other party. *Tolson* v. *Mainor*, 235.

8. A royal grant of land in this state, issued prior to the revolution, will be presumed to be in fee, though the abstract of such grant contains no words of inheritance. *Ib.*

9. When both the plaintiff and the defendant in ejectment derive their title from the state, but under grants of different dates, it is competent for the defendant to show title out of the plaintiff by establishing a prior valid grant from the state to another party, though he fail in an effort to connect himself with such elder title. *Ib.*

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1. It is the duty of every court to correct its records, when erro-

neously made up, so as to make them speak the truth, regardless of the consequences to parties or third persons; and no lapse of time will debar the court of the power to discharge this duty. *Walton* v. *Pearson*, 34.

2. If the judge mistake his powers or fall into other errors in amending the record of a cause, an appeal is the only remedy, and certain it is that the judge of another superior court cannot reverse the order directing such amendments, in the progress of another cause in which the effect of the record is drawn in question. *Ib.*

3. *Semble* that an absolute order to amend the record has the legal effect of an actual amendment, at least as to its inviolability, except by appeal. *Ib.*

See page 415.

ANSWER, 205.

APPEAL:

1. An appeal *in forma pauperis* must be perfected during the term at which judgment was rendered, and the judge has no power to allow the party praying such appeal twenty days from the last day of the term in which to file his affidavit of inability to give the bond required by law. *Stell* v. *Barham*, 88.

2. One who is made, by service of process, a party to an action in a justice's court, must serve notice of an appeal, with a statement of his grounds therefor, within ten days after judgment. *Spaugh* v. *Boner*, 208.

3. *Quære*, as to whether an appeal will lie from a refusal of the superior court to dismiss an appeal from a justice's judgment. *Ib.*

4. The correct practice in case of a refusal to dismiss the action is to reserve the exception and proceed with the trial, so that on appeal the court may dispose of the whole case. *Ib.*

5. Where the case states that a "bond fixed at $— is filed and approved" by the judge, the acquiescence of the appellee in its sufficiency will be assumed, and consequently a waiver of his right to make the objection in this court. (Construction of the act in reference to sureties to an appeal. C. C. P., § 303.) *Hancock* v. *Bramlett*, 393.

6. Where a bond for costs of an appeal was not justified by the surety, but simply endorsed by the clerk—"the within bond is good;" *Held* not to be in compliance with the law for perfecting appeals. *Bryson* v. *Lucas*, 397.

7. To have the effect of vacating or suspending a judgment in a crim

inal action, an appeal must be perfected during the term—whether by giving bond for the costs or procuring an order dispensing with such security. *State* v. *Gaylord*, 551.

8. An appeal will be dismissed on motion when, in the transcript sent up, there is no record of any trial, verdict or judgment, no errors assigned, or statement of the case for appeal, and no appeal bond or order dispensing with one. *Ib.*

9. Motion to dismiss, for failure to comply with law in reference to appeals. *Smith* v. *Reeves*, 594; *Applewhite* v. *Fort*, 596. Where no final judgment. *State* v. *Woodfin*, 598. Where state can appeal. *State* v. *Murdock*, 598, and *State* v. *Scanlan*, 601.

See pages 35 (5, 6), 70 (3), 115 (4), 141, 179 (5), 199, 211 (1), 218, 275, 296 (3), 322 (2), 342 (5), 500 (1), 513, 548, 569 (3).

APPEAL BOND, 393, 397.

ARBITRATION AND AWARD:

1. A reference to arbitration of "all matters between the parties" justifies an award which declares that the defendant's intestate is indebted to the plaintiff in a certain sum, and directs the cancellation of two mortgages from the plaintiff, put in evidence by the defendant, the debt secured by which was adjusted by the arbitrators. *Bryant* v. *Fisher*, 69.

2. Where such award is imputed to the bias of the arbitrators, the bias must be found by the judge when the facts are referred to his decision, or he must refuse to pass on the same, on timely application, before the question will be considered on appeal. *Ib.*

3. Where a cause pending in court is referred to arbitration, the legal effect of the submission and award, if not successfully assailed, is to put an end to the action by a final judgment according to the award, if the reference was under a rule of court, or if not, to defeat it by the merger in the award of the original demand. *Moore* v. *Austin*, 179.

4. To have the benefit of the award at a later stage of the cause, it must be pleaded "since the last continuance," and it is not admissible as *evidence* upon issues previously joined. *Ib.*

5. An agreement of the parties pending a suit to submit to arbitration, and that the submission and award shall be a rule of court, will not constitute in fact such a rule as will authorize an entry of judgment in conformity to the award. *Ib.*

6. An award is not evidence of an account stated between the parties

to the submission, unless, perhaps, in the single event of there being no regular agreement to refer, and consequently no award capable of being enforced. *Ib.*

7. Where an award is enforced by a justice as a rule of court, and the party aggrieved obtains a *recordari* in lieu of a lost appeal, an order directing the docketing of the cause for trial in the superior court, is not an adjudication in any sense, upon the matters in controversy. *Ib.*

ARREST, not of itself sufficient to exclude declarations, 585 (3).

ASSAULT:

Defendant being about twenty steps distant, advanced towards prosecutor with knife and stick, cursing and threatening to do him bodily harm, in consequence of which the prosecutor went into a store and remained until a warrant was obtained, the defendant walking in front of the store saying he would whip prosecutor if he came out; *Held* an assault. *State* v. *Martin*, 508.

ASSAULT WITH INTENT, &c., 553 (2).

ASSESSMENT OF LAND FOR RAILWAYS, 452.

ASSIGNMENT OF MORTGAGE, 402.

ATTORNEY, 367 (2); fee paid by guardian, 500 (4); comments of, to jury, 17 (6), 576.

BANKRUPTCY, 152 (4).

BANKS:

1. The president of a bank is chargeable with constructive notice of the management of its affairs by the cashier and other subordinate officers; and where such bank is doing business without legal organization, he cannot escape the responsibility resulting from such notice, by showing that he supposed himself the president of a legally constituted bank, if he has contributed the influence of his reputation to give undeserved credit to a spurious corporation. *Hauser* v. *Tate*, 81.
2. Where the charge is a combination to defraud, the declarations of any one of the alleged confederates is evidence against the others, though made in the absence of the latter, if made in furtherance

of the common design; and slight evidence of concert is sufficient to let in such declarations. *Ib.*

3. The liability of the ostensible president of a spurious bank for debts contracted by his assistance is not collateral, but direct and original, and he must respond in damages to the same extent as the bank, if legally constituted, would have been liable. *Ib.*
4. When several debts due to a national bank are consolidated into one, and a new note is given, the bank is not acting *ultra vires* in taking a mortgage on real estate to secure such note. *Oldham* v. *Bank*, 240.
5. It is competent for a national bank to purchase a note in favor of a third party, and thereby acquire incidentally a mortgage on land which had been given to secure it; and the claim so evidenced may be incorporated with other indebtedness, and a new mortgage on real estate taken to secure the whole sum. *Ib.*
6. Even if taking such security by the bank were *ultra vires*, the mortgage would not be *void*, but only an offence against the United States, of which the mortgagor could not avail himself to defeat his own deed. *Ib.*
7. Usurious interest previously received by a national bank in the course of renewals of a series of notes, terminating in one upon which suit is brought, cannot be pleaded by way of set-off or payment. *Ib.*
8. The *only* remedy open to the party aggrieved is that prescribed by the act of congress, a *separate* action for double the interest paid by him. *Ib.*

BANK STOCK, taxation of, 379.

BASTARDY:

1. It is not proper to join the mother of a bastard child with the state in a proceeding to fix the paternity upon the putative father. *State* v. *Collins*, 511.
2. A proceeding in bastardy being a civil action, either party has the right of appeal as a matter of course, under the rules prescribed for perfecting appeals in other civil cases. *State* v. *Wilkie*, 513.

BETTERMENTS, 185.

BIDDERS, impression among, 195.

BILL OF REVIEW, 259 (6).

BONDS AND NOTES, 166, 168.

BOND, sufficiency of, 141; on appeal, 393, 397; for title, 393 (2).

BOOKS, production of, 341, 342.

BOUNDARY, 226.

BREACH OF TRUST, 147 (2).

BURDEN OF PROOF, 5, 152 (3).

CANVASSING BOARD, 387.

CASUS OMISSUS, 278 (4).

CAUSA LITIS, 248 (2).

CHALLENGING JUROR, 585.

CHARTER, when change in will release stock subscriber, 433.

CHURCH, selling liquor near, 538.

CITY, 387, 573 (2); violating ordinance of, how charged in indictment, 522 (3).

CLERK, power to take deposition, 342 (4).

CLOUD UPON TITLE, when equity will interfere, 329, 332.

CODE PRACTICE, 18 (11).

CO-DEFENDANT TESTIFYING, 520.

COLOR OF TITLE, 229, 479.

COMMENTS OF COUNSEL, 17 (6), 576.

COMMISSIONER OF AFFIDAVITS, 485 (5).

COMMISSIONS TO GUARDIAN, 500 (3).

COMMON CARRIER, 423, 429.

COMMON DESIGN, evidence of, 81 (2).

COMMUNICATION WITH PERSON DECEASED, 367 (2), 406, 482.

COMPETITION AMONG BIDDERS, 195.

CONDEMNING LAND FOR RAILWAYS:

1. The statutes relating to the appropriation and assessment of the value of land for railway uses, have taken away the common law remedy of trespass *q. c, f.*; and the damages alleged to have been sustained by the owner of lands thus appropriated, must be assessed in the manner prescribed in the general law, as contained in the Revised Code, ch. 61, § 10, unless special provision is made in the charter for that purpose. *Holloway* v. *R. R. Co.*, 452.

CONFEDERATE SECURITIES, 283, 284, 500 (6).

CONFIRMATION BEFORE TITLE, 275 (2).

CONSENT REFERENCE, 321.

CONSIDERATION, 132 (2), 168, 313, 473.

CONSIGNOR AND CONSIGNEE, 423, 429.

CONSTRUCTIVE NOTICE, 81.

CONSTRUCTIVE POSSESSION, 235.

CONTEMPT:

1. Where, at the instance of a party litigant, judgment of imprisonment is rendered against the adverse party for a contempt in wilfully disobeying an order of court, the party aggrieved is entitled to appeal. *Cromartie* v. *Com'rs*, 211.
2. Under the act of 1868-'69, ch. 177, the court has no power to *punish* a contempt already committed by an imprisonment of indefi-

nite duration; but it may, by "proceedings *as* for contempt," coerce obedience to any lawful order, by imprisoning the contumacious party until he shall comply. *Ib.*

3. Upon the principle that private interests must yield to those of the public, if the entire fund which can be raised by taxation within constitutional limits is required to meet the necessary expenses of an economical administration of the county government, a statement of such facts, supported by proof, will be a due return to peremptory mandamus directing the county commissioners to levy and collect a sufficient tax to satisfy a judgment in favor of an individual creditor. *Ib.*

CONTRACT:

1. Where the charge is that the execution of a written contract to purchase land was procured by fraudulent representations, it is competent to show, in a court administering both law and equity, the accompanying acts and declarations of the parties *dehors* the writing, as illustrating and forming a part of the transaction. *Knight* v. *Houghtalling*, 17.

2. Where the instrument and declarations are duly in evidence, it is competent to ask a witness to the transaction, who was to pay the expenses of giving possession of the land; his answer will not be necessarily the statement of an opinion, or conclusion of fact. *Ib.*

3. It is also competent to show that other articles were sold at the same time with the land, and the price thereof included in the same consideration, as bearing on the question of fraud and indicating the inducements held out by the vendors to effect the trade. *Ib.*

4. It being alleged by the defendants that they were inveigled by the plaintiffs into the purchase of said land by false and fraudulent representation as to its area, advantages of situation, &c., it is competent to show that a hand-bill was exhibited by the agent of the plaintiffs under their directions, containing such misrepresentations; and it is also competent to put such hand-bill in evidence. *Ib.*

5. Declarations of a joint contractor, shortly after the agreement was made, are evidence of its terms against his co-contractors. *Ib.*

6. An admission in writing, under section 331 of the Code of Civil Procedure, that a letter is genuine, does not preclude comments by counsel as to the truth of its contents, suggested by its appearance, the fact of its being written by an amanuensis, &c.; but if such comments were improper, exception thereto, in order

to be available, on appeal, must be made before the court has given the case to the jury. *Ib.*

7. False representations, reasonably relied on, and inducing a contract, vitiate the agreement so effected. *Ib.*

8. An expenditure by the defendants of their own means, to put themselves in the condition in which the plaintiffs should have placed them, will not condone the fraud of the plaintiffs, so as to disentitle the defendants to relief; nor will *all* relief be denied because the plaintiffs have made payments in part performance of their contract after the discovery of the fraud. *Ib.*

9. A party entitled to rescind a contract upon the purchase of land on the ground of fraud must declare his intention as soon as fraud is discovered; and when sued by the other party, after a number of years, for the foreclosure of a mortgage to secure the purchase-money, he cannot for the first time ask to rescind, but can only ask to deduct from his debt an amount sufficient to repair the consequences of such fraud. *Ib.*

10. The defendants' right to such reimbursement is not barred by the statute of limitations applicable to an ordinary action for *deceit*, as their remedy is affected by *retaining* part of the money due by an unexecuted contract, the consideration for which has failed *pro tanto*. *Ib.*

11. Under the code-practice a party is not restricted to the specific relief demanded by him, but may have any additional and different relief which the pleadings and facts proved, show to be just and proper. *Ib.*

12. Where services are performed by one person for another under an express or implied contract that the party receiving the service will provide compensation in his last will, and the latter dies without making such provision, an action will lie on a *quantum meruit* for the reasonable value of such services, freed from the operation of the statute of limitations, such action not being maintainable until after the death of the party liable. *Miller* v. *Lash*, 51.

13. Where services are given in the mere expectation of a legacy, not founded on contract, no action can be sustained for their value when such expectations are disappointed. *Ib.*

14. Where services are rendered for a series of years under no definite contract as to duration, rate, or mode of compensation, other than that implied by law, the promise which the law implies is to pay for such services as they are rendered, and the statute of limitations begins to run then, or at least, from the end of the year in which they were performed. *Ib.*

15. In an action against an administrator for personal services rendered his intestate by the plaintiff, it appeared in evidence that the services were of considerable value and highly esteemed by the intestate, who declared his intention of compensating plaintiff in his will; and further, that plaintiff had frequently declared that she was not working as a hireling: *Held*, that the evidence authorized an inference involved in the verdict of the jury, that the services were not gratuitous, but did not justify the finding, in effect, of a mutual understanding as to the terms and conditions of plaintiff's service, so as to remove the bar of the statute of limitations. *Ib.*

16. In a suit brought by a wife against the administrator of her deceased husband for money "advanced and lent" to him during the coverture, where the marriage took place since the adoption of the constitution of 1868; *Held*, that the contract between them was not inconsistent with public policy, and therefore valid, the making thereof not being prohibited by the act of 1871–'72, ch, 193, and that the action could be maintained. *George* v. *High*, 99.

17. The policy of the courts in respect to the enforcement of contracts of a husband with his wife, based upon valuable consideration, discussed by RUFFIN, J. *Ib.*

18. Where two parties, having agreed upon an interchange of lands, execute a bond in the sum of four hundred dollars, conditioned to make title and give possession in pursuance of the agreement, and providing that in default of performance the disappointed party may sue the other and recover the sum of two hundred dollars and all damages, the instrument will be construed as a bond for the penal sum of four hundred dollars, to be void upon certain conditions, and in case of non-performance to secure two hundred dollars and damages. *Morris* v. *Saunders*, 138.

19. As the holder of such bond has no option but to take judgment for the full penalty, to be discharged upon the payment of two hundred dollars and damages, the sum demanded is beyond the jurisdiction of a justice of the peace. *Ib.*

20. Where in a contract for purchase of land, it is impossible for a vendor to comply strictly with his bond to make title, and the vendee waives his right to annul, he must submit to the partial execution of its provisions so far as they can be carried into effect, and be content with a proper reparation in money for such as can not be performed. *Hancock* v. *Bramlett*, 393.

See pages 168, 313, 492 (3).

CONTRACT, time of, 104, 132.

CONTRIBUTORY NEGLIGENCE, 310.

CONVERSATION, 9.

CONVERSION OF PERSONAL PROPERTY:

1. In an action for damages for the conversion of personal property, it is not error in the court to restrict the issues to an inquiry into the plaintiff's title, the act of conversion, and the injury; under which issues all legitimate defences to the action are susceptible of proof. *Rhea* v. *Deaver*, 337.
2. Nor is it error to refuse to charge that the immediate right of possession is not in the plaintiff, where the evidence tended to show that the property was used by another with the permission of plaintiff, and not as bailee. *Ib.*

CORPORATIONS:

Any fundamental change in the charter of a corporation relieves a non-assenting subscriber from liability upon his stock. *Bank* v. *Charlotte*, 433.

CORPORATIONS, liability of officers, &c., 81, 82, 411, 485 (2, 3).

CORRECTION OF DEED, 240 (4).

CORROBORATIVE EVIDENCE, 195.

COSTS:

1. Under the act of 1868-'69, ch. 96, § 3, where'er one sues *in forma pauperis*, no officer shall require of him any fee, and if successful in his suit, he shall recover no costs. *Booshee* v. *Surles*, 90.
2. The expenses of carrying to the asylum a prisoner found by the jury to be insane and unable to plead to the indictment, are no part of the costs of the prosecution against him. *Neal* v. *Com'rs*, 420.
3. Where the prosecutor is taxed with the costs of a criminal proceeding, it was held, that as to want of public necessity for the prosecution and the malicious motives prompting it, the finding of the court in which the trial was had, is conclusive; and it is immaterial whether the judgment against prosecutor be rendered

at the instance of the solicitor or the judge *ex mero motu*. Act of 1879, ch. 49. *State* v. *Adams*, 560; and *State* v. *Murdock*, 598.

See also *Jones* v. *Mial*, 597; and pages 159, 569.

COSTS, bond for, 393, 397.

COUNTER-CLAIM, 185 (4), 241 (5), 363.

COUNTY COMMISSIONERS:

1. Where the writ directed to the sheriff commands him to summon "the board of commissioners of Rowan county, composed of D," and others—(giving the names of the commissioners) the suit will be considered as one against the board in its corporate capacity, and the names of the members treated as surplusage. *Jones* v. *Com'rs*, 278.
2. It is not the duty of the county commissioners, individually or as a board, to revise upon appeal the allotment made by the appraisers of an execution debtor's exemptions. *Ib.*
3. The duty of revising such allotment, which, under the former law, was incumbent upon the township trustees, devolved upon them as individuals, and it seems that a legislative transfer of corporate duties *only* to the county commissioners was a *casus omissus*: which operated the discontinuance of any supervisory tribunal in the allotment of homesteads and other exemptions. *Ib.*

See pages 211 (3), 379.

CREDIBILITY OF WITNESS, 544.

CREDITORS' BILL:

1. It is error to vacate an order admitting a creditor as a co-plaintiff of record in a creditors' bill for an alleged irregularity occurring before the personal representatives of certain deceased defendants had been brought in by the service of process. *Long* v. *Bank*, 354.
2. The right of any creditor to become a plaintiff in such case rests upon the same ground as his right to sue alone, and the possession of evidences of debt accompanied by a verifying affidavit, makes a *prima facie* case sufficient to warrant the order of admission. *Ib.*
3. The practice of making one suit answer in place of many, is for the protection of the person administering the fund, and to secure the prompt settlement thereof. *Ib.*

4. A judgment creditor of a corporation caused an execution to issue which was returned unsatisfied, and he then brought a suit for himself and all other creditors against the corporation and its stockholders, demanding an account to ascertain the amount due upon unpaid stock, to pay debts of the corporation: *Held* to be a new and independent action, and not demurrable on the ground that his remedy was by proceeding supplementary to execution, or that complaint fails to specify the number of shares held by defendants. *Bronson* v. *Ins. Co.*, 411.

5. Where it is averred in the complaint that the defendants and others whose names are not known are stockholders, and that it is impracticable from their great number to bring them all before the court: *Held* not demurrable for defect of parties. In such case one may sue or be sued for all the others. *Ib.*

See page 35 (3).

CREDITS, proof of, 3

CRIMINAL PROCEDURE, 534, 551, 553, 555.

CURSING, indictment for nuisance in, 528.

CURTESY, tenant by, 73.

DAMAGES, 82 (3), 132 (3), 310, 337 (2), 423, 452.

DECLARATIONS, 17 (5) 81 (2) 226, 585 (3).

DECREE OF CONFIRMATION, a judgment, 399.

DEED:

1. Where the husband of a *feme covert* does not join in a conveyance of her land, and she is not privily examined as to her voluntary assent to the deed, the attempted conveyance is an absolute nullity; and the vendee has no lien on the land, or right of action against the woman personally, for the purchase-money paid by him. *Scott* v. *Battle*, 184.

2. Such purchaser, being charged by implication of law with knowledge of the invalidity of his title, cannot maintain a claim for "betterments" under the act of assembly (Bat. Rev., ch. 17, §§ 262 a, et seq.), for improvements put by him upon the land. *Ib.*

3. One who acquires the estate of the first purchaser, under a mortgage sale, is affected with notice of the defect in the direct chain of his title, and stands in no better plight as regards improvements. *Ib.*

4. While purchasers so situated cannot claim for betterments *as such*, they will be entitled to a fair allowance as an equitable counterclaim, to the demand of the real owner for the rents and profits of the land. *Ib.*

5. Where the operative words of a conveyance were that the grantor "doth give, grant, bargain, sell and convey unto the party of the second part all his household and kitchen furniture, *to be theirs at his death*, to have and to hold," &c.; *It was held*

(1) That such conveyance was an attempt to limit an estate in remainder in chattels, expectant upon the determination of a precedent life estate reserved to the grantor;

(2) That the reservation of the life interest could not be disregarded as inoperative by reason of its repugnancy to the estate conveyed to the grantor;

(3) That the particular estate for life absorbed the entire interest, and the limitation over was void;

(4) That parol evidence that the grantor put the grantees in possession of the property immediately after executing the deed, is inadmissible to affect the construction of such deed. *Dail* v. *Jones*, 221.

6. Where, by the mistake or oversight of the makers of a deed, the same is incorrectly written, they have no equity to call upon the grantee to correct the mistake in the books of the register, as they have an ample remedy under Bat. Rev., ch. 35, § 26; and a promise by the grantee to make such correction at his own expense and trouble, would be *nudum pactum*. *Oldham* v. *Bank*, 240.

DEED, description in, 12.

DEFECT OF PARTIES, 411 (2).

DEFENDANT'S TESTIFYING, 520, 585.

DELIVERY, evidence of, 166.

DEMAND, 441 (2).

DEMURRER, 124, 203, 205, 278, 413.

DEVASTAVIT, 34 (1).

DISCRETION OF JUDGE, 141, 585 (4).

DIVIDEND IN PARTITION, execution in favor of, 399.

DIVORCE AND ALIMONY:

1. Where a wife alleges sufficient facts for a separation from bed and board, and also to obtain alimony makes the necessary affidavit, under Bat. Rev., ch. 37, § 6, in reference to the husband's removal of his property from the state; *Held* that it is not necessary, in order to get a decree for separation, to file another complaint six months after the time the facts (upon which alone the decree could be made) are alleged to have occurred. *Scoggins* v. *Scoggins*, 347.

2. Where in such case it is alleged and the jury find, that a drunken husband cursed his wife and drove her from his house, and by demonstrations of violence caused her to leave the bed-side of a dying child and seek safety and protection at a distance of several miles, a decree *a mensa et thoro* was properly granted. Act 1871-'2, ch. 193, § 36; Bat. Rev., ch. 37. *Ib.*

DOCKETED JUDGMENT, 174 (5), 248 (4), 383.

DOCUMENTS, production of, 341, 342.

DORMANT JUDGMENT, docketing, 383.

DUE DILIGENCE, 441.

EJECTMENT, evidence in, 12, 104, 108, 195, 222 (4), 226, 229, 235.

ELECTIONS:

Where city authorities are authorized to order an election to ascertain the sense of the qualified voters upon a question, the registry of voters is only *prima facie* evidence of the number of votes cast, and the board of aldermen may hear other evidence, and their finding, sustained by the court below, that a majority of all the qualified voters of the city have given their approval of the measure, is conclusive. *Norment* v. *Charlotte*, 387.

ELECTION OF COUNT TO PROCEED ON, 534, 561.

ENCUMBRANCE OF HOMESTEAD, 96.

ENDORSEE, 1, 3.

ENTERING ON LAND, 566.

ENTRY AND GRANT:

1. Where A takes out a grant of land from the state in pursuance of a contract with B, that the latter shall share the land upon payment of a certain proportion of the expenses incurred in securing and completing the title, and B is let into possession of the land by consent of A, a trust in favor of B attaches to the estate, and he is entitled to an account of the proceeds of timber cut from said land and sold by A. *Harrison* v. *Emery*, 161.

EQUITABLE COUNTER-CLAIM, 185 (4).

EQUITY, 35 (3), 185 (4), 240 (4), 291, 329, 332, 456 (3).

EQUITY OF REDEMPTION, 479.

ESCROW, 230 (4).

ESTOPPEL:

1. Where two or more successive actions are identical as to the parties, the alleged cause of action, the defences relied upon and the relief demanded, a judgment upon the merits in the first action will estop any and all parties from maintaining the subsequent ones. *Tuttle* v. *Harrill*, 456.
2. Except in special cases, the plea of *res adjudicata* applies not only to points upon which the court was actually required to pronounce judgment, but to every point which properly belonged to the subject of the issue, and which the parties, exercising reasonable diligence, might have brought forward. *Ib.*
3. Under the present system of pleading and practice, a party is conclusively presumed when sued in a second action on matters before litigated, to have set up in the former action all the equitable defences of which he might have availed himself to defeat the legal title. *Ib.*

See pages 35 (3), 218 (3), 230 (3), 272, 456.

EVIDENCE:

1. Where a part of the conversation between a witness and one deceased is called out by the defendant on cross-examination, the plaintiff is entitled to all that was said in that conversation pertaining to the same subject matter of inquiry. *Roberts* v. *Roberts*, 9.

2. The defense of payment being one which confesses the cause of action and seeks to avoid it by new matter, the party setting it up must plead and prove it. *Ellison* v. *Rix*, 77.

3. Whether or not the loss of a paper has been sufficiently proved to admit parol evidence of its contents is a question for the court, but if the judge, not content with his ruling, leaves the matter to the jury, whose finding agrees with that of the court, there is no harm done, and therefore no error. *Ib.*

4. It is not error to refuse to charge that the failure to produce the subscribing witness to a note is evidence that it was never executed, when there is no evidence that there ever was a witness. *Ib.*

5. In ejectment, the plaintiff claimed under execution sale and sheriff's deed, and the defendant under a homestead allotment; *Held*, (1) In order to show that the land was not exempt from execution, it is competent to prove by the plaintiff in the judgment on which the execution issued, the *time* when the debt was contracted, (without producing the evidence thereof) as an independent fact and collateral to the contract, which was between other persons than the parties to this suit. (2) Where the loss by fire of the execution under which the sheriff sold was shown, entries in the judgment docket of the levy, sale, &c., may be admitted and proved by the clerk who made the entries, as secondary evidence of the contents of the execution. And in such cases the recital in the sheriff's deed is *prima facie* evidence of the existence and validity of the execution. Bat. Rev., ch. 14, § 19. *Dail* v. *Sugg*, 104.

6. Where the plaintiff sues for the possession of land purchased by him at a judicial sale, and the defendant asserts an equity attaching to the estate by virtue of a distinct agreement that the plaintiff would buy the land for the defendant, and re-convey to him upon being reimbursed the sum bid and accruing interest, it is competent, after evidence has been given of an express promise on the plaintiff's part to purchase for defendant conformably to such agreement, to show *as a fact* that there was a general impression among the by-standers at the sale that such an understanding existed, and that, in consequence, there was no competition among bidders. *Cheek* v. *Watson*, 195.

7. Such evidence of what the by-standers understood is also admissible as corroborative of the defendant's statement as to what was the actual agreement. *Ib.*

8. The declarations of a deceased owner of land, locating an angle of an adjoining tract, is admissible, though the corner so established is coincident with one of his own boundaries, where both parties to the action place the corner in the declarant's line, and it is immaterial to him at what point it is fixed. *Mason* v. *McCormick*, 226.

9. Upon an issue as to the defendant's occupation of land in dispute, it is proper to introduce the record of a former suit by the defendant against the plaintiff and others for an injunction and to stay trespass, for the purpose of showing, by an affidavit made in that cause in behalf of the plaintiff therein, a deliberate admission of such possession. *Ib.*

10. Defendant moved for a continuance on account of the absence of a witness, and in his affidavit stated what he expected to prove by the witness; and to avoid a postponement of the trial the parties agreed that the affidavit should be read in evidence and have the same effect as if the fact stated was sworn to by the witness in open court, subject, however, to plaintiff's right to contradict or explain; *Held*, that testimony was properly received to contradict the statement made in the affidavit, (the statement being upon the material issue involved, and not relating to collateral matters.) *Rhea* v. *Deaver*, 337.

11. When the plaintiff has exhibited an account for services rendered the defendant, it is competent for him to prove that he was in the service of the defendant for a longer period than that charged in the account, and to explain that the excess was the equivalent of time lost while he was in such employment. *McPeters* v. *Ray*, 462.

12. It is also competent for a witness who testifies as to the value of the plaintiff's services, to assign in support of his estimate that he had himself previously employed the plaintiff and paid him at that rate. *Ib.*

13. This court cannot consider exceptions to findings of fact as being against the weight of evidence. *Ib.*

14. Whether the declarations of a prisoner are voluntary or induced by hope or fear, is a question of fact to be decided by the court below, whose finding is conclusive. And the mere fact of the prisoner's making them while under arrest, is not in law sufficient to exclude his declarations otherwise freely made. *State* v. *Efler*, 585.

15. Evidence was received without objection, and on the next day of the trial, a motion to strike it out on the ground of irrelevancy was refused; *Held*, no error. It is matter within the discretionary power of the judge, and its exercise is not reviewable. *Ib.*

See pages, 3, 12, 17, 52, 81 (2), 152, 166, 179 (2, 4), 222, 259.

EXCEPTIONS, 218 (1), 275.

EXCHANGING LAND, bond for, 138.

EXCUSABLE NEGLIGENCE UNDER SECTION 133:

1. On motion to set aside a judgment under section 133 of the Code, it appeared that defendant's case among others was set for trial on Wednesday of the third week of the term, of which his counsel had two weeks' notice by a calendar, printed and distributed among the attorneys and litigants, and also published in a newspaper in the town where defendant resided and the court was being held; on call of the case, his counsel stated that defendant had mistaken the day and was absent attending to other matters, and the trial was postponed until the afternoon to allow time for the defendant to be sent for; on the second call of the case, a trial was had, the defendant being still absent but represented by counsel, and judgment was rendered against him; *Held*, that his neglect was inexcusable. *Henry* v. *Clayton*, 371.
2. Upon a motion under C. C. P., § 133, to set aside a judgment taken by default, it appeared that the defendant was sick and unable to leave home when the summons was served, and to attend court; that at the time the summons was served the defendant expressed a doubt to the officer as to whether he was the person meant, and the officer promised that if upon inquiry he found that the summons was not intended for defendant he would notify him; *Held*, the motion was properly denied. *Depriest* v. *Patterson*, 376.

EXECUTION:

1. The purchaser of land sold under execution is not entitled to an injunction to restrain another creditor from selling the property under an alleged prior incumbrance. *Fox* v. *Kline*, 173.
2. The sum bid for land at an execution sale is the measure of its value subject to all prior liens, and the purchaser cannot demand that the money paid by him shall be applied to the discharge of paramount incumbrances. *Ib.*

3. The lien of a docketed judgment is lost by delaying for more than ten years to enforce it by execution. *Ib.*

4. A party may have execution on his judgment, and at the same time prosecute an action on it under leave of court. *McDonald* v. *Dickson*, 248.

See pages 93, 96, 104, 173, 291, 303, 399, 418.

EXECUTION, distributing proceeds under, 418.

EXECUTORS AND ADMINISTRATORS:

1. Where an administrator dies without having fully administered his intestate's estate, an action will not lie by the next of kin for distribution against his administrator, but must be brought by an administrator *de bonis non* of the original intestate. *Ham* v. *Kornegay*, 119.

2. Administrators declared against distributees upon a written contract without seal, conditioned for the refunding of their estimated shares in the estate, if the same be necessary for the purposes of administration, and allege a deficit in the estate by reason of the fact that they were obliged to take back certain property of the estate for which the purchasers had refused to pay; *Held* upon demurrer,

(1) That the foregoing constituted such *special circumstances* and manifested such diligence upon the part of the administrators, as justified them in calling upon the distributees to refund.

(2) That the benefit conferred by the receipt of the money was a sufficient consideration for the promise to refund.

(3) That it was not requisite that the complaint should set forth an "account of the administration."

(4) That the sum demanded not being in excess of two hundred dollars, the justice's court had jurisdiction.

(5) That it was immaterial as to whether the return of the property by the purchaser to the administrator was before or after the execution of the paper writing by the distributees.

(6) That as the instrument sued on was a simple contract, it was proper that the plaintiff should have demanded judgment for the exact amount of his claim, and no more. *Lowery* v. *Perry*, 131.

3. *Held further*, That, the action being on a contract made prior to the adoption of the code, and the plaintiffs declaring in *assump-*

sit and asking damages, there could only be an interlocutory judgment and a writ of inquiry to ascertain the damages. *Ib.*

4. A testator devised and bequeathed real and personal estate to his son for life, with a limitation over if he should die without issue. The executor was *authorized* to sell the land and invest the proceeds for the benefit of those entitled to the estate. The executor, having sold the land, turned over the purchase-money, in the year 1858, to the testamentary guardian of the son, and a part of it was lost by the insolvency of such guardian; *Held*,

(1) That the executor should have *invested* the money in the purchase of other property or in public or private securities, as directed by the testator, and retained the substituted fund under his control, for the benefit of the parties entitled.

(2) That he was guilty of a breach of trust in turning over the *corpus* of the fund to the guardian.

(3) That the claim of the legatees against the executor was not barred by the statute of limitations, or by the efflux of time giving rise to the presumption of a settlement.

(4) That the contingent interest of the ulterior legatees should be represented by making them parties to the action to secure the fund. *Peacock* v. *Harris*, 146.

5. The bond of an administrator whose appointment has been revoked may be sued on by his successor in office or by the next of kin, in case of his failure to account fairly for the assets that came to his hands. *Neal* v. *Becknell*, 299.

6. Where it is admitted or proved that there came into the hands of an administrator assets belonging to the estate of his intestate, it is proper to order a reference to take an account of his administration of the same, unless some defense is interposed which bars the right to such account. *Ib.*

See pages 35 (3), 51, 52, 99, 127, 313.

EXEMPTION OF PERSONALTY, 159.

EX MERO MOTU, 560.

EXPECTATION OF LEGACY, 51.

FAILURE OF CONSIDERATION, 168.

FALSE REPRESENTATION, 17.

FEE, paid by guardian, 500 (4); of solicitor, 569 (2)

FEE-SIMPLE, presumption of in state grant, 235 (2).

FEME COVERT, deed of, 184.

FIDUCIARY, negligence in, 283, 284.

FINDING OF FACT BY COURT, 500 (l).

FORBEARANCE, 441.

FORCIBLE TRESPASS:

1. To constitute the offence of forcible trespass, there must be actual demonstration of force in excess of a bare civil trespass, as with arms, or a multitude of attendants, so as to create or make imminent a breach of the peace,—approving *State* v. *Covington*, 70 N. C., 71. *State* v. *Lloyd*, 573.
2. Whether the general doctrine, that ownership of land bounded upon a highway giving the owner the right to the soil to the center of the way, applies to the streets of a city—*Quære*. *Ib.*

FORMER ACQUITTAL AND NOT GUILTY, pleas of, 535 (2).

FRAUD:

1. Where the defendant had given to the plaintiff his bond for the payment of money in consideration of a quit-claim deed from the latter to land also claimed by the former, he cannot defend an action on such bond on the ground of a failure of consideration, in that, the plaintiff had no title to the land, without showing that, while in the exercise of due diligence on his part, he had been mislead by the fraudulent pretentions of the plaintiff to a title which he knew he did not possess. *Foy* v. *Haughton*, 168.

See pages, 17, 81 (2), 258.

GRAND JURY, 522.

GRANT FROM STATE, 161, 235.

GUARDIAN AND WARD:

1. One who conducts a suit as guardian or next friend of infants is not a party of record, but the infants themselves are the real

plaintiffs; nor will *any one* who has an interest in the action hostile to that of the infants be permitted to conduct the same. *George* v. *High*, 113.

2. A ward is entitled to demand of her guardian an annual statement of the manner and nature of his investments of her estate; and the rejection, by the probate court, of such a demand, is the denial of a substantial right, which entitles the ward to an appeal. *Moore* v. *Askew*, 199.

3. The great depreciation reached by confederate securities in June and July, 1863, raises a presumption of a want of caution on the part of a fiduciary who collects well secured ante-war debts and invests the proceeds in such securities and calls for exculpatory evidence. *Robertson* v. *Wall*, 283.

4. When the evidence shows that a guardian, without any sinister or selfish motive appearing, makes such an investment of funds arising from the collection of well-secured debts contracted before the war, he will be exonerated from blame, upon showing that he had invested his own funds in the same way; that he acted upon the advice of experienced business men; that he failed after due trial to make private loans; and that the money received in July, 1863, was the balance of an entire debt, the other portions of which had been collected prior to 1863. *Ib.*

5. A father, though he be the guardian of his minor child's estate, is not ordinarily permitted to charge for its maintenance, and, if able, he is himself bound to maintain his child; if not so, he must before applying any of his ward's income to that end, procure the sanction of the proper court. *Burke* v. *Turner*, 500.

6. A guardian is not entitled to commissions on money collected and used by him in his own business, nor on debts of his ward paid to a firm of which the guardian is a member. *Ib.*

7. He should be allowed reasonable attorney's fees, paid in good faith. *Ib.*

8. Where one who is aware of the misapplication of trust funds by a guardian afterwards succeeds to that office, he is guilty of *laches* if he fails to charge the first guardian in his settlement with him with the sum so misappropriated. *Ib.*

9. Even though the circumstances be such as to justify a guardian in receiving confederate currency for his ward in 1862, yet he is chargeable with its value if he neglects to invest it, uses the greater part of it in his own business, and mixes it all with his own funds. *Ib.*

See page, 258.

HANDWRITING, proof of, 166.

HEIRS, words of limitation, 59.

HIGHWAY, 573 (2).

HOMESTEAD:

1. A note or bond given for land is not a *lien* on the land for the purchase money, but no real property of the vendee is exempt, under the constitution of 1868, from sale under *execution* against him for payment of obligations contracted for the purchase thereof. *Smith* v. *High*, 93.
2. Where land is sold at execution sale "subject to homestead," the purchaser takes it with the encumbrance. *Barrett* v. *Richardson*, 76 N. C., 429, approved. *Wyche* v. *Wyche*, 96.

See pages 104, 248 (4), 273.

HOMICIDE, 581, 585, 591.

HUSBAND AND WIFE, contract between, 99, 184, 291, 492.

ILLEGAL SENTENCE, 600.

IMPEACHING STATEMENT MADE IN AFFIDAVIT, 337.

IMPLIED PROMISE, 51, 52.

IMPRESSION OF BY-STANDERS, 195.

IMPRISONMENT FOR CONTEMPT, 211.

IMPROVEMENTS, 185.

IN CUSTODIA LEGIS, 491.

IN FORMA PAUPERIS, appeal, 88; costs of suit, 90.

INCUMBRANCE, 174.

INDICTMENT:

1. Where one is indicted for violating a city ordinance, the terms of

the ordinance and the particular breach alleged, should be set forth. *State* v. *Edens*, 522.

2. An indictment under the act of 1879, ch. 232, for selling spirituous liquor within a certain distance of a church in Hyde county, cannot be supported by evidence of such a sale within the prescribed distance of a house conveyed primarily for educational purposes, with permission to hold divine service therein on suitable occasions, which is ordinarily used for a school-house, but in which there is preaching at stated intervals. *State* v. *Midgett*, 538.

3. The issuing a marriage license by a register of deeds in violation of the statute (Bat. Rev., ch. 69, § 5, 7,) is not an indictable offence. A penalty of two hundred dollars to any person suing for the same, is prescribed, and this particular mode of proceeding excludes that by indictment, unless the illegal act be done *mala fide*. (Section 107, chapter 32 of Battle's Revisal discussed.) *State* v. *Snuggs*, 541.

4. It is an indispensable requisite to an indictment for murder by a stroke or blow, that it should allege the infliction of a *mortal wound*, of which the deceased died. *State* v. *Morgan*, 581.

See pages 506, 555, 564, 566.

INFANT DEFENDANT, 258.

INJUNCTION AND RECEIVER:

1. Mere irregularity in the granting of an injunction will not render it a nullity so as to prevent the suspension of the statute of limitations, under section 46 of the code, during the pendency of the injunction. *Walton* v. *Pearson*, 34.

2. Where the jury find that the rebuilding of a proposed mill and dam would overflow and render useless the plaintiff's land, and injure the health of his family, but that the mill would be a public convenience, pecuniary compensation is all that the plaintiff can claim, and an injuction against such erection will be refused, upon the principle that private advantage must yield to public benefit. *Daughtry* v. *Warren*, 136.

3. An injunction will not be granted to restrain the erection of a planing mill and cotton gin (in process of construction) upon an allegation by plaintiff that the same, when completed, will expose his premises to increased perils of fire, and that the noise, &c., will render his dwelling unfit for a residence. *Dorsey* v. *Allen*, 358.

4. The prior jurisdiction acquired by the pendency of a former action in which an injunction and receivership are sought, will exclude the interference of the court in another suit of which the principal object is the same provisional remedies. *Young* v. *Rollins*, 485.

5. When a corporation has become extinct by legislative enactment, and its powers and property transferred to a new corporation substituted for it, the courts have no power, on an *ex parte* application, to appoint a receiver of the assets of the defunct corporation. *Ib.*

6. An order appointing a receiver of the extinct corporation cannot properly be made except in a proceeding to which its successor or substitute is a party. *Ib.*

7. The office of receiver should not be conferred upon a party to the cause. *Ib.*

8. An affidavit upon which an application for a provisional remedy is based, is sufficiently verified when made before a commissioner for this state resident in another state, and authenticated by his official signature and seal. *Ib.*

9. When the defendants in an application for a provisional remedy meet the plaintiffs' allegations by counter affidavits, it is competent for the plaintiffs to support their original affidavits by others to the same effect and in reply to those offered by the defendants. *Ib.*

See pages 35 (2), 174 (3).

INSANE PERSON, expenses of carrying to asylum, 420.

INSTANTANEOUS SEIZIN, 466.

INTERCHANGE OF LAND, bond for, 138.

INTEREST, 415, 441 (2).

INVESTMENT BY GUARDIAN, 199.

IRREGULARITY IN INJUNCTION, 35 (2).

ISSUES, 69, 218, 272 (2, 3), 275, 296, 337 (2), 477.

JOINING TORT AND CONTRACT, 205.

JUDGE'S CHARGE:

1. Where there is a severance on the trial of defendants, and another party charged in the bill testifies in behalf of the accused, it is error, as indicating the opinion of the court on the facts, to charge that the very fact that the witness is included in the same indictment will impair his testimony, and that his testimony should not be placed on the same plane or footing with that of a witness of undoubted character who is disinterested. *State* v. *Jenkins*, 544.
2. An omission of the judge to charge that there is no evidence on a controverted point, where there is no prayer for instructions, and no exception to the charge until after the jury have rendered a verdict adverse to the appellant, is not assignable for error. *State* v. *Nicholson*, 548.

See pages 77 (3), 337 (3), 576.

JUDGE'S DISCRETION, 141, 585 (4).

JUDGE'S POWER, 35 (4, 6), 500 (1), 560.

JUDGE'S SIGNING JUDGMENTS, 258.

JUDGMENT:

1. Taking judgment upon a sealed obligation does not merge the specialty so as to estop the judgment creditor from bringing action on the administration bond of the defendant in the judgment, assigning as a breach a *devastavit* by the defendant and a consequent failure to pay the plaintiff's claim. *Walton* v. *Pearson*, 34.
2. The doctrine that equity will not upon the filing of a general creditors' bill restrain a particular creditor, who has obtained an absolute judgment against an administrator, from proceeding against such administrator personally and his sureties, has no application to a case where such judgment creditor is the one to file the bill, thereby submitting his claim to the control and disposition of the court. *Ib.*
3. A judgment will not be vacated because some of a number of infant defendants united in interest, appeared only by a guardian *ad litem*, appointed without process previously served on such infants. (See C. C. P., § 59, for present practice.) *Matthews* v. *Joyce*, 258.
4. The act requiring the signature of a judge to authenticate his

judgments and decrees is directory only, and such signature is not essential to their validity. *Ib.*

5. A successful plaintiff cannot be made to forego the advantages of his victory because his opponent, defending in a representative capacity, has fraudulently omitted to set up an available defense, if such failure was not the result of collusion with the plaintiff. *Ib.*

6. To entitle a party to the revision of a judgment on the gound of newly discovered evidence, the evidence must not be merely cumulative, nor such as ordinary diligence would have discovered in time for the first trial, nor then in the possession of the counsel or agent of the party. *Ib.*

7. The docketing a dormant justice's judgment in the superior court does not have the effect of reviving it, but merely brings it within the operation of the rule applicable to original judgments in that court. Before removal a new action is necessary to revive it. *Williams* v. *Williams*, 383.

8. *Quære* as to whether the transfer to the superior court should not be made before the dormancy of the judgment. *Ib.*

JUGDMENT UNDER CODE, 18 (11), 248 (4) Judgment Lien, 174 (5), 248 (4). Judgment, action on, 248 (7). Judgment in Partition, 399. Judgment *nunc pro tunc*, 415. Judgment, estopel, 456. Judgment affirmed, no errors, &c., 591, 592. Docketing Justice's 383. Judgment against county, 211 (3).

JUDICIAL SALE:

1. It is error to order the making of title to property disposed of at a judicial sale, prior to the commissioner's report of such sale, and its confirmation. *Alexander* v. *Robinson*, 275.

2. Where land has been ordered to be disposed of at a judicial sale, it is *in custodia legis* until title has been made to the purchaser under the sanction and direction of the court. *Kemp* v. *Kemp*, 491.

See pages 275, 313, 492, (3, 4).

JURISDICTION:

1. When a case, commenced wrongfully before the clerk, gets into the superior court by appeal or otherwise, and the latter has jurisdiction of the whole cause and can proceed to its determination, it will do so, and make all amendments of process needful to give effectual jurisdiction; but where a complaint which states matters properly triable in the probate court is amended in the

superior court on appeal by engrafting new matter cognizable only by the superior court in term, a demurrer by a defendant averring a defect of jurisdiction over such matter, was properly sustained. *Capps* v. *Capps*, 408.

2. The act of 1879, ch. 92, does not apply to proceedings pending at the date of its ratification; hence in a bastardy proceeding pending in 1878 and tried in 1881, the superior court was not restricted to the fine imposed by that act upon a defendant against whom the issue was found. *State* v. *Ingram*, 515.

3. The act of 1879, ch. 92, does not apply to proceedings pending at the date of its ratification; hence the superior court was not restricted in its jurisdiction and power to punish by fine or imprisonment or both, defendants convicted of assaults, &c., upon indictments found prior to that act. (Review of the statutes in reference to criminal jurisdiction, by ASHE, J.) *State* v. *Watts*, 517

4. The superior, inferior and criminal courts have jurisdiction of all offences, whereof exclusive jurisdiction is given to justices of the peace, if some justice shall not within six months after their commission have proceeded to take cognizance of the same. Act 1881, ch. 210. And if the prosecution originated in any of said courts before the expiration of the six months, objection to the jurisdiction must be taken as matter of defence upon plea of not guilty. *State* v. *Reaves*, 553.

5. Although, on trial of an indictment for assault with intent to commit rape, the jury find the defendant guilty of the assault only, yet the superior court having jurisdiction of the offence charged, can proceed to judgment upon conviction of the subordinate misdemeanor. *Ib*.

6. One who fails to obtain license to carry on a trade, &c., is guilty of a misdemeanor under section 32, schedule B, of the revenue act of 1879, punishable by fine not exceeding twenty dollars, or imprisonment not exceeding thirty days; and a penalty not to exceed twenty dollars is also imposed, to be recovered by the sheriff before a justice of the peace. And in such case the superior court has jurisdiction of the misdemeanor under the act of 1881, ch. 210, (see *State* v. *Reaves, ante*, 553,) but the punishment must not be greater than that prescribed by said section 32. *State* v. *Clarke*, 535.

See pages 132 (4), 138 (2), 205 (3), 272 (3), 363, 485 (1).

JUROR:

1. One is not disqualified under section 229*g* of the Code to act as a

grand juror in the criminal court of New Hanover county, by reason of his having a civil suit pending in another court of the county; and it was not error to refuse to quash an indictment found by the grand jury of which he was a member. *State* v. *Edens*, 522.

2. On a trial for murder, a juror stated, in reply to the question whether he had formed and expressed an opinion as to the *guilt or innocence* of the prisoner, that he had, and the prisoner challenged him for cause; thereupon the court suggested to the prisoner's counsel to ask the juror, whether the opinion expressed was that the prisoner is guilty, which counsel declined to do, and the challenge was disallowed: *Held* no error. In such case an opinion expressed constitutes good cause of challenge for that party only against whom the bias exists, and it is incumbent on him who challenges to show himself to the party likely to be prejudiced. *State* v. *Efler*, 585.

JUSTICE'S WARRANT:

1. A justice's warrant charging the defendant with an offence punishable by statute, which concludes "contrary to law" is defective. The particularity required in indictments cannot be dispensed with in warrants, and hence in this case the conclusion against the statute was necessary. *State* v. *Lowder*, 564.

2. The omission of the words, "unlawfully and wilfully," in a justice's warrant charging the defendant with a violation of the act in reference to entering on land of another after being forbidden, is a fatal defect. *State* v. *Whitaker*, 566.

JUSTICE'S JUDGMENT, docketing, 383.

LACHES, 147 (1), 500 (5).

LANDLORD AND TENANT:

1. A tenant from year to year is entitled to a written or verbal notice to quit, to be given three months before the expiration of the current year; a mere demand for possession is insufficient. But where the tenant disclaims to hold as such, a notice to quit is not necessary and need not be proved in a summary proceeding in ejectment. *Vincent* v. *Corbin*, 108.

2. Under the act of 1876-'77, ch. 283, the landlord's lien extends to and includes the costs of such legal proceedings as are necessary to recover his rents; and as all the crops are his until such lien is duly discharged, the tenant has no property therein which he

can claim as his constitutional exemption, as against such costs. *Slaughter* v. *Winfrey*, 159.

LARCENY:

1. All felonious stealing being now reduced by statute (Bat. Rev., ch. 32, § 25,) to the grade of petit larceny, that offence no longer admits of accessories. *State* v. *Tyler*, 569.
2. A receiver of stolen goods not being an accessory after the fact, in the present condition of our law, the solicitor is not entitled under the act of 1873–'4, ch. 170, to a fee of ten dollars upon his conviction. *Ib.*
3. Where, upon application of the defendant to retax the costs, the solicitor's fee is reduced from ten dollars to four, the solicitor has no right to appeal, the state having no interest in the result *Ib.*

See page 561.

LEAVE TO SUE, 248 (1), 259 (6).

LEGACY, expectation of, 51.

LIABILITY OF BANK OFFICER, 82 (3).

LICENSE TO CARRY ON TRADE, indictment, 555.

LIEN, of landlord, 159; of judgment, 174 (5), 418; for purchase money, 184, 466; prior lien, 174 (4).

LIQUOR SELLING, 538.

LOST RECORDS AND PAPERS, 77 (2), 104 (2).

MANDAMUS:

Mandamus is not now a prerogative or extraordinary writ, but a writ of right, to be used as ordinary process in any case to which it is applicable. *Haymore* v. *Com'rs*, 268.

See page 211 (3).

MARRIAGE LICENSE, illegal issuing, 541.

MARRIAGE SETTLEMENT, 492 (2).

MARRIED WOMEN:

1. A married woman will be considered as discovert *quoad* her separate estate, only to the extent of the powers expressly conferred upon her in the deed of settlement, and her powers will not be extended by implication. *Kemp* v. *Kemp*, 491.
2. Where the purchaser of the land of a *feme covert* sold under an order of court has satisfied the trustee of her separate estate by surrendering a claim held by him against the trustee individually, and the latter has agreed by parol with his *cestui que trust* to convey her a tract of land in discharge of the purchase money which should have come into his hands, and put her in possession of such land, the contract is not enforceable against the *feme covert*—especially when the separate estate is limited over to other persons after the *feme covert's* death. *Ib.*
3. In such case, if the purchaser acted in good faith as regards his actual intentions in paying the trustee by a cancellation of the latter's indebtedness, he will, upon paying to the married woman the amount of his bid, be subrogated to her title to the tract of land acquired from the trustee. *Ib.*

Deed of, 184.

MASTER AND SERVANT, 51, 462.

MEASURE OF VALUE, 174 (4).

MERGER, 34 (1).

MILLS, injunction against building, 136.

MINISTERIAL ACT, 141.

MISDEMEANOR UNDER REVENUE ACT, 555.

MISTAKE, 240 (4).

MORTGAGE:

1. An assignment of a mortgage in terms which do not profess to act upon the land, does not pass the mortgagee's estate in the land, but only the security it affords to the holder of the debt. *Williams* v. *Teachey*, 402.
2. Where a mortgage on land is given to one who has advanced the

purchase money therefor, and executed at the same time with the deed which confers title on the mortgagor, the making of the two deeds is considered as but one transaction; the seizin of the mortgagor is but an instantaneous one, to which prior encumbrances on his estate will not attach; but the mortgage to secure the purchase money will take precedence of all other liens or encumbrances. *Moring* v. *Dickerson*, 466.

3. Although a mortgage deed with unexecuted trusts is not color of title so as to give effect to a seven years's adverse possession under it, yet the mortgagee's actual possession of the land for ten years after default raises a presumption of a release of the equity of redemption—and a discharge of the secured debt and a reconveyance would be presumed by a similar possession in the mortgagor. *Edwards* v. *Tipton*, 479.

See page 240. Mortgage sale, purchaser at, 185 (3).

MOTIONS: In the cause, 173, 174; to issue execution, 248 (3); under section 133 of the Code, 371, 376.

MURDER, 581, 585, 591.

NATIONAL BANK, 240.

NEGLIGENCE:

1. Notwithstanding the previous negligence of the plaintiff, if at the time when the injury was committed, it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie for damages. *Gunter* v. *Wicker*, 310.

2. In an action for damages against a railway company to recover the value of goods lost by the alleged negligence of the defendant, it appeared that after the arrival of the goods they were placed on a platform at the depot for the convenience of delivery to consignees, and remained there for nearly two days; notice of their arrival was given the plaintiff who paid the freight charges with full knowledge of the place of deposit, but failed to remove them on account of his inability at the time to procure the services of city draymen for that purpose, and in the afternoon of the second day they were destroyed by fire, together with much of the defendant's property; *Held*,

(1) There was a delivery in law of the goods to the plaintiff consignee, which exonerated the defendant company from liability as warehousemen.

(2) The fact that the fire originated in a steam cotton compress, erected on the company's premises with its permission but not under its control, does not constitute negligence in the defendant, the permission to erect the same not being the proximate cause of the injury sustained by the plaintiff. *Chalk* v. *R. R. Co.*, 423.

3. Goods bought and paid for were delivered to a railway company, whose bill of lading was executed to the vendor acknowledging the receipt of the goods to be conveyed to the vendee; *Held*, that the contract for transportation is in legal effect with the vendee, and the company liable to him for non-delivery of the goods. In such case the title vests in the vendee purchaser, and a delivery of the goods to the carrier is a delivery to the purchaser himself. *Gwyn* v. *R. R. Co.*, 429.

4. Where one through his agent sells goods to another, and they are shipped to the purchaser, the agent has no right to stop the goods *in transitu*, because his principal owes him on account of money advanced in the purchase of the goods. *Ib.*

See pages 283, 284, for negligence in guardian.

NEGOTIABLE INSTRUMENT, 116.

NEWLY DISCOVERED EVIDENCE, 259.

NEW MATTER, 205.

NEW PROMISE, 1, 127, 152 (2, 4.)

NEW TRIAL, 477, 576.

NOLLE PROSEQUI, 534.

NOTES AND BONDS:

1. An instrument in the form of a promissory note, with a seal attached, has all the qualities of negotiable paper, in this state. *Pate* v. *Brown*, 166.

2. The production of such a paper, supported by proof of the handwriting of the obligor, is sufficient evidence of delivery and of the ownership of the holder. *Ib.*

3. An obligor in a bond pledged himself to be responsible for the payment of a note, setting out in said bond the names of the payer and payee, the amount and date of the note and for what it was given, when due and payable and the rate of interest;

Held (upon demurrer that no obligee is named) the payee is pointed out with sufficient certainty as the obligee with whom the contract is made. *Leach* v. *Flemming*, 447.

4. An unsealed note which upon its face states a consideration, or to be for "value received," furnishes proof *prima facie* of a consideration to support it. *Stronach* v. *Bledsoe*, 473.

See pages 1, 3, 122. Note for purchase money of land, not a lien on the land, 93.

NOTICE, 81.

NOTICE TO QUIT, 108.

NOTICE OF DEFECTIVE TITLE, 185.

NUDUM PACTUM, 240 (4).

NUISANCE:

1. The defendant was charged in a common law indictment with a nuisance by obstructing a street, in that, he kept a market cart standing in the street for an hour and a half, and the jury rendered a special verdict finding that he was notified to remove the same but refused; that he and numbers of other persons were accustomed to occupy places on the street with their carts, selling vegetables, &c., but that it was contrary to the municipal regulations, and that notwithstanding the alleged obstruction, there was the usual passing of vehicles and foot-passengers; *Held*, not to be a nuisance *per se*. *State* v. *Edens*, 522.

2. The continued and public use of profane oaths, frequently and boisterously repeated, though on a single occasion and but for the space of five minutes, is indictable as a public nuisance. *State* v. *Chrisp*, 528.

See pages 136, 358, for injunction against nuisance.

NUNC PRO TUNC JUDGMENT, 415.

OBLIGOR AND OBLIGEE, 447.

OBSTRUCTING HIGHWAYS, 522, 573 (2).

OFFICERS OF BANK, liability of, 81, 82.

ONUS, 5.

OPEN AND CONCLUDE, right to, 5, 367 (1), 473.

OWNERSHIP OF NOTE, 166.

PARENT AND CHILD, 500 (2).

PAROL EVIDENCE, 77 (2), 222 (4).

PAROL TRUST, 195.

PARTIES, 113, 119, 147 (4), 278 (2), 354, 411, 485 (3).

PARTITION:

1. Plaintiffs ask for sale of land for partition, defendants insist that actual partition would be more advantageous; the tract contains one hundred and forty acres encumbered with a dower interest, only fifty of which are fit for cultivation, but much worn and wasted; the supply of wood is insufficient for all the tenants, of whom there are seven in number, and one of the shares to be sub-divided into seven others if actual partition be made, which witnesses testify would be an injury to all; *Held*, that the decree for sale was proper. *Trull* v. *Rice*, 327.
2. In partition, where one lot is charged with the payment of a sum of money, there is no law, (except the act in reference to minors, Bat. Rev., ch. 84, § 9,) suspending the payment until the lot falls into possession; and a decree confirming the report of commissioners in the proceeding is such a judgment as will warrant the court in issuing a *vend. ex.* against the lot charged. *Turpin v. Kelly*, 399.
3. Where land is sold under several executions, some issuing for the collection of personal debts of the land-owner, some to enforce a lien for equality of partition, the latter claims are entitled to priority in the distribution of the proceeds. *Thompson v. Peebles*, 418.
4. Until the discharge of such lien for equality of partition, the share of the debtor in the land liable to the satisfaction of his general engagements cannot be known. *Ib.*

PARTNERSHIP, 156, 462 (4).

PAUPER: Appeal by, 88; suit by, without costs, 90.

PAYER AND PAYEE, 447.

PAYMENT, 77 (1), 122, 152.

PENAL BOND, 138.

PENALTY, for illegal issuing marriage license, 541; for failure to obtain license to carry on trade under revenue act, 555.

PERJURY:

Where the putative father is indicted for false swearing on his own behalf in a bastardy proceeding, under a bill which describes the cause as constituted between "the state as plaintiff and the said J. C. as defendant," and the record of the cause, put in evidence by the solicitor, shows that the mother of the child was joined with the state as a party, there is no material variance. *State* v. *Collins*, 511.

PERSONAL PROPERTY EXEMPTION, 159.

PETITION TO REHEAR, w en to be filed, 593.

PLEADING:

1. A demurrer to a complaint in a proceeding for account and settlement, which assigns as cause, that a certain justice's judgment was dormant, and that the plaintiff had no right to have the same docketed in the superior court, is insufficient on the ground of irrelevancy to defeat plaintiff's action. *Bacon* v. *Berry*, 124.
2. The statute of limitations, relied on as a defence, must be pleaded in the answer, and not set up by demurrer. *Ib.*
3. A general demurrer that the complaint (or answer) does not set forth facts sufficient to constitute a cause of action (or defence) was properly overruled. *Bank* v. *Bogle*, 203; See also *Jones* v. *Com'rs*, 278.
4. A demurrer precedes an answer, and cannot be put in after it, without leave obtained to withdraw the answer. *Finch* v. *Baskerville*, 205.
5. An application for the partition of land, joined with a demand for an account of the rents and profits, from certain tenants in com-

mon, alleged to have been in exclusive possession, and to have converted such rents and profits to their sole and separate use, is not a joinder of a demand in *tort* with one arising on contract. *Ib.*

6. Where the court has cognizance of the cause made by the complaint as first filed, the jurisdiction will not be ousted by an amendment averring additional matter which the court is not competent to consider; but such new matter should be disregarded as surplusage. *Ib.*

7. A counter-claim cannot be asserted in a justice's court, the amount of which exceeds the jurisdiction of the justice. *Boyett* v. *Vaughan*, 333.

8. A plaintiff cannot set up a counter-claim in reply to a counter-claim asserted by the defendant. *Ib.*

See pages 77 (1), 132 (3), 241 (5), 248 (3), 278, 408, 411.

POSSESSION, 229.

POWER, 62.

PRACTICE:

1. The party who asserts the affirmative of an issue has the right to open and conclude the argument; hence the defendant who pleads payment of the note sued on (admitting its execution) being the affirmant, the *onus* is upon him to show payment, and he is entitled to open and conclude. *Love* v. *Dickerson*, 5. See also *Syme* v. *Broughton*, 367, *Stronach* v. *Bledsoe*, 473.

2. Where the facts of a case are to be passed on by the judge, an omission to find upon an issue claimed to be raised by the pleadings is not assignable for error, unless the judge was requested on the trial to pass upon such issue or his failure to do so then called to his attention. *Bryant* v. *Fisher*, 69.

3. Where a question of law is improperly left to the jury and they decide it correctly, the verdict cures the error of the court. *Vincent* v. *Corbin*, 108.

4. The decision of a judge below, either at chambers or in term, upon the question of the sufficiency of an indemnity bond executed in compliance with his order, is not reviewable on appeal; no notice is required in such case, nor is the judge concluded by the action of the clerk by whom he directed the bond to be approved. The act is ministerial and the power exercised discretionary. *Sternberger* v. *Hawley*, 141.

5. One of a number of contesting claimants to a fund raised under execution cannot maintain an independent action to support his claim, but must proceed by motion in the original cause of which such execution is the result. *Fox* v. *Kline*, 173.

6. A motion in the cause, and not a distinct action, is also the proper means of compelling the sheriff to make title to the purchaser at the execution sale. *Ib.*

7. Under the present practice it is not necessary to obtain leave of the court in order to bring an action in the nature of a bill of review. *Matthews* v. *Joyce*, 258.

8. It is against the practice to sever the facts of a demand in the complaint and enter judgment for one portion, and order a reference to ascertain the amount of the other portion for judgment as to that. *Depriest* v. *Patterson*, 376.

9. When, upon a review of the record sent up to this court, the contending allegations of the parties in the court below do not appear to have evolved any issue, a *venire de novo* will be awarded in order that there may be a *repleader*. *Brown* v. *Cooper*, 477.

10. The findings of the judge of the superior court on questions of fact properly submitted to his decision, in a cause of purely legal cognizance, are as inviolable as the verdict of a jury, and cannot be reversed on appeal. *Burke* v. *Turner*, 500.

See pages 18 (11), 70 (3), 77 (2), 179, 205, 208, 248 (1), 354. Practice under reference, 114, 115.

PRESUMPTION OF PAYMENT, 3.

PRIMA FACIE EVIDENCE, 104, 387, 473.

PRIOR LIEN, 174 (4, 5).

PRIORITIES IN EXECUTION, 418, 466.

PROCESS, 258, 268.

PRODUCTION OF BOOKS AND DOCUMENTS:

1. Where an administrator of an agent for negotiating and applying proceeds of county bonds, is sought to be examined under sections 332-341 of the Code, and such administrator as bank cashier kept his intestate's accounts, an order to produce the books of the bank, and also such bonds as belong to the intestate, or were

found among his effects after his death, aside from pre-existing provisions of law, is regular and proper under section 331 of the Code. *Com'rs* v. *Lemly*, 341.

2. As such books and bonds are sufficiently described in the order, they must be produced, notwithstanding any vagueness in the description of other documents, and the administrator may then defend himself against any further enforcement of the order. *Ib.*

PROFANITY, indictment for nuisance in, 528.

PROMISE TO CORRECT DEED, 240 (4).

PROSECUTOR, taxed with costs, 560, 598.

PROVISIONAL REMEDIES, 485.

PUNISHMENT, 515, 517, 555, 600.

PURCHASE, of land subject to homestead, 96, 185, 491; under contract of sale, 393 (2); for defendant in execution, 195; at execution sale, 174, 291, 303.

RAILWAYS, appropriation of land, 452; negligence of, 423, 429, 485 (2).

RECEIVER, 485. See also Injunction and Receiver.

RECORD OF FORMER SUIT, 226 (2).

REFERENCE AND REFEREE:

1. A referee under the Code should report in writing all the testimony taken by him and file copies of all documents adduced in evidence and considered by him. *Com'rs* v. *Magnin*, 114.

2. Referees should exercise their own judgment in taking and making up accounts which they are required to state; not merely adopt a statement made by other parties; and *it seems* that the items should be given in detail, and not simply the result of an adjustment of them. *Ib.*

3. When exception is taken to the failure of a referee to report evidence the omission may be supplied by an order for its production, if it has been preserved in writing, but when it has not been so preserved, a recommittal of the report becomes necessary. *Ib.*

4. Where the court orders a compulsory reference to state an account, an appeal does not lie from an order recommitting the report of the referee for the correction of errors and irregularities. *Ib.*

5. It is irregular to proceed with a reference to state an account while there are matters of defense left open which, if sustained by evidence, will bar the claim to have such account. *Sloan* v. *McMahon*, 296.

6. Under this rule, where the defendant's answer calls for an account, and the plaintiff replies a full settlement heretofore of all matters of account between the parties, it is proper for the court to submit to the jury the issue raised by the replication before ordering a reference to take the account demanded. *Ib.*

7. Such action on the part of the court decides no substantial right, and is not the subject of an appeal. *Ib.*

8. Upon a consent reference to try a cause, the question as to whether *all* the issues raised by the pleadings are to be considered, depends upon the extent of the agreement of the parties, and being a matter of fact, the finding of the court below is conclusive. *Barrett* v. *Henry*, 321.

9. Whatever may be the scope or character of such reference, an appeal will not lie from an order of re-reference. *Ib.*

10. Distinction between a reference to state an account preparatory to trial, and the trial of a cause by a referee under the Code, pointed out by RUFFIN, J. *Ib.*

11. An order of reference to state the accounts of a co-partnership between its members will not be reversed, as having been prematurely made before the existence of such co-partnership has been established, when no exception was taken at the time when the reference was made; when the right to a jury trial as to the existence of such association was expressly reserved in the order of reference; the co-partnership being admitted in the answer, as to a single transaction, and the verdict afterwards rendered on the question reserved being in affirmance of the plaintiff's claim as to the existence of the co-partnership. *McPeters* v. *Ray*, 462.

See pages 299, 376 (2). Reference to Arbitrators, 69, 70.

REFUNDING BOND, 131, 132.

REGISTER OF DEEDS, illegal issuing marriage license, 541.

REHEAR, when petition to be filed, 593.

RELEASE OF EQUITY OF REDEMPTION, 479.

RELIEF DEMANDED, 18 (11).

REMAINDER IN CHATTELS, 222.

REMOVAL OF CAUSE:

Pending the removal of a cause from one county to another and before the deposit of the transcript, it is competent for the clerk of the former county to take the examination of parties under the Revised Code, ch. 31, § 72, and the Code of Civil Procedure, § 332–341, (correcting the intimation in *Strudwick* v. *Brodnax*, 83 N. C., 401.) *Com'rs* v. *Lemly*, 341.

REPLEADER, 477.

RES ADJUDICATA, 456.

RESCINDING CONTRACT, 17 (9).

RESERVATION OF LIFE ESTATE, 222.

RETAILING, 538.

REVENUE ACT, indictment under, 555.

REVERSIONARY INTEREST, 248 (4).

REVISION OF HOMESTEAD ALLOTMENT, 278.

REVISION OF JUDGMENT, 259.

REVIVING JUDGMENT, 383.

RIGHT TO OPEN AND CONCLUDE, 5, 367 (1), 473.

ROYAL GRANT, fee simple presumed, 235.

RULE IN SHELLY'S CASE, 59, 62.

SALE UNDER DECREE, 275 (2), 313.

SECONDARY EVIDENCE, 104 (2).

SECTION 133, see pages 371, 376.

SECTION 343, see pages 367 (2), 406, 482.

SEIZIN, 466.

SEPARATE ACTION, 241 (6).

SEPARATE ESTATE, 493.

SERVICES, value of, 462; rendered testator, 51.

SET-OFF, 241 (5).

SHARES IN BANK STOCK, taxation of, 379.

SHELLY'S CASE, 59, 62.

SHERIFFS, 174 (2), 420; application for advice in distributing proceeds of sale under several executions, 418.

SIGNING JUDGMENTS, 258.

SLIGHT EVIDENCE, of concert to defraud, 81 (2).

SOLICITOR, 534, 560, 561; fee of in larceny and receiving, 569 (2).

"SPECIAL CIRCUMSTANCES," 132 (1).

SPECIFIC PERFORMANCE. 393 (2), 492 (3, 4).

STATUTE OF LIMITATIONS:

1. The endorsee of a note given in 1862 cannot rely upon a verbal promise to pay the same, made to the agent of such endorsee in 1879, in order to repel the statute of limitations. *Pool* v. *Bledsoe*, 1.

2. Where credits endorsed on a bond are relied on to repel the statutory presumption of payment, it is necessary for the plaintiff to establish by proof, *aliunde* the entry of payment, that the same was made before the presumption arose. *White* v. *Beaman*, 3.

3 Payment on a bond within ten years after it falls due by the assignee in bankruptcy of one of the obligors, repels the presumption arising from the lapse of time. *Belo* v. *Spach*, 122.

4. Plaintiff commenced action in 1879 for services rendered in 1875 to defendant's intestate, and, to repel the plea of the statute of limitations, testified that in November, 1875, he told the administrator that the deceased owed him $56; that the administrator never said whether he would pay it or not; that this was repeated several times, but that the administrator persisted in saying nothing: *Held*,

(1) That plaintiff's claim was barred by the statute of limitations:

(2) That what occurred between the parties was not such a recognition of a subsisting claim as would repel the bar of the statute, and even if it were, would be ineffectual unless in writing, under section 51 of the Code.

(3) That plaintiff's claim derived no aid from the act of 1881, ch. 80, allowing to admissions of administrators and executors the effect of an action commenced in preventing the operation of the statute of limitations. *Flemming* v. *Flemming*, 127.

5. Where suit is brought upon a bond given in November, 1868, no acknowledgment or promise will be received as evidence of a new or continuing contract, whereby the bar of the statute of limitations will be upheld, unless the same be in writing. *Riggs* v. *Robe ts*, 151.

6. An unaccepted offer to discharge the bond by a conveyance of land, is not such a recognition of a subsisting liability as in law will imply a promise to pay the debt. *Ib.*

7. The obstruction of the statute may be removed by an act of partial payment proved to have been made at a time commencing from which the prescribed limitation would not have expired at the beginning of the action; but the burden is upon the plaintiff to show that the partial payment was made at such a time as to save the debt from the operation of the statute. *Ib.*

8. The new promise which will revive a debt extinguished by bankruptcy must be distinct and specific; and a mere acknowledgment of the debt, through *implying* a promise to pay, is not sufficient. *Ib.*

9. Where an individual partner brings suit in his own name on a partnership claim not barred by the statute of limitations, and is defeated by reason of the non-joinder of his copartners, he may bring another suit on the same cause of action within a year, though the latter suit would have been barred by the statute if it had been the beginning of the litigation. *Martin* v. *Young*, 156.

10. Since to achieve the same end by different means can prejudice no one, the result may be attained by an amendment converting the individual action into one in the name of the partnership, if such amendment be made within the time in which a new action might have been brought. *Ib.*

11. Judgment rendered in 1870, though upon a debt contracted before 1868, is subject to the provisions of the Code of Civil Procedure as to the time of commencing action, whenever such judgment becomes itself a *causa litis*. *McDonald* v. *Dickson*, 248.

12. The statute of limitations is a proper plea and a complete bar to a motion for leave to issue execution on a judgment, when such motion is made more than ten years after the rendition of such judgment. *Ib.*

13. The provisions of the act of 1869-'70, (Bat. Rev., ch. 55, § 26,) suspending the statute of limitations until the falling in of the reversionary estate in the land embraced by the homestead, was only intended to apply where the homestead had been actually allotted, and only as to debts affected by such allotment, *i. e.*, to judgments docketed in the county where the homestead land is situate, and solely with reference to their liens upon the reversionary interest in such lands. *Ib.*

14. Defendants will not be allowed to set up the statute of limitations in bar of the plaintiff's claim, when the delay which would otherwise give operation to the statute has been induced by the request of the defendants, expressing or implying their engagement not to plead it. *Haymore* v. *Com'rs*, 268.

See pages 17 (10), 35 (2, 4), 51, 52, 124, 143, 147 (3), 174, 291, 415.

STOCKHOLDERS, liability of, 411, 433.

STOPPAGE IN TRANSITU, 429 (2).

SUBROGATION, 258, 492 (4).

SUBSCRIBING WITNESS, 77 (3).

SUBSTANTIAL RIGHT, 199.

SUBSTITUTED NOTE, 258.

SUFFICIENCY OF BOND, 141.

SUM BID FOR LAND, 174 (4).

SUM DEMANDED, 132 (4, 6), 138 (2).

SUMMARY EJECTMENT, 108.

SUPREME COURT:

The supreme court, being a revisory and appellate tribunal, cannot enter or reform verdicts, and when errors have entered into them it can only set aside such verdicts and award a *venire de novo*. *McMillan* v. *Baker*, 291.

SURETY AND PRINCIPAL:

1. Where the surety to a sealed note relies for his defence upon the statute of limitations, proof that he was surety is not of itself sufficient; but he must also show that the creditor had knowledge of such suretyship, where the same does not appear on the face of the instrument. *Goodman* v. *Litaker*, 84 N. C., approved. *Torrence* v. *Alexander*, 143.

2. Where a surety, upon the conveyance of land by his principal to indemnify him against his contingent liabilities, substitutes his own note for that of his principal, the original liability remains undischarged, and the creditor is entitled to avail himself of the security, which he may enforce whether the surety is or is not damnified. *Matthews* v. *Joyce*, 258.

3. Where a creditor secured in an assignment of the principal debtor's property receives his share of the fund, he cannot afterwards assert the discharged part of the debt against the surety. *Bank* v. *Alexander*, 352.

4. A creditor is not bound to a surety for active diligence against the principal, for it is the contract of the surety that the principal shall pay the debt; and the surety will not be discharged upon mere forbearance to sue, even if accompanied by a failure on the part of the creditor to inform him of the principal's want of punctuality. Due diligence is a question for the court, and it

is not error to refuse to submit an issue involving it to the jury. *Neal* v. *Freeman*, 441.

5. A principal is entitled to interest on money collected by his agent only from demand (date of summons here) and default of agent. *Ib.*

SURPLUSAGE, 205, 278 (2).

SWEARING, indictment for nuisance in, 528.

TAXES:

1. It is not only competent but the duty of county commissioners to rescind an order improvidently granted to release one from the assessment of a legal tax upon property. *Lemly* v. *Comr's*, 379.
2. Remarks of SMITH, C. J., upon the right of the state to tax shares of stock in national banks, where there is no discrimination against such shares and in favor of other *moneyed* capital in the hands of individual citizens of the state. *Ib.*

See pages 211 (3), 303.

TAX TITLES:

1. The power of the sheriff in selling land for taxes, being a naked one, uncoupled with an interest, is strictly construed, so that he must conform in its execution to the terms of the statute which creates and confers it; but, the main object of the statute being to raise revenue for the state, the courts will not exact such a rigid observance of the forms as will defeat the primary purpose, but will apply to such sales the rules applicable to execution sales for private debts. *Hays* v. *Hunt*, 303.
2. The test of the validity of the sales just mentioned is the knowledge which the purchaser has, or is presumed to have, because of his opportunity to know, of the observance by the officer of the prerequisites to such sales. *Ib.*
3. Where the non-observance of the statutory requirements are known to the purchaser, or where he has participated in their violation, he will get no benefit from his purchase. *Ib.*
4. Under these rules, a purchaser of land sold for taxes will get no title when he has not observed the mandate of the statute, to pay the amount of the taxes, take a receipt from the sheriff, and have the same registered. *Ib.* See also *Busbee* v. *Lewis*, 332 (2).

TENANTS IN COMMON, 327.

TENANT FROM YEAR TO YEAR, 108.

TENANT BY THE CURTESY, 73.

TIME OF COMMENCING ACTION, 248 (2).

TITLE TO LAND:

1. In an action to remove a cloud upon title to land, the plaintiff asks for the cancellation of a deed, which in his complaint he alleges to be void on its face because of the uncertain description of the land therein contained, *it was held* that where the illegality of the instrument complained of appears as alleged by plaintiff, a court of equity will not take cognizance of the case, but dismiss the action; it will not declare that to be a void deed which upon its face is no deed. *Busbee* v. *Macy*, 329.
2. An action to remove a cloud upon title to land will not be entertained merely to afford protective relief, where the plaintiff is under no disability to bring suit to test the question of title. (Suggestion as the manner of plaintiff's redress, and a review of authorities by RUFFIN, J., to the effect that where a valid legal objection is apparent upon the face of proceedings, &c., there is no such cloud upon the title as equity will remove. *Busbee* v. *Lewis*, 332.

TITLE TO CHATTELS, 218 (3), 275 (2), 303.

TITLE UNDER EXECUTION, 174 (2), 303.

TOWNS, 387, 573 (2); indictment for violating ordinance of, 522, (3).

TRANSACTION WITH PERSON DECEASED, 367 (2), 406, 482.

TRIAL:

1. An exception in order to be available on appeal must point out specifically the error of which complaint is made. *Moore* v. *Hill*, 218.
2. If issues framed by the court are defective or insufficient to develop the whole case, the party prejudiced thereby must lay the foundation of an appeal by suggesting the proper corrections at the time of the trial. *Ib.*
3. Where the judge determines the fact involved in a question of es-

toppel with the tacit consent of the counsel for the defence, who argues the facts before the court, the defendant cannot complain on appeal that he was denied a trial by jury. *Crump* v. *Thomas*, 272.

4. When the existence of such matter of estoppel depends upon a matter of record, the effect of which is a question of law to be determined by the court, it is unnecessary to refer the issue to a jury, whose verdict must be guided entirely by the instructions of the court. *Ib.*

5. *Quœre*, as to whether the determination of issues in a cause originating before a justice who has no jurisdiction where the title to real estate is in controversy, can be effectual in concluding a party as to the title to the recovered land in another suit where such jurisdiction does exist. *Ib.*

6. A party who neglects to tender on the trial such issues as he deems essential to the development of his cause cannot assign for error, on appeal, the failure of the court to frame and submit such issues. *Alexander* v. *Robinson*, 275.

7. Although ordinarily questions arising and decided during the examination of a witness cannot be singled out and the exception made the subject of a separate appeal, yet such appeal may be sustained when a party is deprived of important testimony, and the action, notwithstanding such appeal, may proceed to full preparation for the trial. *Com'rs* v. *Lemly*, 341.

8. The trial of an issue of *devisavit vel non* is a proceeding *in rem* to which there are strictly no parties; and when upon the trial of such issue the caveators admitted the execution of the will according to the forms of law and that the testator was of age, leaving only the question of his sanity to be tried: *It was held*, that the caveators were not entitled to open and conclude the case. *Syme* v. *Broughton*, 367. See also *Love* v. *Dickerson*, 5.

9. Plaintiff alleges non-payment of note; defendant admits its execution and avers that the consideration thereof was an article bought of plaintiff and warranted by him to be good, but which turned out to be worthless, and sets up counterclaim for alleged losses in its use; *Held*, the admission in the answer established a *prima facie* case for plaintiff, and the *onus* rested on defendant, thereby giving him the right to open and conclude. *Stronach* v. *Bledsoe*, 473.

10. Where a defendant is charged in a warrant (on appeal from a justice's court) and in a bill of indictment for the same offence, the solicitor may elect to proceed upon either, and if he proceed

upon the indictment, it has the effect of a *nolle prosequi* as to the warrant. *State* v. *Respass*, 534.

11. A defendant may plead both former acquittal and not guilty, but the jury cannot try the issues raised at the same time. After verdict against the defendant on plea of former acquittal, the court should proceed to trial on that of not guilty. There being no final determination of the prosecution before the justice in this case, the plea of former acquittal cannot be sustained. *Ib.*
12. On trial of an indictment for larceny and receiving, &c., the two counts relating to the same transaction and varied to meet the probable proofs, the court will not order the solicitor to elect upon which count he will proceed. *State* v. *Morrison*, 561.
13. Where counsel in addressing the court upon a motion for a mistrial on the ground of alleged fraud in selecting the jury, said, that two of the jurors had gone into the box "with souls blackened with perjury and bribery," &c., in the presence and hearing of the jury then impaneled, the opposing counsel objecting, and persisted in the use of abusive language towards the jurors during the trial, without being stopped by the court; *Held* to constitute ground for a new trial. After such errors are committed in the conduct of a cause as are set out in this case, they cannot be cured by the judge in his charge to the jury. *State* v. *Noland*, 576.

See pages 208 (3), 292, 296, 553, 585 (4).

TRUSTS AND TRUSTEES:

1. A husband, as trustee of his wife, was directed by a decree of court to purchase with her funds, and to take a conveyance to her separate use for life, with remainder in fee to his and her children. Instead of doing so, he took a deed "to the only proper use and benefit of the said R. M., [the husband] trustee of E. A., [the wife] her heirs and assigns forever; *Held*,

   (1) That the children mentioned in the decree were the equitable owners of the remainder in fee;

   (2) That the possession of the father under such conveyance was not adverse to the remaindermen, and hence, the statute of limitations would not run during the life-time of the mother to the prejudice of the children;

   (3) That the purchaser of the feme's estate at an execution sale, after the death of the husband, took her interest subject to the equities of the children. *McMillan* v. *Baker*, 291.
2. An administrator having obtained a decree for the sale of his in-

testate's land, to pay an alleged indebtedness to himself, and purchased the land at the sale procured by him, upon objection made by such of the heirs as were of age, contracted to convey to them, and also the minor heirs, each a moiety of the land equal to his share therein, upon the payment by them respectively of a corresponding portion of the claim against the intestate. The heirs that were of age paid their shares of the debt, and received their titles accordingly: *Held*, that the consideration inducing the promise on the part of the administrator enured to the benefit of the minor heirs, and that, upon coming of age, they were entitled to enforce the contract and call for conveyances of their aliquot portions of the land, upon discharging respectively their proportionate parts of the debt. *Williams* v. *Williams*, 313.

See pages 73, 161, 492 (3, 4), 500 (5, 6).

ULTRA VIRES, 240.

USURY, 241 (5), 342 (3).

VACATION OF JUDGMENT, 258.

VALUE RECEIVED, 473.

VARIANCE, 511.

VENDOR AND VENDEE:

The owner of a chattel which has been sold as the property of another, is estopped from asserting his title against the vendee by accepting and collecting to his own use a note which he knows that the vendee gave for the purchase money. *Moore* v. *Hill*, 218.

See pages 393 (2), 423, 429.

VERDICTS, 292, 500 (1).

VERIFICATION, 485 (5).

WAIVER, 393.

WAREHOUSEMEN, 423 (2).

WARRANT, insufficiency of, 564, 566.

WIDOW'S YEAR'S SUPPORT:

It is competent to the court to allow judgment *nunc pro tunc* to be entered in favor of a widow against the personal representative of her deceased husband, for an amount covering the deficiency of personal estate, so as to make up the total sum allowed as her year's support; and there is no statute limiting the power of the court in thus amending its record. The widow is also entitled to interest on such judgment. *Long* v. *Long*, 415.

WILLS:

1. A testator, dying in 1837, devised as follows: "I leave to my daughter C, the tract of land that I bought of H., to her, her natural life, and after her death, I give the same to her heirs forever." In another clause of the will there was a similar bequest of personal property; *Held*, that the word "heirs" was one of limitation, and not of purchase, and the daughter took an estate in fee. *King* v. *Utley*, 59.

2. A devise of an estate generally or indefinitely, with a power of disposition over it, carries a fee; but where the estate is given for life only, the devisee takes only an estate for life, though a power of disposition, or to appoint the fee by deed or will, be annexed. *Patrick* v. *Morehead*, 62.

3. A testator devised as follows: "I give unto my grandson, J. D. P., the plantation known as the old 'Iron Works,' to hold during his life-time, and if it shall so happen that he has any lawful heirs, I give it to them or any of them that he may think proper; and should it so happen that he dies without any lawful issue, for the land to be equally divided among all my grandchildren." At the death of testator J. D. P. was about fourteen years of age and unmarried; and at the date of the will the testator's son, J. P., and daughter, M. F., had children then living; *Held*, that J. D. P. took a life estate only, and that the remainder in fee vested in his children as purchasers. *Ib.*

4. A testator devised land to a trustee for the benefit of his daughter and her children, she having two children when the will was made who survived the testator: *Held* that the devisees take a fee simple estate as tenants in common; and upon the subsequent death of the mother, the father is entitled to an estate for life as tenant by the curtesy in one-third part of the devised land. *Hunt* v. *Satterwhite*, 73.

See pages 146, 147.

WITNESS:

1. The fact that an attorney has had an interest in the event of a suit on account of the tax-fee, does not disqualify him under C. C. P., § 343, from testifying as to a transaction or communication with a person deceased. *Syme* v. *Broughton*, 367
2. An interest in the thing in controversy does not disable a witness to testify as to a communication with one deceased; the disqualifying interest is an interest in the event of the action. *Mull* v. *Martin*, 406.
3. The rule as to interest is, that if the verdict in the case cannot be given in evidence in another suit to which the witness may be a party, he shall be deemed disinterested. *Ib.*
4. A party to an action is not incompetent under section 343 of the Code to testify to a transaction between the witness and a person deceased at the time of such examination, where the representatives of the deceased is not a party to the suit. *Held further*, where the defendant opens the door by his own evidence as to such transactions, the matter is set at large, and the plaintiff's contradictory testimony becomes competent. *Hawkins* v. *Carpenter*, 482.
5. On a trial for an affray prior to the act of 1881 allowing defendants to testify in their own behalf, one defendant could not oppose the testifying of his co-defendant for himself—the state's counsel not objecting. *State* v. *Hamlett*, 520.
6. Where the defendant in a criminal action avails himself of the act of 1881, ch. 110, and becomes a witness in his own behalf, he thereby subjects himself to all the disadvantages of that position, in the same manner as any other witness, and may be discredited by proof of his general bad moral character. *State* v. *Efler*, 585.

See pages 337 (1), 342 (5), 544.

YEAR'S SUPPORT, 415.