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NORTH CAROLINA REPORTS.

VOL. LXXXIX.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA.

OCTOBER TERM, 1883.

REPORTED BY

THOMAS S. KENAN.

(VOL. 14.)

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1884.

JUSTICES OF THE SUPREME COURT,

October Term, 1883.

CHIEF JUSTICE:

WILLIAM N. H. SMITH.

ASSOCIATE JUSTICES:

THOMAS S. ASHE, *AUGUSTUS S. MERRIMON.

*Appointed by Governor Jarvis on the 29th of September, 1883, vice Thomas Ruffin, resigned.

CLERK OF THE SUPREME COURT .....WILLIAM H. BAGLEY.
MARSHAL OF THE SUPREME COURT.....ROBT. H. BRADLEY.

ATTORNEY-GENERAL:

THOMAS S. KENAN.

JUDGES OF THE SUPERIOR COURTS.

JAMES E. SHEPHERD, 1st Dist.	JOHN A. GILMER, 5th Dist
FREDERICK PHILIPS, 2d "	WILLIAM M. SHIPP, 6th "
ALLMAND A. MCKOY, 3d "	JESSE F. GRAVES, 7th "
JAMES C. MACRAE, 4th "	ALPHONSO C. AVERY, 8th "

JAMES C. L. GUDGER, 9th Dist.

SOLICITORS.

JOHN H. BLOUNT, 1st Dist.	F. N. STRUDWICK, 5th Dist.
JOHN H. COLLINS, 2d "	FRANK I. OSBORNE, 6th "
SWIFT GALLOWAY, 3d "	JOSEPH DOBSON, 7th "
JAMES D. MCIVER, 4th "	JOSEPH S. ADAMS, 8th "

GARLAND S. FERGUSON, 9th Dist.

JUDGE OF THE CRIMINAL COURT.

OLIVER P. MEARES..... .... Wilmington.

SOLICITOR:

BENJAMIN R. MOORE..... .... Wilmington.

LICENSED ATTORNEYS,

October Term, 1883.

WILLIAM J. ADAMS,
JAMES T. ELLIOTT,
WALTER E. FAISON,
ARCHIBALD C. FLOYD,
MACMURRAY FURGERSON,
THOMAS H. HARDWICKE,
GEORGE W. HAYES,
ASHLEY T. HILL,
JOHN H. JOHNSTON,
EDMUND JONES,
JAMES M. LEACH, JR.,
THOMAS C. LINN,
JAMES R. LLEWELLYN,
JAMES B. MCGUFFIN,
SAMUEL E. MORPHEW,
JAMES NORFLEET,
JAMES W. OSBORNE,
WILLIAM B. RODMAN, JR.,
NOAH J. ROUSE,
HENRY T. RUMBOUGH,
EDWARD C. SMITH,
DUGALD STEWART,
JAMES H. TUCKER,
WALTER W. VANDIVER,
STEPHEN E. WILLIAMS,
THOMAS C. WOOTEN.

CASES REPORTED.

Cases Cited, see Appendix.

ERRATA.

Page 30, line 17, of opinion, for "manuscript" read "transcript."
Page 98, line 9, from bottom, for "make" read "mistake."
Page 112, last line, for "ruthless" read "reckless."
Page 116, lines 3 and 4, of headnote, read "to charge the jury that he had ɪt shown," &c. (omitting the words "that he") at end of line.
Page 193, line 18, for "whom" read "which."
Page 195, line 27, read, "It was his duty" (omitting "not").
Page 213, line 5, for "constitutional" read "constitutive."
Page 214, line 9, for "boldly" read "broadly."
Page 279, line 6, for "Orange" read "Durham."
Page 382, line 22, for "material" read "natural."
Page 428, line 1, of opinion, for "receipt" read "script."
Page 432, line 7, for "imparted" read "imputed."

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

OCTOBER TERM, 1883.

B. B. WINBORNE v. H. T. LASSITER and others.

Fraud and fraudulent conveyances, evidence in.

Fraud alleged in the execution of a deed cannot be proved by evidence of fraud in one subsequently made, unless it be established by proof that the two transactions are parts of a concerted purpose to defraud, or that the latter is connected with, or in furtherance of the objects of the former.

(*State* v. *Vinson*, 63 N. C., 335; *State* v. *Shuford*, 69 N. C., 486; *Withrow* v. *Biggerstaff*, 87 N. C., 176, cited and approved).

EJECTMENT tried at Spring Term, 1882, of HERTFORD Superior Court, before *McKoy, J.*

Verdict and judgment for plaintiff, appeal by defendants.

Mr. R. B. Peebles, for plaintiff.

Messrs. W. S. Bryan, D. A. Barnes and *Pruden & Shaw*, for defendants.

MERRIMON, J. The record in this action shows that the defendant H. T. Lassiter was the owner of the land described

in the pleadings, and that both the plaintiff and the defendants Whedbee & Dickerson claim to derive title to the same from him.

The plaintiff so claims by virtue of a deed executed to him by the sheriff of Hertford county, in pursuance of a sale made by him on the 7th day of July, 1879, under executions duly issued to him, in favor of sundry creditors, and against the defendants H. T. Lassiter & Son.

The defendants Whedbee & Dickerson so claim by virtue of a mortgage deed executed to them by the defendant H. T. Lassiter and his wife, on the 25th day of September, 1878, and registered November 15th, 1878, to secure the payment of debts due to them from H. T. Lassiter & Son, the said H. T. Lassiter being the defendant of that name.

The plaintiff denied the validity of the said mortgage deed, on the ground that it was fraudulent and void, as to the creditors of said H. T. Lassiter & Son. It was admitted, however, that the debt mentioned in this mortgage was *bona fide*.

At the trial, the court submitted to the jury issues as to the fraudulent character of the mortgage.

The plaintiff introduced testimony tending to prove that the mortgage was fraudulent. A part of this testimony consisted of divers letters relating to the mortgage, but these letters are not set out in the record, nor does it appear what they contained.

In further support of the allegation of fraud in the mortgage, the plaintiff offered in evidence a deed of trust, dated the 27th of November, 1878, whereby the said H. T. Lassiter & Son conveyed to the defendants Whedbee & Dickerson, trustees, all their assets in trust to secure, first, an alleged debt of $12,000 due to them; secondly, a debt of $2,000 due to James Cary & Co.; and thirdly, all their other creditors equally; and, also, divers letters between Whedbee & Dickerson and H. T. Lassiter & Son, tending, as the case states, to prove that this deed of trust was intended to hinder and delay the creditors of H. T. Lassiter & Son. These letters are not set out in the record, nor does it appear what they contained. It was admitted by the defendants,

that $6,000 of the $12,000 debt mentioned in the deed of trust, was the same debt mentioned in the mortgage.

The defendants objected to the introduction of this deed of trust and the letters relating to the same, because the whole was subsequent to the execution of the mortgage deed in question, conveying entirely different property to secure, in part, another debt, and was made to Whedbee & Dickerson as trustees; and insisted that this deed and the letters were not evidence to show the purposes, intent and character of the mortgage of the 25th of September, 1878, which was made, as was admitted, to secure a *bona fide* debt. The court admitted the deed of trust and letters in evidence, and the defendants excepted.

The summary of the evidence given on the trial to support the allegation of fraud, as to the mortgage, is for the most part very general in its terms, meagre and unsatisfactory. It appears that there was evidence other than that sent up, but what it was, and especially what the letters mentioned contained, we have no means of knowing. Neither the mortgage deed nor the deed of trust appears in the record. It is possible that such a state of facts appeared, as rendered the deed of trust and the letters in relation thereto admissible; but we must be governed only by the record as it comes to us.

In our judgment, the exception mentioned above must be sustained, upon the ground that no such relation was shown between the alleged fraudulent deed of trust and the mortgage, as rendered the former evidence to support the allegation of fraud in the latter.

A fraudulent transaction, subsequent to, separate and distinct from, a former one between the same parties, is not of itself evidence to prove the latter. That one made a fraudulent deed, taken *per se*, no more proves that he made another deed similar in character, than the commission of a crime by one party proves that he committed another, or others of like character on different occasions. That a person, who has committed a crime or perpetrated a deliberate fraud, is capable of committing other

like crimes and frauds, one might well suspect; but such suspicion is not evidence. It could not justly and reasonably aid the jury in reaching a fair conclusion upon the issue submitted to them. It would only tend to mislead and confuse them.

In the case before us, the mortgage may be fraudulent and void, while the deed of trust may be honest and valid, or both may be fraudulent; but taken *per se*, how, in the eye of the law, can the fraud in the one prove it in the other? It may create a suspicion, but not evidence. There must exist such facts and circumstances as reasonably point to a corrupt relation between the two transactions. *Edwards* v. *Warren*, 35 Conn., 517; *Somes* v. *Skinner*, 16 Mass., 360; *Stevens* v. *Van Cleve*, 4 Wash., C. C. N., 262; *Matton* v. *Nesbit*, 1 Car. & P., 70; *State* v. *Vinson*, 63 N. C., 335; *State* v. *Shuford*, 69 N. C., 486; *Withrow* v. *Biggerstaff*, 87 N. C., 176.

There is, however, a class of cases wherein similar frauds and fraudulent transactions done at or about the same time, or where the same motive to perpetrate fraud may reasonably be supposed to exist, as the one in question, are admissible to show the *quo animo;* but this is allowed only when there is a conspiracy or a concerted purpose to commit fraud. 3 Wait Act. & Def., 447; *Edwards* v. *Warren*, *supra*.

To render a subsequent fraudulent deed admissible as evidence to prove a former one fraudulent, some corrupt relation must be shown to exist between the two, as that they are both parts of a concerted purpose to defraud creditors, or the subsequent one is in some way connected with, or in furtherance of the prior one. To show this, there must be evidence pertinent, relative, that tends reasonably to show such connection between the two fraudulent deeds. The evidence to prove such relation may consist of positive, direct testimony, or it may consist of a multitude of facts and circumstances combined, from which it may be inferred.

In this case, the mortgage in question was made by the defendant H. T. Lassiter and his wife, to the defendants Whedbee & Dickerson, and embraced the land mentioned in the plead-

ings. It is admitted that the debt, intended to be secured by it, was *bona fide*. The deed of trust was made by H. T. Lassiter & Son, and conveys only their assets to the defendants Whedbee & Dickerson, as trustees, to secure, first, a debt due to themselves; secondly, a debt due to James Cary & Co.; and thirdly, all the other creditors of the trustors. There are material parties to the deed of trust, not parties to, or in any way connected with the mortgage. The mortgage deed embraces only land, the property of H. T. Lassiter.

Now, so far as this court can see, the deed of trust, whether *bona fide* or fraudulent, has no connection with, but is entirely separate and distinct from the mortgage; nor have the transactions, in respect to the mortgage, any relation to or connection with those of the deed of trust. Then, treating the deed of trust, for the purposes of the argument, as fraudulent, it cannot be evidence to show the fraudulent character of the mortgage. There is no evidence appearing in the record to show that the deed of trust was part of a corrupt purpose in the making of the mortgage, or in furtherance of the same.

It was admitted by the defendants that the mortgage debt was secured by the deed of trust. This is a slight circumstance, and of itself does not establish a connection between the two alleged fraudulent transactions. The mortgagees might well desire to increase the security for their debt. The time of the execution of the deed of trust is, under the circumstances of the case, a slight fact.

We do not say that the deed of trust, if fraudulent, could not in any case be evidence for the plaintiff, to show the fraudulent character of the mortgage; but what we say is, that it must first be show by proper evidence, that in some way it had connection with the supposed fraudulent mortgage, as part of the same fraud, or in aid or furtherance of it.

What weight the admission of the evidence objected to had upon the minds of the jury, it is impossible to determine. The plaintiff supposed it would have some weight, and therefore

introduced it. The presumption is, it did in some measure influence the action of the jury. It was, in our judgment, erroneously received, and the exception must therefore be sustained.

There are other exceptions, but as the one we have considered entitles the defendants to a new trial, we need not consider them.

There is error. The defendants are entitled to a new trial, and it is so ordered. Let this be certified.

Error. *Venire de novo.*

W. W. VASS v. N. J. RIDDICK.

Negotiable Instruments—Fraud—Liability of Signer.

One who signs a note or bond cannot avoid his liability by showing that he was induced to execute the same by the fraud of his co-obligor, in which the obligee did not participate.

(*Barnes* v. *Lewis*, 73 N. C., 138; *Gwyn* v. *Patterson*, 72 N. C., 189, cited and approved).

CIVIL ACTION tried at Fall Term, 1883, of WAKE Superior Court, before *Shepherd, J.*

The action was brought upon a promissory note, of which the following is a copy:

We promise to pay to the order of W. W. Vass, 1 year after date, the sum of two hundred and fifty dollars for money borrowed—note to draw eight per cent. interest after maturity. Dated, Raleigh, February 13, 1880, and signed by Leroy G. Bagley, W. H. Bagley and N. J. Riddick.

W. H. Bagley denied the execution of the note, and the defendant Riddick admitted its execution, but averred that the note had been altered in a material part after having been signed by him.

The following issues were submitted to the jury:

1. Was the note altered after the signature and delivery of Riddick, and without his consent, so as to make it read "two hundred and fifty" instead of "one hundred and fifty" dollars. Ans.—No.

2. Was the note altered after the signature and delivery of Riddick, and without his consent, by inserting the words "1 year." Ans.—No.

3. Did W. H. Bagley execute the note. Ans.—No.

Upon this finding, and the admissions of Riddick, the court adjudged that the plaintiff recover of him the amount of the note, with interest at eight per cent., and that W. H. Bagley go without day. From this judgment, Riddick appealed.

Messrs. Pace & Holding, for plaintiff.

Messrs. Battle & Mordecai and *Gatling & Whitaker*, for defendant.

ASHE, J. On the trial, it was conceded that when Riddick signed the note the names of Leroy G. Bagley and W. H. Bagley were on the note, and that he signed the same believing the name of W. H. Bagley to be genuine. It was admitted that, on or about the date of the note, and after Riddick had signed it, Leroy G. Bagley took it to the plaintiff, who, believing the signatures of all the signers of the note to be genuine, loaned the amount of the note, less one year's interest, and that no part of the same had been paid.

After the verdict was rendered, the question of the liability of the defendant upon the verdict and admissions above set forth, was argued before the court, and the court being of opinion with the plaintiff, rendered judgment in his favor.

The record fails to state the grounds taken by the defendant's counsel in the court below, but we presume it was the same that was urged in this court, viz.: that the name of W. H. Bagley having been forged, and the defendant seeing his name to the note and believing it was genuine, and that he was good for the

amount, was induced to sign it, and by reason of the fraud and imposition thus practiced upon him by Leroy G. Bagley, he was discharged from liability on the note, and judgment ought not to be rendered against him upon the finding of the jury.

Such a defense could not have availed the defendant, if it had been taken on the trial; for under our law, all bills, bonds and promissory notes are joint and several, and an action may be brought against one or more of the parties thereto, at the option of the plaintiff. C. C. P., §63. And when bonds and notes are thus several as well as joint, in the absence of any reservation or condition at the time of the delivery of the instrument, the obligors or makers are separately bound; and the obligation assumed by each is the same as upon an independent contract. *City of Sacramento* v. *Dunlap*, 14 Cal., 421. Hence it is held, that if a bond (and there is no difference in this respect between a bond and a promissory note) be signed and delivered without any condition or reservation annexed, although it may appear to have been contemplated by the parties that it should be signed by others, it is the deed of the obligor and will be binding on him, although the others do not sign. *Haskins* v. *Lombard*, 10 Maine, 140; *Barnes* v. *Lewis*, 73 N. C., 138; *Scott* v. *Whipple*, 5 Greenl., 336; *State* v. *Peck*, 53 Maine, 284. And even where there is a condition or reservation imposed at the time of delivery, if it is stipulated with the principal obligor or maker, and the payee or obligee has no knowledge of it, the maker or obligor will be bound. As in *Gwyn* v. *Patterson*, 72 N. C., 189, where it was held, "that one who signed a covenant as surety, upon the condition and agreement between him and his principal that it is not to be binding upon him or delivered to the covenantee, unless another person should also sign it as surety, is bound thereby, although the principal to whom he entrusted it delivered it to the covenantee without a compliance with such condition, of which, and its breach, the latter has had no notice." So in *Bigelow* v. *Comegys*, 5 Ohio, 256, which was an action brought upon a replevin bond that was required by statute to be executed

with two sureties; it was held it was not void because actually signed and delivered by the party with one surety only, the name of another person appearing on the bond, as surety, being a forgery. The principle upon which it was decided was, that an obligor who has signed a bond cannot avoid his liability by showing that he was induced to execute the bond by the fraud of one of his co-obligors, in which the obligee had no participation whatever. To the same effect is *Barnes* v. *Lewis, supra;* and also, *Anderson* v. *Warren,* 71 Ill., 20, which, like the case at bar, was an action upon a promissory note, and it was sought by one of the makers to avoid the payment on the ground the note was obtained by the fraud and circumvention of a co-maker, which was not participated in by the payee; and it was held, that his rights could not be affected by any fraud practiced between the makers of the note.

The doctrine established by these cases is founded upon the settled rule, that where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss; for it is against reason that an innocent party should suffer for the negligent conduct of another.

The facts in the case before us bring it directly within the application of the principle enunciated in the cited cases. Riddick was the maker with Leroy G. Bagley, who forged the name of W. H. Bagley, and Vass was the payee. The loss must fall upon the one or the other. The plaintiff was the innocent payee of the note. He had no knowledge of the fraud practiced upon the defendant by Leroy G. Bagley; but the defendant was guilty of negligence in not informing himself of the genuineness of the signature of W. H. Bagley before signing the note, and he must therefore bear the loss.

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

No error. Affirmed.

*W. W. VASS v. W. H. ARRINGTON and others.

Judicial Sale, power of court to set aside—Title of Purchaser.

1. A sale of land will be set aside when the price is shown to be inadequate; otherwise, it will be confirmed upon a favorable report of the commissioner, unless an offer be made to raise the bid ten per cent.
2. The purchaser in such case acquires title from the day of sale; and the proceeds thereof are only subject to the charge of taxes due upon the land at that time.

(*Blue* v. *Blue*, 79 N. C., 69; *Bost ex-parte*, 3 Jones' Eq., 482; *Pritchard* v. *Askew*, 80 N. C., 86; *Wood* v. *Parker*, 63 N. C., 379; *Attorney General* v. *Ro. Nav. Co.*, 86 N. C., 408; *McArtan* v. *McLauchlin*, 88 N. C., 391, cited and approved).

MOTION to set aside a sale heard at June Term, 1883, of WAKE Superior Court, before *Philips, J.*

The action, in which the motion was made, was brought by the plaintiff against W. H. Arrington and wife Pattie, to foreclose a mortgage.

On the 1st of November, 1872, the defendant W. H. Arrington borrowed from B. F. Moore the sum of $2,140, and gave his bond for the same; and at the same time he and his said wife executed to Moore a mortgage on the house and lot, situate in the city of Raleigh, and described in the pleadings, to secure the payment of the bond. The house and lot were the individual property of said Pattie Arrington, which she inherited from an ancestor.

Sundry payments were made on the bond while held by B. F. Moore, reducing the amount due thereon to $1,242.60 on the 10th of December, 1877, on which day it was assigned for value, and without recourse, by Moore to the plaintiff Vass.

The mortgage deed contained a stipulation that if the bond and interest accrued thereon shall not be paid as the same shall

*Chief-Justice SMITH did not sit on the hearing of this case.

become due, together with all the taxes assessed on the property, then the said Moore should have power to sell the premises, for cash, after twenty days' advertisement in some newspaper published in the city of Raleigh, and apply the proceeds to the payment of the bond and interest, the unpaid taxes, costs of executing the mortgage, and five per cent. commissions on the proceeds of sale.

B. F. Moore died intestate of said property in November, 1878, and by proceedings regularly had in the probate court of Wake, the defendant John Gatling was appointed trustee of the mortgage in January, 1882, in respect to the property therein conveyed. The plaintiff called upon Gatling to sell the property under the power given in the mortgage, but he declined to do so without a judgment of the superior court authorizing him to make the sale. Hence this action was brought demanding a sale and appropriation of the proceeds thereof to the payment of the bond and interest, and all the incidental expenses incurred by the plaintiff, or otherwise arising under the stipulations and covenants contained in the deed of mortgage.

Process returnable to spring term, 1882, of Wake superior court, was served upon the defendants W. H. Arrington and wife, and accepted by the defendant Gatling. W. H. Arrington then alone answered the complaint, admitting in the main the facts alleged, but contended that he was entitled to the excess after satisfying the plaintiff's claims for money advanced for the use of the defendant Pattie Arrington, and as tenant by the courtesy. At said term it was adjudged that the land be sold by said trustee as commissioner, after thirty days' advertisement, at any time after the 1st day of May, 1882, for cash, and that the trustee execute a deed to the purchaser and report his action to the next term of the court.

The report was made to June term, 1883, that the property was sold for cash at public sale on the first Monday in May, 1883, when Pattie Arrington became the last and highest bidder in the sum of $5,050, but as she failed to comply with the bid, the

property was again, at 3:30 P. M. of the same day, offered for sale upon the same terms, when W. N. H. Smith was the last and highest bidder in the sum of $5,000; and at that time and at the time of the sale, there was due on said bond the sum of $79.08 for state, county and city taxes. The commissioner further reported that the land, in his opinion, formed after diligent inquiry of judges of the value of Raleigh property, brought a full and fair price, and recommended the confirmation of the sale.

Thereupon Pattie Arrington, who it was admitted was the owner of the land in fee simple, subject to the mortgage, opposed the confirmation of the sale, and moved that it be set aside upon the ground that the property did not bring a fair price; and she also moved that the commissioner Gatling, be directed to sell the land in parcels, and to sell only so much as was necessary to pay the claims under the mortgage and the costs of the action, which it was admitted would not exceed $2,500. Besides her own, she offered the affidavits of four citizens of Raleigh, stating that the lot did not bring a fair price, and that if sold in parcels it would bring considerably more than the sum of $5,000.

In opposition to the motion, the other parties to the action and the purchaser (Smith) offered, in addition to the opinion of the commissioner, the testimony of some six witnesses, also citizens of Raleigh, two of whom were recent assessors of the real estate in the township of Raleigh, and had assessed the said house and lot at $3,500, as its value at a cash sale; and they both stated that $5,000 was a fair price. All of the other witnesses testified to the same effect, and the most of them expressed the opinion, that if W. N. H. Smith, who owned the adjoining lot, did not bid, the property would not bring as much as $5,000 upon a resale, and that the purchaser could not now get for it as much as he gave. The witnesses were divided in opinion as to whether the property would bring as much as $5,000 if cut up into lots.

His Honor overruled the motion and rendered judgment,

among other things, confirming the sale, and directing the commissioner to make title to the purchaser upon payment of the sum bid, and also adjudged that the commissioner pay out of the purchase money the taxes which attached to the land on the 1st of June, 1883. The *feme* defendant excepted to the ruling, and appealed from the judgment.

Messrs. Strong & Smedes, for *feme* defendant.
Messrs. Battle & Mordecai, for purchaser.

ASHE, J. We can see no reason for disturbing the judgment of the superior court, except so far as it relates to the taxes due in 1883.

The courts, exercising in this respect an equity jurisdiction, according to all the authorities, have an absolute power over all sales had under their orders, in confirming or setting them aside and reopening the biddings, &c., but they have adopted certain rules governing their practice in such cases, which have been observed with almost unvarying uniformity.

In this state our courts have adopted the English practice, and will set aside a sale for inadequacy of price, when that fact is shown to the court by affidavit or otherwise; but when the commissioner has reported that the property sold has brought a fair price, and there is no evidence adduced to the contrary, the court will confirm the sale, unless before confirmation an offer is made to raise the bid ten per cent.; in which case our courts will always set aside the sale and open the biddings. *Blue* v. *Blue*, 79 N. C., 69; *Bost ex-parte*, 3 Jones' Eq., 482; *Pritchard* v. *Askew*, 80 N. C., 86; *Wood* v. *Parker*, 63 N. C., 379; *Attorney General* v. *Roanoke Navigation Co.*, 86 N. C., 408.

There has been no offer in this case to raise the bid, and the evidence upon the question of inadequacy of price is so decidedly in favor of the purchaser, that we are led to the conclusion that the property brought a full and fair price.

By the terms of the mortgage, it is evident it was the inten-

tion of the parties that the property should be sold *in solido*. The decree of sale in that way was acquiesced in by the parties at the time of its rendition, and up to the very day of sale, as is indicated by the bidding of Mrs. Arrington at the sale. There was no objection by her to the sale in entirety until some fifteen months after the decree, and not then until she failed to comply with her bid. And the court, in decreeing a sale of the entire property, only carried out the intention of the parties as indicated by the terms of the deed, and their acts and conduct after the decree. Yet this would have but little weight with the court if it had been made to appear that any injustice had been done to the complaining party.

As to so much of the judgment of the superior court as charges the excess of the proceeds of sale with the taxes due the first of June, 1883, we are of the opinion it was erroneous, and the defendant's exception should have been sustained.

Where land is sold under decree of court, the purchaser acquires no independent right. He is regarded as a mere proposer until confirmation. *Attorney General* v. *Roanoke Navigation Co.*, *supra*. But when confirmation is made, the bargain is then complete, and it relates back to the day of sale. Rorer on Jud. Sales, §122. The case of *McArtan v. McLauchlin*, 88 N. C., 391, is an adjudication on this point, which, it seems to us, is decisive of the question. There, a creditor of one McLeod, who died in May, 1870, brought action against his administrator and recovered judgment for a considerable amount, and then sought to have the land of McLeod subjected to the payment of his demand. The land had been sold under a decree of sale for partition on the 3d of November, 1871, and the deeds to the purchasers were executed after two years from the granting of letters of administration, and the question presented to this court was whether the title of the purchasers accrued from the date of the deeds, or from the sale. Mr. Justice RUFFIN, speaking for the court, said:

"The court thinks, and so declares, that the defendants (who

were the purchasers) took the lands from the commissioner in the same plight and condition they were in at the moment of sale, and subject, as they were, to the payment of the decedent's debts."

Applying the principle there announced to our case: By the confirmation of the report of the commissioner, the purchaser acquired title to the house and lot by relation to the day of sale, and takes them in the same plight and condition they were in at the moment of sale on the — day of May, 1882, subject to the taxes due in that year.

The judgment must therefore be reformed so as to eliminate therefrom so much as relates to the charge of the taxes of 1883 upon the proceeds of the sale, and in all other respects is affirmed. Let this be certified to the superior court of Wake county, that further proceedings may be had in the case as the law requires.

PER CURIAM. Modified.

ADDISON WILEY and wife v. A. W. LINEBERRY and others.

Statutory Presumption of Payment—Insolvent Debtor.

1. Where an insolvent debtor executed a deed in trust conveying land to secure a creditor, and in an action to prevent the sale of the land, the issue was whether the debt had been paid, it was held competent for the debtor to show the value of the land conveyed, to sustain the statutory presumption of payment.
2. Whatever effect the insolvency may have upon other creditors, it cannot avail the creditor in this case who has a security for the debt, for as to him the debtor is not insolvent.

(*Blake* v. *Lane*, 5 Jones' Eq., 412; *Walker* v. *Wright*, 2 Jones, 155, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of GUILFORD Superior Court, before *Shipp, J.*

This action was brought to enjoin the defendant James Sloan from selling certain lands conveyed to him, as trustee, by the plaintiffs. The facts are stated in the opinion of this court. There was judgment for defendants, from which the plaintiffs appealed. (The appeal not being perfected, the plaintiffs applied for and obtained a writ of *certiorari*. See *Wiley* v. *Lineberry*, 88 N. C., 68).

Messrs. Dillard & Morehead, for plaintiffs.
Messrs. Scott & Caldwell, for defendants.

SMITH, C. J. The plaintiffs, by their deed of August 20, 1853, conveyed the land mentioned in the complaint, and which belonged to the wife, to the defendant Sloan, in trust to secure a bond executed by the husband about the same time to John A. Gilmer for the sum of $168.10, due on August 30th.

The concluding clause in the deed provides that in case a sale shall be made in order to the discharge of the trust, the residue of the moneys thus raised and not required for that purpose, if any, shall be paid over "to the said Addison Wiley or his assigns," but if he shall pay the secured debt and all expenses incident to the performance of the trusts, without such sale, then "this deed shall become null and void, and the said James Sloan shall, upon the request of the said Addison Wiley, reconvey said property to him in fee simple."

The bond has since been assigned by the payee to the defendant A. W. Lineberry.

The trustee being required to sell the land, and about to do so, the present suit was instituted on March 22, 1880, for the purpose of preventing the sale, upon an allegation that the secured debt had been paid, and demanding the surrender of the bond and cancellation of the deed, or other appropriate relief.

A single issue, drawn up at spring term, 1882, as embodying the substantial matter in controversy, without exception, or the suggestion of any others, was submitted to the jury at the term following, in these words:

"Have the debt and mortgage described and referred to in the pleadings been paid?"

The jury, under the charge of the court, responded in the negative, and the exceptions before us in the record are to the rulings of the court upon the trial.

To repel the presumption of payment raised by the lapse of time under the statute, the defendants introduced evidence that the plaintiff Addison resided and cultivated crops with the defendant Lineberry, during the period of the civil war; of his utter and continuous insolvency since making the deed; and further, that the said Addison had recognized the debt as subsisting, by an offer to pay it in Confederate currency, while it was in use; had made a small payment on it in 1869; and expressly admitted the obligation within two or three years before the trustee advertised the land for sale.

The surety to the bond who executed it with the principal, his father, examined for the defendants, testified that he had not paid it, and on his cross-examination said that the defendant, Lineberry told him in January, 1870, that the plaintiff Addison had paid the debt, and when he had finished certain work in which he was then employed for said Lineberry, he would have overpaid it.

The plaintiffs' counsel, to sustain the statutory presumption, further proposed to inquire of a witness the value of the land conveyed, and on objection, was not permitted to offer the proof.

The sole inquiry before the jury was as to the discharge of the debt and the security given, and on the one side was the presumption aided by the declarations of the assignee and owner of the bond; and on the other the insolvency and admissions of the principal debtor, with his offer to pay in Confederate money.

This evidence was to be weighed and passed on by the jury in determining the fact in dispute.

The debtor's insolvency was a material circumstance in the inquiry, and certainly it was competent to meet this by showing that the creditor had, in the security provided by the debtor, a

fund in his own hands and under his own control from which his debt could at any time be made. Whatever effect the insolvency might have upon the delay of other creditors to take steps to enforce their claims, it cannot avail this creditor as an excuse for his long inaction, since as to him the debtor may not have been insolvent, and the force of the statute thus unimpaired.

Thus, insolvency of a mortgagor of slaves to secure a debt, when the mortgagee had the means of payment under the security given, was held not to repel the presumption arising from lapse of time in *Blake* v. *Lane*, 5 Jones' Eq., 412, and the same ruling was made in *Walker* v. *Wright*, 2 Jones, 155, cited in the argument for appellant.

In the conflicting evidence, as to actual payment, aside from the legal presumption, the possession by the trustee of a fund under the creditor's control and which the trustee was bound to appropriate at his instance to the discharge of the debt, and its sufficiency for that purpose, was an important element to be considered by the jury in arriving at their verdict, and ought not to have been withheld from their hearing. Whether it would have turned the scale, it is not for us to inquire; and it is enough for us to say that it was error in excluding the evidence, for which the plaintiffs are entitled to a new trial.

This dispenses with the necessity of our passing upon the other exceptions.

There is error and a *venire de novo* is awarded. Let this be certified.

Error. *Venire de novo.*

THOMAS A. ALLEN v. ROBERT SIMPSON and others.

Judgment.

A judgment recovered upon a bond for less than sixty dollars, in an action brought prior to the time when the Code of Civil Procedure went into operation, is a valid judgment. This case is governed by the Revised Code, ch. 31, §38, and it does not appear that the defendant availed himself of his right thereunder, either to *plead in abatement* or *move* to dismiss the suit.

(*Brooks* v. *Collins*, Taylor's Rep. 236, cited and approved).

EJECTMENT tried at Fall Term, 1883, of RUTHERFORD Superior Court, before *Shipp, J.*

Both parties claimed title to the land in controversy under J. M. Justice.

The plaintiff claimed under a sheriff's sale and deed, by virtue of an execution from the superior court of Henderson county, issued on the 5th day of November, 1875, upon a judgment rendered in favor of Albert Jones in the superior court of Henderson county, and docketed in the superior court of Rutherford county.

The plaintiff introduced a transcript of the judgment from Henderson county. The judgment was for the sum of fifty-nine dollars and twenty-five cents, founded upon a bond for forty-six dollars and thirty-five cents.

The defendants claim under a deed from J. M. Justice and wife, dated the 4th day of August, 1873, and showed that they went into possession of the land immediately and have held continuous possession ever since.

The defendants contended that the judgment under which the plaintiff claimed title was void, and that the execution sale under it passed no title to the plaintiff.

Verdict and judgment for the plaintiff; appeal by defendants.

Messrs. Hoke & Hoke, for plaintiff.

Messrs. Jones & Johnston, for defendants.

ASHE, J. There were several exceptions taken on the trial, but they were all abandoned here except that to the validity of the judgment.

The action in which the judgment was rendered was commenced in 1867, and the judgment was rendered in September, 1869.

By the Code of Civil Procedure, Title 1, §3, it is provided, "that all actions commenced prior to the ratification of this act, or which shall be hereafter commenced, founded upon a contract made prior to the ratification of this act, shall be governed with respect to the practice and procedure therein, up to and including the judgment, by the law existing prior to the ratification of this act, as near as may be, and the practice in such actions, subsequent to judgment, shall be governed by the enactments of this act."

What then was the law previous to the 24th of August, 1868, when the Code of Civil Procedure went into operation? In the Revised Code, ch. 31, §40, it was declared that no suit shall be commenced in any of the said courts (county and superior) for any sum of less value than one hundred dollars due by bond, promissory note, or liquidated account signed by the party to be charged therewith. The 41st section of the act provided that if a suit should be commenced in the county courts for a sum of less value than sixty dollars, it should be abated on the plea of the defendant; but if commenced for a sum of less value than one hundred dollars due by bond, &c., it should be dismissed by the court. The 42d section of the act provided that if a suit was commenced in the superior court contrary to the provisions of the 40th section of the act, the same should be dismissed by the court; and if any person should demand a greater sum than is due, and it should be found by the verdict of a jury that a less sum was due to the plaintiff in principal and interest, then by the provisions of the 40th section, it was made the duty of the court to nonsuit the plaintiff, unless he should make affidavit, &c.

The provisions of the enactment in the Revised Statutes were modified by the Revised Code, ch. 31, §38, which, without changing the limit of jurisdiction, provided "that if any action shall be commenced in any of the said courts contrary to the provisions of this section; or if the sum sued for, which may be truly due and owing, is of less value than that for which the action is hereby allowed to be commenced in said courts (county and superior), the same may be abated on the plea of the defendant, or if the *matter appear on the writ or declaration it may be dismissed on motion.*"

The 2d section of the ordinance of the convention of 1866, which has been cited and discussed before us, has no other effect than simply to reduce the jurisdiction of the superior courts in actions on bonds, &c., from one hundred dollars to sixty dollars.

But here the sum demanded and that recovered is less than sixty dollars, and the question is: is that a valid judgment? We do not see why it is not. The rules of practice prescribed in the Revised Code, ch. 31, §38, govern this case. If an action of covenant had been brought under the former practice for a sum above sixty dollars, when the sum actually due was less, the action might have been defeated by a plea in abatement setting forth that the true amount due was less than sixty dollars under the said section 38. But what if the defendant had neglected to plea in abatement, and had gone to the jury upon the general issue, can it be doubted but that the verdict would stand and the judgment therein be valid, notwithstanding the verdict be less than sixty dollars? The same section provides that if the matter, that is, the sum demanded, appear on the writ or declaration to be of less value than that allowed to be sued for, the action *may be dismissed on motion.* The act does not declare that it *shall* be dismissed, but *may* be dismissed on *motion;* but suppose no motion should be made, would not the plaintiff be entitled to take his judgment by default or go to the jury upon the issues, if any, just as in the other case, where there has been no plea in abatement, and with the like effect?

It will be noticed the language of the Revised Code differs from that used in the Revised Statutes, ch. 31, §41, where defining the jurisdiction of the county courts the language used is, *shall be dismissed by the court;* and in the 42d section of the same chapter the language is, it shall be the duty of the court to nonsuit the plaintiff. Whereas the 38th section of the Revised Code, substituted for these sections of the Revised Statutes, uses the language "*may be abated*" and "*may be dismissed on motion.*" This change in the phraseology of the statute must have been made with a purpose, and we can conceive of no other purpose than that if a defendant should fail *to plead in abatement* or to *move* to dismiss, in cases where an action is brought for a sum of less value than that allowed to be sued for, the plaintiff would have a right to his judgment, or at least to go to the jury upon the merits of his case.

We are supported in this view of the question by the decision in the case of *Brooks* v. *Collins*, Taylor's Rep., 236, which was an appeal from the county court, where the jury had rendered a verdict for a sum less than twenty pounds, when that was the minimum jurisdiction of the courts, HALL, J., saying: "This is an appeal from the county court. The jury in the superior court have found a sum under twenty pounds; a motion is made by the defendant's counsel to set aside that verdict after it is recorded, because the county court in the first instance had not jurisdiction, the sum due being under twenty pounds. The verdict being recorded, I think it ought to stand. This motion, in substance, might have been made at an earlier stage of the proceedings; had that been done, in all probability it would have been granted."

Judge TAYLOR, in an extended view of the question, concurred with Judge HALL in his opinion.

Our conclusion is that the judgment is not void, however irregular or erroneous it may be.

No error. Affirmed.

In the matter of W. P. OLDHAM.

Contempt—Legislative Act.

1. Where the respondent is held to answer for an alleged attempt to corruptly influence the administration of justice (but not in the presence of or during the sitting of the court) by giving hand-bills to a juror summoned to serve at a term when the case in which he was interested stood for trial, with a request to read the same and hand them to the others, said hand-bills containing an account of the causes of the suit prejudicial to the adverse party; *Held*, that he is not guilty of contempt. The statute confines such offence to acts specified therein.
2. The constitutional provision, to the effect that the general assembly cannot deprive the judicial department of any power which rightly pertains to it, is not infringed by the legislature in specifying what acts shall constitute a contempt.

(*Ex-parte Schenck*, 65 N. C., 366; *Pain* v. *Pain*, 80 N. C., 322; *Kane* v. *Haywood*, 66 N. C., 1, cited and approved).

PROCEEDING in contempt heard at Fall Term, 1882, of NEW HANOVER Superior Court, before *MacRae, J.*

The court imposed a fine of fifty dollars, and from this judgment the respondent appealed.

Messrs. MacRae & Strange, for the respondent.
Messrs. Geo. Davis and *Stedman & Latimer, contra.*

SMITH, C. J. This appeal brings up for review the question of the power of the court, upon the facts found and set out in the record, to adjudge the defendant guilty of a contempt and to impose a fine for the offence.

The subject is not left as at common law in this state, but is regulated by an act passed in 1869, the first section of which enumerates the acts which severally constitute a contempt, and prescribes and limits the punishment which may be inflicted when either one specified has been committed. To remove

doubt as to the effect of this enactment, an amendatory statute was passed in 1871, which declares that "the several acts, neglects and omissions of duty, malfeasances, misfeasances and non-feasances specified and described in the said act of April, 1869, shall be, and they are hereby declared to be, the only acts, neglects, omissions of duty, malfeasances, misfeasances and non-feasances which shall be subject of contempt of court; and further, that "if there be any parts of the common law now in force in this state, which recognized other acts, neglects, omissions of duty, malfeasances, misfeasances and non-feasances besides those specified and described in the said act, the same are hereby repealed." Acts 1868–'69, ch. 177; Acts 1870–'71, ch. 216, contained in Bat. Rev., ch. 24.

The facts upon which the present proceeding is founded, and constituting the criminal conduct of the defendant, are as follows:

A civil action previously commenced by one Mildred A. Oldham as administratrix of C. W. Oldham, deceased, against the Wilmington & Weldon Railroad Company, was pending and for trial at that term of the superior court of New Hanover, wherein damages were claimed for neglect and mistreatment of the intestate, a passenger on the train of the company, resulting, as alleged, in his death. The defendant caused to be published an account of the transaction, of which it is only necessary to say it was well calculated to prejudice the defence of the company, and, if acted on, subject it to heavy damages in the rendition of the jury-verdict. On the Saturday preceding the sitting of the court, the defendant handed a copy of this hand-bill to one John A. Farrow, then under summons as a regular juror to serve at the approaching term, at the same time saying to him: "Read this." The juror informed the defendant that he would be on the jury the following week, whereupon the defendant handed him two other copies, with a request that he would hand them to the others. The list of jurors drawn for the term had been published in the newspapers in Wilmington for several weeks before that time.

The criminality of the defendant's conduct in furnishing the juror with the hand-bill and requesting him to read it, not corrected or modified after he was informed that the person to whom it was given was a juror, summoned to serve at the term when the cause was standing for trial, and might perhaps be put upon the jury to try it, consists in the imputed purpose to preoccupy the mind of the juror, and prevent a fair and impartial verdict upon the merits, as they might be disclosed in the evidence.

It is very properly conceded that the defendant has not committed a contempt, if the statute is operative in confining contempts to the acts specified, and forbidding the punishment of all others, as such, by the court. But it is contended that the power to punish one who attempts, by improper influences brought to bear on a juror, to prevent the course of justice, is an inherent attribute of the court, necessary in the discharge of its official duties, and beyond the reach of legislative authority, under section twelve of article four of the constitution, which declares that "the general assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it, as a co-ordinate department of the government."

While the essential judicial functions are thus protected in the fundamental law from legislative encroachment, it is equally manifest that subordinate thereto, the law-making power may designate the cases in which the power to summarily punish for a contempt shall be exercised; may prescribe its nature and extent, and prohibit in others.

The inquiry to be answered then is, whether the withdrawal or denial of the right of the judge, under the circumstances of the present case, to proceed and try and punish the offender without an intervening jury, does so invade the jurisdiction of the court, and impair its inherent and essential functions, as such, so as to fall under the constitutional inhibition. Unless such be its effect, the enactment must be upheld as a rightful

exercise of legislative authority, in specifying what acts alone shall constitute a contempt, and expose the party to limited and defined penalties, in order that the law may be known and observed.

The conduct of the defendant, reprehensible as it was, and perhaps the subject of criminal prosecution, as tending corruptly to influence the administration of justice, was nevertheless not in the presence, nor during the session of the court, so that it could interrupt a judicial proceeding and needed an instant repression; and we are unable to see why an indictment, if it will lie, will not afford as ample protection to the court as the exercise of the denied power to act summarily afterwards.

The courts must, in the language of DICK, J., in *ex-parte Schenck*, 65 N. C., 366, "have the power by summary remedies to preserve order during their session, control the action of their officers and enforce their mandates and decrees," and this power is "inherent in the court and essential to the exercise of its jurisdiction and the maintenance of its authority," as declared in *Pain* v. *Pain*, 80 N. C., 322.

It cannot be doubted that the withdrawal of the power to punish for contempt would be to cripple it in the exercise of its functions and impair its essential attributes; and that legislation attempting to do this would be wholly inoperative and void. It was needless to cite authorities in support of a proposition so manifest, for otherwise justice could not be administered, and the court would be deprived of the means of preserving its own existence.

But short of this, the legislature may define the acts which shall be treated as contempts, and designate the final consequences incurred in committing them. Upon the point now under consideration, we do not think the legislation an invasion of the necessary functions appertaining to the judicial department. The enactment may prove an unwise and inconvenient restraint upon the self-defending power of the court, as exer-

cised hitherto, and may impair its efficiency in administering distributive justice, but of this we are not to judge, and our province is limited in enforcing constitutional limitations and seeing that the court is not deprived of its just and necessary prerogatives in the performance of judicial duties. The force of the enactment is recognized in *Kane* v. *Haywood*, 66 N. C., 1, in restricting the judicial authority over practicing attorneys, and PEARSON, C. J., in direct terms, says that "the constitutionality of the statute *with certain savings in respect to the inherent rights of the court* (the italics are his own) is settled by *ex-parte Schenck*."

We refrain from passing upon the other exceptions, as the point decided disposes of the case. There is error, and the judgment is reversed. This will be certified to the court below.

Error. Reversed.

JOHN E. BOYETT v. THADDEUS VAUGHAN.

Contempt, proceeding in.

A rule was obtained for alleged contempt in not performing a judgment of court, based upon an affidavit declaring a belief that the respondent "is able and has sufficient means" to do so, but sets forth no facts upon which such belief is grounded; and in answer, the respondent makes affidavit that his inability to perform the judgment results from his misfortune and necessitous condition, and that he has no intention or desire to injure the opposing party or disobey the mandate of the court; *Held*, that the rule must be discharged.

(*Pain* v. *Pain*, 80 N. C., 322; *Baker* v. *Cordon*, 86 N. C., 116, cited and approved).

RULE for contempt heard at October Term, 1883, of THE SUPREME COURT.

Messrs. Mullen & Moore, for plaintiff.
Mr. Thos. N. Hill, for defendant.

SMITH, C. J. The former judgment in this cause having been rendered on the rehearing at October term, 1881 (85 N. C., 363), and an order of restitution of the money received, made and served upon the plaintiff without result, the defendant's attorney, at February term last, on his own affidavit, obtained a rule upon the plaintiff to show cause at the present term why he should not be attached for contempt, in failing to make restitution according to the said judgment.

The affidavit, after reciting the foregoing facts and that an execution had been issued to the sheriff, on which he had made return that no property was to be found to satisfy the same, declares affiant's belief "that said Boyett is able and has sufficient means to make restitution as aforesaid," but sets out no facts upon which his belief is founded.

In answer to the rule the plaintiff files his affidavit, in which he states that he has made diligent efforts to perform the judgment of the court, but by reason of his misfortune and necessities, "as he had before explained," he is utterly unable to do so; "that his failure to restore the money which he had before used, after collecting it under the process of the court issued on the first judgment, is unintentional and unavoidable," and does not proceed from any "desire to injure the defendant or to disobey the judgment of this court," and he disavows any intention, in what he has done and is unable to do, to disregard the mandate of the court or to resist its authority.

In our opinion, this is a full response to the rule, and it ought to be discharged.

"Inability to comply with an order," as is said in *Pain* v. *Pain*, 80 N. C., 322, "is an answer to a rule to enforce it, and, when made to appear, discharges from its obligation." And it is the province of the court itself to determine the facts, while the judge may or may not, at his discretion, avail himself of a jury

and have their verdict upon a disputed and doubtful matter of fact. *Baker* v. *Cordon*, 86 N. C., 116.

In antagonism to the detailed statement of his circumstances and condition made by the plaintiff, we have only the general expression of the belief of the defendant's counsel that the plaintiff "is able and has sufficient means" to comply with the order to repay. This does not present a case calling for a reference of any issue to the jury to determine a controverted fact. The rule must be discharged.

PER CURIAM. Rule discharged.

STARKEY McDANIEL v. SUSAN KING and others.

Appeal, matters relating thereto.

1. The record of a case on appeal certified to this court, must be taken as importing verity, and cannot be explained or contradicted by matter *de hors*.
2. An appellant is not entitled to a new trial, or to *mandamus* commanding the judge to send up a correct statement of the case, upon an affidavit that the case as settled by the judge does not correctly set forth the grounds of exception. He may apply for a *certiorari*.

EJECTMENT tried at Fall Term, 1883, of JONES Superior Court, before *Philips, J.*

The plaintiff excepted to the ruling of the court below, and submitted to a judgment of nonsuit and appealed. The case on appeal states that the same was settled by the judge, in consequence of the fact that the counsel for the respective parties were unable to agree upon a statement.

The motions made by the plaintiff's counsel, upon the call of the case, which constitute the basis of the decision of this court, are sufficiently set out in its opinion.

Messrs. Battle & Mordecai, Batchelor and *Clark,* for plaintiff. No counsel *contra.*

MERRIMON, J. The plaintiff suggests to the court, upon affidavit, that the statement of the case as settled upon appeal, for this court, does not correctly set forth the grounds of exception on the part of the appellant to the rulings of the superior court, and moves first, that for that cause, a new trial be granted; or, if that may not be done, then, secondly, that the writ of *mandamus* issue to the judge of the superior court, commanding him to certify the statement of the case, correctly settled, to this court.

This court must, and can only be governed by the record, as it comes duly certified from the court from whose judgment the appeal has been taken. It is almost exclusively a court of errors, and it can only see, consider and pass upon errors assigned, as they appear in the record. The record must be taken as importing absolute verity, and it cannot be contradicted, or explained by matter *de hors.*

If it should be properly suggested that the manuscript is in any material respect defective, the parties to the appeal may correct it by consent; or, the party complaining may move for the writ of *certiorari,* to be directed to the clerk of the court from which the appeal comes, commanding him to certify and send up a more perfect transcript.

If there are imperfections or errors in the record, including the statement of the case settled for this court, they may be corrected in the court below, before the clerk shall make return of the writ of *certiorari,* issued as above indicated. And reasonable time for such purpose will be allowed.

If the judge, by inadvertence, mistake or misapprehension, has failed to settle the statement of the case for this court correctly, we cannot doubt that he will gladly correct his error, either with or without notice to the parties to the action, as he may deem just and proper.

This court will not, certainly in the first instance, resort to harsh and extreme remedies to compel the judges of the superior and criminal courts to discharge their duties correctly, and correct their errors in respect to cases coming to this court by appeal. This case does not require that we do so; and we are not called upon to indicate what remedy might be granted in extreme cases. We take it as granted that our brethren of the superior and criminal courts will at all times cheerfully and promptly correct, as far as they can, irregularities, inadvertences and mistakes, when the same are properly brought to their attention.

The motions of the plaintiff are denied. He may, if he shall be so advised, move for the writ of *certiorari*, and this will be allowed simply to enable the judge to correct any error, as he may deem proper.

PER CURIAM. Motion denied.

W. P. CONRAD and others v. J. L. MOREHEAD and others.

Mining Operations—Lessor and Lessee—Covenants, express and implied.

1. Where a lease for ninety-nine years was executed, by which a tract of land was conveyed for mining purposes, the lessor covenanting that the lessee may enter upon the land and erect the machinery, &c., necessary to carry on mining operations, and that, if the same shall become unprofitable, he or his heirs might surrender the lease at any time; and the lessee covenanting to pay the lessor the one-tenth part of the gold or other metals procured upon the land; *Held*, there is an implied covenant on the part of the lessee that he will work the mine in a reasonable manner, and his failure to do so for a considerable period is a breach of such covenant, and works a forfeiture of the lease.
2. Express and implied covenants in a deed, discussed by MERRIMON, J.

CIVIL ACTION removed from Davidson and tried at July Special Term, 1882, of GUILFORD Superior Court, before *Gilliam, J.*

The plaintiffs are the heirs of Henry Conrad and the defendants are the administrators of John M. Morehead.

On the 14th day of February, 1833, the said Conrad and Morehead executed a deed containing mutual covenants, in which Conrad leased to Morehead all that tract of land lying on Four Mile branch in Davidson county (describing it), containing one hundred and sixty-five acres, more or less, for the term of ninety-nine years, to have and to hold the same, together with all its mines, minerals, &c., to the said Morehead, his heirs and assigns, during said term of ninety-nine years from this day ensuing, and fully to be completed and ended. And Conrad, for himself and heirs, covenanted with Morehead and his heirs, that the latter may at all times enter upon the land and dig into and upon the same, and search for gold, silver and all other metals and minerals, and the same when found, to use, work and obtain; and to use all such timber as may be required for mining purposes, building, &c., erect machinery and use the water, &c.; and at or before the expiration of this lease, the said Morehead or his heirs may renew the same for the same length of time, and that he or they may, at any time when they think proper, surrender this or any other subsequent lease. And Morehead, for himself and heirs, covenanted to pay one tenth part of all the gold and silver, or other metals that may be procured from said land, and to account for the same quarterly, if so required.

The other stipulations are not material to the case. The instrument was signed and sealed by Henry Conrad and John M. Morehead.

The plaintiffs claim title to the said land, and have brought this suit to have the same sold by order of the court for partition.

The case states that, after the above mentioned deed was made, Morehead opened one or more shafts on the land to mine gold, which were worked by hand for some years, and he then erected machinery, engine-houses and other buildings necessary for more

extensive operations, which he carried on until the last of the year 1849, when he ceased to mine the property. The engines and machinery were moved off the land in 1855. He left the property in care of one Younce, his agent, who lived about a mile from it, and kept the keys of the houses, and saw that they were kept occupied for Morehead until his death in 1866, and for the defendants, his administrators, after his death and until 1877, by which time all the houses had decayed and become unfit for occupancy. While Morehead operated the mines, he collected a quantity of mineral specimens to be exhibited to persons wishing to buy the property, and left the same after the year 1849, with his said agent, to be exhibited. The defendants, after the death of their ancestor, and up to 1876, visited and claimed the mines and endeavored to sell the said lease.

The plaintiffs' ancestor had possession of the cultivated parts of the tract up to his death in 1835, and they at all times since.

The property is believed to be very valuable for mining purposes.

In 1879, before suit was brought, the plaintiffs offered the absolute title to it at public sale, after due advertisement, for partition, when the defendants forbade the sale, claiming the right to the property under the said lease to the expiration of the term.

Conrad, during his life, and the plaintiffs, since his death, have paid the taxes on the property; and in 1878 the plaintiffs took actual possession of the whole of it, and worked the mines and found gold, and, at the commencement of this suit, had actual and exclusive possession.

His Honor, upon consideration of the facts, refused the judgment demanded, and ordered that the action be dismissed, and the plaintiffs appealed.

Messrs. Scott & Caldwell, for plaintiffs.

Messrs. Dillard & Morehead, for defendants.

MERRIMON, J. The deed before us creates a lease for ninety-nine years, determinable, before it expires by its own limitation, at the will of the lessee. By its terms the lessee might surrender the lease at any time during its continuance. *Doe* v. *Dixon*, 9 East., 15; 4 Wait, Ac. & Def., 203; Arch. L. & T., 93.

The lease, however, might be determined by a forfeiture of the same. What causes work such a forfeiture, depends upon the covenants contained in the lease, express or implied. The right of a landlord to enter for a forfeiture of a term by the tenant, arises, either by implication of law without any stipulation upon the subject between the contracting parties, or where it is matter of express stipulation in the deed or contract, under which the tenant occupies the demised premises.

Where the covenants are express, there need ordinarily be little difficulty in settling the rights of the parties: these are what the parties make them.

Implied covenants, however, are such as the law creates, implies, in the absence of express stipulation, in regard to the existing relations between the lessor and lessee; and they not infrequently spring out of express covenants. They depend for their existence on the intendment and implication of the law, and are such as the law raises from the relations of the contracting parties to each other, in respect to the lease, in the absence of any express agreement on the subject between them. The nature of the contract of lease, the subject matter of the same, the express covenants contained therein, and the like considerations, give rise to the implied covenants and determine their nature and the extent of them. Hence it has been held, that where land has been granted for a term of years, by the words *demise* or *grant*, without any express covenant for quiet enjoyment, the lessee or his assigns, if ousted by rightful title, may sustain an action on the implied covenant that the lessor warranted that he had a good title at the time of the execution of the deed creating the lease. This is because the word *demise* implies the power of letting, as the word *grant*, that of giving.

And so, also, it has been held, in the absence of an express covenant in that respect, that there is an implied covenant on the part of the lessee that he will use the land demised to him in a husband-like manner, and not unnecessarily exhaust the soil by negligent or improper tillage. In another case, it was held, where the lessee covenanted to pen and fold his flock of sheep, which he should keep on the premises, upon such parts thereof as the same had been usually folded, there was an implied covenant *to keep a flock of sheep*. A number of similar illustrations might be cited. Taylor, L. & T., §§252, 253; Arch., *supra*, 68, 69; *Scott* v. *Rutherford*, 92 U. S. Rep., 107.

In the case before us the lessee covenanted expressly to pay the lessor "one-tenth part of all the gold, silver and other metals that may be procured from said land, and to account for the same quarterly, is so required." There is no express covenant that the lessee shall work the mine continuously, or in any particular way, or at all; but there is manifestly an implied covenant on the part of the lessee that he will work it as such mines are usually worked, and with ordinary diligence, under the surrounding circumstances; not, indeed, simply for his own advantage and profit, but as well to the end the lessor may have his toll "quarterly, if he shall so require," or at such longer intervals as he may see fit to prescribe. Taylor, *supra*, §421; *Rosley* v. *Walker*, 5 Term Rep., 373; 4 Wait, *supra*, 246; Arch., 68.

Such covenant arises by necessary implication. It would be unjust and unreasonable, and contravene the nature and spirit of the lease to allow the lessee to continue to hold his term a considerable length of time, without making any effort at all to mine for gold or other metals. Such a construction of the rights of the parties would enable him to prevent the lessor from getting his tolls under the express covenant to pay the same, and deprive him of all opportunity to work the mine himself, or permit others to do so. The law does not tolerate such practical absurdity, nor will it permit the possibility of such injustice.

The lessee is protected by an express covenant; if the mine should turn out worthless or unprofitable, he might in that case, by the express terms of the lease, surrender it, and thus end his obligation to the lessor; but he cannot hold his term indefinitely, one, two, ten, twenty or thirty years, or until it expired by its own limitation, and not work the mine, pending all that time, at all. Such is not the contract between the lessor and lessee. It is of the essence of the contract, necessarily implied, that the lessee should work the mine with reasonable diligence, or surrender the lease, as he had the right to do by express stipulation, so that the lessor might, in the first alternative, get the tolls; or, in the other, work the mine himself, or sell, or let it to some other person, in his discretion. This construction is reasonable and just, and in the absence of any express stipulation in respect to working the mine, the law implies that this was the contract between the lessor and lessee.

The lessee worked the mine for a number of years, and until the last of the year 1849. Since that time, neither himself in his life-time, nor his administrators since his death, have worked it at all. In 1855 the lessee removed the machinery from the mine and land embraced in the lease. In 1878 the plaintiffs took actual possession of all the property, and worked the mine, and, at the time of the bringing of this action, had actual and exclusive possession.

In thus failing to work the mine for a long period of time, for twenty years and more, the lessee broke his implied covenant to do so, and forfeited his term. The lessors had the right to reënter by reason of such breach, take and hold possession as they did do, and thus terminate the lease. Taylor, *supra*, §698; Collyer on Mines, 10. The lease is terminated and the defendants have no right, interest or claim under the same.

There is error. Judgment reversed, and judgment for the plaintiffs according to this opinion.

Error. Reversed.

JOHN DICKERSON v. RALEIGH CO-OPERATIVE LAND AND BUILDING ASSOCIATION.

Building Associations—Illegal Contract.

The law will not aid the defendant building association or its individual corporators in an effort to effect a settlement of illegal transactions—approving *Mills* v. *Salisbury B. & L. A.*, 75 N. C., 292, and subsequent cases.

(*Mills* v. *Salisbury B. & L. A.*, 75 N. C., 292; *Latham* v. *Washington B. & L. A.*, 77 N. C., 145; *Com'rs* v. *Setzer*, 70 N. C., 426, cited and approved).

CIVIL ACTION tried on exceptions to a referee's report, at Fall Term, 1883, of WAKE Superior Court, before *Shepherd, J.*

The purpose of the suit was to effect a settlement with the defendant, and the referee T. M. Argo found the following facts, in substance: The plaintiff became a member of the Raleigh Co-operative Land and Building Association in 1869, and in June of that year borrowed from the defendant the sum of $199, to secure which, he gave his note for $400, bearing six per cent. interest from June 3d, 1869. In November following he borrowed the further sum $293.55, and to secure this, he gave his note for $556, bearing six per cent. interest from November 9th, 1869.

The referee finds further, that the principal sums, with the interest thereon, amounted, on June 1st, 1873, to $602.12, and that up to this date the plaintiff had paid the defendant the aggregate sum of $543.76, a large part of which being for fines, dues and interest, leaving a balance due of $58.36.

The sums borrowed were, under the contract entered into between the parties in June, 1869, to be expended in the purchase of a house and lot, the defendant association obligating to convey to plaintiff a certain lot (describing it), and the plaintiff agreeing to pay interest, dues, &c., on the shares of stock owned by him, in accordance with the charter and by-laws of the asso-

ciation. And it was further agreed between the parties, that the plaintiff should be let into possession of the premises, but that on his failure to perform any of the covenants specified in said contract, the defendant should have the power to take possession of the premises and dispose of the same as it saw fit, all payments theretofore made by plaintiff to belong to the association absolutely.

In May, 1876, the defendant claimed that the plaintiff was still indebted to it in a sum considerably in excess of $400, for principal money, fines, dues, &c., and that plaintiff had forfeited his rights under said contract by a failure to perform its stipulations. After some negotiations between the parties, the plaintiff surrendered to the association four shares of stock of the nominal value of $400, which were received *in settlement* of all claims against the plaintiff, and thereupon the defendant executed a deed conveying to plaintiff the property described in said contract; and the said $400, added to moneys previously paid by plaintiff, amounts to $331.43 in excess of the principal and lawful interest of the sums borrowed; and the referee further finds that plaintiff paid the same, with a knowledge of all the facts, and that no fraud or imposition was practiced upon him by the officers of the association.

Thereupon the referee finds as conclusions of law:

1. The operations of defendant association and the transactions with plaintiff were against the policy of the law, illegal and usurious.

2. The plaintiff being a member of the association, and having paid the surplus over the principal money and lawful interest with a knowledge of the facts, cannot recover the said $331.43, nor any part thereof from the defendant.

The exceptions to the report were overruled, and the report confirmed, from which judgment the plaintiff appealed.

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

MERRIMON, J. The business conducted by the defendant corporation was unlawful. It was a perversion of the purposes and privileges conferred by its charter. The plaintiff was one of the corporators and participated in its transactions. He agreed to share its fortunes, and voluntarily became one of its victims. He borrowed money from it, and repaid the same with more than the lawful interest upon the sum received, but not more than he agreed to pay for supposed advantages. It is not pretended that he paid to it more than was due, according to the methods devised and provided for by its by-laws and business regulations; or that he was dealt with more harshly than others, his associates, under like circumstances.

The courts of justice will not aid the defendant association, on the one hand, in the collection of its unlawful claims upon its members; nor will they, on the other, aid its corporators in their efforts to recover moneys they may have paid under engagements inoperative in law. *Ex dolo malo non oritur actio. Mills* v. *B. & L. A.*, 75 N. C., 292; *Latham* v. *B. & L. A.*, 77 N. C., 145; *Commissioners* v. *Setzer*, 70 N. C., 426.

We concur in the material findings of fact and law by the referee. There is no error, and the judgment of the court below must be affirmed, and it is so ordered.

No error. Affirmed.

A. J. KIVETT v. G. W. WYNNE & CO.

Excusable Neglect—Section 133.

The defendant employed an attorney to appear for him in a case, but he died about three weeks before the return term of the court; he had filled several public offices, and his death was announced generally in the newspapers; the defendant did not attend at the return term or employ counsel; judgment by default was taken, and of which he was informed; he then pro-

posed a compromise of the claim, but gave the matter no further attention; he failed to attend the next term of the court, when a final judgment was rendered; and, after execution was issued, he moved to set the judgment aside upon the ground of excusable neglect; *Held*, that he is not entitled to relief.

(*Thomas* v. *Womack*, 64 N. C., 657; *Griel* v. *Vernon*, 65 N. C., 76; *Deal* v. *Palmer*, 68 N. C., 215, cited and approved).

MOTION to set aside a judgment upon the ground of excusable neglect, under section 133 of the Code, heard at Fall Term, 1882, of HARNETT Superior Court, before *Shipp, J.*

The following facts were found by the court: A summons in the case was issued on the 26th of December, 1879, returnable on the third Monday in February, 1880, and served on defendants on the 15th of January, 1880, at which time the defendants applied to Thos. C. Fuller, a gentleman of the bar, living in the city of Raleigh, where the defendants also lived, and desired to employ him to act as their attorney. They were then informed by Mr. Fuller that he did not practice regularly in the courts of Harnett; and he suggested to them that he would write to Neill McKay, who lived in the county of Harnett and was a practicing attorney there, and procure his services. Mr. Fuller did write to Mr. McKay in regard to the matter, and he agreed to act for the defendants as their attorney. Mr. McKay was a well known gentleman in the state, and previous to this time had filled several public offices. About three weeks before Harnett court, Mr. McKay died, and his death was announced generally in the newspapers.

The city of Raleigh, where the defendants reside, is not more than thirty-five miles from Lillington, the county-seat of Harnett.

At the return term the defendants did not attend in person, or appear by attorney, and a judgment by default was taken against them. After being informed of this fact, they proposed to compromise the claim sued upon, but paid no attention to the matter. They did not attend court at the next term, when final

judgment was rendered; nor employ counsel to look after their interests; nor apply for any relief or propose to set aside the judgment, until after execution was issued.

Upon this finding of fact, His Honor held that the defendants were not entitled to have the judgment set aside, and from this ruling they appealed.

Mr. W. E. Murchison, for plaintiff.
Mr. W. A. Guthrie, for defendants.

ASHE, J. Notwithstanding the 133d section of the Code, upon which the defendants' motion is based, provides that the judge may *in his discretion* relieve a party from a judgment, order, or other proceeding, on account of mistake, &c., and matters of discretion are not reviewable, there have been some seventy-five or eighty appeals from judgments founded upon the provisions of this section, and "still they come." Among such a number of appeals, a great many are found lying so closely along the line of distinction between a clear and undisputed exercise of discretion and the *abuse* of discretion, or the *power* to exercise it, that it is often very difficult to decide upon which side of the line a case falls.

But there can be no doubt here. There was no question arising as to the power, and there was no abuse of the discretion given the judge by the law. The defendants were guilty of very great laches, or at least indifference to the progress of their suit. They most probably heard of Mr. McKay's death; but they did not attend court at the return term or employ counsel, and after judgment by default was rendered against them, and a proposition to compromise, they gave themselves no concern about the case. Then would have been the time that a man of ordinary diligence would have applied for relief, if he believed he had any merit in his case. But the defendants failed to attend the next term of court or employ counsel, when a final judgment was rendered against them, and they never awoke to

the condition of their case until execution was isued against them.

The defendants are guilty of gross laches, and it is needless to cite any authority upon that point. They can be found all along the line of decisions upon cases arising under section 133, from *Thomas* v. *Womack*, 64 N. C., 657, down to those reported in the last volume of the Reports.

There is, in this case, no blame to be attached to the defendants' attorneys, as in *Griel* v. *Vernon*, 65 N. C., 76, and *Deal* v. *Palmer*, 68 N. C., 215.

The judgment of the superior court is affirmed.

No error. Affirmed.

HILLIARD PURNELL v. W. T. PURNELL.

Verdict—Damages for Assault—Separation of Witnesses.

1. The finding of a jury, in an action for damages for an assault, that the defendant acted in self-defence, renders the issue as to damages and the finding thereon immaterial.
2. The separation of witnesses by sending them from the court-room is not a matter of right. And even where such order is made, and one, who remained and heard the other witnesses, is permitted to testify, it was held that the granting a new trial is matter of discretion in the presiding judge, and not reviewable.

(*State* v. *Sparrow*, 3 Mur., 487, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of HALIFAX Superior Court, before *McKoy, J.*

The action was brought to recover damages for an assault and battery alleged to have been committed by the defendant upon the plaintiff. The defendant denied the assault as charged in the complaint, and pleaded that he acted in self-defence.

The following issues were submitted to the jury:

1. Did the defendant cut the plaintiff on the face with a knife? Answer—"Yes."

2. Did the defendant do this act in self-defence? Answer—"Yes."

3. How much damage is plaintiff entitled to recover for the assault? "We respectfully ask for a judgment in favor of plaintiff for $22, it being the amount that the plaintiff stated he paid out for medicine and medical attention."

Before the evidence was offered to the jury, the plaintiff moved the court to have all the witnesses excluded from the court-room during the trial, which motion was granted, except as to the witnesses to character only, and refused it as to them.

Subsequently one Ponton, a witness for defendant, who had been summoned before the trial, and had remained in the court-room during the trial, was introduced by the defendant to testify to character only; and the plaintiff objected because the judge had refused to exclude him from the court-room during the trial; objection overruled, and plaintiff excepted.

The plaintiff moved for a new trial, upon the ground that the finding of the jury was inconsistent, and that the court erred in admitting the testimony of Ponton. Motion overruled; judgment; appeal by plaintiff.

Messrs. Mullen & Moore, for plaintiff.
Messrs. Day & Zollicoffer, for defendant.

ASHE, J. There is no force in either of the exceptions taken by the plaintiff. After finding on the second issue that the defendant acted in self-defence, the issue as to damages was immaterial, and the finding upon that issue was also immaterial. But we do not regard the response of the jury, to that issue, as assessing damages to the plaintiff. They had found by their response to the second issue that the defendant was justifiable in what he had done, and consequently was not liable in any dam-

ages to the plaintiff; and the response to the third issue, in form, seems to be rather an expression of a wish, or a recommendation by the jury, that His Honor, if consistent with their finding, would give judgment for the plaintiff for the amount he had expended.

There is nothing in the other exception. The sending out of witnesses has never been recognized in this state as a matter of right belonging to the parties to an action, though it is the usual practice when requested. But even after such an order has been made, it is no cause for a new trial that a witness, who had not gone out, but remained, heard the other witnesses, and is afterwards permitted by the judge to be examined. *State* v. *Sparrow*, 3 Mur., 487. It is matter of discretion with the court and not reviewable. 1 Greenl. on Ev., §§431 and 432, and notes.

No error. Affirmed.

J. M. WORTH, Trasurer, v. JOHN H. COX and others.

Motion in the Cause—Sheriff, summary judgment against—Surety and Principal—Forbearance—Legislative Power over collection of Revenue.

1. A motion in the cause is the proper remedy to impeach a summary judgment rendered in pursuance of the revenue act, by the clerk of Wake superior court, upon the bond of a delinquent sheriff.
2. The act of assembly authorizing the summary method of obtaining judgment against a sheriff who is delinquent in settling state taxes, is constitutional, and the settled law of this State.
3. A legislative extension of the time within which a sheriff may settle state taxes, does not exonerate the sureties upon his bond.
4. The collection of the revenues is under the controlling power of the legislature, and sheriffs and their bondsmen are affected with notice thereof

and subject to its exercise. It enters into and becomes a part of their contract with the state, and is as binding as any express condition of the bond.

(*Prairie* v. *Worth*, 78 N. C., 169; *Oates* v. *Darden*, 1 Mur., 500; *Prairie* v. *Jenkins*, 75 N. C., 545, cited and approved).

PROCEEDING in summary judgment against a sheriff for failure to pay state tax in the time allowed by law, commenced before the clerk, and heard at June Term, 1883, of WAKE Superior Court, before *Philips, J.*

On motion before the clerk of the superior court of Wake, judgment was rendered against the defendant sheriff of Perquimans county, and the sureties upon his bond, under the provisions of the revenue act, for failure to pay taxes according to law. An appeal therefrom was refused by the clerk, and the defendant sureties then applied to the judge for the writ of *certiorari*, alleging, in substance, that they had no notice of the time when the motion for judgment would be made; that the acts of assembly (referred to in the opinion of this court) extended the time for the sheriff, their principal, to settle the taxes, and that the indulgence was given without their consent or privity. The petitioners insist that they are therefore released from all liability as sureties; that they were entitled to notice of said motion, and to the right of appeal from the judgment rendered by the clerk. Thereupon the judge granted the *certiorari;* notice of the proceeding was served on the plaintiff state treasurer, and on the hearing the attorney-general filed the following demurrer to the petition of the defendants, to-wit:

The plaintiff, waiving any irregularity that may exist in the mode of procedure resorted to by the defendants, and wishing to have the matter determined upon its merits, demurs to the petition of the defendants, and says that the facts set forth do not constitute a cause of action, assigning as grounds therefor:

1. That the defendant sheriff and sureties are liable to the judgment rendered against them, without other notice than that given by the auditor to the plaintiff treasurer of the failure of

the sheriff to settle his account for taxes within the time required by law; and this notice was given in accordance with the express provisions of the machinery act.

2. The legislature imposes the burden of taxation and controls the machinery for the collection of the revenues, and can legally indulge or suspend the collection of the same, and the defendant sheriff and sureties, in accepting the office and executing the public official bond upon which said judgment is rendered, are thereby affected with notice of this legislative power, are subject to its exercise, the same being, in law, a part of their said contract with the state, and therefore binding as well upon the sureties as the principal.

Wherefore the plaintiff says that the said sureties are not released from their said obligation by reason of the legislative extension of the time within which their principal was required to settle his account for taxes, and prays that the petition be dismissed at defendants' costs.

After argument of counsel, the demurrer was sustained by the court. Judgment that plaintiff recover costs: appeal by defendants.

Attorney-General, for the plaintiff.

Messrs. Battle & Mordecai and *J. W. Albertson,* for defendant.

SMITH, C. J. The defendant Cox, sheriff of the county of Perquimans, being in default in his settlement of public taxes, and the time allowed therefor having expired, summary judgment was entered before the clerk in the superior court against him and the other defendants, the sureties, upon their official bond for the sum due, under the provisions of section 44, chapter 117 of the acts of 1881. Pending the motion and before rendition of the judgment, counsel for the sureties, being notified thereof by the clerk, appeared before him and made objection on the ground that indulgence had been granted to their principal, and the time for settlement enlarged by two successive acts of

the general assembly, whereby they had been discharged from their liability. The objection was overruled, and judgment recovered for the penalty of the bond, to be discharged by payment of the sum in arrear, but without the penalties superadded for the delinquency.

The sureties thereupon proposed to appeal to the judge, as we suppose, though the record does not so state, and on being refused, applied by petition to him for a writ of *certiorari*. The defence therein set up to the action before the clerk is, that there being no previous notice to the defendants, the judgment was unauthorized and null; and secondly, that the effect of the acts granting indulgence to the sheriff and extending the time for payment of the taxes, was to release them from their obligation as his sureties.

The judge granted a rule on the treasurer to show cause at a designated day why the *certiorari* should not be ordered, to answer which the attorney-general appeared on the return day and insisted that the causes assigned in the petition for the writ were insufficient in law to warrant its issue. The application was on the hearing denied, and the defendants' appeal brings the matter up for determination.

The course of proceeding adopted to bring the matters of defence relied on before the judge for adjudication, involves a misconception of the character of the judgment and the proper mode of impeaching it. The judgment is rendered in the superior court and constitutes a part of its records, so that no certified transcript from the clerk was necessary in order to its being judicially taken notice of by the judge, and a simple motion after notice was all that was necessary to bring the matter before him, as is pointed out by BYNUM, J., in *Prairie* v. *Worth*, 78 N. C., 169. We notice this irregularity to avoid the inference of its receiving our sanction, and consider the application as a motion in the cause.

We proceed then to examine the validity of the defences set up on behalf of the sureties who appeal.

1. The regularity and efficacy of the summary judgment rendered without previous actual notice:

In looking into the legislation which introduced this summary process against public agents, we find that in 1793 an act was passed authorizing the attorney-general, on motion, to take judgment against receivers having public moneys in their hands and failing to pay over, and that their own delinquences should be sufficient notice of the motion therefor. The compatibility of the enactment with the constitution was brought in question, in an anonymous case reported in 1 Haywood, 29 (Battle's Ed., 38), the very next year, and elaborately argued before Judges WILLIAMS, ASHE and MACAY, by the attorney-general Haywood. The former, who first heard the motion, adhered to the opinion he then expressed, that the act was repugnant to the constitution; while the other judges granted the motion, Judge ASHE remarking "that while he had considerable doubts, Judge MACAY was so clear in his opinion that the judgment might be taken, and had given such strong reasons, that his own objections had been vanquished."

The same summary remedy, given against delinquent sheriffs to the counties by the act of 1808, came before the court in the case of *Oates* v. *Darden*, 1 Mur., 500, and HALL, J., delivering the opinion, sustains the policy of such legislation, and says that "it does not alter the rights of the sheriff," but only "the mode of proceeding against him, and that the legislature had the right to do this." Such acts, in his own words, "are beneficial, and should be liberally construed."

In this case the judgment was rendered after the sheriff had gone out of office.

A similar law to that under which the present proceeding was authorized, so far as we know, has been in uninterrupted force and acted on since the well considered conclusion, in the anonymous case first cited, was announced; nor does the consistency of this summary and efficient remedy against delinquent collections of public money, with the provisions of the organic law,

seem to have been drawn in question since, unless in *Prairie* v. *Jenkins*, 75 N. C., 545, wherein RODMAN, J., thus disposes of the two objections made for the appellant.

1. "The first ground on which the plaintiffs put their claim to relief is, that the judgment was taken before the clerk of the superior court and not before the judge in term time. This objection to the judgment is answered by the act of 1872–'73 (Bat. Rev., ch. 102, §38), which expressly directs the proceeding complained of.

2. That the judgment was taken without notice to them. This also is directed by the act cited."

This summary mode of enforcing the collection of taxes may be necessary in carrying on the operations of government, which would be often seriously interfered with if the state were forced to pursue the ordinary action upon the bond and subject its recovery to the delays incident thereto, and with an unlimited right of appeal on the part of the delinquent and his sureties. The office is accepted and the bond given under the known conditions of the law that permits this direct and expeditious remedy in case of default, and these may be said to enter as elements into the contract itself.

But it is enough to say that if any law can be deemed settled and not longer to admit of controversy, the practice under this, or a similar enactment for near a century past, has established its validity.

It is suggested in argument for the appellants that the present constitution, essentially different from its predecessor, delegates to the general assembly all the power it possesses, and is not a mere limitation upon general legislative power, and hence there is no warrant for the enactment.

We do not see any material difference between them, in this respect, in their declaration of personal rights and immunities, which the act may be supposed to invade; and as it is a part of the machinery provided for the collection of public taxes and

their payment into the treasury, the act, as incident thereto, is necessarily involved in the power to levy and collect taxes for the support of the government.

2. We are now to examine into the effect of the statutory indulgence upon the obligation of the sureties.

The act of 1879, ch. 168, after a recital of the robbery of the sheriff of a specified sum collected from taxes, proceeds to declare:

"That John H. Cox, sheriff of Perquimans county, be allowed until the 1st day of February, 1881, to pay the treasurer the said sum of $1,642; and he and his sureties on his official bond shall be relieved until the expiration of the term hereby allowed, of all penalties, forfeitures and liabilities, by reason of not paying over to the treasurer the said sum of which said sheriff was robbed."

The other act simply extends the indulgence for a period of two years longer. Acts 1881, ch. 225.

It will be observed that the relief is extended not alone to the sheriff, but equally to his sureties; nor does it seem to impair any equities which, growing out of their relations, they may have against him.

It is true there are some adjudications which hold the sureties to be exonerated by giving time to the principal, as in the present case, some of which were referred to in argument, and others are cited in the note to section 324, in Brant on Suretyship; other adjudications are referred to by the same author. We think the latter better supported on reason, and, instead of comments of our own, quote from that section: "Laws that require that settlements shall be made at stated times are merely *directory* to the officers of the government, and form no part of the contract with the sureties, and the change of such laws in no way affects the right of the sureties." Besides, using the language of the judge in *Commonwealth* v. *Holmes*, 25 Grattan (Va.), 771, "the indulgence granted to the officer by the extension of time in this case is not a contract, but is an ordinary act of leg-

islation for the public good, with no consideration for the extension moving from the officer, and is repealable at the will of the general assembly."

But while some intimation of approval of the contrary rulings is given in the opinion in *Prairie* v. *Jenkins*, the point is presented and a distinct exposition of the law announced in the later case of *Prairie* v. *Worth*, wherein BYNUM, J., thus expresses the views of the court:

"The collection of public taxes must be conducted under the continuous supervision and control of the legislative department of the government. The laws, affecting the assessment and collection of the public revenues, must be from time to time made more or less rigorous in their enforcement, or otherwise modified to conform to the existing condition of the country, the depression of trade, the failure of crops, the scarcity of money and other causes, often delicate and complex, affecting the sensitive subject of taxation. * * * Every collecting officer therefore accepts and gives bond, affected with notice and subject to the exercise of this right of sovereignty. It enters into and becomes a part of the contract with the state, and is as binding on the bondsmen as any express condition of the bond, subject to the power of the legislature to control its duties as the public good might require."

This reasoning, clear and logical, commends itself to our approval, aside from its force as an adjudication of the court.

We are unable to see the force of the argument, which deduces from a mere forbearance to enforce penalties against a delinquent and his sureties, and the giving him time to replace public moneys, of which he has been robbed, the exoneration of the surety obligors from all further liability to make payment.

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

No error. Affirmed.

LOCK'S CREEK CANAL COMPANY v. A. A. McKEITHAN and others.

Practice—Report of Commissioner or Referee.

The report of the commissioners appointed in pursuance of the act of 1879, ch. 149, assessing persons for benefits accruing to their lands from the operations of the plaintiff canal company, should have been confirmed by the court, as to those defendants who did not object; but as to those who did, the court should have proceeded to try the issues involved in the controversy. The case is not presented in such manner as to enable this court to pass upon the merits.

APPEAL from an order made at Fall Term, 1882, of CUMBERLAND Superior Court, by *Gilmer, J.*

The plaintiff corporation was authorized by statute (acts of 1879, ch. 149), to commence and prosecute in the superior court of Cumberland county, a special proceeding for the purpose of equalizing the benefits accrued and accruing to the persons owning lands so situated as to be enhanced in value by reason of the work done, or to be done by said corporation, in pursuance of its chartered privileges. This act, after prescribing what the complaint in such proceeding should contain, further provides, that "the said court shall appoint five disinterested freeholders, or commissioners, who, after being duly sworn, shall view the lands already enhanced in value by said canal or its tributaries," &c.

The superior court of Cumberland county duly appointed such commissioners, and after examination they made their report to that court, as the statute directed.

The plaintiff then moved before the court for the confirmation of this report and for judgment accordingly as the statute allowed in that respect, except as to such of the parties to the proceeding as objected to the confirmation, and as to them, that the case be transferred to the civil trial docket of the court, to be there tried before the judge and jury.

The court refused to grant the motion, or any part thereof; and from this order, the plaintiff appealed to the court in term time. Before the judge in term, the plaintiff moved for the confirmation of the report of the commissioners and for judgment thereon as allowed by the statute. The judge declined to grant the motion and entered this judgment: "After hearing argument of counsel, the court adjudges that there is no error. Judgment of the clerk affirmed, and this cause is remanded to the probate court."

From this order the plaintiff appeals to this court.

Mr. W. A. Guthrie, for plaintiff.
Mr. R. P. Buxton, for defendants.

MERRIMON, J., after stating the above. No case was settled for this court upon appeal, nor do we find exceptions to any rulings of the court specified or errors assigned in the record. So we are left to survey the whole matter "without chart or compass," and we find it in a very confused and unsettled condition.

The counsel for the plaintiff insists, that the court ought to have granted the motion to confirm the report and for judgment as to such of the defendants as did not object to its confirmation, and that it ought then to have proceeded to try any issues of fact and law arising upon the whole proceeding between the plaintiff and the defendants objecting to the confirmation of the report. In that the court refused to do this, he insists there was error, and has confined his principal argument to a support of this exception, on the part of the plaintiff, to the action of the court.

On the other hand, the counsel for the objecting defendants contended, in an able argument, that the statute mentioned and other statutes of which it is amendatory are unconstitutional and void; and in addition he has suggested many respects, in which he alleges that the report of the commissioners is defective and imperfect towards some, and oppressive towards others of the objecting defendants.

The case is not in condition to be heard upon the merits as presented by the objecting defendants. There are issues of fact, and perhaps inquiries that the court may have to make by reference or surveys, that must be disposed of before we can properly decide a variety of questions discussed by the defendants' counsel. The case is not before us upon a demurrer.

There are many issues, some of them important, that must be settled before we can pass upon the questions of law presented by them as they may be found, one way or another. In the unsettled condition of the case, we do not feel at liberty to decide the grave constitutional questions raised by the defendants' counsel. Indeed, these or some of them, may or may not arise accordingly as the issues of fact shall be settled.

We think it was the duty of the court, in the first instance, to confirm the report of the commissioners and enter a proper judgment, except as to those of the defendants who objected thereto, and to let such as objected appeal to the regular term of the court, to the end, the questions of fact and law arising in the "proceeding" might, in the language of the statute cited, "be tried before a judge and a jury according to the course and practice of the superior court."

The statute provides "that the said commissioners shall, as soon as practicable, make a written report of their proceedings to the superior court of the county of Cumberland, and the same *shall be confirmed* by the court unless good cause be shown to the contrary, and thereupon said court shall file said reports and enter up judgment severally against each of the parties benefited, as assessed, for such sums as may be charged in said report and assessed against them respectively, giving credit to each for all payments heretofore made by him to said company since the commencement of said work."

Numerous persons of these assessed by the report did not object to a confirmation of it. The court instead of obeying the plain command of the statute, made the order denying the motion to confirm the report. We cannot see any reason for

such denial. If the court deemed the statute unconstitutional and void and was willing to take the responsibility of so adjudicating, this objection did not stand in the way, as to those who did not object. The judge, in term, likewise denied the motion to confirm the report, and held that there was no error in denying it, in the first instance, and affirmed the order in that respect.

In this there was error. The court ought to have reversed the order made out of term, confirmed the report and given judgment as to those who did not object; and as to those who did object, it ought to have proceeded to try the case upon its merits, "according to the course and practice of the superior court." This done, all questions, constitutional and those of a different nature, will be clearly and fairly presented for adjudication, if such shall arise.

The judgment must be reversed, and it is so ordered. Let this be certified.

Error. Reversed.

STATE ex rel. JOHN L. WESCOTT v. JOHN H. THEES and others.

Counties—Official Bonds, party to suit on—Commissions.

1. An action upon a county treasurer's bond to recover an amount alleged to be due the county, must be brought on the relation of the commissioners, and not by the successor treasurer.
2. The treasurer of a county is entitled to one and a half per cent. commissions on receipts and one and a half on disbursements; but the exception to the referee's report, in this case, that he failed to charge the defendant with commissions paid him in excess of those allowed by law, has no foundation, and will not be sustained—the balance found due the defendant being larger than the amount of the excess of legal commissions.

(*Commissioners* v. *Magnin*, 78 N. C., 181 and 186, cited and approved).

CIVIL ACTION tried upon exceptions to the report of a referee, at Fall Term, 1882, of BRUNSWICK Superior Court, before *Gilmer, J.*

Plaintiff appealed from the judgment overruling his exceptions.

Messrs Russell & Ricaud, for plaintiff.
Mr. E. S. Martin, for defendant.

ASHE, J. This action was brought by the plaintiff, as treasurer of Brunswick county, against the defendant, his predecessor in office, and the other defendants, sureties upon his official bond. The receipt of large sums of county funds by the defendant while in office, which it was alleged he had failed to account for, was assigned as a breach of his bond. This allegation was denied by the defendants; and for a further defence, they alleged that at the last meetings of the board of county commissioners, for the years 1875 and 1876, held prior to the commencement of this action, the defendant Thees accounted with a committee duly appointed, for all money that had come into his hands as treasurer of the county; that his accounts were audited by the committee and reported to the board of commissioners and approved by them, and filed with the clerk of the board and recorded in the books of his office; that in December, 1876, he came to a full and fair settlement with Wescott, the plaintiff, his successor in office, and paid over to him the balance then found to be due, and holds his receipt for the same.

The case was referred to R. S. French, as referee, to state an account of the receipts and disbursements of the defendant as treasurer. The account was accordingly taken and a report made to fall term, 1872, of the superior court.

The plaintiff, examined as a witness before the referee, produced a book of the treasurer in which the defendant kept his accounts with the county commissioners. The book contained two settlements of the defendant's accounts with the commis-

sioners; the first, in September, 1872, which was signed by the chairman and two other members of the board; and the second, dated November 27th, 1876, which was signed by the chairman and three other members of the board.

The referee, concluding that he had no right to open these settlements, took the account of such items as were not included therein, and reported that the aggregate of the debts of all the accounts against the defendant, as treasurer, was $5,327.56, and the aggregate of the credits was $2,891.87, leaving a balance of $2,435.69; and that on the 15th of December, 1876, there was a settlement between the defendant and the plaintiff, as treasurer, and the defendant then paid over to him in cash the sum of $3,747.47, and also turned over to him in vouchers, county orders, which the defendant had paid, amounting to $2,330.49; and also county bonds which he had paid, to the amount of $112.50. These credits included commissions at two and one-half per cent., which the defendant claimed and retained.

The conclusion of the referee was, and he so reported, that there was a balance of $1,301.78 due the defendant, and that he had fully settled his accounts, leaving nothing due by him or his sureties to the county of Brunswick on account of his office of treasurer.

There were several exceptions taken to the report of the referee, but were all withdrawn except one, which is as follows:

"The referee should have charged the defendant with the difference between the commissions that were withheld by him and the commissions he was authorized to receive by law; that is to say, with the excess retained by him over and above the amount allowed by law."

With the large balance found due to the defendant, it could make no possible difference, so far as concerns this case, whether the referee allowed the defendant the two and a half per cent. commissions, or only what the law allowed, which was one and a half per cent. on receipts and one and a half per cent. on disbursements; for his commissions at two and a half per cent.

would not amount to one-half of the balance found due to the defendant. So that, the exception is without any foundation. The judgment of the superior court is therefore affirmed.

Lest our silence may be misconstrued, and this action taken as a precedent for suing in the name of the treasurer, we take the occasion to say, that it should have been brought upon the relation of the commissioners of the county; but no exception was taken upon that ground, either here or in the court below, and it can make no difference in this case, as the judgment is against the plaintiff upon the merits. Bat. Rev., ch. 27, §5; *Commissioners of Wake* v. *Magnin*, 78 N. C., 181 and 186.

No error. Affirmed.

HUBBARD O'KELLY v. RICHMOND & DANVILLE RAILROAD.

Removal of cause to Federal Court—Local Prejudice.

1. To entitle a party to the removal of a cause to the federal court, under the act of Congress of 1875, there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different states from those on the other.
2. The act authorizing such removal, has no application to cases of mere local prejudice—approving *Fitzgerald* v. *Allman*, 82 N. C., 492.

(*Simmons* v. *Taylor*, 83 N. C., 148; *Gudger* v. *Railroad*, 87 N. C., 325; *Fitzgerald* v. *Allman*, 82 N. C., 492, cited and commented on).

PETITION for removal of cause to the circuit court of the United States, heard at January Term, 1883, of WAKE Superior court, before *McKoy, J.*

The removal was asked by the Virginia Midland railroad company, one of the defendants, and an appeal was taken from the judgment refusing the motion.

Messrs D. G. Fowle and *Mason & Devereux*, for plaintiff.

Messrs. T. R. Purnell and *Reade, Busbee & Busbee*, for defendant.

SMITH, C. J. The plaintiff's action is against the three railroad companies, defendants, as associated in forming a continuous line over their respective tracks for the carrying of passengers and freight from points on the North Carolina railroad to the general terminus at Washington City, and demands damages for a breach of contract entered into by them jointly to carry him from the city of Raleigh to the said city of Washington. The defendants in separate answers deny the responsibility of each, and deny also the material allegations upon which the plaintiff's demand is based.

It is needless to notice the special matters of defence further than that made by the North Carolina railroad company, that it operates no road and can incur no liability for the alleged expulsion of the plaintiff from a car of the train running between Danville and said city of Washington, as set out in the complaint.

The defendant, the Virginia Midland railway company, applied by petition to the court wherein the case was pending, in apt time, for an order of removal of the cause to the circuit court of the United States, upon the twofold ground that it was entitled thereto, as a citizen of the state of Virginia, under the act of Congress of March 3, 1875, and for that the defendant will not be able to secure a fair trial in the state court, by reason of the alleged existence of prejudice or local influence adverse to the company. The application was denied, and from this ruling the defendant appeals.

It is here insisted that the plaintiff's demand is several as well as joint against the defendants under the alleged contract, and that the appellant is entitled to have the whole cause removed, and if not, its separate controversy with the plaintiff, and that the refusal to so order is error in the court below.

Assuming the obligation to be several, the case is not distinguishable in this feature from that of *Simmons* v. *Taylor*, 83 N. C., 148, wherein it was held, that one of two defendants sued by trespassers, who was a citizen of Virginia, while the plaintiff and the other defendants were citizens of this state, could remove the controversy as between himself and the plaintiff, and leave that of the other defendant in the state court. This decision rested upon a construction of the act of Congress of 1875, which left unimpaired the right of severance and removal, as conferred in the act of July, 1866, under the conditions therein contained.

Since that case was determined, an authoritative interpretation of the last enactment has been put upon it by the supreme court of the United States, at variance with our opinion as to its effect upon the antecedent legislation, in several cases to which we had occasion to advert in *Gudger* v. *Railroad*, 87 N. C., 325.

In *Barney* v. *Latham*, 103, U. S. Rep., 205, Mr. Justice HARLAN declares that "while the act of 1866 in express terms authorized the removal only of the separate controversy between the plaintiff and defendant or defendants seeking such removal, leaving the remainder of the suit at the election of the plaintiff in the state court, the act of 1875 provides, in that class of cases, for *the removal of the entire suit*." In order to such removal, it is held, that it must appear from the pleadings that there is a controversy capable of final determination as between the parties, citizens of different states, without the presence of the associate defendants or any of them citizens of the same state with the plaintiff.

In another case decided at the same term, *Blake* v. *McKim*, the same judge, speaking for the court, declares that an action against several co-executors, of whom two were citizens of the same state as the plaintiff, and the other a citizen of a different state, to enforce a liability of their testator, could not be removed because the controversy was not divisible.

But the late case, *Hyde* v. *Reeble*, 104, U. S. Rep., 407, seems

to us to be a direct authority in support of the ruling of the judge in the court below, and decisive of the appeal.

The suit was brought upon an alleged contract of bailment entered into by the defendants as partners. The plaintiffs and one defendant were citizens of Minnesota, the other defendants were citizens of another state. The case was twice removed to the circuit court of the United States, once upon the application of all the defendants uniting, and again upon the application of the defendants, not citizens of Minnesota; and upon each removal, remanded to the state court. The ruling of the circuit court, in the orders remanding, was brought by writ of error before the supreme court for review, and the opinion delivered by the Chief-Justice affirming the judgment, in which he says:

"The suit then, as it stands on the complaint, is in respect to a controversy between the parties as to the liability of the defendants on a *single contract*": and "that the case was not removable under the first clause of the second section of the act of 1875, because all the parties on one side of the controversy were not citizens of different states from those on the other." He proceeds further: "Neither do we think it was removable under the second clause of the same section, on the ground that there was in the suit a separate controversy, wholly between citizens of different states. To entitle a party to a removal under this clause, there must exist in the suit a *separate and distinct cause of action*, in respect to which all the necessary parties on one side are citizens of different states from those on the other."

As in this case, so in ours, the cause of action is single and springs out of one contract into which the defendants are alleged to have entered,—in the former, a violated contract of bailment, in the latter, a broken undertaking to convey over the road. In both cases a common liability is alike denied, and yet, the transfer is unauthorized under the act.

As to the suggestion of local prejudice unfavorable to a fair trial, we refer to *Fitzgerald* v. *Allman*, 82 N. C., 492, and the

more recent adjudications of the supreme court upon the last constitutional amendments, and the power conferred by them upon Congress.

There is no error in the ruling of the court and this will be certified, to the end that the cause may proceed therein.

No error. Affirmed.

HOSEA HALE v. J. M. RICHARDSON.

Attachment—Arrest—Practice in cases of.

1. A warrant of attachment cannot be supported by an allegation in the affidavit that the defendant is about to remove from the state to defraud his creditors; but such an allegation is material in an affidavit for a warrant of arrest.
2. Upon motion to vacate such warrant, the judge may consider affidavits and any proper evidence adduced by the respective parties, to establish or controvert the allegations of the affidavit upon which the warrant issued; and his findings of fact upon the same are conclusive.

(*Benedict* v. *Hall*, 76 N. C., 113; *Devries* v. *Summit*, 86 N. C., 126, and cases there cited; *Burke* v. *Turner*, 85 N. C., 500, cited and approved).

MOTION to vacate an order of attachment heard at Spring Term, 1883, of UNION Superior Court, before *Shipp, J.*

The plaintiff brought this action before a justice of the peace in the county of Union on the 31st day of January, 1883, and sued out a warrant of attachment therein, which was duly levied upon the property of the defendant.

Afterwards the defendant appeared and moved upon due notice to discharge the attachment, on the ground of alleged irregularity in the issuing thereof, and upon the further ground, that the material allegations in the affidavit upon which the same was issued were not true.

The action was tried before the justice of the peace, who gave judgment for the plaintiff for the debt, refused to discharge the attachment, and the defendant appealed to the superior court. In that court the motion to discharge the attachment was renewed. Numerous affidavits were offered, both on the part of the plaintiff and defendant, in regard to the material allegations contained in the affidavit of the plaintiff upon which the warrant of attachment issued, and the whole matter was considered by the court. The court found as a fact that the defendant did not sell and dispose of his property fraudulently and with a view to defraud his creditors; and further, that the defendant was not about to leave the state with intent to defraud his creditors; and thereupon gave judgment discharging the attachment and directing the restoration of the property levied upon and seized to the defendant, and for costs. From this judgment the plaintiff appealed to this court.

Messrs. Hinsdale & Devereux and *Covington & Adams*, for plaintiff.

Messrs Payne & Vann, for defendant.

MERRIMON, J., after stating the case. The allegations in the affidavit that the defendant was about to leave the state with a view to defraud his creditors, was immaterial in the application for the warrant of attachment: such removal is not made a cause for such warrant, but it would be a material allegation in an affidavit for a warrant of arrest. THE CODE, §§291, 349; *Wilson* v. *Barnhill*, 64 N. C., 121.

It is competent on a motion to discharge an attachment, for the court to hear affidavits and any proper evidence to disprove the allegations contained in the affidavit required by the statute to support a motion for the warrant. The plaintiff may in such case meet them by counter-affidavits and evidence. There is nothing in the statute that makes the affidavit necessary to obtain the warrant of attachment, conclusive of the truth of the alle-

gations therein made, and it would be manifestly unjust to make it so by judicial precedent. If this were so, an overzealous or unprincipled creditor might make a remedial statute an engine of oppression and wrong. There are many cases in which counter-affidavits have been heard under varying circumstances. We think it is generally competent to disprove the alleged grounds for a warrant of arrest, warrant of attachment and like cases by affidavits and proper evidence upon a motion that puts the same in issue. *Clark* v. *Clark*, 64 N. C., 150; *Bruff* v. *Stern*, 81 N. C., 183; *Devries* v. *Summit*, 86 N. C., 126; *Benedict* v. *Hall*, 76 N. C., 113.

The findings of the court upon the evidence, that the defendant did not sell his property fraudulently and with a view to defraud his creditors, is conclusive, and this court has no power to review his findings in this respect. This is well settled by many decisions. *Burke* v. *Turner*, 85 N. C., 500.

The court having found the single material allegation in the affidavit upon which the warrant of attachment was granted to be unfounded, it was proper to discharge the attachment and give judgment that the property levied upon and seized be restored to the defendant, in the absence of any motion to amend that the court would for satisfactory reasons grant.

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

No error. Affirmed.

STATE ex rel. A. B. TITMAN, Adm'r, v. H. T. RHYNE, Adm'r, and others.

Sheriff—Executions—Lien of Judgment.

1. A sheriff is liable upon his official bond for a failure to apply proceeds of sale of debtor's land in payment of an execution, in his hands at the time of sale, issued upon a judgment having the prior lien.

2. The lien upon land acquired by docketing a judgment cannot be displaced by one subsequently acquired. (The rights of the party under the judgment and execution of this court, were lost by not issuing *alias executions*).

(*Rhyne* v. *McKee*, 73 N. C., 259; *Perry* v. *Morris*, 65 N. C., 221; *Isler* v. *Colgrove*, 75 N. C., 334; *Cannon* v. *Parker*, 81 N. C., 320; *Pasour* v. *Rhyne*, 82 N. C., 149; *Whitehead* v. *Latham*, 83 N. C., 232; *Worsley* v. *Bryan*, 86 N. C., 343, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of GASTON Superior Court, before *Shipp, J.*

The defendants appealed.

Mr. G. F. Bason, for plaintiff.

Mr. W. P. Bynum, for defendants.

MERRIMON, J. This action is brought by A. B. Titman, administrator of J. M. Wright, deceased, upon the official bonds of R. D. Rhyne, deceased, who was in his life-time sheriff of Gaston county from September, 1874, to December, 1876. The defendant H. T. Rhyne is administrator of R. D. Rhyne, and the other defendants are the sureties (or the representatives of them) to his official bonds.

The record shows that the said J. M. Wright had judgment against Jacob Lineberger for $254.66, with interest thereon and for costs, and that it was duly docketed in the superior court of Gaston county on the 28th day of August, 1873; that G. W. McKee also had judgment against said Lineberger for $547.80, with interest thereon and for costs, duly docketed in said superior court on the 8th day of November, 1873. Upon these judgments, executions issued, and were directed and delivered to the said sheriff R. D. Rhyne, and he had the same in his hands on the 3d of April, 1876. He levied them upon and sold the lands of Lineberger, and realized therefrom $584, and applied this money to the execution in favor of McKee, except $14.75, the costs of setting apart the homestead of Lineberger.

Afterwards another execution issued upon the judgment in favor of the said J. M. Wright, directed and delivered to said

sheriff; and likewise, an execution issued from this, the supreme court, upon a judgment in favor of G. W. McKee, rendered at the January term, 1873, of this court, for the sum of $2,625, dated on the 1st day of August, 1873, and returnable to the January term of this court, 1874, and secondly, another, dated July 1st, 1876, returnable to the January term of 1877, this last one, and the last one above named in favor of said Wright, were both issued and directed to and in the hands of said sheriff at the same time. He levied them upon and (on the 4th day of September, 1876) sold other lands of the said Lineberger, and realized therefor $25; no part of this sum was applied to the execution in favor of said Wright, nor did the sheriff ever make return thereof.

The relator of the plaintiff assigned breaches of said official bonds, in that the sheriff had failed to apply, first, a sufficient part of the money so realized by him for the land sold upon said executions to the payment of the judgment, interest and costs in favor of his intestate J. M. Wright, and that he had failed to make due return of the executions in his favor. The defendants denied that the sheriff had committed such or any breach of his bonds.

The parties waived a trial by jury, and by common consent, the judge found the facts and the law arising upon them, and upon consideration, gave judgment for the plaintiff. The defendants excepted and appealed to this court.

THE CODE, §435, provides that "upon filing a judgment-roll upon a judgment affecting the title of real property, or directing in whole or in part the payment of money, it shall be docketed on the judgment docket of the superior court of the county where the judgment-roll was filed, and may be docketed on the judgment docket of the superior court of any other county upon the filing with the clerk thereof a transcript of the original docket, and shall be a *lien* on the real property in the county where the same is docketed, of every person against whom any such judgment shall be rendered, and which he may have at the

time of the docketing thereof in the county in which such real property is situated, or which he shall acquire at any time thereafter for ten years from the date of the rendition of the judgment," &c.

The judgment of Wright, therefore, became a lien upon all the lands of Lineberger in the county of Gaston, which he owned on the 28th day of August, 1873, and which he owned at any time within ten years next thereafter until the same was discharged. In the absence of personal property to be sold to satisfy this judgment, the owner of it was entitled to have this lien enforced by execution and a sale of the lands thereunder, at any time while it continued in force, and no subsequent lien could displace it; nor would any sale under execution, issued upon a judgment docketed subsequently to it, operate to discharge it, or pass the title to the land except subject to it as a prior lien.

The sheriff made two sales of the land of Lineberger, and at the time of each he had in his hands an execution issued in favor of Wright to enforce his prior lien. The money he realized by these sales was applicable, first, to the discharge of this lien, and it was his plain duty to so apply it. There was not a shadow of authority for applying the money, first, in favor of the lien (the subsequent lien) of McKee.

The counsel for the defendants insisted that the teste of the execution issuing from this court in favor of McKee antedated the date of the docketing of the judgment in favor of Wright, and therefore the money ought to have been applied to it, and he relied upon the case of *Rhyne* v. *McKee*, 73 N. C., 259. So the first execution issuing from this court did; and if the land had been sold pending that execution, it would have taken the money; but the land was not then sold; it was not sold until 1876, and the execution issuing from this court at that term bore teste as of the term of this court next before that term, and its *teste* did not antedate Wright's lien. If there had been a levy of the first execution issuing from this court upon the land, and the

lien thus created had been kept up by *alias* executions, and a *venditioni exponas*, then the money realized for the land sold ought to have been applied to the judgment in this court, not otherwise. The lien created by the first execution issuing from this court was lost. *Perry* v. *Morris*, 65 N. C., 221; *Isler* v. *Colgrove*, 75 N. C., 334; *Cannon* v. *Parker*, 81 N. C., 328; *Pasour* v. *Rhyne*, 82 N. C., 149; *Whitehead* v. *Latham*, 83 N. C., 232; *Worsley* v. *Bryan*, 86 N. C., 343.

In failing to apply a sufficient amount of the money for which he sold the lands mentioned, to the payment of the docketed judgment in favor of the intestate of the relator, the sheriff committed a breach of his official bond, for which the defendants are answerable in this action.

The plaintiff is entitled to have judgment for the sum specified in the bond, to be discharged upon the payment of the relator's debt and costs.

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

No error. Affirmed.

SUSAN HANNA v. FIDELIA HANNA and others.

Receivers, when appointed pendente lite.

A receiver will not be appointed, *pendente lite*, upon a mere allegation that the party has reason to believe the property in dispute will be wasted or destroyed. The application in such case must state the grounds of apprehension, and the judge determines the reasonableness thereof upon the facts found by him.

(*Twitty* v. *Logan*, 80 N. C., 69; *Hughes* v. *Person*, 63 N. C., 548; *Wood* v. *Harrell*, 74 N. C., 338, cited and approved).

HANNA *v.* HANNA.

MOTION for the appointment of a receiver *pendente lite*, heard at January Term, 1883, of WAKE Superior Court, before *McKoy, J.*

The plaintiff appealed.

Mr. Armistead Jones, for plaintiff.

Messrs. Argo & Wilder, Bledsoe & Bledsoe and *S. G. Ryan*, for defendants.

SMITH, C. J. The plaintiff institutes her action against the three infant children of the intestate husband by a former marriage, and their two grand-parents, to recover possession of various articles of personal property assigned and set apart for the year's support of herself and family. Two of the defendants, being under the age of fifteen years, constituted part of the family, and the allowance was increased by the addition of one hundred dollars for each, under the statute, making the aggregate amount of five hundred dollars, the estimated value of the property assigned by the commissioners. The plaintiff continued to reside in the house occupied by her husband with his children for some time after his death, when, having had her year's provisions laid off, and it seems, from the schedule, all his personal goods appropriated to meet the estimate, a controversy sprang up between herself and them, terminating in her departure and taking up her residence elsewhere and leaving the goods, consisting largely of household furniture and other articles of domestic use, upon the premises with the infant defendants of whom Fidelia alone had arrived at the age of fifteen years. Pending the suit, the plaintiff applied to the judge for the appointment of a receiver to take charge of the property, supporting the same by her complaint and other affidavits, on the hearing of which, and the affidavits offered in opposition, he adjudged a receiver to be necessary to protect three of the assigned articles, a horse, a vice, and pork made from hogs, and refused to invest him with

authority to take into his possession and under his control the others specified in the complaint. From this ruling the plaintiff appeals.

From the affidavit of the defendant Fidelia, it appears that she claims most of the property mentioned in the complaint for herself and the younger children, as a gift from their mother in her life-time, and from others, and denies her father's right thereto, and the title of the plaintiff derived under the allotment.

It is alleged by the plaintiff in her complaint, and an additional affidavit filed, that the defendants killed and converted the hogs into meat for consumption—have attempted to sell the vice, and are unable to provide sustenance for the horse, but no other acts of waste are imputed; nor does it appear that any of the acts charged were committed after the commencement of the suit, or with any hostile intent towards the plaintiff's claim. It is asserted also that the defendants are without means to make good the results of recovery, if effected, and no other grounds, except those stated, are assigned for the plaintiff's apprehension of loss and damage unless the property is taken into the custody of a receiver; and the court is asked to take it from the defendants' possession, and, it may be, order a sale rendered necessary by the removal, before the contesting claims of title are decided.

We cannot see why an injunction against the sale or injurious use of the property would not adequately secure the fruits of an adjudication in favor of the plaintiff, without disturbing the defendants in their possession, while the latter might suffer serious loss, and prevent inconvenience if the goods should be withdrawn and converted into money. It is the duty of the judge in passing upon such a question, to consider the consequences of the proposed action to both parties, and not to needlessly injure the one for the purpose of obviating some slight disadvantage to the other.

The statute authorizes the appointment of a receiver before judgment, only when a party "establishes an apparent right to property," the subject of the action and in possession of the

adverse party, when it or its rents and profits are in danger of being *lost, or materially injured or impaired.* C. C. P., §215, *Twitty* v. *Logan*, 80 N. C., 69.

The case made upon the proofs does not show that the goods, left undisturbed and simply used for domestic purposes, are exposed to the hazards contemplated by the statute, that of loss or material injury or impairment in value, so as to call for the exercise of the power asked, and deprive the defendants of their custody, or that any danger menaces, against which a personal restraining order would not afford adequate defence; and should this prove insufficient, the plaintiff is still at liberty to ask for a further measure of relief.

The plaintiff has not chosen to resort to the summary process of claim and delivery of personal property, provided by the Code in section 176 and following, during litigation, by which she could have obtained the goods, or had them secured to await the result of the contest, and avoided the injury which the defendants may sustain by being deprived of their use in the meantime. But pretermitting this method of redress against apprehended loss, she demands its removal into the custody of an agency of the court, without indemnity to the defendants, should they establish their title.

The appointment of a receiver *pendente lite* is not a matter of strict right, but rests in the sound discretion of the court, and such order will not be made, unless, from all the circumstances, it appears that greater injury will ensue from leaving the property with its present possessors than from its removal into the custody of such officer, and in this regard, the interest of both parties will be considered, and the dangers of loss or injury must be imminent. High on Receivers, §§7, 8.

The application does not present a favorable aspect to invoke the stringent action of the court in interposing its authority in the manner demanded.

Again, we have the plaintiff's declaration of her belief that the goods left where they are, will be wasted or destroyed, and,

except in the acts of the defendants specified, and in their poverty and inability to make amends and to repair the damages which the property may suffer, assigns no facts as the grounds of such belief. The interlocutory order provides for the safety of those articles and places them in the receiver's hands, and it is the office of the judge to determine the *reasonableness* of the plaintiff's apprehensions, and, therefore, the facts upon which they rest; and the plaintiff must not content herself with a mere allegation that she "has reason to believe" that the same will be "wasted and destroyed," without assigning her grounds therefor, unless the court interposes. *Hughes* v. *Person*, 63 N. C., 548; *Wood* v. *Harrell*, 74 N. C., 338.

We therefore find no error in the ruling of the court of which the plaintiff can complain, and as the defendants acquiesce in the order, as restricted, the judgment must be affirmed.

No error. Affirmed.

JOHN A. ATKINSON v. W. A. SMITH and others.

Receiver—Practice in reference to suits upon bond of.

Where a receiver is alleged to have committed a breach of trust, the party complaining must first obtain a rule requiring him to render an account, and, if default be found, apply to the court for leave to sue his bond. In this case, the refusal of the motion for judgment upon the bond was proper.

(*Bank* v. *Creditors*, 86 N. C., 323, cited and approved).

CIVIL ACTION heard on report of a referee, at Spring Term, 1883, of JOHNSTON Superior Court, before *MacRae, J.*

The solicitor for the state brought an action under the statute in the name of the state on the relation of himself against William F. Atkinson, guardian of the plaintiff John A. Atkinson, to secure the estate of his ward in his hands. At fall term, 1873, the defendant William A. Smith was appointed receiver in the action; but, afterwards during the same term of the court,

he declined the receivership, and B. V. Smith was appointed in his stead, and executed his bond as receiver in the sum of one thousand dollars, with the said William A. Smith as his surety, conditioned for the faithful discharge of his duty and obligation in that behalf.

The plaintiff having arrived at the age of twenty-one years, at the fall term, 1882, was allowed to move in said action for, and he obtained, an order, requiring the said William A. Smith to account for the fund he had received as receiver, and also requiring said B. V. Smith to account for the fund he had likewise received, and requiring each to pay the same, respectively, into court.

There was a reference to take proper accounts and ascertain the several amounts due from each of said parties. Notice of the taking of the account was given. The account was taken and report made to the court, from which it appeared there was due from the said William A. Smith the sum of $199; and from the said B. V. Smith the sum of $268.25. No exceptions to the report were entered. Afterwards at spring term, 1883, of said court, the plaintiff moved for judgment against the said B. V. Smith and his surety William A. Smith, upon the said bond given by him as such receiver.

The court denied this motion, but ordered that the report be confirmed, and that William A. Smith pay into court the sum of $202.95; and that B. V. Smith pay into court the sum of $268.25, with interest; and that if the said sums were not paid by said parties respectively, within thirty days, then the plaintiff have leave to bring his action upon the said receiver's bond for the same.

William A. Smith at once paid into court the sum of money specified in the order of the court as to himself.

The plaintiff excepted to the order of the court denying his motion for judgment against B. V. Smith and his surety, upon the bond given by him as receiver, and appealed to the court.

No counsel for plaintiff.

Mr. T. M. Argo, for defendants.

MERRIMON, J., after stating the case. There is no statute of this state, nor any well settled practice under THE CODE, or the common law method of procedure, or in courts of equity, that authorizes such a judgment as that demanded by the appellant. No notice of his motion for judgment upon the receiver's bond had been given the surety, nor had any independent action been brought, nor leave obtained from the court to sue upon the bond.

The regular course of procedure, according to well settled practice in cases like this, is to proceed against the receiver in the first instance, and if he shall fail in the proper discharge of his duty within the scope of his bond, then to obtain leave of the court to sue upon his bond. It may be, that in some cases, the surety might by order of the court, and upon reasonable notice, be brought into the action in which the receiver had been appointed, and proceeded against therein. But this is not the usual course pursued, nor is it to be encouraged, if indeed, it could be sustained in any case. *Bank* v. *Creditors*, 86 N. C., 323; High on Receivers, §129 *et seq;* Kerr on Receivers, 260.

In our judgment, the course pursued by the superior court was the proper one.

There is no error. The judgment must be affirmed, and it is so ordered. Let this be certified.

No error. Affirmed.

ALEXANDER JACKSON v. ROBERT BUCHANAN.

Clerk of Superior Court, powers of the deputy of—Ministerial and judicial acts.

The deputy of the clerk of the superior court is authorized to take the affidavit of the plaintiff and to order the seizure of personal property in an action of claim and delivery. Ministerial and judicial acts distinguished.

(*State* v. *Sneed*, 84 N. C., 816, cited and approved).

JACKSON *v.* BUCHANAN.

APPEAL from an order made at Fall Term, 1882, of RICHMOND Superior Court, by *Gilmer, J.*

This was an action of claim and delivery, and the plaintiff, on the day of suing out his summons, made the affidavit required by section 177 of the Code of Civil Procedure before an acting deputy of the clerk of the superior court of Richmond county, who endorsed thereon an order directed to the sheriff requiring him to take possession of the property described in the affidavit and deliver it to the plaintiff. The seizure was made and the cotton, the property claimed, redelivered to the defendant on his entering into bond under the provisions of section 181.

At fall term, to which the summons was returnable, the court adjudged "that the order of seizure issued by the deputy clerk of Richmond county on the 25th October, 1882, be vacated and dismissed," and from this ruling the plaintiff appeals.

Messrs. McNeill & McNeill and *J. D. Shaw*, for plaintiff.

Messrs. French & Norment and *Rowland & McLean*, for defendant.

SMITH, C. J. While no case accompanies the record and there is no specific assignment of error in the transcript, nor the grounds for the vacating of the order given, we are restricted to an examination of the judgment itself and an inquiry into its correctness.

But a single point is presented in the appeal (and to this the argument before us was directed) to-wit, the character of the act, whether judicial or ministerial. If the former, the authority conferred upon the clerk to issue the order is personal to the office and incapable of delegation to another; if the latter, the deputy was as competent as the principal, acting in his name, to issue the mandate and warrant the seizure.

It is true that a preceding examination of the sufficiency of the affidavit is required, and this in some degree involves the exercise of judgment, yet it is only so far as to see that the

requirements of the statute are complied with, and these are explicit in terms. This being ascertained, it is made the positive duty of the clerk to endorse the mandatory order on the affidavit, and no discretion in the premises is reposed in him. §178. When delivered to the officer, he must demand a written undertaking with sureties and approve of that tendered, exercising functions thereby of the same nature as those exercised by the clerk before awarding the process, before proceeding to execute the command. In issuing the order, the clerk does not represent the court, whose officer he is, and as in numerous cases he is authorized to do, under the statute, but he performs a ministerial act, peremptorily enjoined, and exercises a function belonging to the office.

"*The clerk of the court shall, thereupon, by an indorsement in writing upon the affidavit, require the sheriff* of the county, where the property claimed may be, to take the same," &c. C. C. P., §178.

The language is different where an arrest is to be made, and such order "must be obtained from the court in which the action is brought or from a judge thereof." §150.

Where an attachment is sought against property, the warrant may be issued by a judge or by a clerk, §199; and an injunction can only be obtained from a judge in accordance with whose order the clerk issues the writ. §188.

These variations in the phraseology of the statute clearly show that the order of seizure, in an action for the claim and delivery of personal property, is but the issue of subsidiary process by the clerk acting in his official capacity, as such, and in its character ministerial only.

But the right of these officers to confer authority upon others, to act in their name in the performance of ministerial services, existing at common law, has long been recognized by statute.

They may appoint deputies, and these are required to take the same oaths before entering upon their duties which are required of their principals: the clerks are compelled by "*themselves or their*

lawful deputies" to have offices at the court-house or other place designated by the county commissioners at the county-seat, for a prescribed time every week open to such as have business with them. Rev. Code, ch. 19, §15; C. C. P., §141.

Moreover under the former law the deputy continued, upon the death of the incumbent principal, to perform all the duties appertaining to the office until his successor is appointed. Rev. Code, §15, *supra*.

These statutory provisions for the convenience of the public evidently contemplate a full substitution of the deputy in place of the principal, and his investiture with all the ministerial functions that belong to the office. These provisions are most of them embodied in THE CODE, which has just gone into operation, sections 74, 75 and 80, and indicate a purpose to vest in the deputy the same authority possessed by the principal to issue the ancillary remedial process in aid of the action, to which the plaintiff is entitled of course upon his application and compliance with the prescribed conditions. Its issue is positively demanded and no discretion to withhold given; and hence it is essentially the performance of a ministerial duty only.

The administration of justice between suitors, forced to seek redress by action in counties where the business of the clerk's office is large and onerous, if the authority of the deputy is restricted, as contended, might be seriously obstructed to the public detriment and the delay of the remedy sought and given by the statute. The enactments do not indicate such to be the legislative intent in the words which are used to express that intent.

In a recent case, this court has held that the examination of a person accused of crime not within the jurisdiction of a justice of the peace, with a view of determining whether he shall be bound over for trial in a court having cognizance, was a *ministerial* and not a judicial act. *State* v. *Sneed*, 84 N. C., 816. And if so, the issuing the order for seizure now before us was equally a ministerial duty.

Our own researches and those of counsel have led to the discovery of no adjudicated cases in which the character of such an act has been before the court, and the conclusion to which our reflections lead is, that the issuing of the order was not such an exercise of judicial power as, under the law, could only be performed by the clerk in person.

The judgment vacating the order is declared erroneous, and is reversed. Let this be certified.

Error. Reversed.

RANDALL BODENHAMER v. A. H. WELCH.

Bankruptcy—Possibility coupled with an interest—Equitable counter-claim.

1. The contingent interest of a bankrupt, in real and personal property, passes to and vests in his assignee.
2. Contingent remainders, executory devises, and other possibilities coupled with an interest, are assignable.
3. Equitable counter-claim of defendant is sufficient to defeat an action of ejectment.

(*Fortescue* v. *Satterthwaite*, 1 Ired., 566; *Watson* v. *Dodd*, 68 N. C., 528; *Stith* v. *Lookabill*, 76 N. C., 465; *Farmer* v. *Daniel*, 82 N. C., 152, cited and approved).

SPECIAL PROCEEDING for partition of land, commenced before the clerk of DAVIDSON Superior Court, and heard at Chambers, by consent, at Forsyth court, on the 17th day of May, 1882, before *Eure, J.*

The plaintiff's petition states that in 1840, William Bodenhamer died in the county of Davidson, having previously published his last will and testament, in which he devised, among other things, a tract of land lying in the county of Davidson, containing two hundred acres, more or less, to Martha Boden-

hamer, his wife, for and during her natural life, and after her death, to be equally divided between all his children that are then living. The said Martha, after living on the land so devised, died on the 1st of January, 1882, leaving her surviving, of the children of William Bodenhamer, John D. Bodenhamer, who has sold his interest in said land to the petitioner Joseph Yokely; M. V. Bodenhamer, who has sold his interest to J. M. Raper; Susan Teague, the daughter of said Wm. Bodenhamer, the petitioner Randall Bodenhamer, and the defendant Elizabeth Welch, who intermarried with the other defendant, A. H. Welch.

All of them are claimed by the petitioners to be tenants in common, and an order for the partition of the land is asked for.

The defendants, being willing for a partition to be made, admitted that they were all tenants in common, except Randall Bodenhamer, who they contended was not a tenant in common, and had no interest in the land. They alleged that during the life-time of his mother (Martha) Randall Bodenhamer filed his petition in bankruptcy and surrendered with his other property "his interest" in the land mentioned in the petition, and his assignee in bankruptcy, prior to the death of the said Martha, sold the said Randall's interest on the 10th day of February, 1870, to the defendant A. H. Welch, and executed to him a deed therefor.

On the other hand the petitioner Randall insisted that the sale made by the assignee in bankruptcy conveyed no title to the purchaser, for the reason that during the life of his mother, Martha Bodenhamer, no such estate, interest or title in the land had vested in him, being an executory devise, and was not, as he is informed and believes, the subject of conveyance or sale.

The court adjudged that Randall's interest passed by the sale and deed of the assignee to the defendant Welch, from which judgment the said Randall appealed.

Messrs. M. H. Pinnix and *Watson & Glenn*, for plaintiff.
Mr. J. M. McCorkle, for defendant.

ASHE, J. The only question presented by the record for our determination is, whether the sale of the plaintiff's interest in the land by his assignee in bankruptcy passed a valid title to the defendant A. H. Welch.

It was contended by plaintiff's counsel that the interest of the plaintiff under the will of his father, William Bodenhamer, was a mere possibility, and though such an interest was embraced in the English statute of bankruptcy, it was not in that of the United States.

It is true the term "possibility" is not mentioned in the bankrupt act of the United States, nor are contingent interests mentioned in it in so many words; but the statute is broad enough to include every interest of the bankrupt in real and personal property that may be made available for the payment of his debts.

Section 5,046 of the act of congress provides that "all the property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent-rights and copy-rights; all debts due him or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person, arising from contract or from the unlawful taking or detention or injury to the property of the bankrupt; and all his rights of redeeming his property or estate, *together with the like right, title, power or authority to sell, manage, dispose of,* sue for and recover, or defend the same, as the bankrupt might have had if no assignment had been made, shall in virtue of the adjudication of bankruptcy, and the appointment of his assignee, but subject to the exception stated in the preceding section, be at once vested in such assignee."

Section 14 of the bankrupt act passed to and vested in the assignee every interest of the bankrupt, in real and personal property, and clothed him with the same right, title, power and authority to *sell, manage or dispose of,* as the bankrupt had before the assignment.

The question then arises, had the plaintiff Randall Bodenhamer such an interest in the land described in the petition, as was subject to be sold or disposed of by him?

His interest was contingent, depending upon his surviving his mother. It was not as contended, a mere possibility, but an *estate* in the land, *an executory devise*, or rather a contingent remainder, which is a *certain* interest. A possibility is defined to be "an uncertain thing" which may happen, or a contingent interest in real or personal estate. Possibilities are divided into, first, a possibility coupled with an interest: this may of course be sold, assigned, transmitted or devised: such a possibility occurs in executory devises and in contingent, springing or executory uses; and secondly, a bare possibitity of hope of succession: this is the case of an heir apparent during the life of his ancestor; it is evident he has no right he can assign, devise or release. 2 Bouvier Law Dict., 253.

That executory devises, contingent remainders and other possibilities coupled with an interest may be assigned, is maintained in *Jones* v. *Roe*, 3 D. & E., 88; *Higden* v. *Williamson*, 3 P. Wms., 132; 2 Story's Rep., 630; *Comegys* v. *Vasse*, 1 Pet., 193; 7 Texas Rep., 25; *Fortescue* v. *Satterthwite*, 1 Ired., 566; and in 3 Pars. on Cont., 475; Burrill on Assign., 72; Shep. Touch., 239.

The case of *Higden* v. *Williamson*, *supra*, which is a leading English case, was where one seized of a copy-hold estate surrendered the premises to his last will, and afterwards devised them to his daughter for life, then to trustees to be sold, and the money arising from the sale to be divided among such of his daughter's children as should be living at her death. The testator died; the daughter had issue, among others, a son, who was a trader and became bankrupt, and the commissioners assigned his estate. The bankrupt got his certificate allowed, and then his mother died. The assignees brought their bill for the bankrupt's share of the money arising from the sale; *It was held*, that the assignees were entitled to recover because the son in his mother's life-time might have released his contingent interest.

In 3 Parson's on Contract, 473, it is laid down, that if the interest of the bankrupt rests on a contingency, the assignee takes subject to the contingency, or rather takes the right to recover if the contingency happens.

In *Watson* v. *Dodd*, 68 N. C., 528, Chief-Justice PEARSON, speaking for the court, said that a contingent remainder, like that under consideration, was not assignable at law, but might be assigned in equity; and if assigned, and the assignor received therefor a valuable consideration, and there was no fraud or imposition and the estate afterwards vested, a court of equity would compel the assignor to make title, or else hold the estate as a security for the consideration.

There can be no doubt then that the contingent interest of the bankrupt may be assigned, and whether assignable at law or in equity, whatever interest the bankrupt had, vested in his assignee. What then is the assignee to do with it? Is he to hold it until the estate in remainder falls in by the happening of the contingency, which may be so long deferred that the authority of the assignee may have ceased by the determination of the proceeding in bankruptcy? or must he sell and realize what he can for the benefit of the creditors? If the plaintiff had the right to make an assignment of his interest, and we have shown that he had, the bankrupt act gave to his assignee in bankruptcy the very same right of disposition that he had before filing his petition. The plaintiff disposed of his interest in the land by the surrender of it in his schedule in bankruptcy for the benefit of his creditors. By doing so, his debts were discharged; and that constituted a valuable consideration for his assignment, and when the assignee sold to the defendant A. H. Welch and the contingent remainder fell in by the death of the tenant for life, though the plaintiff acquired the legal estate, he holds it as trustee for the defendant purchaser.

If the plaintiff (Bodenhamer) had brought an action in nature of ejectment against the defendant (Welch) to recover the land, there would have been, we presume, no question but that the

defendant might have defeated the action by pleading his equitable counter-claim. *Stith* v. *Lookabill*, 76 N. C., 465; *Farmer* v. *Daniel*, 82 N. C., 152, and cases there cited. And that principle must, we think, govern and be decisive of this case.

Our conclusion, therefore, is that Randall Bodenhamer has no share in the partition of the land described in the petition, as a tenant in common.

There is no error. Let this be certified to the superior court of Davidson county, that a *procedendo* may issue to the clerk of the superior court of that county to the end that the cause may be proceeded with in accordance with this opinion and the law.

Nor error. Affirmed.

SAMUEL J. GUY v. SHADRACH MANUEL.

Evidence—Admissions of parties and attorneys—Silence.

1. The admissions of a party contained in the pleadings filed in a cause are competent evidence against him, whether the pleadings are verified or not, or signed by the party or his attorney.
2. So also the admissions of attorneys in the conduct of a cause, are admissible in evidence against their clients.
3. The silence of a party in whose presence a statement is made, will not be taken as an acquiescence on his part in the truth of the statement, unless the occasion be one where a reply from him might be properly expected; *Hence* it was held, that the declarations of deceased persons made in presence of the plaintiff concerning the location of land before his purchase of the same, to which the plaintiff made no reply, are inadmissible against the plaintiff (in an action to recover the land), when offered for the purpose of concluding the plaintiff or giving additional weight to the declarations of the deceased persons.

(*Adams* v. *Utley*, 87 N. C., 356, cited and approved).

EJECTMENT tried at Spring Term, 1882, of CUMBERLAND Superior Court, before *Shipp, J.*

The defendant first filed an answer to the plaintiff's complaint as follows:

1. That the first article therein contained is not true.

2. That so much of the second article of the plaintiff's complaint as alleges that the defendant is in possession of the fifteen acres therein described is admitted, but denies that he wrongfully withholds the possession of the same.

Subsequently, by leave of the court, the defendant was permitted to file the following answer, to-wit:

1. That no allegation of the first article thereof is true.

2. That no allegation of the second article thereof is true.

There was no verification of either answer, and both were signed by the defendant's counsel.

Verdict and judgment for the defendant and the plaintiff appealed.

Messrs. W. A. Guthrie and *N. W. Ray*, for plaintiff.
Messrs. Hinsdale & Devereux, for defendant.

ASHE, J. On the trial, several exceptions were taken by the plaintiff to the ruling of His Honor upon points of evidence, only two of which do we consider it important to consider. First, the plaintiff offered to send to the jury the first answer filed by the defendant, contending that it was an admission of record, but the court refused to receive it as evidence. In this there was error. The case of *Adams* v. *Utley*, 87 N. C., 356, directly bears upon the point here presented, and we think is decisive of this case. There, there were two answers filed by the defendant; the first admitted a credit on the bond sued upon; and the second, as here, denied each allegation of the complaint. The plaintiff offered to read the first answer to the jury as evidence to rebut the presumption of payment, relied on by the defendant in his second answer. It was held that the evidence was competent, and that "the admissions of a party are always evidence against him, and the fact that they are contained in the pleadings filed

in the cause does not affect its competency." But the defendant's counsel insist that that case is distinguishable from this, because there, the answers were verified by the defendant, and in this, they are simply signed by counsel without verification. It is a distinction without a practical difference. For the admissions of attorneys in the conduct of an action are always admissible in evidence against their clients, especially when the admissions are of record. "The admissions of *attorneys of record* bind their clients in all matters relating to the progress and trial of the cause. In some cases they are conclusive, and may even be given in evidence upon a new trial, though previously to such trial the party give notice that he intends to withdraw them; or, though the pleadings be altered, provided the alterations do not relate to the admissions. But to this end they must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of relaxing the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial." Taylor on Ev., §700, and cases there cited in support of the text.

Upon the authorities cited, we are of opinion that the first answer filed by the defendant was admissible evidence, and it made no difference whether it was signed by the defendant or his attorney.

The only other exception to which we deem it necessary to advert, is that to the admission of testimony of the fact, that, at a survey of the land now owned by the plaintiff at which he assisted, but before his purchase of the same, the beginning corner of defendant's land was pointed out in his presence by some old persons who had no interest in the land and who are now dead, and that the plaintiff made no objection. However competent the declarations of the deceased persons may have been as substantive testimony, we think the admission of the evidence for the purpose of concluding the plaintiff or of giving additional weight to the declarations of the deceased persons, was erroneous.

The plaintiff at the time of the survey had no interest in the land, nor does it appear that he then had its purchase in contemplation. He was then a stranger to the controversy about the location of the land, which was being surveyed. If he had at that time any interest in the question sought to be settled by the survey, his failure to object to the oral statements of the persons present, we are ready to admit, would have been some evidence of his acquiescence in what was said, in regard to the corner, in his presence and hearing. To make the statements of others evidence against one on the ground of his implied admission of their truth by silent acquiescence, they must be made on an *occasion* when a reply from him might be *properly expected*. Taylor on Ev., §738; *State* v. *Sugg*, at this term. But where the *occasion* is such that a person is not called upon or expected to speak, no statements made in his presence can be used against him on the ground of his presumed assent from his silence.

It has been held, where, in a real action, upon a view of the premises by a jury, one of the chain-bearers was the owner of a neighboring close, respecting the bounds of which the litigating parties had much altercation, their declarations in his presence were inadmissible against him, in a subsequent action respecting his own close. Taylor on Ev., §837, and case cited in note 3.

There is error. The judgment of the court below is reversed. Let this opinion be certified to the superior court of Cumberland county that a *venire de novo* may be awarded.

Error. Reversed.

SAMUEL J. HINSDALE v. SARAH E. HAWLEY, Adm'x.

Judgment, vacation of for irregularity.

A judgment can be set aside for irregularity, only at the instance of the party prejudiced.

(*Wolfe* v. *Davis,* 74 N. C., 597; *Emmett* v. *Steadman,* 2 Hay., 15; *Ray* v. *Patton,* 86 N. C., 386; *Jacobs* v. *Burgwyn,* 63 N. C., 196; *Rollins* v. *Henry,* 78 N. C., 342, cited, distinguished and approved).

MOTION to set aside a judgment heard at Fall Term, 1882, of CUMBERLAND Superior Court, before *Gilmer, J.*

This action, upon a promissory note given by Hawley & Lee, was begun in April, 1867, against the surviving partner Lee, and the defendant Sarah E. Hawley, administratrix of the deceased partner, and at the return term of the superior court of law of Cumberland, the administratrix entered the plea of fully administered. No other defence appears to have been made against a recovery. At November term, 1869, the cause having been transferred to the superior court, judgment was entered up in the following form:

"Judgment according to specialty filed for the sum of one hundred and eight dollars and fifty-six cents, of which sum sixty-eight dollars and thirty-eight cents is principal money, together with the costs in this case to be taxed by the clerk. It is ordered by the court, that no execution issue until further proceedings are had according to law before the clerk to ascertain the state of the assets in the hands of the defendants."

No further action was had in the cause until 1876, when the plaintiff caused to be served on the administratrix notice of his intended motion, at the term following, to set aside the judgment, as being irregular and contrary to the course of the court, in that, the pleas as to the assets of the intestate had not been first disposed of.

The motion was made and at fall term, 1882, heard and

granted, so far as it related to the defendant administratrix, and from this ruling she appeals.

Messrs. Hinsdale & Devereux, for plaintiff.
Messrs. Frank McNeill and *N. W. Ray*, for defendant.

SMITH, C. J., after stating the case. Our attention is called to the case of *Wolfe* v. *Davis*, 74 N. C., 597, wherein a judgment, essentially the same in terms as the present, is held to be irregular, and a refusal to set it aside reversed for error. The ruling would be directly applicable if the movement in this case for the vacation of the judgment, as in that, had proceeded from the defendant, the injured party. The administratrix has been deprived of her defence of a want of assets, so as to render her personally chargeable, if the record remains showing an absolute and final judgment against her in her representative character. Still it has been held, that to a process instituted to subject her own estate to the recovery, she may show that she had no assets, as the opportunity of doing so had been lost. *Emmett* v. *Steadman*, 2 Hay., 15, commented on, and the present practice explained in *Ray* v. *Patton*, 86 N. C., 386.

But we are unable to see in what manner the plaintiff can be prejudiced by the form of the record of the judgment, unless in so far as it restrains the issue of execution, and the correction of this will afford him full relief, without disturbing the judgment itself. Should he seek to convert it into a personal judgment, the defendant, upon the authority of the case cited, would be at liberty then to set up the defence of the want of assets in answer to the process. But, in our opinion, so long as the defendant is content, the plaintiff cannot call on the court to vacate what we must understand to have been done at his instance and for his benefit.

"No one but a defendant," says RODMAN, J., in *Jacobs* v. *Burgwyn*, 63 N. C., 196, "can complain of its irregularity,"

and this is repeated in *Rollins* v. *Henry*, 78 N. C., 342, meaning, as we interpret the words, the party injured.

We do not concur in the ruling of the court, and the judgment must be reversed. It is so ordered.

Error. Reversed.

JOHNSTONE JONES v. A. T. MIAL and others.

Contract, damages for breach of—Evidence of value of services—Quantum Meruit.

Where the plaintiff, by exercise of his right of election, rescinded his contract with the defendant, and brought suit for damages for a breach thereof, *it was held* competent for the plaintiff to show, as upon a *quantum meruit*, what was agreed to be paid under the contract for the services of himself and his employees, in addition to the value of his personal labor, actual outlay and liability in the prosecution of the work, as bearing on the question of the measure of damages. See same case, 82 N. C., 252.

(*Dula* v. *Cowles*, 7 Jones, 290; *Russell* v. *Stewart*, 64 N. C., 487; *Faw* v. *Whittington*, 72 N. C., 321; *Houston* v. *Starnes*, 12 Ired., 313, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of WAKE Superior Court, before *Philips, J.*

The plaintiff appealed.

Messrs. Fuller & Snow and *D. G. Fowle*, for plaintiff.

Messrs. Hinsdale & Devereux and *J. B. Batchelor*, for defendants.

SMITH, C. J. The plaintiff and defendants, on May 30, 1876, entered into an agreement, under the provisions of which the former undertook to begin, early in August, the publication of a weekly journal in the interest of the state grange, and to promote agricultural pursuits, and to prosecute the enterprise for

one year thereafter. In aid of this effort and to insure success, the defendants contracted to procure fifteen hundred paying subscribers, at the rate of two dollars per annum, whereof one thousand were to be furnished by the 1st day of October following, and the rest of the number at the end of the year. The other stipulations of the contract are not material in the solution of the present controversy.

The plaintiff started and continued the publication of the journal up to the 23d day of October, and was then ready and able to fulfill his contract, if he had been supplied with the funds from the subscription list which the defendants were to get up; but in this, the defendants failed, and the plaintiff, being disabled for want of means, discontinued the publication, and early in the next month sold out the materials on hand and his interest in the enterprise.

The series of issues prepared and submitted to the jury, except that inquiring of the damages, were all found by consent, and, among the responses that the defendants' breach of their stipulation to furnish the subscribers in support of the paper, and notice of intention not to comply with it, authorized the plaintiff to elect, and he did so elect on October 25, 1876, to hold the contract rescinded.

Upon the question of damages, the plaintiff, examined on his own behalf, proposed to give evidence as follows:

1. Having testified to his having employed an agricultural associate editor, fully competent for the required duty, but to whom he had paid nothing, the plaintiff offered to show what was to be paid under the contract for their services.

2. After stating that he had refunded a small sum ($7.50) to subscribers, the plaintiff proposed further to show what additional sums he was legally liable for to other subscribers.

3. Besides being allowed to prove the number of subscribers obtained before October 25th and the sums paid by them, the plaintiff offered to testify and estimate "the value of the name, good-will and subscription list, had the number of paying subscribers been procured according to the contract.

This further evidence was refused by the court, and exceptions are taken thereto.

The court charged the jury, "that the plaintiff was entitled to the actual expenses paid by him for running the paper, including suitable compensation for his own labor, and the $7.50 returned by him to subscribers; that from this amount must be deducted the sums received by him from subscriptions, advertising, and the amount for which he sold the paper."

To this instruction, based upon the admitted, and in connection with the rejected testimony, the plaintiff also excepts, and thus we have before us the proper measure of damages, to which he is entitled, for consideration.

It may be true, as contended by the appellant, that being obstructed in carrying out his undertaking by the defendants' failure and refusal to supply the means essential to the continued publication of the journal, dispensed with his performance of his remaining obligation in the premises, and remitted him at once to his redress for the full amount of the injury sustained for the violation of the contract on the part of the defendants, as if the plaintiff had fulfilled his own stipulations. But it is not necessary to pass upon the question in that aspect.

It is affirmatively and by consent of parties found as a fact, that the plaintiff exercised his right of election, upon the defendants' failure, to rescind the contract and thus place himself in such relations towards them, as if no special contract had been made, and his expenditures had been made and services rendered at their request, and to be paid for at their proper value. The authorities are believed to be uniform that a special contract displaces any by implication, and both cannot co-exist at the same time. Unless the plaintiff has performed his contract, or offered, being able to perform it—an equivalent, or its performance has been dispensed with or rendered impracticable by the defendants, he cannot recover upon the contract actually made, but he may elect, upon the defendants' breach, to treat it as annulled thereby, and then he may recover upon the contract implied by law.

"The contract," says PEARSON, C. J., in *Dula* v. *Cowles*, 7 Jones, 290, "is considered to remain in force until it is rescinded by mutual consent, or until the opposite party does some act *inconsistent with* the duty imposed on him by the contract which amounts to an abandonment." *Russell* v. *Stewart*, 64 N. C., 487; *Faw* v. *Whittington*, 72 N. C., 321; *Giles* v. *Edwards*, 7 Term Rep., 181; *Davis* v. *Street*, 1 C. & P., 18.

Assuming then the damages to be recoverable on the basis of the actual outlay of the plaintiff, and the value of services in the absence of any specific agreed amount, was any of the rejected evidence competent upon this inquiry?

There lies no objection to the rule contained in the instructions to the jury, considered in abstract terms, and of them the appellant can have no just grounds of complaint, unless the jury were misled or liable to be misled, in their not being permitted to hear of the value of the services of the assistant editor employed to assist the plaintiff.

As we understand the record, the evidence was not received, because the sum due has not been, and may never be paid, and cannot, therefore, enter into the measure of the plaintiff's damages. This objection rests only upon the claim or count for money paid to the defendants' use, and the cases cited are all referable to a demand in this form.

But the claim to compensation for these services stands upon a different footing. These services are as truly rendered by the plaintiff as if he had given his personal labor, for his employees are acting on his behalf, and their services have been received and appropriated to the defendants' use, and constitute a charge for which they are as much liable as for the plaintiff's own individual services; and this, irrespective of the plaintiff's having made compensation to his employees.

The proper form of enquiry should have been, as upon a *quantum meruit*, what were these services of the associate in the conduct of the paper worth, rather than what price was agreed to be paid by the plaintiff, as the witness proposed to testify. But

we think the agreed compensation was some evidence of the value of their services, and its prompt rejection by the court upon the ground that payment was a prerequisite to the recovery, may have prevented the counsel from prosecuting the inquiry further, and extracting evidence of the value. The evidence seems to have been admissible upon the authority of the case of *Houston* v. *Starnes*, 12 Ired., 313.

We think it a proper case to set aside the finding upon the issue of damages alone, and direct a *venire de novo* as to that.

The judgment must therefore be reversed, and the cause will be remanded, to the end that the plaintiff's damages be assessed according to this opinion, and it is so ordered.

Error. Cause remanded.

JOHN J. HASTY v. G. C. FUNDERBURK and others.

Appeal—Costs.

An appeal will be dismissed where it satisfactorily appears that the question of costs is the only matter involved.

(*State* v. *Railroad*, 74 N. C., 287, and cases cited, approved).

MOTION by defendant to dismiss the appeal, heard at October Term, 1883, of THE SUPREME COURT.

Messrs. Haywood & Haywood, for plaintiff.
Messrs. Payne & Vann, for defendants.

MERRIMON, J. It is suggested, and made to appear to the satisfaction of the court, that the matter involved in this action has been settled by the parties thereto, and that it is unnecessary to decide the question of law presented by the exceptions speci-

fied in the record. It further appears that the defendant, the appellee, has notified the appellant that he would move at the present term of the court to dismiss the appeal when the case should be called in its order for argument. Accordingly the motion to dismiss the appeal has been entered, and the appellant fails to appear and prosecute his appeal or oppose the motion to dismiss.

This court has repeatedly held, that when it appears that the matter in litigation in the action before it has been settled by the parties, or is disposed of in some other way, and it has thus become unnecessary to decide the questions presented by the appeal, it will not proceed to consider and decide them, but will dismiss the appeal. Courts are eminently practical tribunals. It is not their province, and it ought not to be their desire, to decide questions or causes unnecessarily. *State* v. *Railroad*, 74 N. C., 287; *Martin* v. *Sloan*, 69 N. C., 128; *Kidd* v. *Morrison*, Phil. Eq., 31.

In such cases, if the parties agree to dismiss the appeal, it may be done simply on motion; when they do not so agree, it is competent for the appellee, after reasonable notice of his proposed motion to appellant, to move to dismiss the appeal and to support the same by proof satisfactory to the court by affidavit or otherwise, as the court may direct, and the motion in a proper case will be granted.

The motion to dismiss the appeal in this case is allowed. Let an order to that effect be entered.

PER CURIAM. Appeal dismissed.

COMMISSIONERS of Moore County v. G. A. MACRAE and others.

Official Bonds, when suit on barred—County Treasurer, effect of settlement with—Mistake may be proved.

1. An action upon an official bond may be brought within six years after a breach thereof: the statute does not begin to run from the date, but only from the breach of the bond.
2. A settlement had between a county and its out-going treasurer, does not operate a discharge of liability upon his bond; nor is it *conclusive* evidence of a proper accounting, but is open to proof that a mistake was made.
3. The actual payment of the funds remaining in defendant's hands will alone relieve the bond from liability, and it is his duty to know to what fund the money in hand belonged.

(*Baker* v. *Munroe*, 4 Dev., 412; *Coomer* v. *Little*, Conf. Rep., 92, cited and approved).

CIVIL ACTION tried upon exceptions to a referee's report, heard at Fall Term, 1882, of MOORE Superior Court, before *Gilmer, J.*

The defendant G. A. MacRae was elected treasurer of Moore county in August, 1872, and duly qualified on the 2d day of September, 1872, and his term of office expired on the 4th day of September, 1874. On the — day of September, 1873, he gave bond as such treasurer, payable to the state of North Carolina for the sum of $9,000, with the other defendants as sureties thereto, conditioned as follows:

"The condition of the above obligation is such, that whereas the above bounden G. A. MacRae, county treasurer, is the proper and lawful person to receive the school fund during his term of office; Now, therefore, if the said G. A. MacRae shall, during his term of office, well and truly execute the duties pertaining to the school fund, and pay according to law, and on the warrant of the chairman of the board of commissioners, all

moneys which shall come into his hands as school fund, and render a just and true account to the board when required by law or by the board of commissioners, then the above obligation to be void; otherwise to remain in full force and effect."

This action was brought against the defendants upon this bond because of alleged breaches thereof. The defendants, among other defences, pleaded the *statute of limitations*, barring actions in cases like this. Upon the complaint and answer, "the matters at issue between the above parties" was referred by consent to a referee.

At the fall term, 1881, of the court, the referee filed his report in the action. To this report the plaintiffs filed sundry exceptions, only one of which is it material to consider here.

It is agreed between the parties that there was evidence before the referee, and before the court, tending to show that in February, 1875, there was a settlement between the defendant MacRae, as treasurer, and the county finance committee; and that in this settlement there was a mistake of $530.25 in favor of the treasurer; that this mistake was discovered in August, 1876, and this action upon the treasurer's bond was begun on the 21st day of January, 1880, to recover this sum, with interest.

The referee found and decided in his report, that the claim based upon this mistake, was barred by the statute of limitations. To this decision of the referee, the plaintiffs excepted. The court overruled the exception and gave judgment for the defendants, whereupon the plaintiffs appealed to this court.

Messrs. Hinsdale & Devereux, for plaintiffs.
Messrs. W. A. Guthrie and *W. E. Murchison*, for defendants.

MERRIMON, J., after stating the case. The defendants undertook and obliged themselves by their bond, to make good in money any default of their principal, "pertaining to the school fund" that might go into his hands during his term of office as treasurer, and particularly, for the purposes of this action, that

he would, in going out of office, pay over to his successor all sums of money he might then have in his hands belonging to the "school fund." If he failed to so pay over such money in his hands to his successor, he thereby committed a breach of his bond, and it might then at once be put in suit, or at any time next thereafter within six years.

The statute of limitations (THE CODE, §154, sub-division 1) provides that "an action upon the official bond of any public officer" shall be brought "within six years." This does not imply six years from the date of the bond, but from date of the breach thereof, the time when the cause of action accrued. The plaintiffs could not resort to the bond as a security for their benefit until default happened. It cannot be in the light of all past legislation in this state on this subject, that it was the purpose of the legislature to make the limitation begin with the date of the bond. The present statute takes the place of section 5, chapter 65 of the Revised Code. It is manifestly intended to serve the same purpose, and must receive the same construction as to the time when the statute begins to operate. *Baker* v. *Monroe*, 4 Dev., 412; *Coomer* v. *Little*, Conf. Rep., 92 (223).

Viewing the matter in the most favorable aspect for the defendants, the default took place on the 4th day of September, 1874; on that day MacRae ought to have paid all the "school fund" in his hands to his successor, and he failed to do so. The plaintiffs might at any time within six years next thereafter bring the action upon the bond. They did bring it within six years, and so the statute is no bar as to the breach then committed.

It is said, however, that the treasurer, MacRae, had a settlement with the finance committee of the county in February, 1875, by which it was ascertained that he had no part of the "school fund" he had failed to account for, and this conclusively discharged the bond as to all the defendants. We cannot accept such a conclusion.

The fact, if indeed it were a fact, that the defendant MacRae did not know at the time he went out of office, what, if any part of

the "school fund" remained in his hands, did not in any respect or degree change his liability and that of his sureties upon their bond. He was bound in contemplation of law to know, and to pay over all of the fund he had, and if he did not the breach was complete. It was his duty to keep his accounts correctly and to know what fund was in his hands, and in law, he *must know* and pay.

And so, also, if a mistake were made in a settlement had by him with the finance committee of the county in his favor of $530.25, this settlement did not operate to discharge his bond, his liability, or that of his sureties thereto. There could be no discharge of the bond and liability upon the same but by the payment of the money remaining in his hands. The settlement did not change the liability of the defendants; it was only *evidence* to show that the outgoing treasurer had accounted for all the fund in his hands; but it was not conclusive evidence; it might be explained by showing the mistake. The finance committee had no power or authority, statutory or otherwise, to discharge, by receipt or other acquittance they could execute, the bond and liability upon the same. There could not be a discharge but by the payment of the money to the incoming treasurer. Any settlement of the matter short of paying the money in the hands of the outgoing treasurer to his successor would not be conclusive, or conclusive evidence.

It might be difficult in many cases to show a make or disturb a settlement fairly made by the county treasurer with the finance committee of the county or with the county commissioners. Every reasonable intendment would go to support it; nevertheless, it is competent to show a mistake, and when shown, the bond operates to secure the money thus appearing to be due in the same measure, and moreover, as if the mistake had not been made. In contemplation of the law, it was continuously due from the breach of the bond.

The court erred in overruling the exception and granting judgment for the defendants. The judgment must be reversed, and it is so ordered. Let this be certified.

Error. Reversed.

A. M. McDONALD v. B. J. MORRIS and others.

Parties.

In an action by the plaintiff upon the defendant's bond to recover purchase money of land, a third person claiming title to the land adverse to the plaintiff is not a proper or necessary party. THE CODE, §§184, 189, construed by MERRIMON, J.

(*Colgrove* v. *Koonce*, 76 N. C., 363; *Wade* v. *Sanders*, 70 N. C., 277, cited and approved).

CIVIL ACTION tried at Spring Term, 1882, of MOORE Superior Court, before *Shipp, J.*

The plaintiff brought this action to fall term, 1876, of the superior court of Moore county against the defendant B. J. Morris, to recover the money specified in a bond dated the 6th day of March, 1874, for $617.

The defendant admitted in his answer the execution of the bond and that the same had not been paid; but set up as a defence to the plaintiff's cause of action, that the bond was given for the purchase money for a tract of land specified in his answer; that the plaintiff had no title thereto; that the deeds under which he derived title from one Mary Matthews were void, and the title was in the heirs-at-law of Mary Matthews.

At spring term, 1879, of the court, at the instance of the defendant Morris, the court made the heirs-at-law of Mary Matthews parties defendant, and they likewise filed an answer to

the complaint of the plaintiff, in which they, in support of the defence of the defendant Morris, alleged that the plaintiff had no title to the land mentioned; that his two deeds therefor, purporting to be made by their ancestor, Mary Matthews, were void, because of her mental incapacity to execute them, and that the title to the land was in them; and they demanded judgment that the deeds held by the plaintiff purporting to be executed by Mary Matthews, their ancestor, be delivered up to the court and cancelled, and that the court decree the title to be in them.

At the time the order was made making the said heirs-at-law parties defendant, the plaintiff objected thereto, and insisted that they were in no respect necessary or proper parties to this action, and, at the trial, he again so insisted. The court overruled his objection, and held that they were properly made parties, and the plaintiff excepted. A trial was had; several issues were submitted to the jury growing out of the answers of the defendant Morris and the said heirs-at-law; upon the verdict of the jury, the court gave judgment for the defendants that the plaintiff did not have title to the land; that his deeds therefor, purporting to be deeds executed by Mary Matthews, were void; that the plaintiff could not make title to defendants for the land, and that the plaintiff surrender the bond sued upon, to be cancelled; and that the defendants go without day and recover costs. Thereupon the plaintiff appealed to this court.

Messrs. Hinsdale & Devereux and *John Manning*, for plaintiff.
Messrs. W. A. Guthrie and *W. E. Murchison*, for defendants.

MERRIMON, J., after stating the above. Broad and comprehensive as are the provisions of THE CODE (§§184 and 189), allowing and requiring additional parties to be made to an action, we do not think that a proper construction of them would, in any aspect of this case, allow or require the heirs-at-law of Mary Matthews to be made parties defendant, or indeed, parties at all.

The statute contemplates that all persons necessary to a complete determination of the controversy, the matter in litigation, and affected by the same in some way, as between the original parties to the action, may, in some instances, and must in others, be made parties plaintiff or defendant. But it does not imply that any person who may have cause of action against the plaintiff alone, or cause of action against the defendant alone, unaffected by the cause of action as between the plaintiff and defendant, may or must be made a party. It does not contemplate the determination of two separate and distinct causes of action, as between the plaintiff and a third party, or the defendant and a third party, in the same action. It is only when, as between the original parties litigant, other parties are material or interested, that it is proper to make them parties. *Colgrove* v. *Koonce*, 76 N. C., 363; *Wade* v. *Sanders*, 70 N. C., 277.

As between the plaintiff and the defendant Morris the heirs-at-law of Mary Matthews have no interest whatever. They have no interest in *this* controversy adverse to the plaintiff; they are not necessary to a complete determination or settlement of the questions involved therein.

This is not an action to recover the possession of real estate, but is an action to recover a certain sum of money due upon a bond, and the question whether the plaintiff has title to the land mentioned is a collateral one. The court can determine the controversy before it between the original plaintiff and defendant without prejudice to the heirs-at-law of Mary Matthews, and a complete determination of the matter in litigation can be had without their presence. Nor is this an action for the recovery of either real or personal property, in which a third party having an interest therein may ask to be made a party. Nor is it an action upon a contract, or for specific real or personal property, wherein a defendant may, at any time before answer and upon affidavit, suggest that a person, not a party to the action and without collusion with him, makes against him a demand for the same debt or property, and have such person made a party in

substitution for himself. These are the several respects specified in the sections of THE CODE cited above, in which additional parties may be made to an action, and none of them apply to this case.

However the court may decide any question, whether for the plaintiff or the defendant Morris, in the absence of the heirs of Mary Matthews, they cannot be prejudiced or affected in any way, because they are in no respect essential parties in this litigation.

It was asked in the argument here, what injury has the plaintiff sustained by reason of the presence in the action of the heirs, admitting that they were not necessary parties.

It is sufficient to say, the law does not allow unnecessary and improper parties to be brought into an action. The plaintiff has the right to have his action tried upon its merits, uninfluenced and unaffected by persons who have no concern with it. How far in this case the plaintiff suffered detriment, in a variety of ways that might easily be suggested, by the active participation of a great number of heirs-at-law anxious to establish their own right to the land, it is impossible to determine. They seem to have been very active, and their purpose seems to have been to try a lawsuit between the plaintiff and themselves, entirely distinct and separate from this action. They may have a cause of action against the plaintiff, and about the land mentioned in the pleadings; but their right in this respect is unaffected, and will remain so by this litigation; and the rights of the plaintiff and defendant can be completely settled without their presence in this action.

There are numerous exceptions to the rulings of the court, specified in the record, but we need not pass upon them, as we hold that on the one considered, the plaintiff is entitled to a new trial.

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

Error. *Venire de novo.*

In same case upon defendants' appeal:

MERRIMON, J. This is the appeal of the heirs-at-law of Mary Matthews, in the case decided at this term between the same parties, in which a new trial was awarded to the plaintiff. The appellants in this appeal prayed the court to adjudge and decree that the deeds, under and by virtue of which the plaintiff claimed to derive title from Mary Matthews, their ancestor, were void, and that these deeds be surrendered by the plaintiff to the court, and that the same be cancelled.

The court declined to grant the prayer of the appellants; but gave judgment as to them, that they go without day, and recover costs from the plaintiff.

In the plaintiff's appeal we have decided that the appellants in this appeal were not necessary or proper parties to the action; that they were improperly made parties, and that the plaintiff was entitled to a new trial.

As they were not proper parties, and as the litigation which they sought to have with the plaintiff was not in any respect germane to the action, the court properly declined to grant their prayer. There was no action between them and the plaintiff that entitled them to the relief demanded.

There is no error. Judgment affirmed. Let this be certified.

No error. Affirmed.

JOSEPH MARSHALL and others v. COMMISSIONERS OF STANLY COUNTY.

Injunction.

1. An injunction will be granted until the hearing, where the plaintiff alleges irreparable injury and makes out an apparent case.

2. When the injunctive relief sought is not merely auxiliary to the principal relief demanded in the action, but may be the relief itself, the court will not dissolve the injunction upon a preliminary hearing.

(*Troy* v. *Norment*, 2 Jones' Eq., 318; *Lowe* v. *Commissioners*, 70 N. C., 532, cited and approved).

MOTION for an injunction heard at Fall Term, 1883, of STANLY Superior Court, before *Gilmer, J.*

In the year 1842, the town of Albemarle, the county-seat of Stanly county, was laid off into lots by the proper authorities according to law, and in the plat of the town there is a public square on which the court-house was erected. Other lots were sold to individuals and the money realized paid into the county treasury. At the sale, the plaintiffs allege that it was announced that the public square was to be and ever remain a public square, and by reason of such announcement and understanding, purchasers were induced to pay more for the lots adjacent to the square, which serves as an outlet from the buildings erected on said lots. The plaintiffs own improved lots fronting on the square. In September, 1883, the defendant commissioners made an order to sell a part of the public square, immediately fronting said improved lots, which order the plaintiffs insist is without authority of law, and they aver that the sale thereof would cause them irreparable injury, and that there exists no public necessity for such sale which has been advertised in pursuance of said alleged unlawful order. The plaintiffs have commenced an action against the defendants, in consequence of such order, and ask for an injunction restraining them from executing the same.

Notice was thereupon served upon the defendants to show cause why they should not be enjoined from selling any part of the public square.

The defendants appeared in accordance with the notice, and filed answer and affidavits, in which they deny that there was any announcement and understanding on the part of their predecessors who had charge of the county affairs at the time the town was laid off, that the public square would neverbe sold,

and that the sale thereof will not injure the plaintiffs as alleged; and they allege that there is a public necessity for the sale of a part of said square—it is not needed for the public—the property will bring a large price—the county needs the funds—the sale of the lots will greatly add to the prosperity of the town and county—and the county is able to respond to such damages as may be sustained by the plaintiffs by reason of the sale.

The court, after consideration of the matters set forth in the pleadings and affidavits of the respective parties, and after argument of counsel, adjudged that the defendants be restrained from selling the lots until the final hearing of the action, and from this ruling the defendants appealed.

Messrs. J. A. Lockhart and *S. J. Pemberton*, for plaintiffs.
Mr. J. W. Mauney, for defendants.

MERRIMON, J. The plaintiffs allege that the prospective injury to them, growing out of the alleged action taken and about to be taken by the defendants in the proposed sale of lots of land comprising a part of the public grounds on which the court-house of Stanly county was lately situated, if allowed to be consummated, will be irreparable in its character; and they support the allegations of the complaint by sundry affidavits, tending to show that the same, and their apprehensions, are well founded.

The defendants in their answer admit the truth of some of the material allegations in the complaint, and admit others to be in a measure true, and deny that the alleged prospective injury would be irreparable, and insist, that the defendants have the lawful authority to sell the lots of land, as it is admitted they intend to do, without regard to the alleged rights of the plaintiffs; and they support their answer by numerous affidavits tending to prove the averments in the same.

This court is of opinion that in such a case the injunction ought to be continued to the hearing of the action upon its merits.

There is an important class of cases, in which relief, such as that demanded by the plaintiffs, will always be granted; and it may be, this case will turn out to be one of that class. The plaintiffs certainly make an apparent case, and they may be able to prove that they will sustain the injury they apprehend, and that it will be irreparable, unless the defendants shall be restrained; and they may be able to show that the defendants have no lawful authority to sell the lots of land as they propose to do, and thus inflict injury upon the plaintiffs.

If the defendants shall be permitted to go on, pending the action, and sell the lots of land, and it shall turn out in the end that there is injury to the plaintiffs, and that irreparable, the court could not grant adequate relief. When the court can see that the injury apprehended and complained of may arise, it will not, by its own act, cut itself off from the opportunity to grant relief; on the contrary, it will take all proper measures to uphold its power to grant or deny relief in the orderly course of procedure.

In a case where the plaintiff alleges irreparable injury and this is made apparent by the complaint and affidavits to support the same, the court will not dissolve the injunction upon the answer of the defendant admitting some of the material allegations of the complaint, however the same may be supported by affidavits; but the injunction will be continued to the hearing of the action upon the merits; and this is so, especially, when the main relief sought is injunctive in its character.

The injunctive relief sought in this action is not merely auxiliary to the principal relief demanded, but it is the relief, and a perpetual injunction is demanded. To dissolve the injunction, therefore, would be practically to deny the relief sought and terminate the action. This the court will never do, where it may be that possibly the plaintiff is entitled to the relief demanded. In such cases, it will not determine the matter upon a preliminary hearing upon the pleadings and *ex-parte* affidavits; but it will preserve the matter intact until the action can be regularly heard

upon its merits. Any other course would defeat the end to be attained by the action. *Troy* v. *Norment*, 2 Jones' Eq., 318; *Lowe* v. *The Commissioners of Davidson Co.*, 70 N. C., 532.

The court properly granted an injunction restraining the defendants from selling the lots of land mentioned in the pleadings, until the final hearing and determination of the action.

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

No error. Affirmed.

H. C. WATSON, Trustee, v. JOHN DOBBIN.

Trusts and Trustees—Conditional Sale.

An assignment of property by one to secure creditors, in which are enumerated all mortgages, liens, &c., embraces the property in a horse, the title to which had been retained by the assignor as a security for the price.

(*Miller* v. *Hoyle*, 6 Ired. Eq., 269; *Williams* v. *Teachey*, 85 N. C., 402, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of RICHMOND Superior Court, before *MacRae, J.*

The plaintiff brought this action for the recovery of a mule. The facts are stated in the opinion. Verdict and judgment in favor of the plaintiff; appeal by defendant.

Messrs. Burwell, Walker & Tillett and *John D. Shaw*, for plaintiff.

Mr. Frank McNeill, for defendant.

SMITH, C. J. The mule claimed in the action was taken in exchange for a horse that belonged to the partnership firm of J. W. & W. C. Thomas, by whom it was sold to the defendant on

a credit and under an agreement that the property in the horse should remain in the firm until the purchase money was paid. The exchange was made with their approval and consent. The purchase money or some part of it is still due.

On January 20th, 1882, the firm made an assignment to the plaintiff for the benefit of their creditors, and therein besides certain lands, conveyed subject to the claim of the separate partners to his personal property exemption, "all the goods, wares and merchandise of every kind and description in the store occupied by the said J. W. & W. C. Thomas in the said town of Rockingham;

Also other personal property in said store belonging to said firm;

Also all the accounts, notes, bonds, mortgages, liens, judgments, choses in action and credits of every description belonging to said J. W. & W. C. Thomas, as evidenced by the papers themselves and the books and ledgers of the said J. W. & W. C. Thomas."

The price of the horse stood as a debt against the defendant in an account on the books of the firm at the time of the assignment.

Upon the undisputed facts and findings of the jury, the only exception for us to consider is taken to the ruling of the court that the property in the horse, retained as a security for the price and incident to the debt due for the horse, passed by the assignment to the plaintiff.

Though not specifically mentioned in the enumerated articles assigned, unless included in the word "liens," it is quite manifest that the assignors intended to convey all the personal property of the firm connected with their business, and with the "credits" any article upon which a credit constituted a lien as a means of ensuring payment.

We concur in the construction put upon the instrument that its terms comprehend the property in the horse, and in the mule substituted for it.

In *Miller* v. *Hoyle*, 6 Ired. Eq., 269, it is held that the assignee of a bond, upon the principle of substitution, was entitled to the benefit of a mortgage made to secure it. An assignment of a particular claim carries with it, by implication and as an incident to the claim assigned, any collateral security which the assignor may possess, though not specially mentioned.

Burrill Assign., 139; *McHaffey* v. *Shaw*, 2 Penn., 361; *Fitzsimmon's Appeal*, 4 Penn. St., 248; *Waller* v. *Tate*, 4 B. Monc., 529; *Patterson* v. *Hull*, 9 Cow., 747.

So, this court has declared that while the legal estate in land remained in the mortgagee, the assignment of a secured debt carries with it the security afforded by the mortgage, and the assignee can enforce the trust. *Williams* v. *Teachey*, 85 N. C., 402.

Even if the legal estate in the horse did not pass, as we think it did from the clear manifestation of such intent by the assignor in the comprehensive words of description used to express it, we do not see why the plaintiff, with an equitable title and present right of possession, may not maintain the action as a means of enforcing the lien.

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

No error. Affirmed.

REBECCA A. MORRIS v. JOHN R. MORRIS.

Divorce and Alimony—Findings of Fact—Appeal.

1. In an application for alimony *pendente lite*, the facts set forth in the complaint must be found by the judge to be true, in order to the relief demanded, and must be stated in the record.
2. Whether the wife, in such case, is entitled to alimony, is a question of law, upon the facts found, and reviewable on appeal by either party.

(*Wilson* v. *Wilson*, 2 Dev. & Bat., 377; *Earp* v. *Earp*, 1 Jones' Eq., 118; *Taylor* v. *Taylor*, 1 Jones, 528; *Schonwald* v. *Schonwald*, Phil. Eq., 215; *Simmons* v. *Simmons*, *Ib.*, 63; *Lynch* v. *Lynch*, *Ib.*, 46; *Hodges* v. *Hodges*, 82 N. C., 122, cited and approved).

APPEAL from an order made on the 12th of October, 1883, in an action pending in ORANGE Superior Court, by *MacRae, J.*

The plaintiff brought this action against the defendant, her husband, to the fall term, 1883, of the superior court of Orange county, to obtain a divorce from bed and board, for alimony and for the care and custody of the children of the marriage, and other relief.

At the return term the plaintiff filed her complaint and the defendant filed his answer thereto.

After five days' notice, the plaintiff moved before the judge at chambers, on the 12th day of October, 1883, for alimony *pendente lite* and for the care and custody of the children.

The court, in the absence of the complaint and answer, and without having read or heard read the same, upon the affidavits of the plaintiff and sundry other persons, granted the motion, and thereupon the defendant appealed to this court, assigning among other grounds of exception to the action of the court, "that His Honor failed to find the facts set forth in the affidavits, considered by him, to be true, and especially did not find the facts set out in the complaint, which was not before him, to be true; or that such facts existed as entitled the plaintiff to the relief demanded."

Mr. John Manning, for plaintiff.
Messrs. Graham & Ruffin, for defendant.

MERRIMON, J. Whether the plaintiff was entitled to alimony *pendente lite*, was a question of law, arising, not simply from the facts set forth in the complaint or affidavits submitted in support of the motion for alimony, but upon the facts set forth in the complaint and "*found by the judge to be true*, and to entitle her

to the relief demanded in the complaint." The obvious purpose of the statute (THE CODE, §1291) is to afford the wife present pecuniary relief pending the progress of the action, and as well, to afford the husband some measure of protection in a motion so important, made and to be determined before the merits of the controversy are ascertained and the rights of the parties settled regularly by final judgment.

It is not left simply to the discretion of the judge whether he will or will not grant alimony *pendente lite*. As we have said, whether the wife is entitled to it, is a question of law, and his decision upon it may be reviewed upon appeal by either party. The judgment of the court upon this question is one that manifestly "affects a substantial right" of the defendant, and therefore one from which an appeal lies. And as the question arises upon the facts set forth in the complaint, "found by the judge to be true," he must set forth his findings of fact in the record, so that if either party shall desire, his judgment may be reviewed by this court.

And the findings of fact, by the judge, set forth in the *complaint* (not the facts set forth in an affidavit apart from the complaint), is not now a mere formal ceremony; it is significant, and must be done upon due consideration. In his finding of the facts, the judge is not confined to the sworn complaint: he may be aided by affidavits, offered on the part of the plaintiff and the defendant: indeed, the defendant has the right "to be heard by affidavit in reply or answer to the allegations of the complaint."

If the facts set forth in the complaint found by the judge to be true, entitles the wife to alimony *pendente lite*, then it must appear to the court, "by the affidavit of the complainant, or other proof, that she (the wife) has not means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof," before the court can make the order allowing alimony.

Prior to the act of 1852, the law of the state did not allow alimony *pendente lite*. *Wilson* v. *Wilson*, 2 Dev. & Bat., 377; *Earp* v. *Earp*, 1 Jones' Eq., 118. It was first allowed by the act of 1852 (Acts 1852, ch. 33), which provided that, upon the filing of the petition or libel, the court might at any time during the pendency of the suit, "decree such reasonable and sufficient alimony to said married woman, as in the discretion of the court may be necessary for the support and maintenance of herself and family, pending said suit." This left the whole matter in the discretion of the court, and it was held that under that act an appeal did not lie to this court. *Earp* v. *Earp, supra*. This statute, however, was amended by the Rev. Code, ch. 40, §15, wherein it is provided, that if the matter set forth in the petition *shall be sufficient* to entitle the petitioner to a decree for alimony, the court may, in its discretion, allow the same at any time pending the suit; and an appeal to this court was allowed from such interlocutory decree, but this was reviewable only as to the sufficiency of the petition to entitle the petitioner to relief.

The act of 1871–'72, ch. 193, §38, provided that where the married woman "shall set forth in her complaint such facts, *as if true*, will entitle her to the relief demanded, and it shall appear to the judge of such court, either in or out of term, by the affidavit of the complainant, or other proof," &c., then the court might allow it. This act was amended by the act of 1883, ch. 67, which provides that, "if any married woman shall apply to a court for a divorce from the bonds of matrimony, or from bed and board with her husband, and shall set forth in her complaint such facts, which upon *application for alimony shall be found by the judge to be true* and entitle her to the relief demanded in the complaint, and it shall appear to the judge of such court, either in or out of term, by the affidavit of the complainant, or other proof, that she has not sufficient means," &c., and is brought forward and forms part of THE CODE.

It seems, that the legislature intended by the act of 1883, to cut off the possible mischief that a desperate and ruthless mar-

ried woman might make allegations and set forth statements in her complaint, which she could not establish as facts upon the final trial of the action upon its merits. A good woman, with a meritorious cause, cannot be prejudiced by the law requiring the judge to find the truth of the charges made in the complaint, before allowing alimony *pendente lite:* a very bad one ought not to have it, until he ascertains in the preliminary and summary way provided, that her cause is just and true. At all events, the legislature deemed it well, and for the general good, to so provide.

We have already pointed out the reasons for requiring the judge to set forth his findings of fact in the record. *Taylor* v. *Taylor*, 1 Jones, 528; *Schonwald* v. *Schonwald*, Phillips' Eq., 215; *Everton* v. *Everton*, 5 Jones, 202; *Simmons* v. *Simmons*, Phillips' Eq., 63; *Lynch* v. *Lynch*, *Ib.*, 46; *Hodges* v. *Hodges*, 82 N. C., 122.

There is error, in that it does not appear in the record that the court found the facts set forth in the complaint to be true. We do not deem it necessary to pass upon the other exceptions.

The judgment of the superior court must be reversed, and it is accordingly so ordered. Let this be certified.

Error. Reversed.

HONORA GRIFFITH v. ROBERT GRIFFITH.

Divorce and Alimony.

1. In divorce, a complaint alleging that defendant has abandoned his wife and turned her out of doors; that he has treated her cruelly and barbarously, so as to endanger her life, and has offered such indignities to her person as to render her condition intolerable and life burdensome, states facts constituting a cause of action.

2. Alimony *pendente lite* may be granted, not simply upon complaint and affidavit of the plaintiff, but upon a finding by the judge (after considering the counter affidavit or answer of the defendant) that the facts alleged in the complaint are true, and entitle the plaintiff to the relief demanded. THE CODE, §1291. And the facts found must be set out in the record of the case on appeal.

(*Erwin* v. *Erwin*, 4 Jones' Eq., 82, cited and approved).

CIVIL ACTION for divorce *a mensa et thoro* heard at Spring Term, 1883, of MITCHELL Superior Court, before *Gudger, J.*

Upon the complaint and affidavit of the plaintiff, His Honor made an order for alimony *pendente lite*, and thereupon the defendant moved to vacate the order upon the ground of a want of notice to him, and the court sustained the motion. The case then states that the defendant waived the five days' notice to which he was entitled under the statute, and that the plaintiff renewed her motion for alimony. This latter motion was refused by the court upon the ground that the complaint and affidavit do not state a cause of action, and from this ruling the plaintiff appealed.

Messrs. E. C. Smith and *W. H. Malone,* for plaintiff.
No counsel for defendant.

MERRIMON, J. The plaintiff not only alleges in general terms that the defendant has abandoned her, that he has in effect turned her out of doors, that he has treated her cruelly and barbarously, so as to endanger her life, and has offered such indignities to her person as to render her condition intolerable and life burdensome, but she avers facts in detail, that, if she can prove them to be true, certainly make a strong case in her favor, and the case contemplated by the statute, on which relief ought to be granted. THE CODE, §1286.

The court did not find that the allegations in the complaint were true or otherwise, and we must take it that it denied the

motion for alimony *pendente lite*, upon the ground, that upon the face of the complaint the plaintiff did "not state facts sufficient to constitute a cause of action."

In this we think the court erred. The facts alleged do constitute a cause of action, and the court ought to have proceeded to find whether the allegations were substantially true or false. The motion is not granted simply upon the complaint and affidavits of the plaintiff. Before the court can grant it, it must find the facts alleged in the complaint "to be true and to entitle her to the relief demanded in the complaint," and such findings of the court must be set forth in the record, to the end, either party may, if he or she shall see fit, appeal to this court. The defendant will be entitled to be heard in reply to the complaint, by answer or affidavits. THE CODE, §1291; *Morriss* v. *Morriss*, *ante*; *Erwin* v. *Erwin*, 4 Jones' Eq., 82.

There is error; the order denying the motion must be reversed.

Error. Reversed.

STATE ex rel., &c., JOHN H. HANNON v. JAMES M. GRIZZARD.

Residence — Domicil — Animus Revertendi, proof of — Voting, place of — Judge's Charge — Jury, disagreement of, and power of court to keep together.

1. Residence, as used in the clause of the constitution defining political rights, is synonymous with domicil, denoting a permanent dwelling place, to which the party, when absent, intends to return.
2. Upon the trial of an issue as to place of residence, it is competent for the party to prove his intention in respect to it.
3. A protracted residence abroad of one engaged in business and with no home in this state, is not consistent with the idea of a residence here.
4. The plaintiff was in the service of the federal government at Washington, having received an appointment as watchman under the treasury depart-

ment, but continued to pay poll-tax and vote in this state, and spent a part of each year at his home here; *Held*, that his constitutional residence remained unchanged, and that it was not error to refuse to charge the jury had not shown an actual *bona fide* residence in this state, he being that he a single man and sleeping and boarding in Washington during his stay there while acting as watchman. (Section eleven of the act of 1876–'77, ch. 275, does not undertake to declare what shall constitute a *residence*, as a qualification for voting, but rather to designate the place of voting).

5. Nor was it error to tell the jury that if they believed the testimony of the plaintiff, he had made out his case. This was not an expression of opinion on the proofs.

6. Nor to refuse to permit the jury to take the tax list into ther consultation room, without the consent of both parties.

7. Where a jury come into court and announce their inability to agree, the judge may, in the exercise of his discretion, require them to retire again and consider of their verdict, with an intimation that he will cause them to be kept together until the end of the term, unless they shall sooner agree.

(*Roberts* v. *Cannon*, 4 Dev. & Bat., 269; *State* v. *King*, 86 N. C., 603, cited and approved).

CIVIL ACTION in nature of *quo warranto* tried at Spring Term, 1883, of HALIFAX Superior Court, before *Philips, J.*

At a regular election held in November, 1882, in and for the county of Halifax, the relator was chosen by a majority of the votes cast to the office of register of deeds, and it was so declared by the county canvassers. At the meeting of the board of county commissioners next ensuing, he applied for admission to said office, offering to take the oath and give the bond prescribed by law. The board refused the application, upon the ground of the relator's want of the qualifications required by the constitution in that, he had not "resided in the state twelve months next preceding the election, and ninety days in the county." The board thereupon deeming the office vacant, proceeded to fill it by the appointment of the defendant, who took the oath, gave the bond and entered upon the execution of his official duties.

The present action, under the provisions of the Code, substituted in place of the former procedure by *quo warranto*, was

then instituted, and is prosecuted for the ejection of the incumbent, and in order to his own induction on complying with the requirements of law.

On the trial of the cause, the only issue submitted to the jury was in these words: "Was the relator a resident of this state and county on the 7th day of November, 1882, and had he been such resident for the twelve months preceding?" and the response, under the instructions of the court, was in the affirmative.

The relator examined on his own behalf, and the only witness introduced, testified in substance as follows: I was born on November 25th, 1850, in Halifax, and have always lived there. In 1875, I accepted the appointment of watchman under the treasury department of the United States at Washington City, before which time, except for a short interval, I had never been out of the state, and went there to perform its duties. I continued thereafter to pay my poll-tax in the county, and to vote there, as before. I so voted in 1876 and 1878, and proposed to vote in 1880, but the vote was challenged, and before the matter was decided, the time for giving in ballots by law expired, and the vote was not given. In 1882, I again voted, after a challenge. I have uniformly paid my poll-tax, and was never absent from the county for twelve months at one time, always spending here the one month's vacation from service annually allowed by the department.

The plaintiff's counsel proposed to inquire whether the witness, in accepting employment at Washington, or afterwards, intended to abandon his home in this state. To this the defendant made objection, which was overruled and the witness permitted to say: "I did not. I considered North Carolina my home. I have never offered to vote or paid poll-tax elsewhere. The house in Halifax occupied by my step-mother was provided by me for her, before and since my father's death. It is rented, but I own real estate in the county."

The cross-examination developed the foregoing testimony more in detail, but without any substantial repugnance: and the

witness added that from July to October 14, 1875, he was employed in the navy-yard near Norfolk, and proceeded thence to Washington, where he remained in the government service, interrupted by occasional returns to Halifax, as before shown, until the last of December, 1882, when his employment ceased, and early in the next month he returned to Halifax.

The defendant asked an instruction to the effect that the plaintiff had not shown an actual *bona fide* residence in the state, and that being a single man, sleeping and boarding at Washington, during his stay and while acting as watchman, he was not meanwhile a resident of the state within the meaning of the constitution, and that, accepting his statement as correct, the jury should respond to the issue in the negative. This instruction was denied, and His Honor proceeded to charge thus:

A person's residence is his place of domicil; the place where his habitation is fixed, without any intention of removing therefrom. Residence, as used in the constitution, means a domicil in the county and state. As long as a party has the *animus revertendi*, no length of residence elsewhere will change the domicil. In order to such change there must not only be an act, but a concurrent intention to make it. If the jury believe that the relator was born in Halifax in 1850, and there had his fixed abode until 1875, when he accepted service under the department at Washington, and went there to enter upon it, and remained for the period mentioned, returning once or twice a year on leave of absence, voted and paid taxes to the county and town authorities until January, 1883 (erroneously written, as we suppose, 1882), when he came back to the county, where he has since remained, with no intention of abandoning his home in Halifax or making a new home in Washington, then the issue should be found in favor of the relator.

To the refusal of the court to give the instructions asked, and to those given instead, the defendant excepts.

The jury retired on Tuesday night of the first week of the term to consider their verdict, and twice came into court for further directions, and once to announce their disagreement.

Again, on Thursday, they came into court to announce their inability to agree upon a finding and to ask for a discharge, one of the jurors stating that he had been sick and feeble and the jury were in an uncomfortable room, but that he could stand it as long as anybody. Thereupon His Honor remarked: "I do not know what is the cause of your failure to find a verdict in this case, nor do I care to know. But if your failure is a wilful disregard of my instructions, you ought not to ask any favor of the court. I will state that the court expires by limitation on Saturday night week at 12 o'clock. I directed the sheriff to feed you and to move you to a room where you can have comfortable fire. He has done so. I will still do anything in my power to render you comfortable."

One of the jurors stated that the jury wanted to see the tax list, whereupon a discussion sprung up between the opposing counsel, the plaintiff's counsel consenting and the defendant's counsel objecting, to the papers being carried out to the jury-room, and thereupon the court interposed and repressed the altercation, remarking that as the registration books were only offered in evidence and not read or shown to the jury, he should not now let the jury have them, unless with consent of counsel, and added: "If the jury believed the testimony of the relator, he has made out his case." To this ruling and this part of the charge the defendant also excepts.

From the judgment rendered on the verdict the defendant appeals.

Messrs. Mullen & Moore, Day & Zollicoffer and *J. E. O'Hara*, for plaintiff.

Messrs. Walter Clark and *R. O. Burton, Jr.*, for defendant.

SMITH, C. J., after stating the above. The essential question presented upon the record is as to the proper interpretation of the words used in the constitution, in the clause defining the qualification required of electors and persons holding office. Art. VI, §§1 and 4.

Section 1 declares that "every male person born in the United States and every male person who has been naturalized, twenty-one years old or upwards, who *shall have resided in the state twelve months next preceding the election and ninety days in the county* in which he offers to vote, shall be deemed an elector."

Section 4 declares that "every voter, except as hereinafter provided, shall be eligible to office." The exceptions and other qualifications and restrictions elsewhere contained in the constitution, are not material in the present inquiry.

Residence, as the word is used in this section in defining political rights, is, in our opinion, essentially synonymous with domicil, denoting a permanent as distinguished from a temporary dwelling-place. There may be a residence for a specific purpose, as at summer or winter resorts, or to acquire an education, or some art or skill in which the *animus revertendi* accompanies the whole period of absence, and this is consistent with the retention of the original and permanent home, with all its incidental privileges and rights. Domicil is a legal word and differs in one respect, and perhaps in others, in that, it is never lost until a new one is acquired, while a person may cease to reside in one place and have no fixed habitation elsewhere.

This rule as to domicil is based upon the necessity of having some place by whose laws in case of death the personal estate must be administered. In defining political immunities, however, both terms indicate a permanent and retained home.

Thus, remarks GASTON, J. "By a residence in the county, the constitution intends a domicil in that county. This requisition is not satisfied by a visit to the county, whether for a longer or a shorter term, if *the stay there be for a temporary purpose* and with the design of leaving the county when that purpose is accomplished." *Roberts* v. *Cannon*, 4 Dev. & Bat., 269.

Domicil is defined by Mr. Justice STORY, as "the place where a person lives or has his home," that is, as he adds, where one has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. Conf. Laws, §41.

The present constitution, in requiring a previous residence in the state and county as a condition in conferring the elective franchise, did not intend to deprive its own citizens of their privileges, as such, when they left the state and resided temporarily beyond its limits, with a constant purpose to retain their homes and return to them when the objects which called them away were attained. This clause meets more especially the case of incoming persons, who are not permitted to exercise political rights until after they have been in the state and county for the prescribed period.

Nor has the section of the act of 1876–'77, ch. 275, regulating elections, any application to the present inquiry. Aside from questions of its compatibility with the constitution, if capable of bearing the construction given it in the argument of defendant's counsel, section eleven does not undertake to declare what shall constitute a residence, as a qualification for voting so much as to designate the precinct, ward or place of voting in which a qualified elector is to deposit his ballot, and this to prevent fraudulent voting.

Applying then the term used in the constitution as indicating a residence, permanent and fixed, to the facts testified to by the relator, the court was fully warranted in saying to the jury that if they believed the witness (the plaintiff) he had made out his case.

We are not prepared to say that a protracted residence abroad of one engaged in the ordinary business of life, and with no home in the state, is consistent with the idea of a residence here, and can be controlled in its legal consequences by a hidden purpose in the mind not to abandon his citizenship; but, upon the facts of this case, we think the relator's constitutional residence remains unchanged, and none of his political rights as a citizen here have been lost by his employment and temporary residence at Washington. Not only does the relator swear to his continuous intention during his absence, but his conduct in paying his taxes and casting his votes, and in frequent returns to the home

of his step-mother as to his own, is consistently in support of that intention.

We discover no error in permitting the relator to testify to his intent, for it is a material element in the inquiry as to his habitation and home. *State* v. *King*, 86 N. C., 603.

Nor is there any ground for complaint in the refusal to give the directions requested by the defendant's counsel.

The only remaining exception, necessary to notice, is that taken to the declaration of the court about keeping the jurors together until they agreed upon a verdict, or until the expiration of the term; and to the last instruction as intimating an opinion upon the proofs, in violation of the act of 1796.

The conduct of judicial proceedings must be left largely to the discretion of the presiding judge, and it was certainly proper to impress upon the jurors their duty in endeavoring to come to an agreement after a clear and distinct exposition of the law as to what constitutes a residence, as a constitutional prerequisite to filling a public office. The facts testified to were few and simple, and while the intimation of confinement together till a conclusion was reached may have exerted some coercive influence over the minds of the jurors, he was but exercising a discretion reposed in him by law with a view to the ending of litigation. He could refuse to discharge the jury as long as, in his opinion, there was a reasonable ground for expecting a verdict, and this is about the import of his words; and this was accompanied by the assurance that they should be comfortably provided for in the meantime.

Nor does the final instruction convey any opinion as to the weight of the evidence or the facts found under the inhibition of the act. The instruction was entirely appropriate that if the relator's statements were believed, leaving the credit due to be given by the jury, the relator's claim had been made out, and the response to the issue should be in his favor. The case of *Nash* v. *Morton*, 3 Jones, 3, is dissimilar, and not an authority for setting aside the verdict upon this ground.

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

Upon this decision being made known to the county commissioners, we assume no obstacle will be interposed to the plaintiff's admission to the vacated office.

No error. Affirmed.

JOHN H. HANNON v. COMMISSIONERS OF HALIFAX.

Mandamus—Quo Warranto, appeal in and effect of.

A *mandamus* will not lie to induct one into office, during the pendency of an appeal in *quo warranto* between the same parties. The judgment of the court below in favor of the plaintiff is suspended by the appeal and the title to the office undetermined.

(*Bledsoe* v. *Nixon*, 69 N. C., 81; *Isler* v. *Brown*, *Ib.*, 125; *Perry* v. *Tupper*, 71 N. C., 380; *Skinner* v. *Bland*, 87 N. C., 168, cited and approved).

CIVIL ACTION in which application is made for the writ of *mandamus*, heard at Chambers in Halifax on the 10th of May, 1883, before *Philips, J.*

The application for the writ was refused, and the plaintiff appealed.

Messrs. Mullen & Moore, Day & Zollicoffer and *J. E. O'Hara*, for plaintiff.

Messrs. Walter Clark and *R. O. Burton, Jr.*, for defendants.

SMITH, C. J. After the adjudication in the superior court in the action instituted by the plaintiff against the incumbent of the office of register of deeds, amoving him therefrom, and declaring the plaintiff entitled thereto, and from which the defendant had appealed to this court, the plaintiff laid a copy of the record of the judgment before the county commissioners,

and offered to take the oath and give the bond required by law, in order to his induction. The commissioners refused to act in the premises, upon the ground that the contest in regard to the office was still pending, and the right of the plaintiff yet undetermined.

The plaintiff thereupon brought this action against them, and in his complaint demands a writ of *mandamus* to compel them to admit him to the office.

Upon the hearing of the application, His Honor declined to order the issue of the writ, and from this ruling the plaintiff appeals.

The only question before us is as to the effect of the appeal upon the judgment in the court below, and whether thereby all further proceedings for its enforcement are suspended, or it remains still in force and warrants the present application.

The action to recover the usurped office, and to which this is subsidiary, seems not to be provided for in the several sections of the Code (304, 305, 306 and 307), which prescribe the undertaking to be given, and the acts to be done, in order that the appeal shall operate as a *supersedeas* in the case.

Execution is stayed on compliance with the conditions mentioned, when the judgment directs the payment of money (§304); or the assignment or delivery of documents or personal property (§305); or the execution of a conveyance or other instrument (§306); or the sale or delivery of possession of real property (§307). The judgment in a proceeding to recover possession of an usurped office, is self-executing, and operates itself as ouster of the defendant, requiring no further and final process to render it effectual.

It is not, therefore, embraced in any of the recited clauses, and has removed the defendant notwithstanding his appeal; in which case, *mandamus* is the appropriate remedy against the commissioners refusing to act upon the application for admission, or the judgment is vacated or suspended by the appeal.

Under the former practice every appeal bond was to secure the fruits in full of the final judgment in the appellate court to the appellee, in case it was there affirmed, and the cause was itself removed to the appellate court. So it has been repeatedly held under the system provided in the Code. *Bledsoe* v. *Nixon*, 69 N. C., 81; *Isler* v. *Brown*, *Ib.*, 125; *Perry* v. *Tupper*, 71 N. C., 380; *Skinner* v. *Bland*, 87 N. C., 168.

We do not feel at liberty to depart from these authorities, and especially in a proceeding in regard to which the Code is silent upon the point; and in accordance with them, the commisioners were not in default in declining to admit the plaintiff to the office *pendente lite*, and the suit for the peremptory mandate is premature.

We assume that the commissioners when apprised of the decision of this court in the action to test the conflicting claims of the parties to the office, will proceed at once to pass upon the plaintiff's bond and permit him to qualify according to law.

No error. Affirmed.

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*STEWART ELLISON v. ALDERMEN OF RALEIGH.

Municipal Body, power to remove member of—Color of authority—Mandamus—Quo Warranto—Office or Place, what is.

1. The plaintiff was elected an alderman of the city of Raleigh, and excluded by a resolution of the defendant board from acting as a member thereof and his seat declared vacant, upon the ground, that he held "an office or place of trust or profit" under the United States government, at the time of his election as alderman, and was therefore ineligible under the constitution; *Held*, that the action of the defendants was not warranted by law.

*Mr. Justice MERRIMON having been of counsel, did not sit on the hearing of this case.

2. A municipal body cannot deprive one of its members of his place for causes, affecting his ineligibility, that existed at the time of his election.

3. But where, in such case, one is removed and his successor elected and inducted in to office under a power given to fill vacancies, such successor holds under color of competent authority, and is a *de facto* officer: and the plaintiff, being the adverse claimant, cannot be reinstated by *mandamus* against the defendants, but must resort to *quo warranto*.

4. What is an office or place within the meaning of the constitution, and how far the court can go in reinstating one improperly removed from office, but who may be ineligible to hold it (?).

(*Howerton* v. *Tate*, 66 N. C., 231; *Brown* v. *Turner*, 70 N. C., 93; *Cloud* v. *Wilson*, 72 N. C., 155, cited and approved).

CIVIL ACTION in which application is made for the writ of *mandamus* heard at June Term, 1883, of WAKE Superior Court, before *Philips, J.*

The plaintiff was elected an alderman of the city of Raleigh, and asked to be restored to the office from which he was removed by the defendants, but the court, being of opinion that T. J. Bashford, who had been elected by the board of aldermen, in place of the plaintiff, was a necessary party to the suit, and that the question of title to the office was raised by the pleadings and evidence, refused to grant the writ, and the plaintiff appealed. The facts are sufficiently set out in the opinion.

Messrs. D. G. Fowle, T. M. Argo, J. B. Batchelor and *Walter Clark*, for plaintiff.

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

SMITH, C. J. The plaintiff was duly (elected ?) an alderman from one of the wards into which the city of Raleigh is divided, took the oath of office before the mayor and was present with his associate members of the board at three successive meetings of the body. At the third session, held on May 15, 1883, the plaintiff being present and occupying his seat, as he had hitherto done without objection from any source, a resolution was offered

by one of the aldermen (the transcript of which was not introduced on the trial), vacating or declaring vacant the plaintiff's seat by reason of his incompetency in holding an office or place of trust under the government of the United States, at the time of his election, and since. The resolution was put to a vote upon a call for the previous question, and, upon a refusal to hear the plaintiff, was declared by the casting vote of the presiding officer, the mayor, to have passed. Nor was the plaintiff's name called in calling the roll, nor he allowed, though demanding the right to vote upon the passage of the resolution. After the plaintiff's ejection, the board proceeded to supply his place by the election of T. J. Bashford under the provision of the city charter (§20) for filling a vacancy, and the plaintiff has since been excluded from acting with the body to which he had been elected.

This succinct statement of facts connected with the expulsion of the plaintiff and the admission of said Bashford, as his successor, suffices to present the question, whose solution, in our view, is decisive of the case on appeal.

The proceeding is by *mandamus* to compel the restoration of the plaintiff to his office, and against the city of Raleigh and aldermen by name except the said Bashford, who is not made a party, either in person or as a member of the board.

Without pausing to animadvert upon the very irregular and summary method adopted to expel a member from his seat without a hearing and the suppression of all discussion of the propriety of the contemplated action of the board, while there can be no serious doubt of the right of a corporate body to vacate the seat of a corporate officer for adequate causes arising subsequent to taking his seat, since the case of *Rex* v. *Richardson*, 1 Burr., 539, decided by LORD MANSFIELD and followed by numerous others, we have been unable to find any precedent for depriving a member of his place by the action of a municipal body of which he is a member for any pre-existing impediment affecting his capacity to hold the office. On the other hand the

same eminent judge in passing upon the sufficiency of a return to a *mandamus*, says: "It is admitted that they (the Mayor and Burgesses of Lynn, the defendants), could not remove for want of an original title"; and again, "the dueness of the election is immaterial, for the corporation could not judge of the title" of the party prosecuting his right to the place. *King* v. *Lynn*, Douglas, 85.

So in LORD BRUCE'S case, 2 Strange, 819, the court say that a power of amotion is incident to a corporation according to modern opinion, and this exercise of inherent corporate authority in the cases pointed out by LORD MANSFIELD in *Rex* v. *Lynn*, may be essential to attaining the ends for which the corporation was formed. Angel and Ames, Corp., §423.

"The power to remove a corporate officer from his office for reasonable and just cause," says Judge DILLON, "is one of the common law incidents of all corporations." 1 Muni. Corp., §179.

The board of aldermen, thus possessing the power under certain circumstances to vacate the seat of one of their number (the occasions for doing which, and among them—conduct on his part in opposition to his oath and duty as a corporator, are mentioned by LORD MANSFIELD), have chosen to remove the defendant for the assigned reason of his incompetency under the constitution to occupy the place, he at the time of his election holding the appointment of janitor or custodian of the court-house of the United States in said city, and to elect and put another in his place, who has assumed to act with his associate members and been recognized by them as the lawful incumbent in all their subsequent official transactions. His successor having been thus inducted into the office under color of competent authority, even though the amotion of the plaintiff was in excess of the power conferred in the charter, becomes an officer *de facto*, and his co-operating acts in the body are as effectual in their relations to others as if he had filled the place *de jure* as as well as *de facto*. The charter confers authority upon the board to fill a vacancy when any occurs in their body and they

must determine the existence of the vacancy in order to the exercise of the power of supplying it.

Can the plaintiff then avail himself of the remedy by writ of *mandamus* against the wrong-doers and obtain the ouster of the present occupant and the restoration of the office to himself without the presence in the action of the alleged usurper?

In our opinion, the plaintiff misconceives the redress, and the mode of obtaining it provided by law. A *mandamus* is appropriate, when there is no usurpation by another, and the end sought is to compel those who ought to admit, and refuse to admit the person entitled by law to fill the place, to perform their duty in this behalf; and the writ may be granted, says Mr. WILLCOCK, "when *quo warranto* does not lie, although the office be already full, as otherwise, in many cases, the applicant would be without remedy." Dill. Mun. Corp., §678.

Mandamus may be sought to compel the city council to admit a councilman duly elected to that office. *State* v. *Rahway*, 33 N. J. L., 111, cited by Dillon in section 679. But as this writer remarks in the next section, 680, "the adjudged cases in this country agree that *quo warranto*, or an information or *proceeding in the nature of a quo warranto*, is the appropriate remedy, when not changed by charter or statute, for an usurpation of a municipal franchise, as well as for unauthorized usurpations and intrusions into municipal offices"; and the author proceeds: "If another is commissioned and in actual discharge of the duties of the office, an adverse claimant to the office is *not entitled* to a *mandamus*, but *must resort to quo warranto*." The wrongful occupant must, however, have entered under color of authority and not be a mere usurper, in the restricted sense of that term, to put the rightful claimant to the necessity of a resort to this remedy.

In this state, the writ of *quo warranto* and proceedings by information in the nature of *quo warranto*, are abolished, and the remedies which these forms formerly furnished can be

obtained under special provisions made by statute. C. C. P., §362, a substantial re-enactment of IX ANNE.

It is expressly declared in section 366, that an action may be brought by the attorney-general upon his own information or on the complaint of any private party against offenders, "when any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state."

The statute provides thus and in subsequent sections for the fullest relief to the rightful claimant, against an unlawful intrusion, and thereby dispenses with the need of recourse to other process, unless those required to induct, still refuse to do so, after the amotion of the intruder by the judgment of the court; and then they may be compelled to proceed in the discharge of their duties. As the statutory remedy is ample, so where it can be had and made effectual, it is the only mode of deciding the conflicting claims to office by an adjudication between the contesting parties.

In *Howerton* v. *Tate*, 66 N. C., 231, this court remarked that "supposing the writ of *mandamus* to be the proper remedy, *which we do not concede* (C. C. P., §§366 and 367), the proceeding was not properly instituted."

The doubt intimated is resolved in the subsequent case of *Brown* v. *Turner*, 70 N. C., 93, wherein, after an elaborate discussion, the court, BYNUM, J., delivering the opinion, thus speak: "Is the plaintiff prosecuting his claim by the right form of action? *Mandamus* is a proceeding to compel a defendant to perform a duty which is owing to the plaintiff, and can be maintained only on the ground that the relator has a present, clear, legal right to the thing claimed, and that it is the duty of the defendant to render it to him. If it appears from the complaint that two persons are claiming the same duty adversely to each other against a third party, the writ does not lie; Tom. Law Dict. *Mandamus;* Burr. 1452; and that for the plain reason

that the title must be decided between them before the defendant can know to whom the duty or thing is due." * * * "The question of title is put directly in issue, and when that is the case, *mandamus* is not the form of action; but the appropriate remedy is an action in the nature of *quo warranto*, not against Howerton, but against Turner."

The title here is in dispute so as to induce us to refrain from ordering any specific action to be performed by the board until the controversy is settled and the right determined by a direct adjudication. But if there were no other objection to the present form of proceeding, an insuperable obstacle is presented in the fact that the court is called on to pass upon the rights of one who is not a party to it. This is indispensable to his being affected by the result. *Rex* v. *Banks*, 3 Burr., 1452.

In support of a qualified recognition of the right of a removed officer to be reinstated through the command of the court in section 67 (High on Legal Rem.), reference is made in an appended note to several decisions which we have looked into and find but one (*Drew* v. *Judges*, &c., 3 Hen. & M. (Va.) 1), fully sustaining the text. In a return to the rule to show cause why a *mandamus* should not issue to the defendants to admit the plaintiff to the office of clerk of the said district court, whereof the defendants were judges, it appeared that the plaintiff produced on the first day of the session the evidence of his appointment and his taking the prescribed oath, but did not tender a sufficient bond as required by law. The court thereupon appointed another in his stead, who at once proceeded in the discharge of his official duties. Four days thereafter the plaintiff offered a sufficient bond and was refused admittance to the office. The *mandamus* was then asked and the rule to show cause ordered to issue. It was held that the plaintiff was not required to qualify on the opening of the court, and was in time in making his application afterwards according to the statute. In answer to the objection that the incumbent ought to have been served with notice of the pending motion, TUCKER, J., says "it was properly

answered that the return shows he had notice, being attested by him, and the record shows he did appear in the general court as a party and consent to the award of a commission to take depositions." This decision may find support in the exceptional features of the case, the office being under the direct control of the court, so that full relief could be administered with a due regard to the rights of both contestants. The *mandamus* is held a proper remedy in the case, among other reasons, because the right to proceed by a *quo warranto* information is not guaranteed to every citizen and can only be prosecuted by leave of the attorney-general.

But our statute (§366 of C. C. P.), bearing the title, "action upon information or complaint of course," seems to contemplate the action as one open upon the complaint of any private party, and if its institution as a remedy for a violated civil right is left to the discretion of the attorney-general (and we are not ready to concede an arbitrary discretion in the matter), we must assume that in every proper case his consent on proper terms will be given.

This was the method of procedure adopted in *Cloud* v. *Wilson*, 72 N. C., 155, where the defendant entered into the office of judge by virtue of an election authorized by an act of the legislature to fill an unexpired term, and it was sustained although the statute was in violation of the constitution and all done under its sanction was absolutely null. The controversy was between an officer *de jure* and one *de facto* and this was recognized as the legal method of determining it.

We do not propose to inquire whether the office or place held by the plaintiff at the time of the election and since is an "office or place of trust or profit" within the meaning of the constitutional amendment of 1875, which is but the restoration of a clause contained in the amendments made in the constitution of 1835 and omitted in that of 1868, for it is no easy task to run the discriminating line which separates such offices and places from employments in the public service which are not embraced in

those terms. Nor will we consider how far the court should go in reinstating in office, one improperly removed but who may appear disabled and forbidden by law to possess it and exercise its attached privileges and rights in the opinion of the court. It is enough for us to see that the right to the office is drawn in question and that one who entered in the form of law and is in the possession of the place discharging its duties is to be affected by the decision without having an opportunity to be heard.

It is certainly inadmissible to command the defendants to receive the plaintiff into their body without at the same time removing their appointee, for the ward cannot have a representation in excess of the number allowed in the charter, and if this is to be the effect it is as just to give him a hearing, as it was to give the plaintiff a hearing before his expulsion. The argument on both sides has been able and exhaustive of the learning on the points discussed, to only one of which, preliminary to any examination of the merits, have we found it necessary to give attention.

There is no error, and the plaintiff is not entitled to his writ. It is so adjudged.

No error. Affirmed.

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*JAMES DOYLE v. ALDERMEN OF RALEIGH.

Office or Place of Trust or Profit, what is—Mandamus.

1. An "office or place of trust or profit" must involve the exercise of functions affecting the public, in order to render the incumbent ineligible to hold a similar office or place. Under the facts of this case the plaintiff is not ineligible.

2. This case differs from the preceding, in the fact, that, after passing the resolution excluding the plaintiff and declaring his seat vacant, the defen-

*Mr. Justice MERRIMON, having been of counsel, did not sit on the hearing of this case.

dants elected no successor to fill the vacancy; and it was held, here, that *mandamus* is the proper remedy for his restoration to office.

(*Worthy* v. *Barrett*, 63 N. C., 199; *Ellison* v. *Coleman*, 86 N. C., 235, cited and approved).

CIVIL ACTION in which application is made for the writ of *mandamus*, heard at Fall Term, 1883, of WAKE Superior Court, before *Shepherd, J.*

The plaintiff was elected an alderman of the city of Raleigh, and asked to be restored to the office from which he was removed by the defendants. It was found by the jury, upon issues submitted to them: 1. That he was sworn and inducted into office on the 8th of May, 1883. 2. That he was wrongfully obstructed by defendants in the exercise and discharge of the functions of his office. 3. And that the plaintiff, on the first Monday in May, 1883, held and exercised an office or place of trust or profit under the government of the United States. A further statement of the facts appears in the opinion.

Upon this verdict, and the admission of plaintiff that he still holds the office or place as found in the above issue, the court adjudged that the writ of *mandamus* be refused, and the plaintiff appealed.

Messrs. D. G. Fowle, Walter Clark, J. B. Batchelor and *T. M. Argo*, for plaintiff.

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

SMITH, C. J. The plaintiff, elected an alderman of the city of Raleigh, and having taken the oath of office and met and acted with his associate members of the board, was ejected from his seat by a resolution of the body, on the ground of his constitutional incompetency to hold the office under essentially the same circumstances as was the plaintiff Ellison, whose appeal is determined at this term. There was, however, no successor chosen to occupy the plaintiff's vacated place. In this state of

the case the plaintiff has sought an appropriate remedy for his restoration to office in coercive measures against the alleged wrong doers.

At the time of the election and since, he has been acting under an appointment from the treasury department of the United States, and at a salary or compensation of sixty dollars per month, as night watchman of the postoffice building in this city, to guard and protect it from depredation and injury. This employment, it is insisted, rendered him ineligible to hold under that clause of the constitution, omitted in the formation of the constitution of 1868, and reinserted by an amendment made in 1875, which declares that:

"No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this state or any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this state, or be eligible to a seat in either house of the general assembly," with certain exceptions not material to the present inquiry. Const., Art. XIV, §7.

It was upon the assumption of this incompatibility that the board of aldermen proceeded in declaring the office vacant, because the person elected could not, under the law, hold it and exercise the attaching franchises. There is no impediment in the way of the plaintiff's restoration to his seat, even if the aldermen had jurisdiction in the premises, and had proceeded in a regular way to pass upon the question of competency, if his place as watchman at night is not embraced in the comprehensive and somewhat indefinite terms in which the disqualification is expressed. We shall not make the attempt to define the precise extent of the words employed, after the unsatisfactory efforts of the counsel of the respective parties to do so; and we shall do all required in this appeal by assigning the place held by the plaintiff on the proper side of the line which separates those employments in the public service which are, from those which are not, "offices or places of trust or profit" in the sense of the

constitution. It is apparent from the association that "places of trust or profit" are intended which approximate to but are not offices, and yet occupy the same general level in dignity and importance. The manifest intent is to prevent double office-holding—that offices and places of public trust should not accumulate in a single person, and the superadded words of "places of trust or profit" were put there to avoid evasions in giving too technical a meaning to the preceding word.

Thus Mr. Justice READE declares that "members of the legislature are not officers. Theirs are *places* of trust and profit, but not offices of trust and profit." *Worthy* v. *Barrett*, 63 N. C., 199.

An office admitting of the remedy by *quo warranto* for amotion is defined by Mr. High, and quoted in *Eliason* v. *Coleman*, 86 N. C., 235, "is a public position to which a portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public. High Ex. L. Rem., §620.

As an office has some relations to the public, so must those "places of trust or profit" involve the exercise of functions affecting the public, in order to constitute a disqualification for other similar places.

It is plain the plaintiff, by whomsoever appointed, and at whatever compensation, who is employed mainly to guard a public building at night, to prevent its destruction or injury from fire or other cause, is in no sense occupying a place of trust and profit, but is employed in a specific service having none of the attributes to raise it to the dignity of the constitutional disqualification. Without definite information of the extent and kind of services required of the plaintiff, and regarding them such as are comprehended in the name given to the employee, we consider him not holding an office or place that disables him from occupying a seat in the board of aldermen.

There is error, and judgment must be rendered for the plaintiff, and it is so ordered.

Error. Reversed.

H. W. MONTAGUE v. A. T. MIAL.

Jurisdiction—Landlord and Tenant—Sub-Letting.

1. The jurisdiction conferred upon justices of the peace to try civil actions, where the property in controversy does not exceed fifty dollars, is concurrent with that possessed by the superior court.
2. An action for damages for removing a crop is cognizable in the superior court. The special jurisdiction of justices of the peace under the landlord and tenant act (1876-77, ch. 283) does not extend to torts, but is confined to actions for enforcing contracts.
3. The landlord's right to the crop to secure payment of rent is not impaired by the sub-letting of his tenant. The sub-tenant's crop may thereby be subjected to a double lien, that of the landlord and that of his immediate lessor, but the lien of the landlord is paramount.

(*Belcher* v. *Grimsley*, 88 N. C., 88, cited and approved.)

CIVIL ACTION tried at June Term, 1883, of WAKE Superior Court, before *Philips, J.*

Judgment for the plaintiff; appeal by the defendant.

Mr. Armistead Jones, for plaintiff.
Mr. J. B. Batchelor, for defendant.

SMITH, C. J. Early in the year 1877, the plaintiff leased a tract of land belonging to him for the residue of the year to John Hinton, who contracted, as the rent therefor, to deliver to his lessor one thousand pounds of lint cotton. The lessee, soon after, sub-let a portion of the premises for the same period to George W. Faribault, for a rent to be paid of five hundred pounds of cotton of the same kind. In November, with the consent of Hinton and for the purpose of discharging his obligation, Faribault carried a lot of cotton from the rented land to the defendant's gin, where it was picked and packed, and put in a bale weighing five hundred and thirteen pounds, from which Hinton was to have enough to pay his rent.

Subsequently, as the defendant testifies, and, for the purpose of passing on the ruling of the court brought up for review, we assume to be true, though it is denied by Faribault the defendant sold the bale and appropriated the proceeds to his own use in part payment of an indebtedness due him from Faribault, unconnected with the transaction.

The action is to recover the value of the cotton thus tortiously appropriated by the defendant, and, under instructions based upon the evidence, the jury found the several issues submitted to them in favor of the plaintiff, assessing his damages at $51.25, the value of the cotton.

The following propositions, maintained in the argument of the appellant's counsel, embody the subject matter of the exceptions presented in the record:

1. The superior court has no jurisdiction of the cause.

2. The defendant, not having participated in removing the crop from the land on which it was grown, is not liable to the plaintiff.

3. The lessor's lien under the statute adheres to crops cultivated by the lessee only, and does not extend to the crops of the sub-tenant.

These we proceed to consider, since either, if correct, disposes of the appeal.

I. Under the amended constitution (Art. IV, §27) authority is conferred upon the general assembly to give to justices of the peace jurisdiction of civil action "wherein the value of the property in controversy does not exceed fifty dollars." This jurisdiction is conferred concurrently with that possessed by the superior court by an act passed at the session held in 1876–'77, ch. 251.

The summary and expeditious remedy provided in the act enacted at the same session (ch. 283) for recovering a removed crop subject to an unsatisfied lien for rent or other claim growing out of the lease, and for the adjustment of a dispute which may have arisen between the parties in reference to their contract and

its fulfillment, enlarging the justice's jurisdiction to cases where the claim shall be two hundred dollars or less, evidently proceeds upon the idea of enforcing a contract and not the redressing of a tort committed; and in the latter case, it would come under the restrictions of the constitution. But the clear and unquestioned jurisdiction of the superior court to give compensation in damages, as is the purpose of the present action, remains unimpaired and in full force. The remedies, as far as they affect the justices, are cumulative and not in conflict. That the action will lie at the instance of a lessor who has the right of possession with an attaching lien against one who wrongfully converts the property, seems not to have been questioned and is assumed in the recent case of *Belcher* v. *Grimsley*, 88 N. C., 88.

II. The defendant's second contention is disposed of in what is said in reference to the preceding.

III. The statute in force when the contract of lease was entered into, and in this feature unchanged by the subsequent enactment, in explicit terms, declares, that "*all crops raised on said* (leased) *land*, shall be deemed and held to be vested in possession of the owner of the land or the lessor, &c., and not that *raised* by the labor of the lessee, until the rent for said land shall be paid, &c. If parcelled out to others, by sub-letting or otherwise, on terms consistent with the provisions of the lease, their crops are the lessee's crops for the purposes of securing the rent, and with the same rights and interest of the lessor in enforcing payment. The land and the crops to be grown cannot be freed from the conditions imposed by law, nor can the lessor's rights be abridged by any subordinate contracts of the lessee. He can pass no better estate, nor confer any superior rights to the use of the land, than he possesses himself. If it were otherwise, the sub-letting in parts might defeat the security given under the statute, and render it inoperative.

The sub-tenant's crop may be under a double lien, that of the owner of the land and that of his immediate lessor, but the former is paramount, and the rent due on the primary lease must be satisfied.

If Hinton assented to the diversion of the cotton to other uses, it would be relieved of his lien for rent, but the claims of the plaintiff to have his own rent paid would be wholly unaffected, and therefore his recovery unimpeded.

There is no error. The exceptions are overruled and the judgment affirmed.

No error. Affirmed.

D. D. LIVINGSTON v. W. J. FARISH.

Landlord and Tenant—Claim and Delivery.

1. The landlord may bring claim and delivery to recover possession of crops raised by the tenant or cropper, where his right of possession under THE CODE, §1754, is denied, or he may resort to any other appropriate remedy to enforce his lien for the rent due and the advances made.
2. The action will lie, not only where the crops are removed from the land leased, but also in a case where the tenant or cropper, or any other person, takes the crops into his absolute possession and denies the right of the landlord thereto.

(*Varner* v. *Spencer*, 72 N. C., 381; *Durham* v. *Speeke*, 82 N. C., 87; *State* v. *Pender*, 83 N. C., 651; *Alsbrook* v. *Shields*, 65 N. C., 333; *Cotton* v. *Willoughby*, 83 N. C., 75; *Womble* v. *Leach*, *Ib.*, 84; *Belcher* v. *Grimsley*, 88 N. C., 88, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of RICHMOND Superior Court, before *MacRae, J.*

The record presents this case: In the month of January, 1881, the plaintiff leased to the defendant a farm, to cultivate and gather the crop therefrom during that year; and the defendant agreed to pay to the plaintiff by the first day of October of that year, as rent for the farm, four hundred and fifty pounds of good merchantable lint cotton. To enable the defendant to make and gather the crop, the plaintiff furnished him with supplies amounting in value to twenty-three dollars and twenty-five cents,

which sum the defendant agreed to pay when the rent should become due.

The defendant cultivated and gathered the crop, consisting of cotton, corn and fodder.

The plaintiff alleged that the defendant failed and refused to pay the rent and the sum due for supplies, and at the trial it was admitted that the same had not been paid.

The plaintiff requested the court to give the jury this charge: "That if plaintiff demanded the delivery and possession of the property before this action was brought, and the defendant refused to comply with said demand, this action would lie for the recovery of the property."

The court declined to give the jury this instruction, and the plaintiff excepted.

The court charged the jury, "that the action of *claim and delivery* would not lie, under the statute, unless some part of the crop had been removed from the premises by the defendant. As it is admitted that there was a sum due plaintiff from defendant for rent and advances, the jury must inquire from the evidence whether any part of the crop had been removed by defendant; for if no part of the crop which he had raised on that land had been removed before this action commenced, the plaintiff could not recover; and they must respond to the issue in the negative; and if any part of the crop had been removed, they must respond in the affirmative." The plaintiff excepted to this instruction to the jury.

The jury responded to the issue in the negative. The plaintiff moved for a new trial, and the court disallowed his motion, and gave judgment for the defendant. Whereupon, the plaintiff appealed.

Messrs. J. D. Shaw and *Burwell, Walker & Tillett*, for plaintiff.

Mr. Frank McNeill, for defendant.

MERRIMON, J., after stating the above. The manifest pur-

pose of the statute (THE CODE, §1754) is to create a first lien upon the crops produced upon the lands leased, in favor of the landlord or his assigns, to secure the payment of the rents and other charges provided for, and to give him in addition to this lien, to make it more effectual, the possession, not the absolute control and ownership of the crops, until the lien shall in all respects be discharged. The possession is coupled with the lien upon the crops with the view to prevent the lessee or his assigns from using, selling or disposing of them, or any part thereof, by removing them from the land or otherwise; to keep them intact until the rents and charges shall first be paid and the surplus pass to the lessee or his assigns. The lessor or his assignee has not the right to manage or dispose of the crops at his will and pleasure; he has the lien coupled with the possession, and the right to preserve these, and no more, until the rents and charges shall be paid. If he should undertake to pervert his right of possession, his power to preserve this and the lien; or if he should undertake to abridge or imperil the right of the lessee, or his assigns, in that case, the statute provides a remedy for them. The leading purpose of the section of the statute cited is to create the lien, to make this more effectual, by giving the landlord possession of the crops, and to secure the whole. *Varner* v. *Spencer*, 72 N. C., 381; *Durham* v. *Speeke*, 82 N. C., 87; *State* v. *Pender*, 83 N. C., 651.

The last clause of the section provides the remedy in favor of the landlord, in case his right of possession shall be denied and obstructed, or a part of the crops removed from the land leased, by the tenant or his assigns or other persons. It provides as follows: "This lien shall be preferred to all other liens, and the lessor or his assigns shall be entitled against the lessee, or cropper, or the assigns of either, who shall remove the crop, or any part thereof *from the land*, without the consent of the lessor or his assigns, or against any other person who may get possession of said crop, or any part thereof, to the remedies given in an action upon a claim for the delivery of personal property."

By the letter of this provision, the action allowed lies only in case the lessee, cropper, or the assigns of either, "shall remove the crop or any part thereof *from the land* without the consent of the lessor," &c. If it lies only in that contingency, the purpose and spirit of the statute might be practically defeated. The lessee might easily defy the landlord, and consume the crops *on the land* leased, or sell them to another, who could do likewise.

In the case before us, the tenant has the actual possession of the crops, he has not removed them, or any part of them, *from the land leased*, and he refused to surrender them into the possession of the landlord. He may consume them, he may sell them to be consumed on the land, he may defy his landlord indefinitely. Has he no remedy in such case? Can it be reasonably supposed the statute is intended to give the remedy in case of the removal of the crops from the land, and in no other, although the same injury may happen in another way? Can it be said, that the letter of the law shall defeat and destroy its purpose? This cannot be allowed. The statute must be construed in the light of its purpose—the end to be attained and secured, the evil to be prevented, and the mischief to be remedied; and applied so as to effectuate the intention of the legislature in enacting it. We have seen what is the purpose of the statute, and the remedy prescribed by it. This must be so construed, as that the remedy prescribed or any appropriate action lies, whenever the right of the landlord to the possession of the crops produced on the land leased, is denied and obstructed; or when a part of the crops shall be appropriated, or consumed on the land or removed therefrom by the lessee or his assigns, or other person. Any other construction will not effectuate the purpose of the statute; this will, and it is not unreasonable. It does not necessarily contravene the words of the statute. While it prescribes one contingency in which an action lies, the one that probably most generally occurs, there is no provision in terms, that the like action, or some other appropriate one, does not lie in other contingencies and under other circumstances.

The landlord has a lien upon the crops and the possession thereof vests in him. He may assert his right in this respect, when involved and need be, by any appropriate action. We cannot conceive of a reason why he may not. If the crop has been gathered and remains intact, and is converted by the tenant or other person, the landlord may bring his action for the possession of the property. There is no statute that forbids this, either in terms or by reasonable implication. A proper action in such a case is that of claim and delivery of personal property. But if the property has been consumed, or the landlord chooses to recover damages for the conversion of it, he may assert his right to recover the same by any proper action. He has a lien upon the whole crop, and a special property to the extent of his lien, and is entitled to the possession. He has such a property as enables him to maintain an action. Of course, the defendant has the right to make any defence open to him, whether legal or equitable. Such actions have been repeatedly recognized and upheld by this court; indeed, the right to bring and maintain them does not seem to have been questioned heretofore. *Alsbrook* v. *Shields*, 67 N. C., 333; *Durham* v. *Speeke, supra*; *Cotton* v. *Willoughby*, 83 N. C., 75; *Womble* v. *Leach*, 83 N. C., 84; *Belcher* v. *Grimsley*, 88 N. C., 88; *Montague* v. *Mial*, decided at this term, *ante*, 137.

In the case before us, the tenant has actual and exclusive possession of the crops and asserts his right to hold possession and have the property. Upon demand upon him by the plaintiff, the landlord, who has the lien, and had and is now entitled to the possession of the crops, as appears from the case, the defendant, the tenant, refuses to surrender possession thereof. He thus clearly puts an end, so far as he can, to the right of the landlord, and asserts his right to have possession of, and the title as well to the crops. It is admitted that the rents and the debt due for supplies have not been paid.

The action would lie if the crops had been removed from the land; and it lies also, when the defendant took the crops into his

absolute possession and denied the right of the plaintiff, admitting that he had not paid the rent and other charges; and the judge ought to have so charged the jury. As he did not, there is error, for which the judgment must be reversed and a new trial awarded, and it is so ordered.

Error. *Venire de novo.*

BENJAMIN W. WATERS v. J. M. ROBERTS.

Landlord and Tenant—Notice to Quit.

1. In summary ejectment under the landlord and tenant act: Plaintiff leased to W and W assigned to the defendant; *Held*, upon the trial of an issue, whether the lease of the plaintiff to W was by the month, that testimony offered by the defendant to show that he leased from W by the year, was properly ruled out, as irrelevant.
2. The notice to quit given by the landlord, instead of by the immediate lessor, was sufficient.

(*Bruner* v. *Threadgill*, 88 N. C., 361, and case cited, approved).

CIVIL ACTION tried at Spring Term, 1883, of BEAUFORT Superior Court, before *Shepherd, J.*

The action was commenced before a justice of the peace, under the landlord and tenant act, to recover possession of certain rooms of a house, situated in the town of Washington, from the defendant and one A. T. Waters, upon both of whom notice to quit had been served. The plaintiff recovered judgment before the justice, and Roberts alone appealed to the superior court.

The premises in question consisted of a dwelling-house, a bar-room and a store.

The defendant denied that he was in any sense the tenant of the plaintiff, and insisted that the notice to quit should have been given him by his immediate lessor, A. T. Waters, and not by the plaintiff, and that the lease from the plaintiff to A. T. Waters, under whom he claimed, had not expired.

The following issues were agreed upon and submitted to the jury:

1. Was A. T. Waters a tenant by the month of the plaintiff? Ans.—Yes.

2. What rent per month is plaintiff entitled to? Ans.—Seven dollars.

On the trial, the plaintiff testified that on the first of January, 1882, he leased the whole of the premises to A. T. Waters at $16.66\frac{2}{3}$ per month, and that the lease was "by the month and the rent payable monthly"; that on the 12th of January, 1883, A. T. Waters, who had been occupying two of the rooms in the building as a bar, sold his stock to the defendant Roberts; and admitted that Roberts purchased and acquired by said sale all the interest of A. T. Waters in the rooms occupied by him as a bar; that A. T. Waters paid him rent for the year 1881, and for each month since; that A. T. Waters rented one room in the building for the year 1882 to one Farrow, who still occupies it, but the witness did not know the terms of the lease.

The defendant, with the view of contradicting the terms of the lease from the plaintiff to A. T. Waters, as stated by the plaintiff in his examination, proposed to testify as to whether he (Roberts) rented for the whole year of A. T. Waters at the time he bought his stock. The plaintiff's counsel admitted that the defendant acquired whatever interest A. T. Waters had in the lease, and objected to the testimony on the ground of irrelevancy.

The objection was sustained, and the defendant excepted. The defendant, for the same purpose, offered to prove that Farrow rented the room occupied by him from A. T. Waters by the year. To this the plaintiff also objected: objection sustained, and defendant excepted.

The defendant's counsel then proposed to argue the terms of the lease from Waters to Farrow, but he was stopped by the court, and the defendant excepted.

The jury found in favor of the plaintiff, upon the issues as above set out, and the defendant appealed from the judgment rendered thereon.

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

ASHE, J. It is shown by the record that A. T. Waters claims the premises by a lease from month to month from the plaintiff, and that the defendant Roberts claims the bar-room under the said Waters. Taking these to be the facts of the case, it is an established principle that a tenant is estopped to deny the title of his landlord: and the rule extends to a tenant holding over, as well as to an under-tenant, assignee or other person claiming under the lease. Taylor on Landlord and Tenant, §705. But it was competent for Roberts, the under-tenant, to show that his lease had not expired; and for that purpose he proposed to contradict the testimony of the plaintiff, who had testified that his lease to A. T. Waters was by the month, by showing that the lease to him from A. T. Waters was for a whole year, and that the lease of said Waters to Farrow was for a like term. The refusal of the court to admit this testimony constitutes the first two exceptions taken by the defendant, upon points of evidence.

The ruling is correct. The evidence is clearly incompetent, because irrelevant to the issue. The issue was, "Was A. T. Waters a tenant of the plaintiff by the month?" The facts proposed to be proved were collateral to the issue: they were facts from which no reasonable inference could be drawn as to the matter in dispute: they had no connection with the issue, and were *res inter alias acta.*

This principle is well illustrated by Mr. STARKIE in his work on Evidence, p. 618, by the cases there cited. For example: the time at which one tenant pays his rent is not evidence to show at what time another tenant of the same landlord, and of the same description as the former, pays his rent. *Carter* v.

Pryke, Es. & Peake Rep., 95; *Furneux* v. *Hutchins*, Camp., 807. Nor is the quality of a commodity, sold to one customer, proved by showing the quality of that sold to others. *Hollingham* v. *Head*, B. N. S., Vol. I, 387, where WILLES, J., says: "The question is whether in an action for goods sold and delivered, it is competent to the defendant to set up, by way of defence, that the plaintiff has entered into contracts with third persons in a particular firm, with the view of thereby inducing the jury to come to the conclusion that the contract sued upon was not as represented by the plaintiff. I am clearly of the opinion it was not competent to the defendant to do so." Same principle in *Bruner* v. *Threadgill*, 88 N. C., 361; *Warren* v. *Makely*, 85 N. C., 12.

The exception to the refusal of the judge to permit the defendant's counsel to argue the terms of the lease to Farrow, was properly overruled, for there was no evidence before the jury upon which such an argument could be predicated.

A point was made by the defendant, as to the notice to quit, in contending that it should have been given him by his immediate lessor, and not by the plaintiff, but there is no force in the objection. The notice was properly given, whether the defendant Roberts was in possession by an assignment of the lease of A. T. Waters, or by a sub-lease from him. An assignment of a lease passes the whole estate of the lessee; a lease, a less estate than the lessor had. By an assignment, the assignee is placed in the shoes of the assignor, and a notice to him is as good as it would be to the assignor had there been no assignment. In the case of a sub-lease, the notice, as has been held, must be given by the lessor to his lessee, or by the mesne-lessee to the undertenant. Taylor, *supra*, §3. So that, whichever way it may be taken, the notice to quit was good, for it was given to both A. T. Waters and Roberts.

No error. Affirmed.

J. H. STRAUSS v. J. D. CRAWFORD.

Claim and Delivery—Tenants in Common.

An action of claim and delivery by one tenant in common against another to recover possession of personal property, cannot be maintained, unless the same has been destroyed or carried beyond the limits of the state.

(*Bonner* v. *Latham*, 1 Ired., 271; *Grim* v. *Wicker*, 80 N. C., 343; *Campbell* v. *Campbell*, 2 Mur., 65; *Pitt* v. *Petway*, 12 Ired., 69, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of NEW HANOVER Superior Court, before *MacRae, J.*

This was an action of claim and delivery to recover possession of a turpentine still and its appurtenances, and for damages for the detention of the same. The plaintiff was nonsuited and appealed to this court.

No counsel for plaintiff.

Messrs. W. S. Norment and *Rowland & McLean*, for defendant.

ASHE, J. The plaintiff alleged that he was the owner of the still, and that the defendant wrongfully took the same from his possession and unjustly detained it.

The defendant denied both of these allegations, and for further defence stated that he purchased the still and fixtures mentioned in the complaints from one Fulmore, who, together with the defendant, had held said still, &c., adversely to the claim of the plaintiff, and those under whom he claimed, for more than three years prior to the beginning of this action; that the present plaintiff, and those under whom he claimed, well knew of such adverse claim; and that the plaintiff claims under a deed from one John Costin, who purchased the still and fixtures at an execution sale, against one Petteway, who at the time was a copartner and half owner with Fulmore in said still.

The plaintiff offered no proof on the trial, except as to damages, and there was none produced by the defendant.

The still, with its appurtenances, was either a part of the realty, as fixed to the freehold, or it was personal property. In the view we take of the case, it was immaterial whether it was the one or the other. If a part of the realty, of course this action could not be maintained, nor could it be sustained if it was personalty. For if the statement made in the defendant's answer, "that the plaintiff claims under a deed from one Costin, who purchased it at an execution sale against one Petteway, who at the time was a copartner and half owner with Fulmore," is to be taken as an admission of the title of the plaintiff to a moiety of the still, &c., as a tenant in common with the defendant, the plaintiff could not recover; for the possession of one tenant in common is the possession of the other, and no action can be maintained for the specific personal property held in common by one tenant in common against another. *Bonner* v. *Latham*, 1 Ired., 271. He cannot support the action unless the property has been destroyed or carried beyond the limits of the state. *Grim* v. *Wicker*, 80 N. C., 343; *Campbell* v. *Campbell*, 2 Mur., 65; *Pitt* v. *Petway*, 12 Ired., 69.

But if the statement of the defendant is not to be considered as an admission of the title of the plaintiff to a moiety of the still, but only a recital of what the plaintiff *claims* to be his title, then the plaintiff's action must fall, because he has offered no evidence of any title. It is true he alleges in his complaint that he was the owner of the still, but that allegation is denied by the defendant.

It is hardly worth while to consider the plea of the statute of limitation. The defendant says that he and those under whom he claims the still, have had adverse possession thereof more than three years before the commencement of the plaintiff's action, but he offered no evidence to sustain such a defence. It was an allegation without proof. There is no error.

No error. Affirmed.

L. M. ALSBROOK v. SARAH C. REID.

Partition—Jurisdiction—Trusts and Trustees.

1. A petition for partition must give a description of the land, and set forth that the parties are tenants in common and in possession, in order to give the court jurisdiction.
2. The advisory jurisdiction of the court will not be exercised in construing a will, where the estate devised is a legal one and the question of construction purely legal. Such jurisdiction attaches to that over trusts, in directing trustees how to discharge their duties, incidentally involving a construction of the instrument creating the trust.

(*Thomas* v. *Garvan*, 4 Dev., 223; *Ledbetter* v. *Gash*, 8 Ired., 462; *Simpson* v. *Wallace*, 83 N. C., 477; *Simmons* v. *Hendricks*, 8 Ired. Eq., 84; *Tayloe* v. *Bond*, Busb. Eq., 5; *Alexander* v. *Alexander*, 6 Ired. Eq., 229, cited and approved).

SPECIAL PROCEEDING heard at Spring Term, 1883, of HALIFAX Superior Court, before *Philips*, *J.*

This proceeding was instituted by the plaintiffs, Louis M. Alsbrook, Henry Billups and wife, Laura L. Billups and Alma M. Howell (by her next friend, the said Alsbrook), against Sarah C. Reid, on the 1st day of September, 1882, before the clerk of the superior court, to sell land for partition, and the same was heard by him upon the following case agreed:

1. David Alsbrook was seized and possessed of the lands described in the pleadings, and the interest of all parties concerned would be promoted by a sale thereof.

2. At the time of the making of the will of David Alsbrook and at the time of his death, the defendant Sarah C. Reid had one child living (the plaintiff Laura Billups), and one grandchild (the plaintiff Alma), a daughter of her son, W. G. Howell, who was dead at the time of the testator's death, and these facts were known to the testator.

The certified copy of the will annexed to the complaint is a true copy of the will of David Alsbrook, which contained, among

others, the following clause: "I give and bequeath to my son, Louis M. Alsbrook, and my daughter, Sarah C. Reid, all the balance of my estate, to be equally divided between them after paying all my just debts. I leave and empower my executor to sell all my entire estate to the highest bidder, as he may deem best for my heirs; to my daughter, Sarah C. Reid, as named above, I loan to her the portion of my estate named to her and her use all of her natural life and then to her children forever in fee simple."

The plaintiff (Louis) insisted that he was entitled, by a proper construction of the will, to a moiety of the land in fee simple; and he also insisted, in behalf of the plaintiff Alma, that the defendant was only entitled to a life estate in one-half of the same, and that Alma Howell and Laura Billups are entitled to the remainder, share and share alike; and the said Laura contends that she is entitled to the remainder of one moiety in fee. And the defendant insisted that she is entitled to one-half of the land in fee.

The clerk, being of the opinion that Louis M. Alsbrook and Sarah C. Reid were entitled to the land, share and share alike, and that Alma Howell and Laura Billups had no interest therein, gave judgment accordingly, and ordered a sale of the land. The plaintiffs, Alma and Laura, appealed to the superior court, in term, where the order of sale was affirmed and the judgment declaring the respective interests of the said parties was reversed. And His Honor adjudged that said Alma and Laura have, and are entitled to, an undivided one-half interest in the land upon the death of the defendant Sarah, who takes under the will a life estate in the said undivided one-half.

From this judgment the plaintiff Laura and the defendant Sarah appealed.

Messrs. Mullen & Moore, for the plaintiff.

No counsel for the defendant.

ASHE, J. The proceeding in this case was instituted ostensibly for the purpose of procuring a sale of land for partition among the heirs of David Alsbrook, but the case comes before us in a very questionable shape. It is not alleged in the complaint that the parties are tenants in common, nor that any of them are in possession of the land; and there is no description of any land which is sought to be sold; and these are matters necessary to be set forth in every petition for partition—whether to be divided or to be sold for the purpose of partition. *Thomas* v. *Garvan*, 4 Dev., 223; *Ledbetter* v. *Gash*, 8 Ired., 462.

These defects would be fatal to the jurisdiction, even if the clerk had jurisdiction. But the proceeding is evidently undertaken to obtain a construction of the will of David Alsbrook, and thereby have the legal rights of the parties ascertained, without resorting to the less speedy and more expensive remedy provided by law for the determination of such rights. The clerk clearly had no jurisdiction of the case, as presented by the record.

Under the former system, the courts of law and equity had concurrent jurisdiction in cases of partition; but whenever a sale was found to be necessary to effect a just and equitable partition, advancing the interests of the parties, the courts of equity had exclusive jurisdiction. By the act of 1868–'69 (Bat. Rev., ch. 84, §13) this jurisdiction was conferred upon the superior courts, and they were invested in this particular with the same powers as had been possessed and exercised by the courts of equity. But the courts of equity, themselves, had no such jurisdiction as that assumed and exercised by the clerk of the superior court in this case.

The former courts of equity entertained, and our superior courts still entertain applications for advice and instructions from executors and other trustees, as to the discharge of trusts confided to them, and incidentally thereto, the construction and legal effect of the instrument by which they are created. But the courts of equity never exercised this advisory jurisdiction when

the estate devised is a legal one, and the question as to construction is purely legal. The jurisdiction is incident to that over trusts. Where there is no trust or trustee to be directed, the court of equity never takes jurisdiction. *Bailey* v. *Biggs*, 56 N. Y., 407; *Simpson* v. *Wallace*, 83 N. C., 477; *Simmons* v. *Hendricks*, 8 Ired. Eq., 84; *Tayloe* v. *Bond*, Busb. Eq., 5; *Alexander* v. *Alexander*, 6 Ired. Eq., 229; where it is held: "When the estate devised is a legal one, and the question of construction disputed between the parties is a legal one, a bill for partition of land will not lie, nor can such a bill be sustained which states a legal controversy between the plaintiffs and defendants; and that the bill should allege a seizin or possession in the defendants and plaintiffs themselves." This decision is appositely applicable to our case. Here, the estate devised is a legal one, and the question of construction disputed between the parties, not only between the plaintiffs and defendants, but between the plaintiffs themselves; and there is no seizin or possession alleged in the parties, and we may add, no trust or trustee to be directed.

The proceeding cannot be maintained and must be dismissed.

Error. Dismissed.

JOSIAH EVANS v. COMMISSIONERS OF CUMBERLAND.

Counties and County Commissioners—Taxation—Necessary Expenses—Injunction.

1. The legislature may confer upon a county the power to create debts for necessary expenses, without the approval of "a majority of the qualified voters" in the county. Const., Art. VII, §7. And the county authorities are the sole judges of what are "necessary expenses."
2. Under an act of assembly to enable the people of Cumberland to establish a free bridge over the Cape Fear river, the county authorities were au-

thorized to issue bonds and levy a tax to meet the expenses of the same; *Held*, that a motion for an injunction against the exercise of the power was properly refused.

(*Manly* v. *Raleigh*, 4 Jones' Eq., 370; *Newsom* v. *Earnheart*, 86 N. C., 391; *Hill* v. *Commissioners*, 67 N. C., 367; *Railroad* v. *Commissioners*, 72 N. C., 486; *Brodnax* v. *Groom*, 64 N. C., 244; *Satterthwaite* v. *Commissioners*, 76 N. C., 153; *Cromartie* v. *Commissioners*, 87 N. C., 134; *Winslow* v. *Weith*, 66 N. C., 432, cited and approved).

MOTION for an injunction heard at Fall Term, 1883, of CUMBERLAND Superior Court, before *McKoy*, *J.*

The plaintiff appealed from the refusal of the judge to grant the injunction.

Mr. R. S. Huske, for plaintiff.
Mr. Z. B. Newton, for defendants.

SMITH, C. J. The general assembly at its last session passed an act ratified and taking effect on March 8th, 1883, entitled "An act to enable the people of Cumberland county to establish a free bridge over the Cape Fear river at or near the town of Fayetteville, North Carolina," the recital of the substance of which is necessary to a proper understanding of the case on appeal.

It directs the county commissioners, on petition from not less than five hundred voters presented on or before the first Monday in April, to submit the question of a free bridge to the qualified voters of the county at an election to be held on the first Thursday in May, and prescribes the manner in which it shall be conducted and the popular will ascertained.

Section five, so far as its provisions relate to the present inquiry, is in these words:

If it shall appear that a majority of the votes cast at such election were for "free bridge," then the said board of county commissioners shall certify the same to the chairman of the board of justices of said county within five days of said meeting, and the chairman of the said board of justices shall call a joint meeting

of the justices and commissioners of said county, to be held on the first Monday in June next following, which meeting shall make or cause to be made such contract or contracts as may be necessary for the speedy establishment of a free bridge across the Cape Fear river at Fayetteville, North Carolina: provided, that if the owners of the Clarendon bridge now across said river will agree to sell their said bridge and franchises, together with the right of way to and from said bridge, over or across any land they may own contiguous thereto, for a sum not to exceed thirty-five thousand dollars, then a purchase of the same shall be made by said board of justices and county commissioners; but if no agreement can be made, they are hereby authorized to make any contract necessary for the erection of a new bridge across said river at or near the town of Fayetteville.

The contract being entered into, the commissioners, if in their opinion deemed best, are empowered to issue coupon county bonds, bearing date January 1st, 1884, in sums not less than twenty-five nor more than five hundred dollars, at a rate of interest not exceeding seven per cent., and to mature at a period not beyond thirty years. The bonds are required not to be sold under par, and the coupons, as they become due, are receivable "in payment of taxes and other claims due to the county of Cumberland." §6.

The next section authorizes and directs the annual levy of special taxes, as long as may be requisite, "sufficient to pay the coupons as they become due" and to provide a "sinking fund" to pay the principal as the bonds mature, not in any one year to exceed the sum of two thousand dollars.

If the commissioners decline to issue bonds, annual special taxes are authorized to be levied and collected, as long as necessary, which shall not in any one year be above "ten cents on the hundred dollars valuation and thirty cents on each taxable poll. §8.

It appears from the complaint and answer, which do not appear to differ in essential particulars, that an election was held on the

day designated in the statute, wherein were cast one thousand six hundred and ninety-six votes for *free bridge*, and one thousand one hundred and forty-two votes for "no free bridge," while the former, which favor the proposition, are conceded not to be a majority of the number of voters in the county.

The result being known, the joint meeting of the commissioners and justices contracted for the purchase of the bridge from the owners at the price of thirty-five thousand dollars, and, after the commissioners concluded to issue the bonds, proceeded to levy the special tax of five cents on each one hundred dollars worth of taxable property and fifteen cents on the poll, half of the amount authorized, to meet the liabilities to be incurred in putting out the bonds.

While preparing and about to issue the bonds, the commissioners were interrupted by the present suit, and a temporary restraining order granted. Upon the subsequent hearing, the prayer for an injunction was denied and therefrom the appeal brings the case before us.

While county and other municipal corporations possess and can exercise only such powers as are conferred, and are under such restraints as are imposed by the constitution and laws enacted pursuant to it, there is no such direct limitation put upon them as is put upon the legislature in reference to contracting a debt or pecuniary obligation in article five, section four of the constitution. The inhibition put upon them is contained in article seven, section seven, which declares that,

"No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same *except for the necessary expenses thereof*, unless by a vote of the majority of the qualified voters therein."

This provision leaves the legislature free to confer upon municipal organizations the power to create debts and issue public securities in order to raise funds to meet those "*necessary expenses*" when it may be deemed expedient, and the legislation may be

made dependent on the result of a popular vote for its efficacy. *Manly* v. *City of Raleigh*, 4 Jones' Eq., 370; *Newsom* v. *Earnheart*, 86 N. C., 39; *Hill* v. *Commissioners of Forsyth*, 67 N. C., 367.

It is only required that an approval be obtained from a "majority of the qualified voters" before contracting a debt, or levying a tax when the fund is for other than the "necessary expenses" of the county or other corporate municipal body. *Railroad* v. *Commissioners of Caldwell*, 72 N. C., 486.

The inquiry then, is whether the construction of a new or the purchase of an existing bridge for the free transit of people over the waters of the *Cape Fear* can be deemed a necessary county expense within the meaning of the exception? and whether the court can undertake to review and correct the judgment of the commissioners if considered erroneous.

The subject is so well considered in the opinion of the late Chief-Justice delivered for the court in *Brodnax* v. *Groom*, 64 N. C., 244, and his comments so forcible, that we prefer to reproduce what he says:

"Who is to decide what are the necessary expenses of the county? The county commissioners to whom are confided the trust of regulating all county matters. *Repairing and building bridges* is a part of the necessary expenses of a county, as much so as keeping the roads in order or making new roads."

In reference to a judicial control over the exercise of the power delegated to the county authorities in determining what are necessary expenses, he proceeds:

"This court has no power, and is not capable if it had the power, of controlling the exercise of the power conferred by the constitution upon the legislative department of the government or *upon the county authorities.*"

"For the exercise of powers conferred by the constitution, the people must rely upon the honesty of the members of the general assembly, and of the persons elected to fill places of trust in the several counties."

The action in this case was to prevent the expenditure of $10,000 in the construction of a bridge where none had been before, connected with no public road, and which was alleged by the plaintiff to be "unnecessary, inconvenient and extravagantly expensive."

The same proposition is again announced in the case of *Satterthwaite* v. *Commissioners of Beaufort County*, 76 N. C., 153, and recognized in *Cromartie* v. *Commissioners*, 87 N. C., 134. The same views as to the exercise of a revisory control of the court, where a tax is levied in excess of the constitutional limit are expressed in an opinion prepared by *Rodman, J.*, in *Winslow* v. *Weith*, 66 N. C., 432, and published in that number of the reports as an appendix. It must be declared there is no error.

No error. Affirmed.

COMMISSIONERS OF FORSYTH v. W. A. LASH and others.

Witness—Section 590—Evidence—Special Verdict—Agency—Demand—Remarks of Judge.

1. One who is a party to a suit, though in his corporate capacity, is not competent to testify as to a transaction with a person deceased.
2. Neither the admission of incompetent nor the rejection of competent evidence not material to the issue or misleading, is assignable for error.
3. The court has the power under THE CODE, §409, to direct a special finding upon an issue in an action for an account and settlement of a trust fund, and so also, in all other cases except where the suit is for "money only" or "specific real property."
4. A demand upon an agent, whether in the presence of the principal or not, is in law a demand upon the latter; and evidence of transactions with the agent in furtherance of the objects of the trust, is admissible in an action for an account and settlement of the same.
5. Where the relation of principal and agent subsists, the demand for an account necessary to put the statute of limitation in operation, must be

such as to put an end to the agency: an application by letter, asking information of the agent concerning the trust fund, is not such demand, and the remark of the judge in this case, that the letter, upon its face, does not purport to be a demand, was no invasion of the province of the jury.

6. An agent who appoints an agent cannot escape personal liability upon the ground that he had no authority for the appointment.

(*Carrier* v. *Jones*, 68 N. C., 130; *Price* v. *Cox*, 83 N. C., 261; *Wynne* v. *Prairie*, 86 N. C., 73; *Rogers* v. *Moore*, *Ib.*, 85; *Potter* v. *Sturgis*, 1 Dev., 79; *Mining Co.* v. *Fox*, 4 Ired. Eq., 61; *Waring* v. *Richardson*, 11 Ired., 77; *Moore* v. *Hyman*, 12 Ired., 38; *Hyman* v. *Gray*, 4 Jones, 154; *Kivett* v. *Massey*, 63 N. C., 240; *Falls* v. *Torrence*, 4 Hawks, 412; *Edwards* v. *University*, 1 Dev. & Bat. Eq., 325; *Collier* v. *Poe*, 1 Dev. Eq., 55; *Blount* v. *Robeson*, 3 Jones' Eq., 73; *Davis* v. *Cotten*, 2 Jones' Eq., 430; *West* v. *Sloan*, 3 Jones' Eq., 102; *McNair* v. *Kennon*, 3 Mur., 139, cited and approved).

CIVIL ACTION commenced in Forsyth and tried at Fall Term, 1883, of DAVIE Superior Court, before *Shipp, J.*

At June term 1868 of the county court of Forsyth, the justices thereof, among whom was I. G. Lash, the intestate of the defendants, in pursuance of a popular vote of approval, directed one N. S. Cook to subscribe on behalf of the county for one thousand shares of one hundred dollars each in the capital stock of the North Western North Carolina railroad company, and at the same time elected the intestate financial agent of the county in regard to such subscription. In connection with these appointments the justices passed the following resolution:

"Whereas the county of Forsyth has made subscription to the capital stock of the North Western North Carolina railroad company of one hundred thousand dollars, and the first installment of five per cent. is now due and payable; and whereas one or more installments may be called for during the year, and the remainder in 1869 and 1870 by said company; for the purpose of meeting said installments as they may be called for, the court does hereby appoint I. G. Lash financial agent of said county, and he is hereby authorized and empowered to negotiate a temporary loan or loans in the name of the county, on such

terms as he may deem most advisable, to meet the installments as they may be called for; and said financial agent is further authorized to cause to be prepared coupon bonds of said county, with suitable devices, of such denomination as to him may appear most suitable for negotiation, bearing interest at the rate of 8 per cent. per annum, and payable at such time and place as he shall deem most advisable, and to negotiate and sell the same on the best terms he can obtain; provided, however, that not more than fifteen thousand dollars of the principal and interest on such bonds shall mature in any one year; said coupon bonds shall be authenticated by the signature of such financial agent and countersigned by the clerk of the superior court under the seal of the court; and that a tax be annually levied, collected and paid over to said agent on or before the 20th day of December of each year to meet the payment of principal and interest as the same falls due on all loans and bonds, which said agent may have negotiated for the purpose of paying the installments on said subscription."

Then, after directing the raising of the sum of five thousand dollars to meet the first installment prior to the fourth Thursday in July, the justices further ordered "that a tax be levied to meet the installment on the railroad subscription of one hundred thousand dollars on all persons and subjects of taxation now taxed by the state and county for state and county purposes, equal to the said state and county taxes combined for the present year, and that the same be collected and paid over to said agent on or before the 20th day of December, 1868, by the sheriff of Forsyth county, and that the said sheriff collect the taxes according to and upon the tax-list, as now made out by the clerk of this court for the present year."

On October 18th following, the county commissioners, who had succeeded the justices as municipal county officers, met and passed an order in these words:

"*Be it resolved*, That the financial agent is hereby instructed and duly authorized, whenever he finds himself minus of a suf-

ficiency of county funds under his control on the 20th day of December in each and every year, until the loan shall be paid, to meet all the maturing bonds and coupons on the succeeding 1st of January in each year, if minus on the 20th day of June preceding, to negotiate a temporary loan or loans, in the name of the county, payable at such times as he may deem most advisable, and to negotiate and sell the same on the best terms he can obtain, for any amount sufficient to supply him with ample funds to meet the bonds and coupons as they mature; all of which is adopted and passed by the unanimous action of the board, and the clerk is ordered to furnish the financial agent with a certified copy of this resolution."

The foregoing proceedings before the justices and ratification by the board of county commissioners in the exercise of public functions, are recited to show the extent and duration of the contemplated agency and the measure of confidence reposed in the agent in the discharge of its high and responsible trusts.

The intestate accepted the appointment and continued to act under it without rendering any account of the number of bonds issued or the disposition made of them, or of the funds received and disbursed up to the time of his death in April, 1878, during which time large sums derived from taxes levied and collected annually were paid over to him to meet the county liabilities.

The action was begun on the 30th day of September, after his death, against the defendants, to whom letters of administration on his estate have been issued, and its object is to have an account and settlement of the trust and the balance, if any, resulting from its execution, ascertained and declared.

Passing by the numerous complaints and answers as amended from time to time, the defendants rely upon the statute of limitations, put in operation, as they allege, by a demand for an account made upon the intestate in May, 1873, and never rendered, as a bar to an account, and this defence, presented in a series of issues, was

tried before the jury at fall term, 1883, in the superior court of Davie, to which the record had been removed. The issues, with the responses to each, were these:

1. Did the plaintiff in the month of August, 1877, or thereabout, demand an account and settlement of I. G. Lash, through the defendant Lemly, in the presence of Lash, and was said demand for account and settlement refused? Answer—There was a demand made upon I. G. Lash, through W. A. Lemly, in the First National Bank of Salem, N. C., but not in the presence of I. G. Lash, as he was sick in another room across the passage in the said bank, and the said demand was refused.

2. Was W. A. Lemly the agent of Lash and authorized by him to manage his general business? Answer—Yes.

3. Was the said Lemly authorized and empowered by the said Lash to attend to the special matter of his agency in regard to bonds for the county of Forsyth? Answer—Yes.

4. Was there a demand made for an account by plaintiffs in the year 1873, as alleged in the answer of the defendants? Answer—No.

5. Is this action barred by the statute of limitations? Answer—No.

Upon these findings it was adjudged by the court that the defendants come to an account with the plaintiffs touching the matters alleged in the pleadings, and that Kerr Craige be appointed referee to take and state an account touching the whole of the transactions of the intestate, as a financial agent for Forsyth county, and make report to the next term.

From this judgment the defendants appeal to this court, and we proceed to consider the exceptions contained in the record.

Messrs. Watson & Glenn, for plaintiffs.

Messrs. D. Schenck and *J. M. McCorkle*, for defendants.

SMITH, C. J., after stating the above. Exception 1. The plaintiffs introduced as a witness before the jury A. E. Conrad,

chairman of the board of county commissioners, a plaintiff in the action, when objection was made by the defendants to his competency, for the reason that he is a party plaintiff—was such when the suit begun; and is a tax payer, owning taxable property in the county of Forsyth; and further, that he cannot testify to any transaction which took place between the intestate and himself.

The objection being overruled, in answer to the question, "With whom did you transact your business, Lemly or Lash?" the witness replied: "I did all the transactions with Lemly."

The defendants repeated their objection to the details of any transactions with Lemly or conversations between the witness and him, not in the presence of Lash, or any such with the intestate himself. The witness was, however, permitted to proceed and testify as follows:

"After the Belo suit was decided, I went to Mr. Lash's room. He was sick in bed. I asked him what amount of tax would have to be levied to meet the payments on the bonds. He replied about 66⅔ cents on $100 worth of property. I asked who owned the railroad bonds. He said, "I don't know; they were thrown out on the market." He further said if any one presented any of the bonds, he had surplus money and would pay them off."

The testimony recited as to the conversation with the intestate, we are disposed to think, comes under the inhibition of section 343 of C. C. P., as it certainly does within the mischief to be provided against. Although the witness' presence in the action is in his corporate capacity as a member of the county board, as is his signature to the prosecution bond, the purpose of the statute was to prohibit a party to the suit from giving evidence of a personal communication or transaction with a deceased person against his representatives in the action. While perhaps it should have been ruled out, it is not pertinent to any issue before the jury, and is harmless itself. It would be important in taking the account before the referee, but in no way could it have been prejudicial to the defendants upon the inquiries as to the

time when a demand was made and the statute commenced running. The matter of the conversation was entirely collateral and irrelevant, and rather favorable than otherwise to the defence set up in the answers. If it could be seen that the conversation detailed might have had an injurious influence upon the minds of the jurors, we should feel bound to set aside the verdict, but when its tendency is plainly otherwise and it becomes merely irrelevant, the verdict ought not to be disturbed.

As the rejection of evidence in itself not incompetent, but not material to the point in issue, cannot be assigned for error (*Carrier* v. *Jones*, 68 N. C., 130), so the admission of it when impertinent and plainly not misleading, cannot be.

2. The objection to the testimony of communications with Lemly about the agency is untenable, as he acted for his principal in the management of the county agency, and they were directly in furtherance of its objects.

3. The issue as to Lemly's undertaking to discharge the trusts assumed by his principal on his behalf was material, since his acts done with the intestate's assent were in legal effect the acts of the intestate. This agency gave validity to the alleged demand, as if made upon Lash himself.

4. The court was asked to charge the jury that there was no evidence to support an affirmative finding upon the first issue, as no demand was made on Lemly "*in the presence of Lash.*" The verdict is to this effect and the legal sufficiency of the finding is a matter to be decided by the court. As the jury find that Lemly was employed by Lash to attend to the special matter of the county agency, a demand on him as such was in law a demand on the latter, and as effectual in his absence as in his presence. The essential fact is the demand properly made as required by law. The absence of Lash in a sick-room near by is an immaterial incident, and does not impair the efficacy of the act.

It is further objected that the judge directed a special finding upon the issue instead of leaving it to the discretion of the jury, this being an action upon a money demand. THE CODE, §409.

The concluding clause of this section invests the judge with power in all cases, except when the action is for "money only" or "specific real property," to "direct the jury to find a special verdict in writing." The present action is not "for the recovery of money only," but is to close up and settle a long-continued trust, and to this end to have an account stated of the past business of the agency. That this is not an excepted action is fully settled by past adjudications. *Price v. Cox*, 83 N. C., 261; *Wynne* v. *Prairie*, 86 N. C., 73; *Rogers* v. *Moore*, *Ib.*, 85. But we are unable to feel the force of the objection to the verdict, which merely finds the facts as they are shown, and is an appropriate response to the inquiry submitted.

5. The court was asked to charge that the letter written by C. B. Watson, dated May 5th, 1873, was in law a demand for an account, and that the relations between the county authorities and their agent thereby became hostile and put the statute of limitations in operation. This the court declined to charge, remarking that there is no form necessary, and that "it does not purport to be a demand on its face, as I take it."

The letter set out as an exhibit is in this form:

WINSTON, N. C., May 5th, 1873.

HON. I. G. LASH:

Dear Sir:—Mr. Belo having commenced an action against the county of Forsyth upon certain bonds, purporting to have been issued by said county, I am requested by the board of commissioners, in order that they may be able to answer the complaint in the action without delay, to request you to submit to them between now and Monday, the 12th inst., a report setting forth the following particulars:

(1). The dates at which the various bonds purporting to have been issued by the county were sold, naming the number and amount of each bond;

(2). The amount realized from the sale of bonds, separately stated;

(3). Who were the purchasers of each, naming purchaser and number of bond purchased;

(4). When the several sales were made;

(5). What amount has been paid and what number of bonds paid off;

(6). What amount of money has been levied and collected;

(7). The whole amount of the alleged debt against the county, now outstanding;

(8). The present holders of the said bonds, as far as you can ascertain.

Very respectfully,

C. B. WATSON.

This is manifestly but an application for information to the only source from which it could be obtained, to be used in defending the county in an action brought by one who held such bonds. It was not a demand for an account of the transactions of the agency with a view to its termination, and the judge certainly did no wrong to the defendants in leaving the communication, with other evidence to the jury, to enable them to respond to the issue. Nor was he in any degree invading the province of the jury in disregard of the directions of the act of 1796 (CODE, §413) in making the remark that the communication does not upon its face purport to be such a demand as the defendants claimed in the proposed instruction—that is, as we understand, a peremptory demand for an account.

6. But the main and essential question, to the solution of which all the issues pointed, is as to the bar of the statute and the effect of the call contained in the Watson letter in putting it in motion.

The verdict settles the fact that there was no demand until the month of August, 1877, none being shown in the Watson letter, sufficient to set the statute in operation. It is true that an agent in possession of funds which he ought to pay over to his principal, is not in default so as to be exposed to an action, and a demand is required to afford him an opportunity to pay. We

need not go out of our own state for decisions to this effect. *Potter* v. *Sturgis*, 1 Dev., 79; *Deep River Gold Mining Co.* v. *Fox*, 4 Ired. Eq., 61; *Waring* v. *Richardson*, 11 Ired., 77; *Moore* v. *Hyman*, 12 Ired., 38; *Hyman* v. *Gray*, 4 Jones, 155; *Kivett* v. *Massey*, 63 N. C., 240.

The cases in which a demand is held to be necessary, and when made to put the statute in motion, will be found to be concluded or finished agencies, where nothing remains to be done but to account for and pay over the fund. They are inapplicable to a continuous indefinite agency, in which, from the confidence reposed in the agent, he assumes fiduciary relations towards his employer in the management of interests committed to his charge and becomes a trustee. While this *relation subsists*, though there may have been unheeded calls on him for information, by the mutual acquiescence of the parties, it cannot be hostile so as to permit the running of the statute. The demand necessary to convert the fiduciary into a hostile relation, must be one intended to put an end to the agency and withdraw the authority conferred, and then the statute begins to run, unless the parties by subsequent acts recognize the prolonged existence of the agency.

Where the agent becomes a trustee, charged with the execution of fiduciary duties, until the trust is put an end to, the statute does not begin to operate. In express trusts there is no bar until a sufficient time elapses after their close. This is decided in numerous cases. *Falls* v. *Torrence*, 4 Hawks, 412; *Edwards* v. *University*, 1 Dev. & Bat. Eq., 325. The same is the rule as to a bailee. *Collier* v. *Poe*, 1 Dev. Eq., 55.

Thus PEARSON, J., remarks: "Where a confidential relation is established between parties, either by act of law as in the case of coparceners, tenants in common, &c., or by agreement of the parties themselves as in case of a trust or *agency*, the rights incident to that relation continue until that relation is put an end to, and *the statute of limitations and lapse of time have no application.*" *Blount* v. *Robeson*, 3 Jones' Eq., 73.

To the same effect, as to an unclosed trust, are *Davis* v. *Cotten*, 2 Jones Eq., 430; *West* v. *Sloan*, 3 Jones' Eq., 102.

In *McNair* v. *Kennon*, 2 Mur., 139, upon the dissolution of a copartnership, one of the members undertook to collect what debts were due it and to account for the proceeds as often as the plaintiff should require. He did accordingly exhibit a balance-sheet, the paper set up in the plea as a stated account, while the business of collection was yet in progress. Delivering the opinion, TAYLOR, C. J., remarks: "In this state of things the statute of limitations could not attach upon the demand. The statements furnished by Kennon were to show, from time to time, the progress he was making. The moneys were received by him in the character of a trustee, liable to pay what he received when his copartners should require it: and it was only when they did require it and he refused, *that the fiduciary character was put an end to.*"

In South Carolina it has been held that in the case of a general agency, where the business runs through a considerable period, the statute of limitations does not begin to run until the expiration of the agency, especially where there is a current account. *Hopkins* v. *Hopkins*, 4 Strob., 207; *Pairis* v. *Cobb*, 5 Rich., 133.

The continuance of the agency until the death of the agent is fully proved by the testimony of the defendant Lemly, who says:

"I transacted about all of his business as financial agent from his appointment to his death."

"As the coupons on these bonds fell due I cut them off and applied county funds to their payment. I received all funds paid into the bank for the purpose by county authority, placed it to the credit of I. G. Lash, as financial agent, and gave certificates of deposit. I would then draw checks, sign Lash's name to them as financial agent—sometimes signing "per Lemly," and sometimes "I. G. Lash, financial agent," as appears by the checks themselves now exhibited to me—thus check out the money and apply it to the payment of bonds and coupons. I sometimes drew orders and sent to the board of commissioners to be passed by them—my handwriting will show which ones."

The witness also testified to the illness of his intestate for two or three years preceding his death, confining him to his bed, and when no one was allowed to see him on business.

This testimony, showing an uninterrupted continuance of the financial agency during the life of the intestate and the management of its business by the witness, fully warrants the findings of the jury, and removes out of the way any defence arising out of the lapse of time.

Aside from any final demand, the death of the agent necessarily put a termination on the agency. Story on Agency, §§462, 688, 490.

The maxim expressed in the words "*delegatus non potest delegare*" is invoked for the protection of the principal against a liability sought to be imposed by the agent of an agent, to the former of whom no authority is given, and in whose discretion no confidence has been reposed; and even in such case he may perform some services for his superior, of subordinate character, which will be deemed to have been rendered by the appointed agent. But this is a rule under which, in a proper case, the principal may shield himself from responsibility. But when the principal, as in our case, recognizes the validity and sufficiency of the services rendered by the subordinate, for the appointed agent and in discharge of the trusts assumed by the latter, it does not rest with him to repudiate the acts of his employee and escape personal liability for the want of authority to employ him, not contested by the plaintiffs but acquiesced in by them.

We do not attach importance to the variations pointed out between the plaintiffs' allegations and proofs, since the former may be amended so as to conform to the latter and render them consistent. The Code of Civil Procedure is liberal in allowing this to meet the substantial ends of justice—sections 128 to 132 inclusive.

It must therefore be declared that there is no error in the record and the judgment must be affirmed. This will be certified to the court below.

No error. Affirmed.

NANCY NEAL v. JOHN MACE.

Practice—Affirmation of Judgment.

Where no case is settled on appeal and no errors are assigned in the record, the judgment of the court will be affirmed.

CIVIL ACTION to declare the defendant a trustee of the plaintiff and demanding the execution of a deed, tried at Spring Term, 1883, of BURKE Superior Court, before *Gudger, J.*

The defendant appealed.

Messrs. Sinclair & Sinclair, for plaintiff.

No counsel for defendant.

MERRIMON, J. It does not appear in the record that any case has been settled upon appeal for this court, nor are errors assigned in the record. Upon examination, we find that the court has jurisdiction of the parties and the subject matter of the action. In such a case the judgment will be affirmed. *Swepson* v. *Clayton,* 74 N. C., 551; *Bryant* v. *Fisher,* 85 N. C., 669; *McDaniel* v. *Pollock,* 87 N. C., 503. Judgment affirmed. Let this be certified.

No error. Affirmed.

W. O. MULLER & CO. v. COMMISSIONERS OF BUNCOMBE COUNTY.

License to Retail Liquor—Discretion of Commissioners in Granting.

1. The commissioners of a county do not possess the arbitrary power of suppressing all places for retailing spirituous liquors; nor are they bound to license an applicant though he be qualified by proof of good moral character.

2. They have a limited legal discretion; and in passing upon an application for license, they have a right to take into consideration the questions, whether the demands of the public require an increase of such accommodations, and whether the place it is proposed to establish a bar-room is a suitable one. THE CODE, §3701, construed by ASHE, J.

(*State* v. *Melton*, Busb., 49; *State* v. *Woodside*, 9 Ired., 496; *Attorney-General* v. *Justices*, 5 Ired., 315, cited and approved).

APPLICATION FOR MANDAMUS heard at Chambers in Asheville on the 27th of November, 1883, before *Gudger, J.*

The application was made by the plaintiffs against the defendant board of commissioners of Buncombe county.

When the cause came on to be heard, both parties being represented by counsel, it was agreed that irregularities and informalities on both sides should be waived, and the matters in controversy should be determined upon the facts and law raised in the pleadings, and after the matters were so heard and debated by counsel the court found the following facts:

1. The defendants are commissioners of the county of Buncombe.

2. The plaintiffs are citizens and residents of the town of Asheville, in said county.

3. That the plaintiffs, at the regular meeting of the defendants, on the 6th day of November, 1883, applied to them for license to retail spirituous and malt liquors by measure less than a quart in said town; that the plaintiffs tendered proof of their good moral character, which was admitted, and showed the place where they proposed to carry on their business (the house then occupied by W. O. Muller & Co., situate on Patton avenue, in the town of Asheville), which was not within any territory where the sale of liquor was forbidden by law.

4. The defendants refused to grant the license, believing they had a reasonable discretion in the granting or refusing the same.

5. That the facts set forth in the fourth paragraph of the answer, upon which the defendants found their action, are true, the plaintiffs admitting them substantially to be true as therein stated, which facts are as follows, to-wit:

That they, as the board of commissioners, were clothed by law with a reasonable and sound discretion in the matter of granting license to retail spirituous liquors within the county of Buncombe; that honestly, and as they believed for the best interest of the community of Asheville, as well as for that of the dealers in liquors to whom they had before then granted license (they had granted license to five persons or firms in said town, the plaintiff Muller being one of them) to retail such liquors in said town; and at the time of said application, as well as since and for a long time theretofore, there were issued licenses to five of such establishments, which are now in business, and sufficient in capacity and accommodations to supply the wants and necessities of the inhabitants and visitors of said town; that the said town contains from three to four thousand inhabitants and is rapidly increasing in population. It already has seven or eight churches, two academies for the instruction of boys, one college for the education of girls, besides many other private schools. It is a popular summer resort, much frequented at all seasons by persons from a distance seeking recreation; that owing to the peculiar character of the territory inclosed within its boundaries, it is difficult to police the residences of its citizens, in many instances widely separated from the dense and populated business portion thereof; that keeping in view these circumstances, as well as the requirements of the people generally for refreshments, the defendants, in granting license several years since, caused it to be publicly announced that they would not license any establishment of this character save on Main street, and near the centre of the town, where it was possible to keep the results likely to flow from such traffic under the constant supervision of the corporate authorities and officers; that the plaintiff Muller had full notice of this requirement and had availed himself of it; that the place where the plaintiffs propose to open another establishment is in every way unfit for the traffic. It is on one of the streets leading from the public square to that portion of the town most densely occupied by the inhabitants thereof for pri-

vate residences. It is a building in sight of the Methodist, Presbyterian and Episcopal churches, not more than one hundred yards from the nearest, and not exceeding two hundred yards from the farthest of them; that it is one of the streets through which a large portion of the citizens must pass on their way to the churches aforesaid, and other places of worship, on Sundays and other days, and one of the principal streets used by the children of both sexes in going to and returning from school, and it is the most popular and frequented street in town for persons who walk; that they honestly believe that the opening of a bar-room on such a street, with its inevitable attendant evils, could not but be most distasteful to all the inhabitants of said town, and injurious to the peace, good order and morals of the community.

Some of the churches above referred to are as near some of the licensed bar-rooms as to the house in which the plaintiff proposes to retail, but they are on opposite sides of the public square, with intervening structures, trees, fences, walls, &c., so that the sights and sounds of an unpleasant character which usually are seen and heard about bar-rooms, are concealed and prevented from offending citizens while attending divine worship.

It was under these circumstances and for these reasons that they have time and again refused to grant license to the plaintiffs.

Messrs. W. H. Malone and *Hinsdale & Devereux*, for plaintiffs.
Messrs. Battle & Mordecai, for defendants.

ASHE, J., after stating the facts. The only question presented by the appeal in this case for our determination is, whether the board of commissioners of a county, under THE CODE, §3701, have any discretion in the granting license to retail spirituous liquors by a quantity less than a quart, when the applicant has complied with the requirements of the act by proving a good moral character.

In the investigation of the question it is necessary to review the history of the legislation on the subject to come to a just and satisfactory conclusion.

The first act on this subject was the act of 1825, ch. 1272, §§2 and 3, amended by the act of 1828, ch. 10, combined in the Revised Statutes, ch. 82, §7, which enacts that every person wishing to retail spirituous liquors by a measure less than a quart shall apply to the court of pleas and quarter sessions of the county in which he resides, to obtain an order therefor, which order *shall be granted by the said court*, seven justices being on the bench, only to such free white persons as shall satisfactorily show to the court their good moral character by at least two witnesses of known responsibility, to whom the character of the applicant has been known for at least one year.

This act was followed by the provision in the Revised Code, ch. 79, §6, which amended the Revised Statutes, ch. 82, §7, by requiring that the place should be designated in the application for license and omitting the residence of the applicant.

Then came the act of 1872–'73, ch. 144, schedule B, §11, which omitted the designation of the place and the proof of good moral character, and provided that the commissioners *may grant license at their option*, and by section 8, schedule C, repealed all former laws on the subject. And this act was amended by the act of 1881, ch. 116, §26, only in the particular of substituting the word "gallon" in place of "quart," and this act, as amended, was again amended by the act of 1883, ch. 10, which struck out the word "gallon" and restored "quart."

Then, upon the ratification of THE CODE, the act of 1872–'73, as amended by the acts of 1881 and 1883, was impliedly repealed by section 3701 of THE CODE, which declares that "every person desiring to sell spirituous or malt liquors, wines, cordials or bitters in quantities less than a quart, shall, before engaging in the said sale, file his petition stating the place and house in which he proposes to retail, and obtain an order from the board of com-

missioners of the county to grant him a license to retail at that place, which order *they shall grant* to all properly qualified applicants.

From this brief history of the legislation on the subject of traffic in liquors, it will be seen that the law has been changed, from time to time, in accordance with the fluctuations of popular sentiment. But the last expression of the legislative intention, as declared in THE CODE, §3701, restored the law as provided in the Revised Code, ch. 79, §6.

THE CODE, §3701, is so variant from and inconsistent in its provisions with those of the act of 1872–'73, and the several statutes amendatory thereof, that they are necessarily repealed by implication; and the effect of that repeal is to revive section 6 of chapter 79 of the Revised Code, so far as the provisions of that section are not repugnant to those of the former.

Upon comparing these sections, so far from there being any repugnancy, they are substantially the same in their provisions. In each section it is provided that the applicant shall obtain an *order;* in one case, from the county court, seven justices being present; and in the other, from the board of commissioners, designating the *place* where it is proposed to retail, and upon showing they are properly qualified (that is, by proving a good moral character), a license *shall* be granted, omitting in the last act the words "free white persons." The two sections then, being *in pari materia*, are to be construed together. *State* v. *Melton*, Busb., 49; *State* v. *Woodside*, 9 Ired., 496.

It will however be noticed that the section of the Revised Code here referred to is the same as section 7, chapter 82 of the Revised Statutes, with a slight modification. It is in fact a re-enactment of that section *in totidem verbis*, except that the former act dispenses with a residence of the applicant in the county, and required that the place where it was proposed to retail should be designated. The change was immaterial so far as it affected the substance of the section in the Revised Statutes.

This then brings us to the main point in the case. What is the proper construction of THE CODE, §3701, in reference to the question presented by the appeal?

The section being substantially the same as that contained in Revised Statutes, chapter 82, §7, whatever construction was given to that section must be given to this, and a construction was given to it by Chief-Justice RUFFIN in an able and elaborate opinion in the case of *Attorney-General* v. *The Justices of Guilford county*, 5 Ired., 315. And SIR EDWARD COKE has said: "Great regard ought, in construing a statute, to be paid to the construction which the sages of the law, who lived about the time or soon after it was made, put upon it, because they were best able to judge of the intention of the makers at the time when the law was made." In that case the applicant claimed that when he complied with the requirements of the act by proving a good moral character, the justices were bound to grant him license, and they, on the other hand, contended that they had, by a proper construction of the act, an unrestricted discretion to grant or refuse a license. The chief-justice was of the opinion that neither construction was correct, that "the legislature meant neither extreme, but the mean between them." He said:

"It is clear, as it seems to us, that the justices have not, by the just construction of the law, the arbitrary power of suppressing all places for the retailing of spirituous liquors. On the other hand, we hold they are not entirely without discretion as to be bound to license any applicant, though he be qualified. It is true there is no express grant of discretion *eo nomine* in the 7th section of the Revised Statutes, nor is it to be found in the acts of 1825 or 1828 which are combined in that section. But the very requiring a license, and the presence of so many magistrates at the granting of it, imports a duty of *judging* whether the supply of retailers is adequate to the accommodation of the public. Not indeed upon the arbitrary principle that the people ought not to be allowed any, but upon the principle of the legislative policy that they shall have those accommodations accord-

ing to the demand the justices really believe will be made by those of the people who repair to such places 'for their relief,' as the statute of Edward expresses it. So too, there are situations in which it would be so unseemly that a tippling-house should be set up, that all men would be shocked at one's being licensed there; as literally, at a church door or school-house, or even so near a court-house as to incommode the court in the dispatch of business."

So we here have what may be considered a contemporaneous construction of the section in question; and it is to the effect that the commissioners have a limited discretion; and in judging whether a license should be granted in any case, that they may take into consideration the questions whether the demands of the public require an increase of such accommodations, and whether the place where it is proposed to establish a retail shop is a suitable one. This is all the board of commissioners have done in this case. They had already granted license to some five persons or firms in the town of Asheville, which in their judgment was amply sufficient to afford accommodations to all such as might be disposed to seek "relief" at such places, and they believed that the place designated in the petition was an unfit location for such an establishment, being situate on a street principally occupied by the inhabitants of the town for private residences, in sight of three churches, not more than one hundred yards from the nearest and not exceeding two hundred from the farthest: a street through which a large portion of the citizens passed in going to and from the churches on Sundays and on other days when divine worship is had in them; and the principal street in the town through which the children of both sexes passed in going to and from school.

Besides these, which we think were sufficient reasons for the exercise of their discretion by the commissioners, they offered other cogent reasons why they felt warranted in refusing the license to the plaintiffs. And being of opinion that the board of commissioners exercised a sound legal discretion in refusing to

grant a license to the plaintiffs to retail spirituous liquors at the place designated in their petition for a *mandamus*, we hold there was no error committed by the court below, and therefore affirm the judgment.

No error. Affirmed.

JAMES L. WELCH v. M. D. KINGSLAND.

Power of Court over Interlocutory Orders.

A judge of the superior court has the power to vacate or modify orders made in a cause at any time before final judgment.

(*Winslon* v. *Anderson*, 3 Dev. & Bat., 9; *Perry* v. *Adams*, 83 N. C., 266; *State* v. *Swepson*, *Ib.*, 584; *Henderson* v. *Graham*, 84 N. C., 496; *Miller* v. *Justice*, and cases cited, 86 N. C., 26, approved).

APPEAL from an order made at Spring Term, 1883, of HAYWOOD Superior Court, by *Avery, J.*

The plaintiff appealed.

Mr. Armistead Jones, for plaintiff.

Mr. Fred. C. Fisher, for defendant.

SMITH, C. J. The parties to this action, which involved the proper location of the divisional line between their several tracts of land, at spring term, 1881, came to a compromise, and agreed that it should be established according to the calls of the deed from William Deaver to John Deaver, under which the plaintiff derives title, and be ascertained and fixed by a survey made by W. H. Hargrove, and that certain designated persons should assess the plaintiff's damages. The terms of this agreement were embodied in a judgment, and orders were made by the court to give it effect.

At spring term, 1882, the reports that had been made to the previous term and to which the plaintiff had filed exceptions,

were set aside, and a re-reference entered for a survey conforming to the line established by James Parks for the consideration of the court, and directing the said Hargrove and Parks to run the line "from the black oak to the sassafras and to the maple, to the end that the rights of the parties may be settled."

Pursuant to this order, separate surveys were made and reported, one by Hargrove, the other by Parks, to the first of which the plaintiff, and to the other, the defendant filed exceptions.

At spring term, 1883, the plaintiff, on affidavit, obtained a rule on the defendant for further security for his damages and costs, should they be adjudged to him, and at the time moved the court to set aside, or, as is said in the case, to expunge from the record that portion of the interlocutory judgment entered two terms previous, which directs a "reference to W. H. Hargrove and Parks to survey according to last order in the cause and report to the next term of this court, the *line from black oak to the sassafras and to the maple*, to the end that the rights of the parties may be settled."

The motion was predicated upon the fact that this addition was ordered to be made by the judge after the end of the term of the court in Haywood and while he was at Webster, the county-seat of Jackson, holding the court of that county.

The motion was denied on the ground of a supposed want of power in the judge to grant it, and without enquiring into the facts in order to the exercise of discretion in the premises.

We do not undertake to say that the circumstances do not warrant the refusal of the plaintiff's motion after his long acquiescence in the order and subsequent steps taken in the progress of the cause, even if a prompt application to the court was entitled to its favorable consideration; but it was an erroneous conclusion that the power to vacate was not vested in the court.

In such case the appellate court will entertain the appeal and reverse the erroneous ruling, in order that the court below may exercise the discretion confided to it, and grant or refuse the

application according to its judgment upon the merits. *Winslow* v. *Anderson*, 3 Dev. & Bat., 9; *Perry* v. *Adams*, 83 N. C., 266; *State* v. *Swepson*, *Ib.*, 584; *Henderson* v. *Graham*, 84 N. C., 496.

We think authority to vacate or modify previous orders ascertained to be erroneous or wrong, when discovered during the progress of the cause and before final judgment, does reside in the court, and on proper occasions should be exercised to promote the ends of justice.

An interlocutory order, in the language of READE, J., is "always under the control of the court during the pending of the action." *Shinn* v. *Smith*, 79 N. C., 310; *Ashe* v. *Moore*, 2 Mur., 383; *Miller* v. *Justice*, 86 N. C., 23.

This was a well settled rule in the courts of equity, but must be equally applicable to the present practice, which, in its essential features, conforms to that prevailing in those courts.

There is error in the ruling, and it is reversed. This will be certified, to the end that the court may proceed to hear and pass upon the plaintiff's motion.

Error. Reversed.

HARSHAW'S EXECUTORS *v.* S. A. MCDOWELL, Administratrix.

Appeal, undertaking on, justified by one surety.

1. An appeal will be dismissed on motion of the appellee, if it is not perfected according to law.

2. In all cases of appeal, except *in forma pauperis*, a written undertaking is required (unless properly waived), and one of the sureties must make affidavit that he is worth double the amount specified therein. THE CODE, §§552, 560.

(*Hancock* v. *Bramlett*, 85 N. C., 393; *Bryson* v. *Lucas*, *Ib.*, 397, cited and approved).

HARSHAW *v.* MCDOWELL.

MOTION to dismiss an appeal heard at October Term, 1883, of THE SUPREME COURT.

No counsel for plaintiff.
Messrs. Reade, Busbee & Busbee, for defendant.

MERRIMON, J. The appellant, in all cases, should be careful to see that the errors upon which he insists are properly assigned, and that in all respects his appeal is perfected. If he fails to do so, as the law requires, it is his own neglect, and he cannot complain if his appeal fails or is dismissed.

THE CODE, §552, requires that, "to render an appeal effectual for any purpose in any civil cause or special proceeding, a written undertaking must be executed on the part of the appellant, with good and sufficient surety, in such sum as may be ordered by the court, not to exceed the sum of two hundred and fifty dollars, to the effect that the appellant will pay all costs which may be awarded against him on the appeal, or such sum as may be ordered by the court must be deposited with the clerk by whom the order was entered, to abide the event of the appeal: such undertaking or deposit may be waived by a written consent on the part of the respondent." This language is plain, strong and mandatory. It does not simply prescribe a form; it is not merely directory; it requires a thing to be done that is of the substance of the appeal, and it can be dispensed with only by a written waiver on the part of the respondent or appellee. It is not within the discretion of the court to dispense with it.

THE CODE, §560, further provides in like strong and mandatory terms, that "an undertaking upon appeal shall be of *no effect* unless it be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein." This is a modification of the C. C. P., §310: it required all the sureties to make a like affidavit. And the sufficiency of the sureties may be excepted to as provided. Of course these statutory provisions do not apply to cases where a party sues as a pauper.

In this case the appellant executed an undertaking upon the appeal with a surety, but the surety did not make affidavit as required by the statute. The clerk certifies that it was "sworn and subscribed before me;" but who was sworn, and what the person swearing swore, does not appear. This swearing was not the affidavit required. It does not appear to be a substantial compliance in a material respect with the statute. It must appear by the affidavit that the surety was worth double the amount of the undertaking. An affidavit is not simply the taking of an oath: it is what is said under oath, duly taken and reduced to writing, and the writing ought to be subscribed by the affiant.

We have examined the record carefully to see if there is anything in it that could be construed to be a *waiver* of a justified undertaking, and we find nothing. Where the appellant is in court and the bond is offered and accepted without objection, and this is noted in the record, this is construed to be a sufficient *waiver* in writing under the statute. *Hancock* v. *Bramlett*, 85 N. C., 393; *Bryson* v. *Lucas*, *Ib.*, 397.

The appeal was not perfected according to law, and the defendant is entitled to have her motion to dismiss the appeal allowed.

PER CURIAM. Appeal dismissed.

LEVI MORPHEW *v.* JOSEPH TATEM and others.

Appeal Bond, justification of.

The justification of a surety to an undertaking on appeal, must be made by the surety himself. The affidavit of another as to the pecuniary reputation of the surety will not answer the demands of the law. See preceding case.

MORPHEW *v.* TATEM.

MOTION to dismiss an appeal heard at October Term, 1883, of THE SUPREME COURT.

Messrs. J. W. Todd and *J. F. Morphew*, for plaintiff.
Messrs. Q. F. Neal and *R. Z. Linney*, for defendants.

MERRIMON, J. The plaintiff appellee moves to dismiss the appeal because the surety to the undertaking has not made affidavit as required by THE CODE, §560, that he is worth double the sum of money specified in the undertaking.

It appears that the surety made no affidavit at all, but one Daniel Dougherty made affidavit "that the surety and principal in the above bond (referring to the undertaking) are worth fifty dollars above their debts and exemptions, according to reputation.

The statute requires that the surety shall make the affidavit. He is presumed to know his pecuniary and property circumstances better than any one else, and ought to make the affidavit.

But if another can be allowed to do so, the affidavit in this case is insufficient. The affiant does not swear that he knows the circumstances of the surety at all; he swears to "reputation." This is not a compliance with the statute in form or substance. The intent of the statute is to serve a substantial purpose, and we cannot undertake to impair its force and effect by giving it a construction prompted by a desire to relieve negligent appellants.

The motion to dismiss the appeal must be allowed. It is so ordered.

PER CURIAM. Appeal dismissed.

*CATHARINE G. SHELTON v. SARAH L. SHELTON.

Appeal—New Trial where Judge retires from office.

Where a judge goes out of office before preparing a case on appeal, a new trial will be awarded unless the parties agree upon a statement of the case. The *certiorari* applied for is granted to afford the parties an opportunity to adjust their differences in the premises.

PETITION for *certiorari* heard at October Term, 1883, of THE SUPREME COURT.

Mr. Armistead Jones, for plaintiff.
No counsel for defendant.

SMITH, C. J. The facts disclosed in the affidavit of the plaintiff's counsel, to which no opposing evidence is offered, are, that separate statements of the case on appeal, prepared for the respective parties, were delivered to the judge who tried the cause, for his adjustment of the differences between them. He transmitted to the clerk a statement of his own, omitting one or more of appellant's exceptions to the rulings which were intended to be brought up for review, without giving notice to the parties or affording them an opportunity of being heard before his final action. The retirement of the judge from office prevents the perfecting the appeal in the mode prescribed by the statute, and would, in the absence of any case, render unavoidable the award of a new trial. This necessity may be avoided by the appellee's assent to the filing of the appellant's case, as part of the record and the appeal then heard upon it. We therefore grant the application for the writ of *certiorari*, to the end that an opportunity may be offered to the parties to file the appellant's case, without addition or change, to come with the record in

*Mr. Justice MERRIMON, having been of counsel, did not sit on the hearing of this case.

response to the requirements of the writ, and this can only be with the assent of the appellee.

Let the writ issue as prayed for on the terms prescribed by law.

PER CURIAM. *Certiorari* ordered.

M. M. LUTZ v. W. P. CLINE and others.

Appeal—Reference.

No appeal lies, where the rulings upon exceptions to a referee's report and an order of recommittal do not affect the substantial rights of either party.

(*Bank* v. *Jenkins*, 64 N. C., 719; *Wallington* v. *Montgomery* (and cases cited), 74 N. C., 372; *Rollins* v. *Rollins*, 76 N. C., 264; *Railroad* v. *Richardson*, 82 N. C., 343; *Commissioners* v. *Magnin*, 85 N. C., 114; *Sloan* v. *McMahon*, *Ib.*, 296; *Leak* v. *Covington*, 87 N. C., 501; *Moore* v. *Hinnant*, *Ib.*, 505, cited and approved).

CIVIL ACTION tried at Fall Term, 1883, of LINCOLN Superior Court, before *Shipp*, *J.*

Messrs. D. Schenck and *Reade, Busbee & Busbee*, for plaintiff.
Messrs. M. L. McCorkle and *Hoke & Hoke*, for defendants.

MERRIMON, J. The plaintiff brought this action against the defendants, as executors of the will of O. P. Bost, deceased, who was in his life-time the guardian of the plaintiff, then an infant, to obtain an account and settlement with the estate of his said guardian in respect to the guardianship of himself.

Upon the complaint and answer, the court directed an account to be taken, and made an order of reference to that end. The referee proceeded to take and state the account and made report of the same. To this report, the defendant filed sundry exceptions. The court heard the action upon the report and the exceptions thereto. Some of the exceptions were sustained, others were overruled, and in some respects the report was confirmed.

The court then, preparatory to giving final judgment, recommitted the report, with directions to correct the same in accordance with its rulings in respect thereto. From this order of recommittal and rulings adverse to him, the plaintiff appealed to this court.

The law does not contemplate that actions are to be brought into this court for the correction of errors, in fragments or sections. On the contrary, every action should be brought, or as nearly as practicable, as a harmonious whole, and tried and disposed of in all its parts in order, and continuously, until finally disposed of upon its merits as a complete litigation. Generally, errors, if suggested at any stage, should be appropriately noticed and set forth in the record, so that in due time they may in the course of procedure be regularly passed upon, either by the superior court in correcting its own errors, or by this court upon appeal. There ought to be, and in every well tried action there is, an orderly and logical oneness; it has a beginning, successive intermediate steps and an end; each part has its appropriate place, and each part is affected by, and immediately, or mediately, supports every other part.

In the case before us, no appeal lies at the present stage of the action. The rulings upon the exceptions and the order of recommittal do not affect any substantial right claimed by either the plaintiff or the defendants that must be presently determined, or lost or prejudiced. In the further progress of the action, other exceptions may be taken by the one side or the other, or it may turn out, the court can and will correct its own errors, when the merits are more fully developed. In any case, the appeal will not be cut off in the end, nor can harm result from the delay; and time and expense will be saved by finishing the action in the superior court, and bringing the whole up together. In the orderly progress of the action, any proper exception might have been entered in the record, to be passed upon, on appeal from the final judgment in the superior court. Nor do the rulings of the court upon the exceptions to the report and the

order thereupon determine the action and present a judgment from which an appeal may be taken; nor do they discontinue the action; nor do they grant or refuse a new trial. In no possible aspect of the case does an appeal lie at its present stage. If the supposed appeal could be sustained, the practical result would be to stop the progress of the action until this court could pass upon the legality of an inconclusive interlocutory order upon appeal! A more striking and appropriate comment than this could scarcely be made upon the latitudinous construction constantly given to the section of THE CODE providing for appeals to this court. *The Bank* v. *Jenkins*, 64 N. C., 719; *Childs* v. *Martin*, 68 N. C., 307; *Gray* v. *Gaither*, 71 N. C., 54; *Wallington* v. *Montgomery*, 74 N. C., 372; *Rollins* v. *Rollins*, 76 N. C., 264; *Sutton* v. *Schonwald*, 80 N. C., 20; *R. R. Co.* v. *Richardson*, 82 N. C., 343; *Commissioners* v. *Magnin*, 85 N. C., 114; *Sloan* v. *McMahon*, 85 N. C., 296; *Leak* v. *Covington*, 87 N. C., 501; *Moore* v. *Hinnant*, 87 N. C., 505.

The appeal in this case was prematurely taken; it did not lie as supposed. The case must be remanded to the end that the superior court may proceed to determine it according to law. It is so ordered.

Error. Remanded.

JOHN L. JONES v. M. CALL and others.

Appeal—Exceptions to report of Refesee.

An appeal from an order sustaining some of the exceptions to a referee's report and overruling others, and recommitting the report with instructions to correct the same in confirmity to the ruling of the court, is premature and will be dismissed. Upon the coming in of the report and the rendition of a final judgment, all the exceptions can be noted and passed upon in one appeal.

JONES *v.* CALL.

CIVIL ACTION tried at Fall Term, 1883, of GUILFORD Superior Court, before *MacRae, J.*

Defendants appealed.

Mr. John N. Staples, for plaintiff.

Messrs. Scott & Caldwell, J. A. Barringer, D. Schenck and *Dillard & Morehead*, for defendants.

MERRIMON, J. The case presents several questions for our decision, if it were properly before us. We find, however, upon an examination of the record, that the appeal was prematurely taken. No appeal lies from the order excepted to, at the present stage of the action.

There was an order of reference under THE CODE; the referee made his report of findings of the facts, the law arising thereon, and stating an account; exceptions thereto were filed by the plaintiff and one of the defendants. The case was afterwards heard upon these exceptions. An order was entered sustaining some and overruling others of them, and recommitting the report with instructions to correct the same in conformity with the rulings of the court in respect to the exceptions, and from this order the defendants appealed to this court. It is settled that an appeal does not lie at once from every order or judgment that may be made in the progress of an action. Generally, in the order of procedure, it lies from the final judgment, and then it brings up, all together, the exceptions that may have been taken and noted in the record from time to time, and the whole are heard together. An action might easily be protracted indefinitely, if an appeal could be taken at once from every order or judgment, however unimportant or inconclusive, entered in the course of its progress, to say nothing of the inconvenience and practical absurdity of suspending, unnecessarily, its progress pending the determination of successive appeals in this court. The due administration of justice does not require such a course of practice, even if a fair construction of the statute providing for appeals to this court

would allow it, as it certainly does not. Indeed, if allowed, it would be at the cost of a due administration of justice, order, time and pecuniary expense.

There are instances in which orders and judgments entered in the progress of the action short of the final judgment may be appealed from at once, and in some cases the progress will be stayed pending the appeal, but such instances are exceptions to the general rule; and appeals are allowed in them, because to postpone the appeal until final judgment would result in an absolute loss of the right, or unavoidable prejudice to it. No rule has yet been settled classifying such cases, and perhaps it would be unwise to undertake to settle a rule definitely at this time; but it is settled that an appeal does not lie from such an order as that appealed from in this case. The order is interlocutory and inconclusive, and the exceptions to the rulings of the court embraced by it can just as well be considered after final judgment as now; and indeed, upon the coming in of the corrected report, the court may correct its own errors, if any exist.

No exception was taken to the appeal by counsel for the appellees, but it is the duty of the court to see that appeals come to this court in the case contemplated by the law and to uphold a just and wholesome practice. Well settled and orderly practice is essential to the life and vigor of the law; and it is one of the first duties of courts of justice to see that it is properly observed on all occasions. *Lutz* v. *Cline*, *ante*, 186, and cases there cited.

The appeal must be dismissed, and it is so ordered.

PER CURIAM. Appeal dismissed.

ANNA K. ROULHAC, Executrix, v. JOHN MILLER and others.

Appeal—Certiorari.

1. A *certiorari* will be granted where the party is in no default, but has been diligent in his efforts to take an appeal.

2. Where the papers in a case were sent to the judge to be returned after the expiration of the term, with his judgment therein: *Held*, that the party intending to appeal, if the judgment should be against him, and who made repeated enquiries of the clerk of the court about the return of the papers, and lost his right of appeal by reason of the lack of information of the clerk as to the time when the same were filed, is entitled to the writ of *certiorari*.

3. In such case it must appear that there is reasonable ground for the appeal that was lost—not that the cause therefor would avail the party in this court.

4. The right to the writ is not affected by the denial of the petitioner's motion for an injunction against collecting the judgment, as that motion was made in a separate and distinct action from the one in which the petitioner desired to appeal.

(*Murray* v. *Shanklin*, 4 Dev. & Bat., 276; *Howerton* v. *Henderson*, 86 N. C., 718; *Parker* v. *Railroad*, 84 N. C., 118; *Syme* v. *Broughton*, *Ib.*, 114; *Parker* v. *Bledsoe*, 87 N. C., 221; *Grant* v. *Moore*, 88 N. C., 77: *Wynne* v. *Prairie*, 86 N. C., 73; *Rogers* v. *Moore*, *Ib.*, 85; *Williams* v. *Rockwell*, 64 N. C., 325, cited and approved).

PETITION for *certiorari* heard at October Term, 1883, of THE SUPREME COURT.

From the petition and answer, and the affidavits filed on both sides, these material facts sufficiently appear:

The plaintiff, executrix, brought an action against Wm. Garl Brown in the superior court of Orange county, and at spring term, 1882, obtained judgment against him for $504, with interest, and for costs. In this action she applied for and obtained a warrant of arrest, under which the said Brown was arrested; and at said spring term, John Miller and John Gatling, the petitioners for the writ of *certiorari*, became his bail, and executed a proper undertaking in the sum of $800 on the 7th of April, 1882. Thereafter, an execution issued upon said judgment, which was returned unsatisfied, the defendant Brown having no property. Thereupon, an execution against the person of Brown was issued at the instance of the plaintiff, which was returned *non est inventus*, and then the plaintiff brought an action to spring term, 1883, of said court, against the defendant petition-

ers upon their undertaking as bail; and in this action, and at that term, the plaintiff filed her complaint alleging the grounds of liability of the defendants, and demanding judgment for the sum of $800, to be discharged upon payment of the $504 and interest and costs. On Wednesday of the second week of that term, the plaintiff moved for and obtained a judgment final against the defendant Gatling for the sum of $733.32, with interest on $504, and for costs.

The defendant Miller had filed an answer, but the plaintiff moved for judgment against him because the same was frivolous and false in fact, and raised no substantial defence to the merits of the action, and the court so held, but granted leave to this defendant to withdraw the answer and file another on or before the afternoon of Saturday, the last day of the term.

The judge left the court before the end of the term, but on the evening of the last day thereof the counsel for the plaintiff sent the papers in the case (including the answer filed by Miller in pursuance of the leave granted, and also an answer in substance the same for the defendant Gatling) to the judge, with a motion for judgment because the answers were frivolous and false in fact, and raised no substantial defence to the merits of the action. It was stipulated that the judgment should be entered as of the term mentioned, and that the parties might appeal, if they should so desire, after the judge returned the papers and the judgment, but the time within which the appeal might be taken was not then settled.

The judge received the papers and adjudged that the defendants had filed no answers "raising any defence to the merits of the action" and gave judgment against them "for $733.32, with interest on $504 from the 2d of April, 1883, and for $9.00 former costs, and for costs of this action to be taxed by the clerk of the court;" and made this further order: "By agreement of counsel in the presence of the court, it is ordered that the defendants may have until the 10th of June to file a case of appeal if they desire. Bond for costs fixed at $30."

The papers, including the judgment, were returned by the judge to the counsel of the plaintiff, who, on the 14th of May, 1883, caused them to be placed in the clerk's office, and the judgment to be docketed in the counties of Orange and Wake.

On the 11th of June next thereafter an execution issued upon the judgment to the sheriff of Orange, and on or about the 3d of July following, the defendant petitioners brought an action against the said Roulhac and the clerk of said court and the sheriff of the county, and moved before a judge at chambers for an injunction restraining the collection of said execution, and for on order directing the clerk to accept an undertaking on appeal from said judgment, and to allow them to take an appeal to this court. And on the 17th of July next thereafter, the judge, having before him substantially the same evidence that appears to this court now, denied the motion and gave judgment for costs against the plaintiffs in that action.

The petitioners had two attorneys in the action in which judgment was given, of whom they complain. It appears from their affidavits that one of them called upon the clerk about the 7th of May last and inquired whether the judge had returned the papers and judgment, and the clerk replied that he had not; and on the next day he made like inquiry and received like reply. This attorney then asked permission to examine for the papers, which was granted; he made search, but could not find them; he was especially anxious to appeal for the defendant Miller. The counsel for the defendant Gatling called repeatedly on the clerk and made similar inquiries of him and received like replies; he called only three or four days before the execution issued and received like information, and he too got permission to make a search for the papers, but could not find them; he called twice, specially, between the 13th and 30th of May, and the clerk uniformly made the like reply.

Both of the counsel swear positively that they made repeated and earnest inquiries of the clerk about the papers and judgment, and up to within a few days of the 10th of June, and

he uniformly told them that the judge "had not been heard from"; and that they desired to appeal to this court.

The affidavit of the clerk seems to be made with scrupulous care. It does not in any material respect contradict the affidavits of the said counsel. What the clerk states is his best recollection and what appears on the docket, and in several respects he confirms the statements of the counsel; he says that one of the counsel "did come several times and ask if the judgment had been returned; that being busy writing, he referred him to the papers, but he has no recollection of the time at which he made inquiries"; that about the week before the execution issued "the papers were all put together and the judgment thought of"; he says it appears on the records in his office that the judgment was docketed on the 14h of May, 1883, and he is confident that no inquiry was made after that time by counsel, and that a search of the docket would have showed the judgment; that he had no design to mislead the counsel or the defendants; the papers lay upon his desk for some time; the contents "not thought of or recollected."

Another affiant swears that, by instructions, he placed the papers in the office of the clerk on the 14th of May, 1883, and had the judgment docketed and filed among the papers.

Messrs. Graham & Ruffin, for plaintiff.
Messrs. Gatling & Whitaker, for defendants.

MERRIMON, J., after stating the above. Upon this state of facts we think the petitioners are entitled to the writ of *certiorari*. It is very manifest they desired and intended to appeal from the judgment from the beginning. It was agreed, at the time it was stipulated that the judgment might be entered as of the term of the court, though it was, in fact, to be given after the term, that the party against whom judgment should be given might appeal. The counsel for the petitioners in that action swear that they intended to appeal, and it appears they were

vigilant and earnest in their efforts to learn when the judgment was entered, with the view to appeal. Indeed, we can scarcely see how they could do much more than they did. It could not be expected that they would communicate with the judge on the subject. The clerk was the proper person to have charge of the papers and the judgment, and to him were all inquiries about them properly addressed. He ought to have known when they came into his office, and been able to give all proper information about them. It seems, however, that he was not advertent to their presence in his office for some considerable time, and repeatedly told the counsel applying for information about them, that the judge "had not been heard from," and he did this, as the counsel swear, a few days before the time expired within which the appeal might be taken.

It is true the clerk says he feels confident that the counsel did not call upon him for information after the 14th of May, but he does not say positively that they did not. Indeed, he says he could not say at what time he called, and it appears that he relied largely for his recollection and information upon the entries on the docket. His affidavit is not positive, and he frankly says he relies, in several respects, upon the docket-entries.

The counsel do not say they examined the docket-entries; they say they called for the papers and searched for, but could not find them. This was sufficient. It is customary to call for and examine the papers. Under the circumstances of this case, it was sufficient if the counsel called upon the clerk, and he told them that the judge had not been heard from. It was not his duty to know of the presence of the papers and the judgment, and to give information about them. There are cases in which counsel ought to examine the records for information, but in a case like this, it is sufficient to call upon the clerk. The object was merely to get notice of a fact known to the clerk.

Where a party intending to appeal in apt time has not been in default himself, and has been reasonably diligent in his efforts to appeal, in the course of procedure, but failed to do so because

of the inadvertence, mistake or lack of information of the clerk, as in this case, the writ of *certiorari* as a substitute for an appeal will be granted. *Murray* v. *Shanklin*, 4 Dev. & Bat., 276; *Howerton* v. *Henderson*, 86 N. C., 718; *Parker* v. *Railroad*, 84 N. C., 118; *Syme* v. *Broughton*, *Ib.*, 114.

It was insisted in the argument, that the denial of the motion for an injunction ought to be conclusive of the whole matter assigned as ground for this application. We do not think so. That motion was made in a separate and distinct action from that in which the petitioners desired to appeal, and the judge had no authority to correct errors or irregularities in the latter; nor had he authority to exercise his powers of discretion to set aside the judgment for "mistake, inadvertence or excusable neglect." Indeed, the purpose of the application seems to have been an ill-advised effort to enable the present petitioners to appeal from the judgment complained of. The judge simply denied the motion for an injunction, without assigning any of the grounds of his decision. He may have thought the defendants in the judgment complained of ought to have moved before him in the action wherein it was granted, to set it aside for some sufficient and properly assigned cause, or, that their remedy was the application they are now making. But in any view of the matter, his action was not conclusive. *Parker* v. *Bledsoe*, 87 N. C., 221; *Grant* v. *Moore*, 88 N. C., 77.

In such an application as the present one, it ought to appear that there was apparent or reasonable ground for the appeal that was lost, and that the purpose was not simply to delay, harass or annoy the party obtaining the judgment from which it was intended to appeal. But it need not appear that the party deprived of the appeal had cause therefor that would certainly avail him in this court if his case should come before it, as upon appeal, and errors being properly assigned. Such a course of practice, if allowed, would practically result in deciding the question at issue in an action, upon errors assigned in an application for the writ of *certiorari*—a collateral proceeding. It is

sufficient if it appear that there was reasonable ground for appeal; that the purpose is not vexatious.

The petitioners insist that the judgment of which they complain ought to have been for the penalty of the undertaking ($800), and an inquiry directed as to the damages the plaintiff had sustained; that the damages are not necessarily the plaintiff's whole debt; and they further insist that, at all events, the judgment is irregular, in that, it ought not to have been final. We are not prepared to say that these suggestions of error are trivial and not fit to be considered, if properly assigned and brought before us. They raise questions that admit of much plausible debate, as we learned in the able arguments of counsel upon this application. We do not think it proper to decide them now; indeed they are not presented for our decision further than to enable us to see that there was some reasonable ground for the appeal.

The defendants had the right to appeal, and lost it by no inexcusable default or negligence of their own, and they are entitled to bring their case before this court by the writ of *certiorari*. *Howerton* v. *Henderson, supra; Wynne* v. *Prairie*, 86 N. C., 73; *Rogers* v. *Moore*, 86 N. C., 85; *Williams* v. *Rockwell*, 64 N. C., 325.

The prayer of the petitioners is granted, but they must give the undertaking required by the superior court upon appeal, and a *supersedeas* bond according to law, if they desire to stay the execution upon the judgment for the debt. Let the writ of *certiorari* issue accordingly.

PER CURIAM. Motion allowed.

A. K. WEAVER v. VEIN MOUNTAIN MINING COMPANY.

Recordari, practice in applications for.

Upon petition for the writ of *recordari* a notice was served upon the adverse party to show cause, &c., and he appeared with affidavits in opposition to the granting the writ; *Held*, error in the judge to refuse to entertain the affidavits. The practice in applications for writs of *recordari* and *certiorari* touched upon by SMITH, C. J.

(*Leatherwood* v. *Moody*, 3 Ired., 129; *Webb* v. *Durham*, 7 Ired., 130; *Caldwell* v. *Beatty*, 68 N. C., 399, cited and approved).

PETITION for *recordari* heard at Chambers in Jefferson, Ashe county, on the 16th of May, 1883, before *Gudger, J.*

The action in which this proceeding was had originated in McDowell county. The plaintiff had obtained judgment against the defendant company before a justice of the peace on a contract for services rendered to it, and on the 7th of May, 1883, notice of the intended application of defendant for a writ of *recordari* was served upon the plaintiff. The plaintiff demanded *oyer* of the petition for the writ, which was refused by defendant, and thereupon the plaintiff prepared affidavits in opposition to the motion to grant the writ, and filed them on the day of the hearing before His Honor by way of answer to the petition, together with a transcript of the proceedings had before the justice of the peace. Upon the hearing, the judge refused to entertain the affidavits and exhibits of the plaintiff or to find the facts, but granted the defendant's motion, and the plaintiff appealed.

Messrs. Sinclair & Sinclair, for plaintiff.
Messrs. Erwin & Morris and *Battle & Mordecai*, for defendant.

SMITH, C. J. The writ of *recordari* under the former practice and retained in the new, as has been often declared, is used for two purposes: the one, in order to have a new trial of the

case upon its merits, and this is a substitute for an appeal from a judgment rendered before a justice; the other, for a reversal of an erroneous judgment, performing in this respect the office of a court of error or a writ of false judgment. *Leatherwood* v. *Moody*, 3 Ired., 129; *Webb* v. *Durham*, 7 Ired., 130.

The remedy was usually sought in a direct *ex-parte* application to the judge in a verified petition setting out the facts, and the writ issued upon sufficient cause shown. Upon its return the opposite party was heard upon his motion to dismiss, or the petitioner's to have the cause docketed for trial. *Caldwell* v. *Beatty*, 68 N. C., 399.

Thus there were two hearings; the first, upon the *prima facie* case made by the petitioner and its sufficiency to warrant the awarding the writ, where the proceeding is to have a retrial as upon an appeal; the other, upon the opposing proofs offered, when it is proposed to put the cause on the docket, the writ having performed its office in bringing up the record. This mode of proceeding, it is true, secures all the just rights of the party who has recovered the judgment to be disturbed, and may sometimes require prompt action to arrest its enforcement by execution, not admitting of the delay necessary to give notice. But when the necessity for a *supersedeas* is not urgent and permits the delay, we see no sufficient reason why the merits may not be inquired into upon evidence and a final disposition made of the application when presented, if the petitioner chooses to pursue this course and avoid the needless expense of deferring the inquiry until after the return is made to the writ. This is more in harmony with the spirit and purpose of the present procedure which aims to bring about a speedy determination of controversy, and in accord with the practice in this court in applications for the similar writ of *certiorari*, of which notice is required to be given the other party, unless the motion is made in a cause on the docket where it is regularly reached and called.

In the present case the petitioner caused notice to be served upon the plaintiff of the *time* and *place* (we infer, though not so

specially mentioned as to the latter) when and where the application would be made, in pursuance of which the plaintiff was present with his affidavits and the transcript of proceedings before the justice, and his own explanatory statement on oath accompanying, to contest the application and show cause why it should not be granted, which the notice impliedly invites him to do.

The judge refused to hear any evidence from the plaintiff, and made the following order:

"Upon consideration of the petition in this cause, *the counsel for the parties being present*, it is ordered that the clerk of the superior court of McDowell county issue writs of *recordari* and *supersedeas* according to the prayer of the accompanying petition, unless the defendant company shall give bond with surety before the said clerk in the sum of three hundred dollars: then he is to draw the writ of *recordari* in such a manner as not to require obedience to the writ until the said defendant shall give bond with good surety before the justice who tried the cause."

From this ruling the plaintiff appeals, and we think his appeal is well taken.

It is not at all clear that after the plaintiff had notice and was present at the hearing, as is recited in the judgment, if left unreversed, he would not be concluded from raising any objection to the process when it is returned, and if so, the most obvious injustice would be done him. Whether such be the effect of the adjudication or not, we think it was, under the circumstances of the case, his duty to hear the plaintiff's objections and pass upon the issue made by the parties in the light of the evidence offered.

Why should the plaintiff's presence be declared if his mouth was closed and no opportunity to resist the application afforded? Should the record reciting the fact stand, when for all practical purposes he was outside the transaction as if absent?

It is true the defendant might have moved in the matter without giving notice, but it has elected to bring the plaintiff before

the judge in order that the right to the writ might, in this preliminary state, be finally settled, and we think it was the duty of the judge to hear the plaintiff's objections and the supporting evidence against the issuing of writs, which directly obstructed his collection of his debt and were prejudicial to his interests.

For these reasons the judgment must be reversed, and it is so ordered.

Error. Reversed.

WILLIAM GAMBILL v. JAMES GAMBILL.

Justices of the Peace, practice in courts of—Appeal.

A new trial cannot be allowed in a justice's court, but the party dissatisfied with the judgment has his remedy only by appeal. THE CODE, §865. But where the judgment is rendered in the absence of either party and such absence is occasioned by sickness or excusable neglect (§845), relief may be had by filing an affidavit before the justice, setting forth the grounds therefor, within ten days after judgment.

(*Froneburger* v. *Lee*, 66 N. C., 333, cited and approved).

APPEAL from a justice's judgment, tried at Spring Term, 1883, of ASHE Superior Court, before *Gilmer*, *J.*

The plaintiff complained that he was the owner of certain justice's judgments against one John McMillan, and that he had caused executions to be issued thereon, which he had placed in the hands of an officer for collection; and on the 16th day of March, 1876, while his executions were in the hands of the officer, McMillan sold a tract of land to the defendant James Gambill; and, as a part of the purchase money, defendant promised and agreed that if plaintiff would have satisfaction entered on his judgment against McMillan, and take defendant for the debts, that he would pay plaintiff the said debts and costs, amounting to the sum of $65.54, by the first of September, 1876. That plaintiff agreed thereto, and caused satisfaction to be entered on

his judgment against McMillan, and waited till the day of payment, and the defendant refused to pay said debts as he had promised, and still refuses so to do.

The defendant, in answer to the complaint, denied that he ever promised to pay the plaintiff the debt as alleged, and if he did make such a promise, it was an agreement concerning land, or a promise to answer for the debt, default or miscarriage of another, and in either view was void under the statute of frauds; and for a further defence, he stated that before the rendition of the judgment appealed from, a judgment had been rendered before a justice of the peace in the same county in favor of the defendant in an action between the same parties and for the same cause of action, and that the said judgment is still in force and unreversed.

The following issues were submitted to the jury:

1. Did the defendant agree with the plaintiff that if he, plaintiff, would cause satisfaction to be entered of his judgment on the execution against McMillan, he, the defendant, would pay him the sum of $65.54, as alleged in the complaint? Answer, Yes.

2. Did plaintiff cause satisfaction to be entered? Answer, Yes.

3. If such promise was made, was there any writing of the same, signed by the defendant or his agent? Answer, No.

4. Has judgment been heretofore rendered in favor of the defendant in an action brought upon said promise by plaintiff, as alleged in the second allegation of the answer? Answer by the judge, No.

On the trial the plaintiff offered in evidence two judgments for the sum of $65.54, and then testified in his own behalf that defendant came to his house on a certain day, and, after saying he had bought said McMillan's land, promised to pay off the two judgments against McMillan, and this was understood to be a part of the purchase money for the land; that the constable who had the executions in his hands, understanding the agreement between him and the defendant, entered satisfaction upon

the executions, and that he thereupon released McMillan, who was principal, from the judgment, and looked to the defendant for his money, according to his promise.

The defendant introduced himself and testified that his promise to pay the debt due from McMillan was conditional, if he got a good title to the land he had purchased; that he had never got a title and could not get one, the land having been sold under executions issued upon judgments for several hundred dollars, docketed prior to his purchase. And under his plea of former judgment, the defendant introduced a justice's judgment, rendered on the 17th day of February, 1877, in favor of defendant, against the plaintiff; also a justice's judgment, in the same case, rendered on the 7th day of April, 1877, founded upon an affidavit of plaintiff asking for a rehearing of the first judgment.

It was in evidence that upon both the trials before the justices, both parties were present, and the facts and matters now in dispute were investigated by the justices, and the testimony of witnesses given by each party at both trials. And the third issue was agreed by the parties to be found in the negative, and the fourth issue by the court.

The first and second issues alone were submitted to the jury, who found in favor of the plaintiff, and the fourth issue was found by the court also in plaintiff's favor.

Upon these findings, the court gave judgment for the plaintiff, from which the defendant appealed.

Messrs. J. W. Todd and *R. Z. Linney*, for plaintiff.
Messrs. Q. F. Neal and *D. G. Fowle*, for defendant.

ASHE, J. It is needless to inquire whether the promise made by the defendant to the plaintiff to pay him the McMillan debt was void under the statute of frauds, for that promise having been the subject of the action upon which the judgment before the justice, dated February 17th, 1877, in favor of the defendant, was founded, it was merged in that judgment, and no longer subsists, unless that judgment has been reversed.

The plaintiff insists that this action now under consideration is brought to rehear that judgment, and if in the opinion of this court it ought to be reheard, then the question whether the promise was void under the statute of frauds will be material. But our opinion is, that the ruling of His Honor upon the fourth issue was erroneous.

The "case" shows that both parties were present upon the trial before the justice when the judgment of the 17th of February, 1877, was rendered, and no appeal was taken. The judgment, then, was final, and the justice had no right or power to order a rehearing or grant a new trial.

THE CODE, §865, declares that, "a new trial is not allowed in a justice's court in any case whatever; but either party dissatisfied with the judgment in such court, may appeal therefrom to the superior court, as hereinafter prescribed."

But THE CODE also provides that, "when a judgment has been rendered by a justice, in the *absence* of either party, and when such *absence* was caused by the sickness, excusable mistake or neglect of the party, such absent party, his agent or attorney, may, within ten days after the date of such judgment, apply for relief to the justice who awarded the same, by affidavit, setting forth the facts, which affidavit must be filed by the justice." This section has received a construction by this court in the case of *Froneburger* v. *Lee*, 66 N. C., 333, where it was held that, "when both parties to an action are present at a trial in a justice's court, and the cause is heard, and judgment rendered, a new trial cannot be allowed. The party dissatisfied with the judgment can have a remedy only by appeal to the superior court." THE CODE, §845, C. C. P., §508.

In this case, both parties were present at the trial before the justice, the cause was heard and judgment rendered, and no appeal taken; the judgment was therefore final and conclusive. This action, therefore, which was brought to rehear that case, cannot be maintained, and judgment must be rendered here that the defendant go without day, and that the plaintiff pay the costs.

Error. Reversed.

*W. G. B. GARRETT v. W. L. LOVE.

Counterclaim—Mistake corrected in Equity—Account and Settlement.

1. A counterclaim is where the answer sets up a cause of action upon which the defendant might have sustained a suit against the plaintiff, and the answer in such case must contain the substance of a complaint with a concise statement of the facts constituting a cause of action.
2. Where a mistake occurs in an account and settlement in which the defendant gives his note to the plaintiff for the amount of the supposed balance due, and the plaintiff sues upon the note; *Held*, that the court, under its equitable jurisdiction, will open the settlement and allow the defendant to show such mistake by way of counterclaim.

(*Costin* v. *Baxter*, 6 Ired. Eq., 197; *Compton* v. *Culbertson*, 2 Dev. Eq., 93; *Hall* v. *Commissioners*, 74 N. C., 130, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of HAYWOOD Superior Court, before *Avery, J.*

The action was begun before a justice of the peace and brought by appeal to the superior court.

The plaintiff complained that the defendant was owing him $130, due by note, dated February 1st, 1866, and that no part of the same had been paid, except the sum of $50 on May 25th, 1870, $25 on May 5th, 1871, and $17.50 on May 28th, 1873.

The defendant, admitting the execution of the note, set up the following defence: That he and one Rogers were partners in the mercantile business under the name of Love & Rogers; that the firm became embarrassed and the plaintiff assumed as surety for it a considerable partnership debt; that in order to indemnify the plaintiff, the firm transferred to plaintiff a large amount of notes and accounts, among which was a note on one W. F. Parker for $85.33, dated April 27th 1858, and due six months after

*Mr. Justice MERRIMON having been of counsel, did not sit on the hearing of this case.

date; that sometime about the date of the note sued on, the defendant acquired all the right and interest of his partner Rogers in the assets of the firm, and he and the plaintiff came to a settlement, in which the plaintiff undertook to account for all sums by him collected out of the property assigned to him, and all sums which he had paid for the defendant or the firm of Love & Rogers, and after the account was taken and a balance struck, he turned over to the defendant a number of the accounts which he had received from the firm, among which was the note on Parker, the plaintiff, alleging that he had collected nothing thereon.

Upon the settlement, there was a balance found due from the defendant to the plaintiff to the amount of $130, and the defendant executed his note to the plaintiff for the same. This note is the one sued on, and was founded upon no other consideration than the balance supposed to be due on the settlement.

The defendant further alleged that after he had made several payments on the note, he ascertained that Parker had paid his note in full to the plaintiff long before the settlement and the execution of the note sued on, and held the plaintiff's receipt for the same.

Whereupon the defendant asked judgment:

1. That the note be adjudged to have been executed by ignorance, mistake and inadvertence on the part of the defendant, and wholly without consideration, and that it be delivered up and cancelled.

2. That the plaintiff account to the defendant for the amount of the Parker note and the interest thereon.

3. For such other and further relief as the nature of the case may require, and for costs.

The plaintiff replied to the defendant's answer and denied the allegation in reference to the payment of the Parker note to the plaintiff.

The following issue was submitted to the jury: Did W. F. Parker pay the plaintiff the note for $85.33, dated April 27th,

1858, executed by Parker to Love & Rogers, and did the plaintiff by mistake fail to account on settlement with the defendant for the amount of said note received by the plaintiff." Answer, "Yes."

Upon this finding, the defendant moved for judgment against the defendant for $..... the difference between the amount of the principal and interest of the Parker note and the principal and interest of the payments he had made to the plaintiff on the note sued on. His Honor refused the motion upon the ground that the defendant was not entitled to judgment upon the pleadings, and gave judgment against the plaintiff for costs, from which judgment the defendant appealed.

No counsel for plaintiff.
Messrs. Battle & Mordecai, for defendant.

ASHE, J. From His Honor's ruling upon the motion of the defendant for judgment, we presume he considered the defence set up to be setoff and not a counterclaim, and in this we think there is error.

Since the distinction between the forms of actions at law and suits in equity has been abolished, the defendant may set up as many defences of new matter or as many counterclaims as he may have, whether legal or equitable, THE CODE, §245; provided, however, they are such causes of action as are defined in subdivisions one and two of section 244. The counterclaim here set up is clearly one of the class embraced in the first sub-division, for it is a cause of action connected with the plaintiff's action.

The criterion for determining whether a defence set up can be maintained as a counterclaim, is to see if the answer sets up a cause of action upon which the defendant might have sustained a suit against the plaintiff; and if it does, then such cause of action is a counterclaim; and it must disclose such a state of facts as would entitle the defendant to his action, as if he was plaintiff in the prosecution of his suit, and should contain the substance

of a complaint, and, like it, contain a plain and concise statement of the facts constituting a cause of action. There is no formula prescribed for either a complaint or counterclaim, and even if informal, "in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice." THE CODE, §260.

The answer in this case, though informally drawn, contains the essential elements of a counterclaim. The defendant, independently of the plaintiff's action against him, certainly has a cause of action against the plaintiff. The answer states that there had been a settlement between the parties, an account stated, and a balance struck in favor of the plaintiff, and a bond given by the defendant to the plaintiff as evidence of his indebtedness; and after sundry payments on the bond, it was ascertained that in the settlement, *by a mistake*, the plaintiff had been credited with a note passed over to the defendant as good, which had, theretofore, been paid to plaintiff. The plaintiff then, in justice, owed the defendant the difference between the amount of the bond given by him to plaintiff, and the amount of the note transferred to defendant, for which the plaintiff got an improper credit. The defendant, under the former procedure, would have been without remedy at law, but a court of equity which took cognizance of mistakes would have maintained a bill to open the account and correct the mistake. Adams' Eq.; *Costin* v. *Baxter*, 6 Ired. Eq., 197; *Compton* v. *Culbertson*, 2 Dev. Eq., 93.

Very much like this case is that of *Hall* v. *Commissioners*, 74 N. C., 130, where READE, J., in speaking for the court, says: "Before the Code of Civil Procedure, if parties accounted with each other, and the debtor gave the creditor his bond for the balance due, everything was merged in the bond; and at law the debtor was not allowed to set up any defence of mistake or fraud in the settlement, or in the consideration of the bond; but if such mistake or fraud were alleged and proved, he could have relief in *equity*. Now we administer both law and equity in the same civil action. If, therefore, there was mistake or fraud in

the consideration of the bonds sued on, the defendant may show it in this action, and have the benefit of it as a counterclaim, or by way of having the bonds reformed so as to show the amount justly due.

Our opinion is that the defence set up in the answer of the defendant constitutes a counterclaim, and that the court below erred in refusing to render judgment in favor of the defendant for the amount claimed by him.

As the sum due to the defendant, in consequence of the mistake, is the difference between the amount of the Parker note, with interest, and the balance due on the note sued on, after deducting the endorsed credits, it is a matter of simple computation; and the clerk of this court will ascertain the amount due and report, and judgment will be rendered here in favor of the defendant for said amount.

Error. Reversed.

JACOB MILLER v. H. A. MILLER.

Evidence—Deed, mistake in and cancellation of—Issues—Pleading and Practice.

1. In an action to cancel a deed which the plaintiff alleged was executed to his son by mistake, the plaintiff, with a view to show that he would not convey so much property to his son without reserving a sufficiency for himself, was allowed to prove the extent and value of the land; *Held*, no error, especially when the defendant had proved that, about the same time, the plaintiff had conveyed to him all his personal property as well as the land. In such case it was not improper in the court to allow equal latitude to both parties.

2. *Held further*, if the alleged mistake be established, the defendant has no deed in contemplation of equity, and the plaintiff is entitled to have the same cancelled.

3. Only such issues as arise upon the pleadings should be submitted to the jury, and it is the duty of the court to determine what they are. The law and practice in reference to pleading and framing issues, discussed by MERRIMON, J.

MILLER *v.* MILLER.

CIVIL ACTION tried at Fall Term, 1883, of IREDELL Superior Court, before *Avery, J.*

This was an action to set aside and cancel a deed upon the ground that it was executed by mistake.

The substance of the complaint is that on the 8th day of May, 1860, the plaintiff was and now is, the owner in fee of the lands specified in the pleadings; that, on that day, he prepared and intended to execute to the defendant, who is his son, a power of attorney authorizing him to sell and convey said land and account to him for the money he might realize for it; that the plaintiff being an ignorant man, unable to read and write, requested one Johnson to prepare a proper power of attorney for the purpose mentioned; that said Johnson was an unskilled person in such matters, and through lack of information, instead of furnishing a power of attorney, as he was instructed to do, he prepared a deed purporting to convey the fee simple in the land to the defendant, and advised the plaintiff that this deed was what he wanted and would effectuate his purpose; that plaintiff so believing, and supposing the paper was indeed a power of attorney, and having full confidence in his son's integrity, registered the deed; that afterwards the defendant did not sell the land, but promised to surrender the power of attorney or deed to be cancelled, and then, to reconvey the land to plaintiff; that he neglected from time to time to execute his promise, and at last absolutely refused to do so, and claimed the land as his own by virtue of said deed, and is in possession of a part of the land. The plaintiff demands judgment for the possession of the land; for damages, and that defendant reconvey the land to plaintiff and surrender the deed to be cancelled; and for general relief.

The defendant denies the material allegations in the complaint, and avers that the plaintiff well understood what he was doing when he executed the said deed, and that he intended to convey the land to defendant, and that he had no purpose to execute a power of attorney, as alleged. He further avers that at the time the plaintiff executed said deed, he was indebted to sundry cred-

itors; that his wife had sued him for divorce and alimony, and that the deed was made to defraud his creditors and his wife.

Before the trial, neither party tendered issues, but at the trial the court submitted to the jury the following issues, to which they responded in the affirmative:

1. Was it the intent of the plaintiff and defendant, when the deed of May 8th, 1860, was executed by plaintiff, that the plaintiff should execute a power of attorney, or other instrument, authorizing defendant to sell the land therein described for the plaintiff's benefit?

2. Was the said deed, by mistake of the parties, so drawn as to convey the lands therein described in fee simple to defendant?

The defendant, at the conclusion of the evidence, prayed the court to submit the following issues to the jury, which the court declined to do, and thereupon the defendant excepted:

1. Was the said deed from the plaintiff to defendant intended to be a power of attorney only, and, by mistake of J. A. Johnson, the draftsman, drawn as a deed conveying the land therein named to the defendant in fee?

2. Was it not the intention and purpose of the plaintiff Jacob Miller, in making the said deed to the defendant H. A. Miller, to delay and hinder the payment of his debts, and to defeat his wife Elizabeth Miller, in obtaining alimony out of said land in her suit then pending?

On the trial, the plaintiff asked a witness how many acres the tract of land in question contained, and the value of it? The defendant objected to this question and any answer to it, but the court allowed it and the answer, and the defendant excepted.

The defendant had offered testimony tending to show that the plaintiff had, in the month of May, 1860, conveyed to him all his personal property as well as the land. The plaintiff offered the testimony objected to, with the view to insist, before the jury, that it was not probable that he would convey to his son all his property, making no reservation or provision for himself.

There was judgment for the plaintiff and the defendant appealed to this court.

Messrs. T. S. Tucker, Armfield & Armfield and *J. M. Clements*, for plaintiff.

Messrs. D. M. Furches and *R. Z. Linney*, for defendant.

MERRIMON, J., after stating the case. The evidence objected to was competent, especially in view of the latitude given the defendant in respect to the testimony introduced by him. He was allowed to introduce evidence tending to show that the plaintiff had conveyed to him all his personal property about the time of the execution of the deed, plainly with the view to lead the jury to infer from this and other testimony the purpose he attributed to the plaintiff. The plaintiff, on the other hand, was allowed to show the quantity of the land embraced in the deed and its value, with the view to induce the jury to infer from this and other testimony that he would not probably convey so much property to his son and make no reservation or provision for himself. The fact was not of much moment and the jury not likely to be much impressed by it. It is not probable that it misled them. Great latitude is sometimes allowed by the court in the trial of issues by the jury, and it must be largely left to it, to see that the parties have equal latitude and advantage, as was the case here. Greenl. Ev., §48; Steph. Dig. Law of Ev., 36, *et seq.*

"Issues arise upon the pleadings, where a material fact or conclusion of law is maintained by the one party and controverted by the other." THE CODE, §391.

The complaint ought to contain a succinct and logical statement of the facts that constitute the plaintiff's cause of action. Passing by the demurrer, the answer should admit or deny the facts alleged with precision, stating only necessary facts in denial or explanation. If a counterclaim is pleaded, only the facts constituting it should be stated. These facts should be admitted

or denied specifically or generally by the plaintiff, and any facts constituting a defence to the counterclaim, not inconsistent with the complaint, should be stated with like precision. By the facts in the pleading, is not meant merely evidential facts, the evidence, but constitutional facts, facts that embody the elements of the cause of action, or the defence thereto, or the thing pleaded. These are proved by evidential facts.

If the pleadings are drawn with care and precision, there would need be little difficulty in eliminating the issues, whether of law or fact; they would stand out manifestly upon the face of the pleadings. The difficulty in ascertaining them grows, generally, out of the introduction of a multitude of unnecessary evidential facts, irrelevant and redundant matter, first into the complaint, then into the answer, then into the counterclaim and the reply, sometimes in one, sometimes in another, sometimes in all of these pleadings. Issues do not arise upon the evidential facts, nor upon the irrelevant or redundant matter, however important these things may be in themselves; as to the real pleadings, they are surplusage, foreign matter, that only serves to encumber and embarrass the pleadings. The issues of law or fact arise only upon the essential facts embodied in the pleadings, tersely and logically stated on one side and denied on the other. Redundant matter, whatever it may be, or whatever issue it may present, is *aliunde* and outside of the action, and must be rejected, and it is for the court to determine what issues are presented. The parties may suggest issues, the court may suggest issues; the court may accept or reject them, subject to review for alleged error upon appeal to this court, at a proper stage of the action. Parties cannot agree upon improper issues; issues arise upon the pleadings, and these alone must be tried. Unnecessary issues should be avoided, as they only tend to confuse, and serve no substantial purpose.

The plaintiff in this action alleged in his complaint, stripping it of all redundant matter, that he was the owner in fee of the land mentioned therein, and entitled to the possession thereof;

that by reason of his own ignorance and lack of skill, and the same lack on the part of the draftsman of the deed, he unintentionally executed to the defendant a deed conveying to him his tract of land; whereas, in fact, he only intended, and the defendant so understood at the time, as well as himself, to execute to the defendant a simple power of attorney authorizing him to sell and convey the land and account to the plaintiff for the money he might realize for it.

This the defendant boldly denies, except that he admits himself in possession of a part of the land. He then avers that the plaintiff conveyed the land to him by the deed intentionally and in fraud of his creditors. He did not need to aver this fact; it was not material in this action; the whole matter at issue upon the essential pleadings was presented without it. If the mistake was made as alleged, the defendant had no deed in contemplation of equity. The plaintiff was entitled to have what purported to be a deed, cancelled, as having been executed by mistake, and a reconveyance of the land. But if there was no such mistake, the plaintiff could not recover; for the defendant in the present state of the pleadings, no matter what motive prompted the execution of the deed, would remain in possession of and have title to the land, whether he paid a fair price for it or whether it was conveyed in fraud of creditors.

The plaintiff does not in any view of the pleadings allege that the land was conveyed to the defendant upon a trust, secret or otherwise, for some consideration, with a stipulation to reconvey, and ask for a reconveyance on such ground. In such, or the like case, such an issue as the defendant insisted upon might be pertinent and proper. If we suppose the second issue proposed by the defendant had been submitted and the jury had found upon it in the negative, as they must have done in view of their findings, the result in that case to the defendant would be just as it is. Suppose, however, they had found upon it in the affirmative; in that case, they must have found in the negative upon the issues that were submitted to them, and the result would be

the same still. If they had found as they did upon the issues submitted to them, and in the affirmative upon the proposed issue, then the verdict would have been contradictory and absurd, and the court would not have received it. The defendant got, by the issues submitted, all that the pleadings gave or could give him. He presented an unnecessary issue, and one not presented by the pleadings. He would have a direct issue raised by the pleadings determined incidently by an issue not necessarily presented.

Upon the naked material pleadings in the action, the two issues submitted by the court might, with slight modification, have been embodied in the one. The first issue proposed by the defendant was embodied in those submitted; the second did not arise upon the pleadings; it was immaterial, and the court properly refused to submit it.

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

No error. Affirmed.

MELISSA WARD v. EDWARD PHILLIPS.

Judgment non obstante veredicto—Tax Title—Sheriff's Deed.

1. A judgment *non obstante veredicto* is granted in cases where the plea confesses a cause of action and the matter relied upon is insufficient.
2. A sheriff's deed made to a purchaser of land for taxes within the twelve months after the sale, is void and passes no title. The act of 1872–'73, ch. 115, §§30—33, construed by ASHE, J.

(*Moye* v. *Petway*, 76 N. C., 327, cited and approved).

EJECTMENT tried at Spring Term, 1883, of CHATHAM Superior Court, before *Gilmer, J.*

The plaintiff alleged that she was the owner of a life estate in the land, as described in her complaint, and that the defendant was in possession thereof, wrongfully withholding the same.

The defendant denied the title of the plaintiff and her right to the possession, and admitted that he was in possession, but not wrongfully.

Defendant, for a further defence, alleged that the land in question was sold by the sheriff of Chatham for the taxes of the plaintiff due for the years of 1872–'73; and that he became the purchaser in the sum of twenty-five dollars and twenty-eight cents, and the sheriff executed a deed to him for the same on the 11th day of November, 1873, the plaintiff having failed to redeem said land as required by law; that after receiving the deed, the plaintiff agreed to hold the land as tenant of the defendant, and thereupon the defendant paid her the sum of one hundred dollars—eighty-five at one time and fifteen at another; that plaintiff, under the agreement to hold the possession of the land as tenant, did so hold it until about a year before the filing of this answer.

The plaintiff replied to so much of the answer of the defendant as set up his second defence. She admitted the land was sold for taxes as alleged in the answer, but denied that the defendant purchased the same for himself, and averred that he purchased it as the friend, agent and trustee of the plaintiff under a former agreement with the plaintiff so to do, and to hold the same for her benefit, and the deed was taken by him from the sheriff in fraud of this agreement; and she denied that she ever agreed to hold the possession of the land as tenant of the defendant, or that she ever received any money from the defendant in consideration of the land. She alleged that she was ready and willing to pay to the defendant whatever sum he may have advanced for the land, with interest.

The following issues were submitted to the jury:

1. Did the defendant buy the land as agent or trustee of the plaintiff?

2. Did the plaintiff after the sheriff's sale agree to receive from the defendant $100 for her interest?

3. Did the plaintiff receive $100 in money or otherwise from the defendant for her interest?

4. What is a fair annual rent?

The court instructed the jury, upon the suggestion of defendant's counsel, that if they should respond "No" to the first issue, they need not pass upon the others. The jury did respond "No" to the first issue, and the others were not considered. The plaintiff appealed from the judgment rendered.

Messrs. W. E. Murchison and *J. H. Headen*, for plaintiff.
Mr. John Manning, for defendant.

ASHE, J. The plaintiff's counsel insisted that the finding of the jury upon the first issue was not decisive of the case, and, after verdict, moved for a judgment *non obstante veredicto*, which was refused by the court, and judgment rendered in behalf of the defendant.

In this, we are of opinion there was error. The motion should have been allowed. A judgment *non obstante veredicto* is granted in those cases where a plea or defence confesses a cause of action and the matter relied upon in avoidance is insufficient. *Moye* v. *Petway*, 76 N. C., 327. It is true the defendant denies in his answer that the plaintiff had title to the land as alleged in her complaint, but in his second defence he virtually admits that the plaintiff did have a title, unless divested by the sale of the land for her taxes; and he alleges it was divested by the sale and the sheriff's deed to him. And this raises the question whether this matter of the sale and sheriff's deed was a sufficient avoidance to divest the title of the plaintiff, and we are of opinion it did not, for the reason the deed of the sheriff, made within the twelve months after the sale, was a nullity.

It is provided in §31, ch. 115, of the act of 1872–'73, that "the delinquent (tax-payer) may retain the possession of the property for twelve months after the sale, and within that time may redeem it by paying or tendering to the purchaser the amount paid by him and twenty-five per centum in addition thereto. If the purchaser shall accept the sum so tendered, he

shall give a receipt therefor. If he shall refuse, the delinquent may pay the same to the clerk of the superior court for the use of the purchaser, and the clerk shall give a receipt therefor. Such payment shall be equivalent to payment to the purchaser." The act goes on to provide for the registration of the receipt, &c., and then proceeds: "After payment to the purchaser or to the clerk for his use as aforesaid, his right under the purchase shall *cease*."

Section 32 provides that, "if the delinquent shall fail to redeem as provided in the preceding section, the purchaser may, within eighteen months after the purchase, pay to the sheriff the residue of the sum bid by him, together with the interest thereon at the rate of one per centum per month from the expiration of the twelve months next succeeding the sale to the day of payment, and *demand* a deed. The sheriff shall receive the money for the use of the delinquent and *make the deed*."

In section 30 it is provided, "if no one will, on sale, offer to pay the amount of taxes and charges for a less number of acres than the whole number of acres in said tract, then the sheriff shall bid off the property for the state, and, upon proving the fact and tendering to the auditor of the state a deed to the state for the property, duly registered in the county in which it lies, shall have credit for the amount of such tax and charges."

Section 33 then provides, "in case the state becomes the purchaser under §30, then, within twelve months after the sale, the delinquent may pay to the county treasurer the county taxes due, with twenty per centum added thereto, and to the public treasurer the state tax due, and twenty-five per centum added thereto, together with the costs. * * * * Upon the presentation of the several receipts of those officers, respectively, to the secretary of state, that officer shall endorse upon the deed conveying the property to the state these words, 'taxes and costs paid, delinquent restored to his rights,' and sign the said endorsement, annexing the seal of his office thereto and charging thirty-five cents therefor, and shall deliver deed to delinquent or his agent."

We are of opinion the proper construction of these sections is, that whether a citizen bids off the land or it is bid in for the state, the owner has twelve months in which he may redeem, and the sheriff has no authority to make a deed to a private citizen who may be the bidder within that time. In interpreting these several sections, they must be considered together.

By the 31st section the owner has twelve months to redeem, and upon his compliance with the requirements the right of the purchaser *ceases*. There is no provision made for a deed within that time. But by the 32nd section the purchaser has eighteen months after the purchase to demand a deed, and as he is required to pay interest to the owner on any balance due him, at the rate of one per cent. per month *from the expiration of the twelve months* next succeeding the sale to the day of payment, the deduction is that the deed is not to be made to the purchaser until after the twelve months, but within six months thereafter. This construction is strongly supported by the fact that when the property is bid off for the state, the sheriff is required to make a deed forthwith, and upon redemption by the owner, the deed, with an endorsement of satisfaction, is to be delivered to the owner. When the citizen is the purchaser, there is no such provision; but upon the payment of the taxes, &c., within the twelve months, "the right of the purchaser shall *cease*."

If this be the proper construction of these sections of the act of 1872–'73, and we are of opinion it is, the sheriff had no authority to make a deed to the purchaser within the twelve months after the sale, and the deed so made by him in this case passed no title to the defendant.

There is error. Judgment should have been rendered in the court below for the plaintiff *non obstante veredicto*. The judgment below is therefore reversed, and judgment must be rendered here for the plaintiff in accordance with this opinion.

Error. Reversed.

H. F. JONES v. DANIEL B. POTTER and wife.

Deed of Husband and Wife—Reservation of Life Estate—Remainder—Entireties—Survivorship—Contract of Lease—Appeal Bond, waiver of justification of.

1. A deed of husband and wife conveying an estate in fee to a son and reserving a life estate in themselves creates no change in the relations of the grantors to each other, and they hold the life estate by entireties, with the remainder to the grantee; and upon the death of the husband the widow becomes sole tenant for life.
2. The grantee under such deed has no right to lease the land during the continuance of the life estate, and one in possession under such contract is a trespasser as against the life tenant or her lessee, and not entitled to notice to quit or demand for possession before suit brought.
3. The motion to dismiss the appeal upon the ground that the bond is not justified cannot be allowed, as the record shows there was a waiver by the acceptance of the bond in court.

EJECTMENT tried at July Special Term, 1883, of WATAUGA Superior Court, before *Gudger, J.*

On the trial the plaintiff offered in evidence:

1. A deed bearing date September 27th, 1847, from John Macus to Enoch Potter and wife Hannah Potter, giving the land in dispute to them and their heirs.

2. A deed in fee from Enoch and Hannah Potter to Daniel B. Potter, dated July 4th, 1873, but reserving a life estate to Enoch and Hannah.

3. A deed of lease from Hannah Potter and Daniel B. Potter to the plaintiff, dated January 26th, 1880, for the term of five years.

It was in evidence that at the time this lease was executed by Hannah and Daniel B. Potter to plaintiff, Enoch Potter was dead, having died some time previous to the execution of the lease. It was also in evidence that Hannah Potter was still living.

It was admitted that by the deed from Macus to Enoch and Hannah they took the estate by entireties.

One Sutherland, a witness for the plaintiff, testified that he witnessed the deed of lease from Hannah Potter and Daniel B. Potter to plaintiff, and did not see any money paid; that he was in his field when he witnessed the execution of the deed, and that D. B. Potter lived with the plaintiff Jones after the execution of the deed of lease.

On the part of the defendants, Sally Potter (wife of D. B. Potter) testified that after the deed of Enoch and Hannah Potter was made, she paid some money, viz.: ninety dollars, at the instance of her husband, for the benefit of Enoch Potter, and it was agreed that she was to have two fields known as the "Ray fields," until she was repaid her money, the two fields containing twenty-five or thirty acres; that Enoch was present when she paid the money. This evidence was offered in support of the defence set up in the answer of the defendant Sally Potter, which was to the effect that some time after the marriage, her said husband bought the land now in dispute from his father, and took the deed to himself in fee, and she further avers that at the time of said purchase, she paid the sum of ninety dollars on the purchase money, for which she now has receipts, and that upon her husband's receiving the money, it was fully understood that he was to take the deed in his own name, but to the use of the defendant, until out of the rents and profits she was repaid her ninety dollars thus advanced towards the price of the land. She further testified that she and Daniel B. Potter were married on April 15th, 1868, and that Daniel abandoned her five years ago, but has at times lived with her since.

There was no writing offered in evidence in reference to the agreement between the defendant Sally and her husband, and the allegation of the agreement was denied by the replication of the plaintiff.

The plaintiff Jones gave notice before bringing the suit.

The defendant Sally Potter insisted, first, that a demand of possession should have been made upon her before she could have been dispossessed; and secondly, that there was evidence that the

plaintiff had taken the lease for the benefit of Daniel B. Potter, and to get rid of her and drive her away from the premises, and upon that view and the evidence in the case, the plaintiff could not recover, and asked the court so to charge; but His Honor refused to give the instruction, and charged the jury that the plaintiff was entitled to recover. The jury found all the issues in favor of the plaintiff. There was judgment for plaintiff, from which the defendant Sally Potter appealed.

Messrs. R. Z. Linney and *J. W. Todd*, for plaintiff.
Mr. J. F. Morphew, for defendants.

ASHE, J. We are of opinion there was no error in the charge of the court to the jury. The first instruction asked by the defendant was properly refused, and the second exception, under the facts of the case, was altogether immaterial.

The deed from Macus to Enoch and Hannah Potter, as was properly admitted on the trial, passed to them an estate by entireties, and the deed made by them to Daniel B. Potter only conveyed to him the remainder after the determination of the life estate, which was reserved to them by the same instrument. The effect of the deed to Daniel B. Potter was simply to convey to him all of the estate of the bargainors that remained after their life estate. The original estate, except so much as was conveyed by the deed, remained in them. There was no change in the relations in which they stood to each other, and they still held the life estate by entireties, and when Enoch Potter died, the life estate survived to Hannah. She then became sole tenant for life, with remainder in Daniel B. Potter. And when she and Daniel made the lease of the land to the plaintiff for five years, it was the lease of Hannah and the confirmation of Daniel. She, having the freehold, alone could convey the interest in the term. No present title passed from Daniel to the lessee, and the only effect of his signing the deed with Hannah would perhaps be to estop him from ousting the plaintiff during the term, in the event she should die before its expiration.

The principles here announced are fully sustained by all the elementary writers on the subject, and to apply them to the facts of this case, the claim set up by the defendant to have the right to hold the possession of the land against the plaintiff until a formal demand of possession should be made by him, is without foundation. Her only right to the possession was through a contract with her husband, Daniel, who had no right to make any contract of lease. She had no agreement whatever with Hannah, and did not even claim to have held the possession with her implied consent. She, then, was neither a tenant at will nor a tenant at sufferance, much less a tenant from year to year, as was contended in the argument before this court. So far as regards her relations towards Hannah Potter, from all to be gathered from the facts of the case, she was a mere trespasser, and had no right either to a notice to quit or a demand for possession before action.

But, even conceding that she might legally claim to be a tenant at will, by the acquiescence of Hannah Potter, her tenancy was determined by the lease to the plaintiff, and she had no right to have a demand. "A determination of the will of the lessor may be implied at common law, from his exercising any act of ownership inconsistent with the nature of the estate; as, if he makes a lease of the land, to commence immediately." Taylor, Land. and Ten., §466. "And a tenant at will is even held to be a trespasser by any unreasonable delay to remove after the estate has been determined." *Ib.*, §64. Here, the lease was made on the 26th of January, 1880, and the summons was issued on the 19th day of April, 1880, and served on the ensuing day.

But, even conceding further, that Enoch Potter assented to the contract made by D. B. Potter with Sally, his wife, still, after the death of Enoch, he and his wife Hannah being seized by entireties, any right of possession Sally Potter may have acquired by such assent would have ceased, and she would have become a trespasser as to Hannah by holding the possession without her consent. "Where husband and wife were lessees of land during their natural lives and the longest liver of them, free of rent,

and the defendant took possession under a verbal agreement with them to support them, and to receive the profits of the land over what should be necessary for such support: *It was held*, that, upon the death of the husband, the widow was entitled to recover possession, for the defendant's interest in the land under the verbal agreement terminated on the death of the husband, as that agreement conferred no right which could affect the estate of the wife as survivor; and the defendant, holding over after the husband's death and without the widow's consent, became a trespasser and was not entitled to notice to quit." *Torrey* v. *Torrey*, 14 N. Y., 430. But here, the record shows affirmatively that a notice was given before the action was commenced.

The claim of Sally Potter for money advanced to her husband in the purchase of the land, under an agreement between them, may possibly be asserted when the remainder falls in upon the husband by the death of Hannah, but we are unable to see any ground she has to hold the possession for a moment against Hannah Potter, or her tenant the plaintiff. The judgment of the superior court must, therefore, be affirmed.

There was a motion in this case to dismiss the appeal, because there was no justification of the appeal bond, but in looking into the record, we find there was a waiver by the acceptance of the bond in court.

No error. Affirmed.

T. H. WEBSTER and wife v. WESLEY LAWS and wife.

Pending Suit—Husband and Wife—Agency—Judge's Charge—Vendor and Purchaser.

1. The exception based upon the pending of another action between the same parties cannot be entertained under the facts of this case.

2. Where, in an action against husband and wife to recover the price of goods, the court charged the jury upon the testimony offered, that if the wife acted under the directions of the husband and as his agent in the transaction, he is liable; and that it is not necessary to prove the agency by direct testimony, but the same may be inferred from the attending circumstances; *Held*, no error. But in such case no recovery can be had against the wife, whose coverture incapacitates her from assuming a personal obligation.

3. A purchaser of goods cannot resist a recovery for the price by setting up a defect of title in his vendor, and showing a paramount title in a third person who does not himself assert his claim. In case the purchaser's possession is disturbed, he has a remedy upon the warranty of title, express or implied, in the act of sale and delivery by the vendor.

(*Wilson* v. *Lineberger*, 82 N. C., 412; *Sanderson* v. *Daily*, 83 N. C., 67; *Mabry* v. *Henry*, *Ib.*, 298; *Roulhac* v. *Brown*, 87 N. C., 61; *McNair* v. *McKay*, 11 Ired., 602; *Herrin* v. *McIntire*, 1 Hawks, 410; *Cowan* v. *Silliman*, 4 Dev. 46; *Dougherty* v. *Sprinkle*, 88 N. C., 300, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of ALEXANDER Superior Court, before *Avery, J.*

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

Messrs. Robbins & Long, for plaintiffs.
Messrs. D. M. Furches and *R. Z. Linney*, for defendants.

SMITH, C. J. This action originating in the court of a justice of the peace and transferred by appeal to the superior court of Alexander, is for the recovery of the sum of eleven dollars, the price claimed to be due for a dun heifer sold to the defendants.

The defendants allege, in resisting the demand, the pendency of another suit between the parties for the same cause of action, when this suit was instituted, deny that any contract of purchase was made, and aver that the plaintiffs were not the owners of the property and could convey no title thereto. The legal sufficiency of these defences and the rulings of the court in passing upon them, and instructing the jury upon the evidence, are presented for review upon the defendants' appeal:

1. The objection based upon the institution and pendency of a preceding action when this was begun cannot be entertained. The defence was made and passed upon in an adjudication upon a former appeal (86 N. C., 178), and is not open to the defendants. If it was, the facts being essentially the same, we see no reason for disturbing the conclusions to which our examination of the subject then led, and which are announced in the opinion. But the matter is *res adjudicata* and settled. *Wilson* v. *Lineberger*, 82 N. C., 412; *Sanderson* v. *Daily*, 83 N. C., 67; *Mabry* v. *Henry*, *Ib.*, 298; *Roulhac* v. *Brown*, 87 N. C., 1.

2. The denial of the contract: The evidence was conflicting and was fairly submitted to the jury in the charge of the court. Their finding is conclusive as to the sale, unless they were, or may have been, misled by an erroneous instruction of the judge. To ascertain whether the testimony warranted the jury in finding the sale, it is necessary only to recapitulate briefly the testimony offered by the plaintiffs, for it was exclusively their province to pass upon its credit and ascertain what facts were proved.

The *feme* plaintiff testified that in 1876 the *feme* defendant, with her husband, came to the house of Ruth Webster, the mother of the plaintiff (Thomas), with whom the plaintiffs had resided since their intermarriage early in the year 1873, and proposed to buy the heifer, offering the said Thomas the sum of ten dollars for her; that the offer was declined and twelve dollars demanded, but it was finally agreed that the price to be paid should be fixed at eleven dollars; that defendant Wesley was not present when the trade was consummated, and witness did not know where he then was; that this was on Saturday, and on Monday following the said Wesley returned, took possession of the heifer and carried her away, the witness assisting him in securing her. She further stated that her mother-in-law died in 1869.

The plaintiff Thomas testified that his sister, the *feme* defendant, came to his mother's house, when the former proposed, in her husband's hearing, to buy the heifer; that they went together

to the lot where the heifer was, about the time the wife of the witness was milking the cows, when witness offered to sell to his sister for twelve dollars; that the said Wesley then disappeared in the bushes, and his wife agreed to give eleven dollars; that Wesley soon came back, while the conversation was going on about the cows; and he afterwards carried the heifer away.

It was further in evidence that Wesley kept the cow, now a milch cow, for several years, and at last sold her.

Upon the question of sale the court charged the jury, that if the *feme* defendant acted under the directions of her husband, and as his agent in the transaction, he would be liable for the agreed price; that it was not necessary to prove the agency by direct testimony, but it could be inferred from circumstances; that if he was present when his wife made the contract, and came the next week and took possession of the heifer and carried her to his own house, and then sold her after having long used her as a milch cow; these were circumstances from which the agency of the wife might be inferred.

In our opinion, these directions are exposed to no just complaint, and the case was fairly left to the jury in the aspect in which it was presented by the plaintiffs' testimony, and if the facts thus shown were accepted by the jury, they were fully warranted in their finding upon this point.

3. The defendants further contended that the title to the heifer, admitted to have once been in the deceased, had not been divested by the alleged parol gift, because no corresponding delivery and change of possession took place necessary to make an effectual transfer. Much of the argument was addressed to us upon this objection, but we do not deem it important to be considered. Without reference to the formalities indispensable to the transfer of personal property by a parol gift in a controversy between the parties to the transaction, and the rulings of the judge in reference thereto, the right of recovering the purchase money is entirely independent of the solution of an inquiry into the transfer of the property from the deceased former owner to the plaintiffs, both or to one of them.

It is plain that a bailee entrusted with the goods of another could not resist the bailor's demand for their return after the termination of the bailment, nor defend against his action by showing that the title was not in the bailor, but in some other person, unless the latter had asserted his superior and paramount right and the bailee had yielded to it. If he had thus yielded, it was to an answer to the bailor's demand for restitution.

"We do not deny the rule," remarks Mr. Justice STRONG, speaking for the supreme court of the United States, "that a bailee cannot avail himself of the title of a third person (though that person be the true owner) for the purpose of keeping the property for himself, nor in any case when he had not yielded to the paramount title." *The Idaho*, 103 U. S. Rep., 581.

The same principle is asserted in numerous cases. *Osgood* v. *Nichols*, 5 Gray, 420; *Cheesman* v. *Exall*, 6 Ex., 345, note.

Referring to the ruling in *Osgood* v. *Nichols*, in which the defendant was *not allowed to show title in himself* to goods which had been entrusted to him for sale, and he, as auctioneer, had sold and received the money therefor, as a defence to the plaintiff's action for the money paid him, Mr. BIGELOW says: "The same rule applies *between the vendor and purchaser of goods in an action by the vendor to recover the price.*" "It is laid down," he adds, "that no principle of law can be found which would permit the purchaser (in the absence, of course, of the assertion of superior right by another) to set up, in defence of a claim for the price, a defect of title in the vendor. It is not permitted such a party to volunteer the protection of the claims of those who do not themselves assert their claims." Big. Estoppel, 430.

The rule clearly is, that neither bailee nor purchaser of goods who has not paid the price, can resist the recovery by the bailor of the goods, or by the vendor of the purchase money, by showing a paramount title in a third person, unless he can also show an authority from him or its assertion to which he must yield. *McNair* v. *McKay*, 11 Ired., 602; Story on Agency, §217.

But it is suggested that a purchaser may thus incur a double liability, unless he can protect himself from the payment of the purchase money by proving his liability to the rightful owner of the goods. But this is the precise condition of every one who pays the purchase money for goods he buys of another who has no title. He has his remedy in either case upon the warranty, express or implied, in the very act of selling and delivery by the vendor.

But it may be answered that unless the vendor could recover the price, the vendee, if never held responsible by the true owner, would have the goods without paying any one, and in disregard of his promise to pay for them. This would be as unjust to the vendor as the other rule is alleged to be to the vendee.

It was also urged that the defendants have a claim upon the implied warranty which may be used in opposition to the demand for the price of the heifer. This proposition is equally untenable, for a covenant of general warranty is subject to the same construction with a covenant for quiet enjoyment; and it is essential to the maintenance of an action upon it, in the language of Chief Justice TAYLOR, "that the plaintiff assign as a breach an ouster or eviction by a paramount legal title." *Herrin* v. *McIntire*, 1 Hawks, 410. This was said in reference to a warranty in a deed for land, but it is equally true of a warranty in the sale of chattels.

"That a warranty of chattels * * * is a covenant for quiet enjoyment," remarks Chief Justice RUFFIN, "is a settled rule in this state. It has been understood by the profession too long to admit now of question. Hence upon eviction, the value at that time is the measure of damages. It is familiar doctrine in reference to land, that suit and even recovery is no breach unless the loss or disturbance of possession follows. I had thought it equally so in reference to chattels. The reason is the same. The covenants respect the possession." *Cowan* v. *Silliman*, 4 Dev. 46.

No disturbance of the defendants' possession then having occurred, and neither the alleged owner, up to her death, nor her personal representative since, having asserted any claim, there has been no breach of the implied warranty which can constitute a counterclaim or diminish the sum to be recovered below that mentioned in the contract.

But there can be no recovery against the *feme* defendant, who could not, by reason of her coverture, contract and assume a personal obligation by means of it. This has been so recently decided that we are content to refer to the case of *Dougherty* v. *Sprinkle*, 88 N. C., 300.

It must be declared there is no error in the proceedings as respects the defendant Wesley Laws, and the judgment as to him must be affirmed, but it was error to render judgment against the defendant Nancy, and as to her it must be reversed and she go without day.

Error. Judgment accordingly.

STATE ex rel., &c., DAVID HOWELL v. ROBERT PARSONS and others.

Notes and Bonds.

Parties who subscribe thier names as obligors to a bond are bound by its stipulations, whether their names are inserted in the body of the instrument or not.

(*Vanhooks* v. *Barnett*, 4 Dev., 268, cited and approved).

CIVIL ACTION tried at Spring Term, 1882, of ASHE Superior Court, before *Avery, J.*

A trial by jury was waived, and it was agreed that the judge might try all issues of law and fact. The court found the following facts.

Robert Parsons was regularly appointed clerk of the superior court of Ashe county by J. L. Henry, Judge, to fill the unex-

pired term of Joseph B. Parsons, who died in 1868, and said Robert acted and discharged the duties of his office till the fall of 1874. He filed his official bond, dated September 2d, 1872, which was signed by Robert Parsons, Peter Eller, Abraham Miller, William Parsons, John Osborn and Jacob Roten, and in the obligatory part of the bond the names of Robert Parsons, Peter Eller and Abraham Miller are only mentioned, and a blank left for other names.

A petition was filed at the spring term, 1867, of the court of equity for Ashe county by the heirs of Amos Howell for the sale of certain lands of said Howell for partition. In pursuance of an order of sale made at said term, the land was sold, and report of sale, made to the fall term of said court of equity by the clerk and master, and confirmed. William Howell and R. T. Hardin executed their note for $667, for the purchase money to the clerk who sold the land. After the courts of equity were abolished, the clerk and master turned over the whole to Robert Parsons and took his receipt therefor as clerk.

The plaintiff is one of the heirs-at-law of the said Amos Howell, and all the other heirs-at-law received in full their portion of the fund arising from said sale before this action was brought. The said Robert Parsons received two hundred and fifty-five dollars from the obligors in said bond for the purchase money, for which he failed to account.

The agent of the plaintiff demanded the amount due plaintiff of said Robert Parsons after he received the same, about the last of the year 1874, and he failed to pay the same to the plaintiff or to the clerk, his successor, and soon thereafter left the state.

The defendants are the sureties of the said Robert Parsons on his official bond as clerk, and executed and delivered the same in the presence of the witness whose name is signed as witness thereto.

The defendants' counsel insist:

1. That none of the defendants are liable by virtue of said bond for the said default of Robert Parsons, because it does not

appear that the names of all the defendants appear in the body of the bond.

2. That if any of the defendants are liable, only Peter Eller and Abraham Miller, whose names are inserted in the body of the bond, lawfully executed the same, and the plaintiff can only recover against the two sureties named.

The court held that all of the defendants were bound as sureties and rendered judgment against them, from which they appealed.

Mr. J. W. Todd, for plaintiff.
No counsel for defendants.

ASHE, J. When parties subscribe their names as obligors to a bond in the presence of a witness or acknowledge their signatures to him, and he is called upon to witness the instrument as their act and deed, they are bound by all the stipulations in said bond whether their names are set forth in the body of the instrument or not, in the absence of any agreement at the time of its execution that they are not to be bound, unless certain conditions are complied with. Here, the bond was signed and delivered by all the defendants with the understanding, and the legal intendment, that they were to be bound for the performance of all duties required by law of their principal in said bond; and to sustain their defence to this action would be to allow them to escape liability upon a most flimsy technicality.

The facts in the case of *Vanhooks* v. *Barnett and others*, 4 Dev., 268, are very similar to those in this case. There, a new trial was moved for at the instance of Barnett, one of the defendants. His name was not mentioned in the body of the bond, nor did the bond begin with the words, "We are held and firmly bound to R. V., &c.," but it began thus: "Know all men by these presents, that John Garner, Carey Williams and Richard H. Burton are held and firmly bound unto R. V., &c." At the bottom of the paper were the signatures and seals of Garner,

Williams, Burton and Barnett. In the body of the printed form there had been a blank left for the insertion of the names of the obligors, and the name of Barnett had been omitted in filling up the blank. This court held that Barnett by signing and sealing the instrument became bound in the bond if it was afterwards delivered.

An adjudication in the state of New Hampshire is in perfect accord with that of this court. In *Pequawkett Bridge* v. *Mathes*, 7 N. H., 230; 26 Am. Decisions, 737, it has been held, that it is not necessary that the names should appear in the bond. If the obligors, in witness of their obligations to perform certain covenants and conditions, have affixed their hands and seals to the instrument, it is sufficient to bind them.

The question, we think, is fully settled by these authorities, and our conclusion therefore is, that there is no error, and the judgment of the superior court must be affirmed.

No error. Affirmed.

JOHN LITTLE v. H. F. MCCARTER and others.

Contract—Statute of Frauds—Consideration—Judgment.

1. Where a promise is made to A to pay him one hundred dollars if he will buy B's land, and thereupon A buys the land; *Held* that, in an action by A against the promisor to recover the one hundred dollars, the statute of frauds has no application. The subject of the action is neither a contract for the purchase of an interest in land nor a promise to pay the debt of another.
2. The consideration necessary to support a promise must be a benefit to the party promising, or attended with trouble and inconvenience to the other party. The facts of this case show there was a sufficient consideration.
3. A judgment is not void because no complaint has been filed, especially where the action was commenced in a justice's court and the defendant filed an answer to the oral complaint, thereby waiving the right to object to the omission of the plaintiff to file a written complaint.

(*Simms* v. *Killian*, 12 Ired., 252; *Johnson* v. *Johnson*, 3 Hawks, 556; *Leach* v. *Railroad*, 65 N. C., 486, cited and approved).

CIVIL ACTION commenced before a justice of the peace and tried on appeal at Fall Term, 1883, of ASHE Superior Court, before *Avery, J.*

The defendants filed an answer to the oral complaint, by leave of the judge.

On the trial the plaintiff testified in his own behalf, that one Levi McCarter was trying to sell to him a tract of land, on which the said McCarter resided, and demanded therefor two thousand dollars, but the plaintiff offered him eight hundred dollars, which he refused to take. The plaintiff then having abandoned the idea of purchasing the land, left the house of McCarter, and on his way home passed the house where the defendants H. F. McCarter and G. C. McCarter resided. The defendants told the plaintiff that Levi McCarter was a troublesome neighbor; that he turned his stock on their fields and destroyed their grain; and agreed that if the plaintiff would go back and purchase the land that they would pay one hundred dollars of the purchase money. The proposal was not made in writing, but the defendants promised that if the plaintiff would buy the land they would execute a joint note for the one hundred dollars. After this conversation with the defendants, he went back to the house of Levi McCarter and bought the land at the price of two thousand dollars, and settled upon it and has lived there ever since, and that he was induced to buy the land by the promise of the defendants to pay one hundred dollars, if he would make the purchase and settle upon it, and that he did buy it in August and moved to it the winter following.

Plaintiff further testified that after he had purchased the land, the defendant H. F. McCarter promised to pay him two hundred dollars for a small piece of the land, and told him that the land was not worth more than one hundred dollars, but that he would pay the plaintiff in that way the one hundred promised

for making the purchase; and, that subsequently and before this action was brought, the other defendant told him that he would pay his part, fifty dollars. No part of the one hundred dollars has ever been paid.

The defendants insisted that the plaintiff had not shown facts sufficient to constitute a cause of action, for the reasons:

1. That there was no writing executed by the defendants, and a verbal agreement, such as that set up by the plaintiff, was void.

2. That apart from the statute of frauds, the testimony of the plaintiff as to the agreement before he purchased the land, did not show any liability for which they could be sued jointly.

3. That the plaintiff could not recover against the defendants, either upon the alleged offer of H. F. McCarter to buy a part of the land and pay double its worth, or the alleged promise of G. C. McCarter to pay fifty dollars, his part, such promise being made without consideration, and if made upon consideration, would only bind the party making the promise.

4. That there was no complaint filed by the plaintiff.

Upon an intimation from the court that the plaintiff could not recover, the plaintiff submitted to a nonsuit and appealed.

Mr. J. W. Todd, for plaintiff.
Mr. Q. F. Neal, for defendants.

ASHE, J. The statute of frauds has no application to the contract which is the subject of this action. It is neither a contract for the purchase of an interest in land, nor is it a promise to answer for the debt or default of another, within the statute of frauds.

The defendants made no contract for the purchase of an interest in the land of Levi McCarter. That was a contract altogether between the plaintiff and the said McCarter. If the defendants, when the plaintiff was negotiating for the purchase of the land, had promised, in consideration of McCarter's selling it to plaintiff for two thousand dollars, to pay said McCarter one

hundred dollars as a part of the price of the land, and had been sued by McCarter, the statute of frauds might have been pleaded in bar of his recovery. But the defendants were not parties to the contract between the plaintiff and Levi McCarter, for the sale of the land. The statute applies only to the parties to the contract. *Simms* v. *Killian*, 12 Ired., 252. As a promise to answer for the default of another, it clearly does not come within the fourth section of the statute, for it is well settled that to bring a promise within that section of the statute it must be made to the party to whom the person, undertaken for, is liable. It applies only to promises made to the persons to whom another is already, or is to become liable; as for instance, if A owes a debt to B, and C promises A to pay the debt to B, that promise is not within the meaning of the statute. Smith on Contracts, 48, 84, 85, 87.

In our case, the action is brought on the original promise made by the defendants to the plaintiff, that if he would go back and buy the land from Levi McCarter, they would pay one hundred dollars, and give their joint note for the amount. Give their note to whom? Why of course to the plaintiff. That that was the understanding and intention of the parties, is shown by the fact, that after the purchase of the land by the plaintiff, H. F. McCarter proposed to buy from him a small part of the land, worth only one hundred dollars, and pay him two hundred dollars for it, and in that way discharge his obligation to pay the *one hundred dollars*, and the promise of the other defendant to pay to the plaintiff fifty dollars, his part of the *one hundred.*

The promise of the defendants, according to the testimony of the plaintiff, was a joint promise made by them, as much so as if they had executed their joint and several note to the plaintiff, as they had agreed to do.

The ground taken by the defendants, that the promise made by them to the plaintiff to pay him one hundred dollars was without any consideration, is quite as untenable as the other ground insisted upon as a defence to the action.

The consideration necessary to support a promise must be a

benefit to the party promising, or to be attended with trouble or inconvenience or prejudice to the other party. *Johnson* v. *Johnson*, 3 Hawks, 556; Smith on Contracts, 87.

Here, the defendants said to the plaintiff, if you will go back and buy the land and settle on it, we will pay you one hundred dollars. He did go back and purchase the land, and then settled on it. This necessarily put him to some *trouble* and *inconvenience*, and then the defendants were *benefited* by the transaction, as they thereby had moved from their vicinity a disagreeable neighbor, whose removal was the chief inducement to make the promise to pay the one hundred dollars.

As to the remaining ground, that the plaintiff had filed no complaint: It has been held by the court that a judgment is not void because no complaint had been filed. *Leach* v. *Railroad*, 65 N. C., 486.

Especially is this so, where the action was commenced before a justice of the peace, as here, in whose court the pleadings are not required to be filed in writing; and more especially so, where, as in this case, the defendant has waived the objection to the omission to file a complaint in writing, by answering the oral complaint of the plaintiff, by leave of the court.

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

Error. *Venire de novo.*

W. S. BROWN and wife v. T. S. COOPER, Adm'r.

Pleading—Answer—Witness—Counterclaim.

1. An answer denying "the truth of the averments contained in the first, second, third, fourth, fifth and sixth paragraphs of the complaint" (being the number contained in the complaint), is a specific denial of each allegation, and a sufficient compliance with THE CODE, §243.

2. The plaintiff is not a competent witness in an action upon a bond executed prior to August 1st, 1868, except where the defendant relies upon the

plea of payment in fact or upon a counterclaim, and introduces himself as a witness to establish the truth of such plea. Act of 1883, ch. 310, construed by ASHE, J.

3. This construction embraces a counterclaim, which is in the nature of a cross-action, when the plaintiff relies upon payment in fact.

(*Flack* v. *Dawson*, 69 N. C., 42, cited and approved).

CIVIL ACTION tried at Fall Term, 1883, of MECKLENBURG Superior Court, before *Gilmer*, *J.*

This action was brought in the superior court of Mecklenburg county against the defendant upon a lost bond, and after a complaint and answer had been duly filed, the parties obtained leave to amend their pleadings.

The plaintiff alleged in the amended complaint, in separate paragraphs, substantially, as follows:

1. That about the month of May, 1857, the defendant's intestate and one Clanton executed their note under seal to Eliza Cathey for the sum of $230, due one day after date.

2. That no part of the note had ever been paid.

3. That in the year 1864 the *feme* plaintiff purchased the said note from Eliza Cathey.

4. That in the month of April, 1865, the note was destroyed by fire which consumed the dwelling-house of the plaintiff.

5. That plaintiff has demanded payment of the note, with the proposition to give adequate indemnity, but without effect.

6. That a judgment had been obtained against Clanton on the note, but the sheriff has returned the execution thereon unsatisfied.

The defendant answering the complaint said:

That he denied the truth of the averments contained in the first, second, third, fourth, fifth and sixth paragraphs of the complaint, and insisted that the plaintiff be held to strict proof thereof, and for a further defence relied upon the statute of limitations.

Before the jury were impaneled, the plaintiff's counsel moved to strike out all of the answer except the part setting up

the statute of limitations, insisting that the other answer and denials were not sufficient under THE CODE. The motion was refused and the plaintiff excepted.

On the trial, the *feme* plaintiff offered herself as a witness in her own behalf, and objection was made by the counsel of defendant to her competency under the act of 1883, ch. 310. The objection was sustained by the court, and in deference to the ruling the plaintiff submitted to a nonsuit and appealed.

These constituted the only exceptions, which, as it appears from the record, were taken by the plaintiff.

Mr. Clement Dowd, for plaintiff.
Messrs. Wilson & Son, for defendant.

ASHE, J. There is no force in the first exception. The answer of the defendant must contain a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. THE CODE, §243 (1).

It has been repeatedly held by this court that a general denial, that "no allegation of the complaint is true," is not a sufficient answer under this section of THE CODE, because such a plea may put in one issue several matters of fact, some of which are triable by the court, and others by the jury. *Flack* v. *Dawson*, 69 N. C., 42.

But the answer in this case is not obnoxious to this objection. It is a sufficient compliance with the requirements of the section. It is a specific denial of each allegation of the complaint contained in the paragraphs, numbering from one to six inclusive, as much so, as if each denial had been set forth in separate and distinct paragraphs.

The other exception is quite as untenable as the first. The action was upon a bond given prior to the 1st day of August, 1868, and the defendant, besides the statute of limitations and other defences, relied upon the plea of payment in fact, but did

not introduce himself as a witness to establish the truth of such plea. But the plaintiff offered herself as a witness in her own behalf.

We are of opinion that under the facts of this case, upon a proper construction of the act of 1883, ch. 310, she was an incompetent witness. The first section of the act provides that no person, who shall be a party to an action founded on a bond executed prior to the 1st day of August, 1868, shall be a competent witness on the trial of such action. The second section, which is in effect a "proviso" to the first, declares that this act shall not apply to the trial of any action, in which the defendant relies upon the plea of payment in fact, or pleads a counterclaim and also introduces himself as a witness to establish the truth of such plea or pleas.

Our interpretation of the act is, that whenever a defendant pleads payment in fact or a counterclaim in an action upon a judgment or bond of date before the 1st day of August, 1868, and does not offer himself as a witness to establish the truth of his plea or pleas, as the case may be, no person who is a party to the action, or assignor, or indorser, or any person who had at the time of the trial, or ever had an interest in the judgment or bond sued on, can be examined as a witness in behalf of the plaintiff; but when the defendant, setting up such plea or pleas, does offer himself as a witness in support of either of such defences, all such persons are competent, unless excluded by some other rule of evidence.

And we are further of the opinion that the spirit and equity of the act extend to counterclaims, which are virtually cross-actions, where the plaintiff relies upon the defence of payment in fact.

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

No error. Affirmed.

J. J. CRUMP v. B. M. THOMAS.

Pleading—Leave to amend answer upon terms—Motion—Apt time.

1. Where leave is given a defendant to put in an amended answer, provided no matter be set up therein which will affect orders previously made in the cause, such amended answer will be stricken out if it is incompatible with the terms upon which the leave was granted.
2. The motion to strike out the answer was made in apt time under the facts of this case.

(*Wilson* v. *Lineberger*, 82 N. C., 412; *Sanderson* v. *Daily*, 83 N. C., 67; *Mabry* v. *Henry*, *Ib.*, 298, cited and approved).

MOTION by plaintiff to strike out the amended answer of defendant, heard at Spring Term, 1883, of CHATHAM Superior Court, before *Gilmer, J.*

The plaintiff commenced his action in August, 1880, to enforce an alleged right to redeem the land mentioned in the complaint, and in order thereto for the statement of an account to show what was due from him. The case made in the complaint is in substance as follows:

The plaintiff becoming indebted to the partnership firm of A. J. Bynum & Co., mortgaged the land to them for their security. The indebtedness, at the plaintiff's instance and according to an understanding with the mortgagees, was assumed and paid by one J. W. Scott and the land sold under the mortgage to him, he agreeing that the plaintiff might redeem on reimbursement of the sum advanced with accruing interest. In 1876, Scott unwilling to remain longer out of his money, the plaintiff applied to the defendant to take up the debt due to Scott, which he consented to do, and, under an arrangement among the parties, the title of the land which was still in the mortgagees was conveyed to the defendant, and the plaintiff executed his note to the defendant in about the sum of $2,400, expressing on its face

the consideration to be the purchase money due for the land, under an express agreement that the plaintiff should have the land when it was paid.

The plaintiff remained in possession of the land until January, 1878, and of the house until the fall of 1879, when the defendant took possession of both and has since occupied or rented them, for which he is held to be responsible in adjusting the accounts between them.

The answer of the defendant made at spring term, 1880, admits the plaintiff's ownership of the land, the mortgage to A. J. Bynum & Co., and the taking possession as charged, but denies knowledge or information of the plaintiff's transaction with Scott, and denies the allegations in respect to himself, without reason or explanation. The defendant sets up also, as a bar to this proceeding, an alleged adjudication of the same subject matter between the parties.

Upon the hearing of the proofs offered in support of the estoppel, the court ruled against the defendant, and, on motion of his counsel, without plaintiff's consent, after adjudging the plaintiff "entitled to an account as prayed for in the complaint," ordered a reference and directed an account to be taken and reported "of the indebtedness of the plaintiff to the defendant for the purchase money of the land described in the complaint, and of the payments made by the plaintiff on account of said purchase money, of the annual rental value of the lands while in possession of the defendant, and of the value of the rents and profits received by him when in possession, and of the balance due defendant from the plaintiff."

The decretal order was made, not only at the defendant's instance, but without any suggestion as to the trial of the issues raised by his denial of the facts charged in reference to the trust attaching to the estate in the land conveyed to him, and such defence must therefore be considered as concluded by the adjudication then made.

At spring term, 1881, the defendant moved to vacate the previous order, which was refused, and the defendant appealed to this court. (85 N. C., 272). Leave was, however, given on defendant's application, to file an amended answer during the term, "provided that no matter set up in the amended answer is to affect the report of the referee, already made or to be made, or to necessitate a reference (rereference we suppose to be meant) to take an account," and time was given the plaintiff until next term to reply as of this term.

The defendant then put in an amended answer, pending the appeal, wholly at variance with the first of the statements, contained in which the following is a summary:

The defendant states that, in February or March, 1875, the plaintiff and Scott applied to him for a loan of $500 for the use of the plaintiff, which sum was furnished and the bond of the two taken, payable one day after date.

That the defendant met the plaintiff in August thereafter, and informed him that Scott said the time in which the plaintiff was to redeem the land would expire in January next, but if plaintiff pay Scott $1,000 at that time, further time would be allowed for redemption, and it was then agreed between them that the plaintiff should raise $600 and the defendant $400 with which to pay Scott and thus secure a longer extension.

That on the first day of January, 1876, plaintiff came to defendant, without money, and it was then agreed that the defendant should take Scott's place if he would consent, upon defendant's paying what the plaintiff owed for the land; that the parties then went to Scott, when the defendant communicated to him in the plaintiff's hearing what had been agreed upon, and Scott assented to carry out the arrangement. Thereupon the defendant paid over the $500 and executed to Scott his bond for $1,409.90, the residue of the debt, at the same time taking the plaintiff's bond payable to himself at twelve months for $2,409.90, an excess of $500 over the sum paid and assumed; and that it was expressly then agreed that on payment of plain-

tiff's bond at or before its maturity, the defendant would convey the land to the plaintiff, and upon his failure, the right to redeem should be gone.

That the money was not paid, and at the plaintiff's earnest and repeated solicitations, the plaintiff was indulged until March, and again on several successive occasions until the beginning of the following year, when plaintiff being still unable to raise the money, surrendered the land and abandoned all claim to redeem and to the rents before accrued, since which the defendant has occupied and used the land as his own. At spring term, 1882, the ruling in the superior court having been affirmed in this court and the certificate transmitted, the plaintiff moved to have the amended answer stricken from the files, which motion, having been continued to spring term, 1883, was then heard and refused, and the plaintiff appealed to this court.

Mr. John Manning, for plaintiff.
Messrs. Batchelor & Clark, for defendant.

SMITH, C. J., after stating the above. It will be noticed that while the first answer disavows any information or knowledge of what the plaintiff alleges transpired between himself and Scott, and positively denies the facts charged in reference to the plaintiff's arrangement with the defendant, the second answer sets them out with great particularity and seeks to avoid their effect by the repeated failures of the plaintiff to come up to his engagement to raise the money for redeeming, and his final abandonment of all right to redeem. These repugnant statements alike rest upon the defendant's oath that they are true, and raise issues in defence wholly inconsistent, the one with the other.

The appellant sustains his overruled motion upon two grounds:

1. That the amendment is not warranted by the order allowing it; and

2. That it is repugnant to, and incompatible with, the previous adjudication.

We are not prepared to admit the facts set out in the amended answer, if accepted as correct, as sufficient to bar the conceded right of the plaintiff to redeem under the original contract of the defendant, when the defendant took the plaintiff's bond for a larger sum than he owed or the defendant advanced. The delay in paying the money admits of compensation in accruing interest, and it does not appear that the land was inadequate security for its payment, or that any special damage has come to the defendant.

Indeed the relations between these parties give to the alleged surrender of the right to redeem (while, as the plaintiff alleges and the defendant does not deny, the latter retains the plaintiff's bond as well as the land under the mortgagee's deed) the aspect of a coerced act not entitled to a favorable consideration in a court of equity.

But aside from this, if the answer now put in is allowed to stand, it subverts the order of reference, and if successful, annuls all done under it.

The leave given expressly restricts the amendatory matter to such as does not interfere with the taking of the account, and will not require another reference; and how can the new defence brought forward, which denies all equity to redeem, co-exist with the taking of an account, only necessary in case it is to be enforced? If there be no right to redeem on any terms, no reference is required, and the order to that effect is useless. Our interpretation of the ruling upon the first hearing is, that the plaintiff has the right to redeem, to which the taking an account is subsidiary, and that it was not intended, in the leave to amend, to allow the introduction of such new matter as would disturb the judgment then rendered, and that the answer is not authorized by the order.

It is equally plain that the plaintiff's right to redeem is conclusively settled, upon his payment of what is due to the defendant, and that the closed controversy which the defendant now seeks to reopen cannot be renewed as long as the first adjudication remains in force. Otherwise, there would be conflicting

adjudications in the same cause shown upon the record, and this has been repeatedly said to be inadmissible. *Wilson* v. *Lineberger*, 82 N. C., 412; *Sanderson* v. *Daily*, 83 N. C., 67; *Mabry* v. *Henry*, *Ib.*, 238.

There was error then in allowing the defendant to put in the answer and in the refusal to require its withdrawal.

Nor do we think the plaintiff so negligent in making his motion as to lose his right to make it. The appeal had transferred to this court an element in the controversy, which if determined in the defendant's favor was decisive of the action, and the delay in awaiting the adjudication ought not to deprive the plaintiff of his right to call to the attention of the court, as soon as the appeal was determined, the character of the answer and to ask that it be stricken from the files. This was done and it was in apt time.

The judgment below must be reversed, and the plaintiff's motion allowed.

Error. Reversed.

HARRY BURKE and wife v. J. M. TURNER and others.

Reference and Referees.

Where the report of a referee in the statement of an account does not conform to the order of reference, the court will set it aside with instructions to observe strictly, in restating the account, the method pointed out in the order of the court.

CIVIL ACTION on a guardian bond tried at Fall Term, 1881, of IREDELL Superior Court, before *Seymour, J.*

This case is fully reported in 85 N. C., 500, and to the report submitted by the referee, in obedience to an order there made, (being changed by substituting the clerk below for the clerk of this court) the plaintiffs filed exceptions in this court. These

exceptions were not passed upon because the report did not conform to the order of reference in certain particulars deemed material, but another statement of the account was ordered to be made by the clerk here.

Messrs. J. M. Clement and *R. Z. Linney*, for plaintiffs.
Messrs. Robbins & Long and *D. M. Furches*, for defendants.

MERRIMON, J. This court affirmed in *Burke* v. *Turner*, 85 N. C., 500, so much of the judgment of the superior court as adjudged that the defendant owed the *feme* plaintiff the sum of $1,725.36, the scale value of the Confederate money therein mentioned, with compound interest thereon from the 19th day of December, 1862, and disallowed the credit of $1,024.19, allowed him for the board and clothing of the *feme* plaintiff, daughter of the former guardian, and in all other respects, except that it did not affirm it "as to the allowance of commissions to the defendant J. M. Turner, upon the sum of $1,000 of his trust fund, used in his own business, and upon the amount paid in store-bills to the firm of which said defendant was a member"; and as to these two items, it was ordered that the account be corrected: It was accordingly referred to the commissioner who took the account in the superior court, to make his account in all respects conform to the opinion of this court.

What, and all the commissioner ought to have done, was to add the sum allowed for board and clothing of the *feme* plaintiff, and any interest due upon the same, to the item of $1,725.36, and compound interest on the same from the date mentioned; and to this, such further sum of money as had been allowed to J. M. Turner as commissioner, upon the sum of $1,000 used by him in his own business, and the sum allowed him as commissions, upon the amount of the store-bills of the firm of which he was a member; and also, the item of $78.10 from sale of land and the interest thereon.

The commissioner has filed his report, and the plaintiffs have filed exceptions thereto. We do not deem it necessary to pass upon these exceptions, because the report does not conform to or observe the order of reference. We cannot see that the commissioner has ascertained the fund and amount thereof, in pursuance of the judgment of the superior court, as modified by this court. In such a case, this court will set aside the report and order a reference, with instructions to simply modify the account first taken in the superior court, in strict accordance with the opinion of this court, stating each item of the amended account, with such explanations as will show how and why it came to be changed.

Let an order be drawn setting aside the last report and referring it to the clerk of this court to ascertain and state the amount due in accordance with this opinion. It is so ordered.

PER CURIAM. Judgment accordingly.

S. A. MORRIS and others v. S. H. GENTRY and others.

Judgment, valid until impeached—Rights of third persons thereunder, if reversed—Party presumed to have notice of suit—Guardian and Ward, next friend, ad litem—Demurrer, practice in.

1. Judgments of a court in a case properly constituted before it, and where it has jurisdiction of the parties and the subject matter of controversy, are deemed to be valid, and will be upheld until impeached by a direct proceeding for that purpose.
2. And although such judgments may afterwards be reversed, the rights of third persons honestly acquired thereunder will be protected; but otherwise, where such persons have knowledge of any irregularity or fraud in procuring their rendition.
3. The law presumes that a party to an action has notice thereof and a knowledge of its nature, but the contrary may be shown in a proceeding to attack the judgment therein.

4. The interests of minors are under the care of the court, and to the end that the same may be protected in suits brought by or against them, the court should see that the *next friend* or guardian *ad litem* be appointed upon due consideration of an application in writing, and not upon a simple suggestion.

5. Demurrer was overruled in court below with leave to defendant to answer over, and to plaintiff to amend complaint; *Held*, that although the demurrer in this case was sustained on appeal, yet no final judgment will be entered here, but the cause will be remanded for further proceeding under the leave granted in the court below.

(*University* v. *Lassiter*, 83 N. C., 38; *Ivey* v. *McKinnon*, 84 N. C., 651; *Sutton* v. *Schonwald*, 86 N. C., 198; *Gilbert* v. *James*, 86 N. C., 244; *Ex-parte Dodd*, Phil. Eq., 67; *Rowland* v. *Thompson*, 73 N. C., 504; *George* v. *High*, 85 N. C., 113; *Foy* v. *Haughton*, 83 N. C., 467, cited and approved).

EJECTMENT tried at Spring Term, 1883, of STOKES Superior Court, before *Graves, J.*

The plaintiffs allege in their complaint, that at the time of the death of James Morris, their father, which took place in the year 1865, he was seized in fee of an undivided half of a large tract of land situate in the county of Stokes; that at the fall term, 1860, of the court of equity of said county, an *ex-parte* petition was filed, in which they, as the infants and only heirs-at-law of their deceased father, purported to sue in that behalf by their mother, Mary S. Morris, as their next friend, for the purpose of selling the land for partition; that the petition was filed and the proceedings had under and in pursuance thereof without their knowledge, consent or sanction, and that their mother had no knowledge thereof, and never consented to or sanctioned the same; that an order directing the sale of said land was made by the superior court of said county, in the exercise of the jurisdiction in this respect, then lately belonging to said court of equity, and after repeated efforts to sell said land, it was at last sold at the price of $469, one William H. Gentry, the father of the defendant of that name, being the bidder; that the commissioner who sold the land reported that it did not sell for a fair price, and that the land was, in fact, reasonably worth $2,500; that

notwithstanding the inadequacy of the price bid, and in the absence of any inquiry or evidence as to the value of the land or the necessity for a sale thereof, the court at fall term, 1873, made a decree confirming the sale, and directing title to be made to the purchaser upon the payment of the purchase money, and directing that a large part of the purchase money be paid to one Penn, the owner of the other moiety of the land, for some cause that does not appear; that the said purchaser paid his bid and took a deed for the land; that afterwards, in the year 1878, the said William H. Gentry was adjudged a bankrupt in the district court of the United States, and he assigned to the assignee in bankruptcy his interest in said land, and said assignee sold the same to the defendant Sterling H. Gentry, and he purchased with full knowledge of the manner in which his said father became the purchaser thereof; that the said Sterling H. Gentry has conveyed the land to the defendant A. H. Joyce as trustee, to secure a debt due one George, and said trustee had knowledge and notice of the nature of said Sterling's title.

The plaintiffs insist that the sale of the land under the said proceedings in their names was irregular and unauthorized by law, and they demand judgment:

1. That they have possession of said land.

2. That the sale thereof and all the decrees and orders in relation thereto be declared null and void, and for general relief.

The defendants demurred to the complaint because it does not state facts that constitute a cause of action, and insist that the court of equity and the superior court succeeding to its jurisdiction, had general jurisdiction of the parties to said proceeding in the said court of equity and the superior court, and of the subject matter therein specified, and that the title of the purchaser of said land cannot be invalidated by reason of any supposed irregularity in the pleadings; that they purchased long after the land was sold under the decree, and they were not bound to take notice of the errors of the court, or to look beyond the decrees directing and confirming the sale, the facts necessary to give the court jurisdiction appearing upon the face of the petition.

The action was heard by the court upon the complaint and demurrer. The court gave judgment overruling the demurrer, allowing the defendants to answer, and the plaintiffs to amend their complaint; whereupon, the defendants appealed.

Messrs. Watson & Glenn, for plaintiffs.
Mr. J. T. Morehead, for defendants.

MERRIMON, J. It is an essential and fundamental principle of the law, that all properly constituted judicial proceedings must be upheld as regular, warranted by the facts and the law applicable to them, valid and effectual, until the contrary shall be shown and established by some competent proceeding for that purpose. Hence, wherever it appears upon the face of the record in any action or other judicial proceeding, that the court had jurisdiction of the parties litigant and the subject matter in litigation, the law presumes that the court got jurisdiction in a regular or proper way, and that its orders, decrees and judgments are valid and effectual, however irregular or fraudulent, until the irregularity and invalidity, because of fraud or other sufficient cause, shall be duly established, and such proceedings, orders, decrees and judgments shall be declared invalid by proper decree. To allow the records of courts of justice, their judgments and decrees, to be questioned and held to be inoperative in the same tribunal that made them, or in other tribunals, would be subversive of judicial authority and destructive of public and private justice. The law is too true to itself, and too thorough in its life and vigor, to allow of such practical absurdity; it requires that its courts shall be careful to see that their judgments settle and establish rights, and when once made must prevail everywhere. The courts making them will be slow to disturb them, and never, except for adequate cause shown in a direct proceeding for the purpose.

It is likewise well settled that courts will protect third persons who honestly do acts and acquire rights under their judgments,

although such judgments may afterwards be reversed. All that such persons need be careful to see, is, that the court had jurisdiction of the parties and the subject matter, and that the order or judgment, upon the faith of which such acts were done or rights acquired, authorized the same to be done or acquired. As, where land was sold by an order of court, it is only necessary that the purchaser should see that the court had jurisdiction of the parties and had authority to order the sale, and that the order did authorize it. This implies, however, that the third person purchased honestly on his part, and without knowledge of fraud on the part of others in procuring or bringing about the sale. He will not be allowed to take advantage of his own fraudulent conduct or that of others, of which he had knowledge at the time of the purchase. *University* v. *Lassiter*, 83 N. C., 38; *Ivey* v. *McKinnon*, 84 N. C., 651; *Sutton* v. *Schonwald*, 86 N. C., 198; *Gilbert* v. *James*, 86 N. C., 244.

Now, the late court of equity and the superior court succeeding to its jurisdiction in Stokes county had authority upon the *ex-parte* petition of the plaintiffs, while they were infants, suing by their mother as next friend, to order and make a valid sale of their land mentioned, for partition, and to pass the title thereto through its commissioner appointed for the purpose. THE CODE §1602; *Ex-parte Dodd*, Phil. Eq., 97; *Rowland* v. *Thompson*, 73 N. C., 504; *George* v. *High*, 85 N. C., 113; *Ivey* v. *McKinnon*; *Sutton* v. *Schonwald*, *supra*.

According to the allegations in the complaint, the record upon its face shows that an *ex-parte* petition was filed by the plaintiffs, then infants, suing by their mother as a next friend, suggesting that the land in question ought to be sold, that an order of sale was made and confirmed by the court, the purchase money was paid, and by the like order title was made to the purchaser. Irregularities, important ones, in the proceeding to sell the land are alleged, but it was sufficient for the purchaser (taking it that he purchased honestly and fairly and without the knowledge of fraud on the part of any one in procuring the sale to be made,

and the contrary is not suggested or alleged) to see that the court had jurisdiction of the parties and of the subject matter, and that the order authorized the sale to be made. All this appeared to him.

It is said, however, that the plaintiffs and their mother, represented as being their next friend, in fact, had no knowledge of the filing of the petition or of the sale of the land until recently, long after it was made, and that they never authorized or sanctioned the same.

But the presumption of law is that they had knowledge and notice of the whole proceeding, and it must be taken that they had; that they by themselves, or by an attorney of the court, filed the petition with the practical knowledge and sanction of the court, and the whole was done at their instance, by the court, it having proper regard for the interests of the infants, and they must be bound by the decrees until, by proper action, the whole of the proceeding shall, because of material irregularities, be set aside; or, because of fraud on the part of some one in procuring the sale to be made, declared and decreed to be void; and even then, the sale to the purchaser will remain good and effectual, unless the plaintiffs can allege and prove that he fraudulently procured or participated in the fraudulent procurement of the sale to be made, or had knowledge at the time of the sale of such fraud on the part of others, or such information as put him on inquiry.

It is not alleged that the purchaser, William H. Gentry, purchased otherwise than honestly, nor is there any suggestion in the complaint unfavorable to him, except that he bought the land at greatly less than its reasonable value; but it is alleged, that his son, the defendant Sterling Gentry, purchased from the assignee in bankruptcy "with full knowledge of the manner in which his father became the purchaser." This allegation is vague and indefinite. So far as appears from the complaint the purchase by the father was *bona fide*. If the purchase of the father was tainted with fraud and the son was cognizant of this,

or participated in the fraud, then the plaintiffs ought to have so alleged. The allegation that the defendant Joyce had knowledge of "the nature of said Sterling Gentry's title" at the time he purchased, is so indefinite as that it has neither force nor point.

The complaint is vague, uncertain and indefinite, and it is difficult to determine whether the action was brought to recover the possession of the land, treating the sale in equity as void, or whether the object is to impeach the decree therein for fraud. But be this as it may, in the absence of a denial of what is alleged, we have a painful apprehension that a flagrant fraud was practiced by some person or persons upon the plaintiffs, while they were infants, and, in an important sense, in contemplation of law, under the care and protection of the court. As it now appears to us, to say the least, the court was not circumspect; it allowed itself to be imposed upon by designing and dishonest persons in a respect and about a matter wherein it ought to have given special and careful attention.

This is another sad illustration of the loose and careless practice that too generally prevails in the courts, of allowing guardians *ad litem* and *next friends* of infants to be appointed almost as of course, upon a suggestion, and frequently without that, who, however careless and faithless as to the trust reposed in them, are by implication recognized, and must in the nature of judicial proceedings be treated as recognized by the court.

It is the duty of courts to have special regard for infants, their rights and interest, when they come within their cognizance. The law makes this so, for the good reason, they cannot adequately take care of themselves. It is a serious mistake to suppose that a next friend or a guardian *ad litem* should be appointed upon simple suggestion; this should be done upon proper application in writing, and due consideration by the court. The court should know who is appointed, and that such person is capable and trustworthy. The appointment of guardians *ad litem* and their *duties* are prescribed by statute. THE CODE, §181. But while the statute (§180) allows infants to sue by their next

friends, the manner of the appointment of them and their duties are left as at the common law. As to their appointment, Tidd in his work on Practice says, at page 100: "To constitute a *prochein amy* or *guardian*, the person intended, who is usually some near relation, should come with the infant before a judge at his chambers, or else a petition should be presented to the judge on behalf of the infant, stating the nature of the action, and, if for the defendant, that he is advised and believes he has a good defence thereto, and praying in respect of his infancy that the person intended may be assigned him as his *prochein amy*, or guardian, to prosecute or defend the action. This petition should be accompanied by an agreement signifying the assent of the intended *prochein amy*, or guardian, and an *affidavit* made by some third person that the petition and agreement were duly signed. On being applied to in either of these ways, the judge will grant his *fiat*, upon which a rule or order should be drawn up and filed with the clerk of the rules in the King's Bench, for the admission of the *prochein amy*, or guardian," &c. 2 Arch. Pr., 154; 2 Sell. Pr., 65, Appendix (Forms) 504; Story's Eq. Pl., §§57, 58, and note.

It would have been better if such practice, or the substance of it, had prevailed in this state from the beginning, but a loose practice has been recognized and pursued by the courts, and we cannot now disturb rights that have been acquired under it. If the strict methods in this respect of the English courts had prevailed, it could scarcely be possible that calamitous cases, like this seems to be, and many similar ones that have come before this court, and many that have not, could happen. This evil, in the future, may be easily and thoroughly corrected.

We think the court erred in overruling the demurrer. If the action was brought to recover possession of the land, the complaint states facts showing the title thereto in the defendants; if it may be treated as an action to impeach the decree directing a sale of the land for partition, there is no sufficient allegation that the defendants were in any way connected with or had knowledge of the procurement of the sale so as to affect the validity of

their title. So the complaint, as it stands, "does not state facts sufficient to constitute a cause of action," and the demurrer ought to have been sustained. There is error.

But the court, in overruling the demurrer, granted leave to the defendants to answer over, and to the plaintiffs to amend the complaint.

Ordinarily, when this court sustains the demurrer, the judgment here is final; but where, as in this case, the court gave the plaintiffs leave to amend the complaint, and it seems they did not have opportunity to amend before the appeal was taken, this court will remand the case, to the end they may amend if they shall be so advised. Otherwise, the superior court will sustain the demurrer and dismiss the action. Generally, when the court thinks the case a proper one for allowing amendments, this should be done before deciding to sustain or overrule the demurrer; if the amendment should be made, it might cut off the ground of demurrer and save delay and expense. *Foy* v. *Haughton*, 83 N. C., 467.

The case will be remanded with instructions to reverse so much of the judgment as overrules the demurrer, and to enter judgment sustaining the same, and dismissing the action, unless the plaintiffs avail themselves of the leave granted to amend the complaint, in which case the action will proceed according to law. It is so ordered. Let this be certified.

Error. Reversed and remanded.

D. M. LEE v. W. A. BISHOP.

Ejectment—Justice's Judgment, transcript of—Title not affected by irregular judgment.

1. In ejectment, the plaintiff who is a stranger to the judgment need only show the execution under which the land was sold, in order to establish his title against the defendant in the execution; nor is his title affected by an irregularity in the judgment.

2. A transcript of a justice's judgment containing the names of plaintiff and defendant, the amount of the judgment and costs of action, is sufficient. The law does not require the entire record to be sent up to be docketed.

(*Surratt* v. *Crawford*, 87 N. C., 392; *Wilson* v. *Patton*, *Ib.*, 318; *Skinner* v. *Moore*, 2 Dev. & Bat., 138, cited and approved).

EJECTMENT tried at Fall Term, 1883, of TRANSYLVANIA Superior Court, before *Gudger*, *J.*

The plaintiff offered in evidence an execution in favor of Helen Larned against W. A. Bishop (the defendant in this case), and also a deed from the sheriff of Transylvania county, and proved that the defendant was in possession of the land, but offered no other evidence of a judgment except the execution.

The defendant introduced the clerk of the court, who testified that there was no record in his court of any judgment against W. A. Bishop except the record upon page 141 of his judgment docket, which was alleged to be a docketed transcript from J. S. Heath, a justice of the peace, and is as follows:

HELEN LARNED
v.
W. A. BISHOP.

One judgment,	$1.00
Docketing same,	25
Execution,	35
Sheriff's return,	10
Costs in J. P.'s court,	1.70
Costs of J. S. Heath,	1.30
	$4.70

Judgment for two hundred dollars and the costs of this action.

(Signed) T. L. GASH.

Judgment docketed and transcript filed September 15th, 1875.

(Signed) T. L. GASH, *Clerk.*

T. L. Gash, the former clerk of the court, testified that a transcript of a justice's judgment in the case of Helen Larned against W. A. Bishop was filed in the office of the clerk of the court

while he was clerk, and from said transcript he made the entries which appear upon the judgment docket of said court, a copy of which is above set out, and he further stated that it was his habit as clerk of the court to docket transcripts of justices' judgments as above shown, and that he did it under the advice of a judge of the court, and that he signed his name at the end of the entry of the judgment on the judgment docket to show that as clerk of the court he had docketed the judgment.

Defendant did not offer the transcript of the judgment except as appears above, nor was there any evidence to show that the transcript of the judgment was not on file in the judgment-roll of the office of the clerk of said court, nor was there any evidence to impeach the judgment, except, as defendant's counsel insisted, that the said entry on said judgment docket was informal and irregular and not sufficient to create a lien on the land of the defendant in said county or to sustain the said execution.

Defendant's counsel asked His Honor to charge the jury:

1. That if the defendant has shown by evidence that there was no judgment docketed in the superior court in favor of Helen Larned against W. A. Bishop, then the defendant has rebutted the *prima facie* case made by plaintiff by the execution and sheriff's deed.

2. That it is necessary that some transcript of the justice's judgment shall appear to be upon the judgment docket, and the justice's certificate must appear. The justice's signature must appear either to the judgment or transcript. That a mere bill of costs, with the amount of judgment in figures without any signature of the justice and without any certificate from the justice, is not a transcript, the same being signed by the clerk of the court.

His Honor refused both instructions and told the jury that the foregoing was a good docketed judgment of a justice of the peace. The jury found a verdict for the plaintiff. The court gave judgment accordingly and the defendant appealed.

Messrs. J. H. Merrimon and *Geo. H. Smathers*, for plaintiff.
Mr. Armistead Jones, for defendant.

ASHE, J. The plaintiff in support of his title offered in evidence an execution issued from a court of competent jurisdiction in favor of Helen Larned against W. A. Bishop, reciting the judgment and sale, and a sheriff's deed for the land in controversy, and proof that the defendant was still in possession. This was all the law required of him, being a stranger to the judgment and execution, to establish his title against the defendant. He was not bound to show any judgment. *Hardin* v. *Cheek*, 3 Jones, 135.

The defendant offered in evidence the judgment docket of the superior court of Transylvania county, in which was an entry of the justice's judgment in favor of Helen Larned against W. A. Bishop, the same upon which the execution issued, under which the plaintiff purchased; and contended that the entry was irregular and informal and not sufficient to create a lien on the land of the defendant or to sustain the execution.

Defendant contended, and asked the court to instruct the jury, that a transcript of a justice's judgment should appear upon the judgment docket accompanied by the justice's certificate, and that the justice's certificate or the judgment should be signed by the justice. And to impeach the validity of the judgment he introduced the former clerk, who was the incumbent when the judgment was docketed, and he testified that a transcript of a justice's judgment in the case of Helen Larned against W. A. Bishop was filed in the office of the clerk of the superior court and that he made the entries, which appear upon the judgment docket, from that transcript, and that it had been his habit to docket the judgment of justices in that manner, having been advised to do so by a judge of the court.

By the introduction of the witness, the defendant established the fact, that a transcript of the justice's judgment had been filed, and it does not appear but that it is to be found among the judgment-rolls of the superior court, and it is not only to be presumed that it is there, but, nothing to the contrary appearing, that it is in due form properly authenticated and signed.

The law does not require that the entire transcript of the record of the judgment in the justice's court, should be entered upon the judgment docket of the superior court. "It is not required," says the chief-justice, "that the transcript, sent up in order to the docketing in the superior court, should contain more than the essential particulars constituting the judgment, and though the signature is not attached to the judgment, it must be assumed, from the terms of the certificate of authentication, that it was entered up regularly and in proper form, in the absence of any proof to the contrary." *Surratt* v. *Crawford*, 87 N. C., 372.

And in *Wilson* v. *Patton, Ib.*, 318, it was held that the transcript of a judgment sent from one county to another to be docketed, which sets out the date of its rendition, the names of the parties to the suit, the amount of the judgment and the costs of the action, is a sufficient docketing to create a lien on the defendant's land.

The entry on the judgment docket in this case, contains all of these essential elements of a good docketed judgment, the names of plaintiff and defendant, the date and the amount of the judgment, and the costs of the action. It would have been a sufficient entry of an original judgment in the superior court, though not signed, for the law requiring judgments to be signed has been held to be only directory. *Rollins* v. *Henry*, 78 N. C., 342.

But conceding, as the defendant contends, that the judgment is informal and irregular, that cannot affect the title which the plaintiff has derived from his purchase. While an irregular judgment does not justify the plaintiff in any of the acts done under it, provided it be set aside, it does the officer; and a stranger, as the plaintiff is in this case, gets a good title even if it be set aside. *Skinner* v. *Moore*, 2 Dev. & Bat., 138. So the plaintiff gets a good title to the land whether the judgment was regular or irregular.

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

No error. Affirmed.

F. M. OSBORNE, Guardian, v. B. F. ANDERSON.

Deed—Boundary—Ejectment.

1. Where a deed conveyed a life estate, and the grantee remained in possession thirty years or more, the heirs of the grantor setting up no claim to the reversion; *Held* that the occupancy for so long a period becomes in itself an independent source of title.
2. In locating the boundaries of land, the calls in the deed must be fulfilled and effect given to the descriptive words used in it.
3. Under the act of 1874–'75, ch. 256, an action of ejectment may be maintained by a grantee in his own name whenever the grantor has the right to sue, notwithstanding the person in actual possession claims under a title adverse to that of such grantor.

(*Bullard* v. *Barksdale*, 11 Ired., 461; *Davis* v. *McArthur*, 78 N. C., 375, cited and approved).

EJECTMENT tried at Spring Term, 1883, of ALLEGHANY Superior Court, before *Graves, J.*

Verdict and judgment for plaintiff; appeal by defendant.

Mr. J. W. Todd, for plaintiff.
Mr. Q. F. Neal, for defendant.

SMITH, C. J. In the year 1828, Joshua Cox, by deed, conveyed to Moses Dixon, an estate limited for want of words of inheritance to the term of his life in the tract of land described in the complaint, of which that in controversy is claimed by the plaintiff to constitute part. Moses Dixon entered and continued in possession of the land until his death, in 1863, as did his son (Back) thereafter until December, 1868, when he sold and conveyed to plaintiff.

In 1856, a grant issued from the state to J. M. Gentry, under whom the defendant Anderson claims, by virtue of a written contract for a tract which embraces the disputed part within its boundaries.

There are no diagrams or maps representing the several tracts, though such are referred to as constituting part of the case sent up, and for want of them, we may fail fully to understand the merits of the controversy, and the point intended to be presented for revision. The case itself is not stated with entire accuracy. Thus, it is said there was evidence tending to show a continuous adverse possession by Moses Dixon for a period of fifty years, while only thirty-five years elapsed from the date of his purchase to his death. Accepting the latter as the time of his occupancy of a part, and constructively of the whole territory embraced in the boundaries of his deed, and making deduction for the interval covered by the act suspending the operation of the statute of limitations, there yet remain more than thirty years, a space more than sufficient to raise the rebuttable presumption of the issue of a grant from the state. *Bullard* v. *Barksdale*, 11 Ired., 461; *Davis* v. *McArthur*, 78 N. C., 357.

The title has thus been divested out of the state and put in the possessor, unless Joshua Cox, or some one succeeding to his estate can show a larger estate than that conveyed to Moses Dixon, reserved, against which the possession of the latter would be inoperative to defeat a recovery by one in whom the reversion is vested.

But there is no such claim asserted or suggested, and hence the long occupancy of the land with limits defined in the deed, irrespective of the latter as color of title, becomes itself an independent source of title in Dixon, which descended to his son.

2. The next exception is to the charge in regard to the boundary and its location as described in the deed.

Starting from a point not in dispute, the line in the words of the deed runs, "south to James and John McMillan's line," and thence west to Cynthia Gambrill's land or line. There was conflicting evidence on the point whether the lines of separate tracts held by James and John McMillan did or did not intersect, and there was no land held by them in common at this place. In running the boundary of the deed to Dixon, it first met with

the land of James, and then continued on with the land to John McMillan, there being a small space, according to some of the testimony, traversed in passing from the one to the other.

The court, in construing the description of the disputed line, directed the jury that after striking the separate tract of James, the line proceeded on to the tract of John, and then ran west to the land of Cynthia Gambrill. In our opinion, this was the correct method of locating the boundary, as it fulfilled the calls of the deed and gave effect to all the descriptive words used in it. The defendant's interpretation requiring the line to stop when it reached the land of James, and then deflect west, leaving out the part in dispute, is inadmissible, as omitting part of the description. It is as reasonable to disregard James' and run to John's land, as it is to disregard the latter and stop at the former. But the running directed by the judge admits neither, and meets the requirement that it shall touch both, and in the order of succession in which they are mentioned in the deed.

3. The record shows a further objection, not pressed on the hearing before us, however, by the appellant, that the land when purchased by the plaintiff, upon his own allegation in the complaint, was in the adverse possession of the defendant, and so no title was acquired under his deed.

This objection is answered by the act of 1874–'75, ch. 256, which was in force when the suit was begun, and provides:

That an action may be maintained by a grantee of real estate in his own name, whenever he, or any grantor, or other person, through whom he may derive title, might maintain such action, notwithstanding the grant of such grantor or other conveyance be void, by reason of the actual possession of a person claiming under a title adverse to that of such grantor or other person, at the time of the delivery of such grant or other conveyance.

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

No error. Affirmed.

ALBERT CANNON and others v. GEORGE W. YOUNG.

Contract for land purchase, assignment of interest in—Fraud and fraudulent conveyances.

1. One who holds a bond for title to land has the right to assign a part interest therein to another, and such assignment conveys an equitable interest which is a sufficient consideration in law to support a deed.
2. An assignee under a fraudulent deed is not affected by it unless it be shown that he co-operated in the making thereof, or took with notice of the intended fraud.
3. There is no presumption of the law, arising from the known insolvency of the maker of such deed, that the assignee knew of his intent to defraud creditors.

(*Leadman* v. *Harris*, 3 Dev., 144; *Hafner* v. *Irwin*, 1 Ired., 490; *Lassiter* v. *Davis*, 64 N. C., 498; *Reiger* v. *Davis*, 67 N. C., 185; *Rencher* v. *Wynne*, 86 N. C., 268; *Tredwell* v. *Graham*, 88 N. C., 208, cited and approved).

EJECTMENT tried at Fall Term, 1883, of TRANSYLVANIA Superior Court, before *Gudger, J.*

The plaintiffs appealed.

Mr. Armistead Jones, for plaintiffs.
Mr. J. H. Merrimon, for defendant.

SMITH, C. J. The parties to the action derive title to the land in controversy from the same source, claiming under one Joshua Orr, the former owner—the plaintiffs, by virtue of a sale under execution issued upon a judgment recovered by them as executors of Hugh Johnson, on September 9th, 1868, and docketed in the superior court of Transylvania; the defendant, under a deed executed by said Orr to him on September 10th, 1878.

It must be assumed that the defendant's title was acquired under a deed made prior to the lien of the plaintiffs' judgment, and must prevail unless successfully impeached for fraud, and this was the issue tried by the jury in the court below.

The errors assigned and shown in the record are to the refusal of the judge to give three of the six instructions he was asked to give to the jury, numbered in the series one, two and four, and to the consideration of these only will our attention be directed:

1. The court was requested to charge that the partial assignment is not an assignment of the title bond held by the defendant entitling the assignee to sue thereon, and, conveying no interest, is void in law.

The evidence to which this instruction is supposed to be pertinent is in substance as follows: The defendant, examined on his own behalf, testified that Joshua Orr, his father-in-law, on June 4th, 1878, proposed to sell him the lots claimed in the suit, and that between the 12th and 15th days of that month he contracted to purchase them, and was directed by Orr to have the papers prepared very soon; that Orr was then indebted to witness for money advanced for him on the tract of land bought by them jointly from one Clayton, and for which the latter had executed title bond, and that the consideration of the deed from Orr to the defendant was the discharge of this indebtedness; that witness assigned one-third interest in the title bond to Orr, but did not make him a deed for the land mentioned in the bond, for the reason that no conveyance from Clayton had been made to him, a small portion of the purchase money being yet unpaid.

This evidence does not warrant the charge requested, for an equitable interest was transferred by the assignment of the bond in the land to which it related, commensurate in extent. This was a consideration in law sufficient to sustain the sale of the land in dispute, and its inadequacy in value, if shown (and we have no information upon the point), was a matter to be considered and weighed by the jury in passing upon the *bona fides* of the transaction.

2. The second instruction refused was, in substance, that the effect of the investment of the property of Orr in the title bond, while the purchase money had not all been paid, was to cover up and place it beyond the reach of executions sued out by creditors,

and that the defendant in participating in it is affected with knowledge of this effect and of Orr's intent.

The language employed is not very perspicuous, and we may fail to apprehend its precise import.

The proposition expressed seems to impute fraud in the view of the law, in a sale or assignment of property by a debtor where the consideration received consists in money or in some other form, which is inaccessible to execution, if the debtor reserve none, and is himself insolvent, and that one dealing with him shares in this fraudulent purpose.

The effect of every assignment of property liable to execution, in exchange for such as is not so liable, by an insolvent debtor, is to this extent an obstruction in the way of enforcing payment of the debts under final process. But the conveyance is not for this reason inoperative against creditors. If so, the insolvent debtor could be rendered incapable of disposing of his visible estate for the most laudable purpose, or of converting it into a different fund. There are circumstances to be considered by the jury in arriving at the debtor's intent, but they do not themselves constitute fraud to be declared to the jury as the judgment of the law upon them. There must be in the mind of the debtor, prompting to the making of the deed, a purpose to place his property beyond the reach of his creditors by this means, and thus hinder, delay or defraud them, to vitiate and annul the conveyance. An assignment to secure or to pay a *bona fide* debt would be rendered ineffectual by the presence in the consideration of this infectious element, or where it is a moving cause for the making the assignment; and in this there must be the co-operating agency of the assignee, or his assent with notice of the intended fraud. *Leadman* v. *Harris*, 3 Dev., 144; *Hafner* v. *Irwin*, 1 Ired., 490; *Lassiter* v. *Davis*, 64 N. C., 498; *Reiger* v. *Davis*, 67 N. C., 185; *Rencher* v. *Wynne*, 86 N. C., 268; *Tredwell* v. *Graham*, 88 N. C., 208.

3. The fourth instruction refused is to the effect that if the defendant, when he accepted the deed, knew, or had reason to

believe, that Orr possessed no other property liable to seizure under execution or to be applied to the satisfaction of his debts to the plaintiffs, then he is presumed to know of the insolvency of Orr and of his purpose to hinder, delay and defraud his creditors in executing the deed.

This exception has been sufficiently answered in what has been already said in reference to the intent of Orr in the transaction. If no fraud is imputed to him, none can be to the defendant. If the purpose of Orr was, and the jury should so find, to use the instrument as a means of escaping from the payment of his debts, or to delay their enforcement, or to secure some benefit to himself which the law forbids, it does not follow from his insolvency that the defendant knew of such intent, or contributed to giving it effect. A purchase from an insolvent is as effectual as from a solvent assignor, when the transaction is not tinctured with illegality or fraud, and the one has the same right as the other to dispose of his property by sale or to appropriate it to the payment of preferred creditors, where the act is *bona fide*.

We have not considered questions that may arise upon the record if the dates are correctly set out in the statement of the case, nor the consequences of the lapse of time since the rendition of the judgment before the issue of the process under which the plaintiffs bought at the sheriff's sale.

We have confined our examination to the assigned errors and assumed the predominant right of the defendant to the land, unless it is successfully assailed for fraud, and the verdict negatives this.

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

No error. Affirmed.

COMMISSIONERS OF GUILFORD COUNTY v. WILLIAM B. MARCH and others.

Bond, when illegal—Costs of Prosecution.

1. A bond executed by the prosecutor to pay the costs of a criminal action, the matter being then compromised by entering a *nolle prosequi*, and the accused paying the prosecutor a sum of money, is against public policy and void.
2. The statute in force at the time of this proceeding in reference to taxing a prosecutor with costs does not provide for a case where a *nolle prosequi* is entered.

(*State* v. *Cockerham*, 1 Ired., 381; *Lindsay* v. *Smith* (and cases cited), 78 N. C., 328, cited and approved).

CIVIL ACTION tried upon exceptions to a referee's report, at Spring Term, 1883, of ROWAN Superior Court, before *Graves, J.* The plaintiffs appealed.

Messrs. J. S. Henderson and *J. N. Staples*, for plaintiffs.
Mr. J. M. McCorkle, for defendants.

SMITH, C. J. An indictment charging one John W. Thomas with perjury was found at fall term, 1866, by the grand jury of the superior court of Guilford county, on which, by the direction of the presiding judge, the name of the defendant, William B. March, was entered as prosecutor. At spring term, 1869, a capias was ordered to issue against the accused, when the solicitor should so require, provided the prosecutor should first assume payment of the costs hitherto incurred, and give adequate security to be approved by the clerk for the discharge of such as might thereafter accrue. This order was made on the application of Thomas, and upon his representation of the insolvent condition of March. The bond described in the statement of the first cause of action in the complaint was thereupon executed to

the state in the penal sum of $2,000, with condition in avoidance, if the said March should discharge all the costs accrued and to accrue in the event a *nolle prosequi* shall be entered by the state in said case, or in the other event of the acquittal of the said John W. Thomas on the trial.

In September, 1870, some doubt being entertained as to the sufficiency in form of the bond, a second was required by the presiding judge, and thereupon another bond was executed by the same obligors, and in the same sum, to Abram Clapp, clerk of the superior court of Guilford, to become void if the said March "shall well and truly discharge all the costs now incurred in said cause, in the event that the said John W. Thomas is not convicted of the offence of perjury aforesaid, and shall well and truly indemnify and save harmless the county of Guilford from all costs now incurred or which may hereafter be incurred by reason of a failure of the state of North Carolina to convict the said John W. Thomas of the crime of perjury aforesaid.

The cause was thereupon removed to the superior court of Rockingham, and at spring term, 1871, was compromised and a *nolle prosequi* entered, the accused paying the prosecutor $6,500 in order to obtain his assent to this disposition of the case, and the said March was adjudged to pay the costs of the prosecution.

The insolvency of March prevented the collection of the sum ($970.34 costs) he was required to pay; the county of Guilford has been compelled to discharge the judgment, and, after demand and refusal of March to reimburse, brings this suit upon the said bonds, claiming as assignee of the clerk a right to recover upon the last, against the said March and the other defendants, Lemly and Shaver, administrators of the deceased obligor, John I. Shaver.

Without inquiring whether the action can be maintained in the name of the board of county commissioners *alone* upon both bonds or either, we shall confine our examination to the force of the objection to a recovery, sustained by the referee and by the court, and brought by the plaintiffs' appeal for our review, to-

wit, that the bonds are contrary to public policy, illegal and void.

The law in force when the bonds were executed and the prosecution came to an end, provides, that "if a defendant be acquitted or judgment against him arrested, the costs, including the fees of all witnesses summoned and actually examined for the accused, whom the judge before whom the trial took place shall certify to have been necessary or proper for his defence, shall be paid by the prosecutor if any be marked on the bill, unless the judge shall certify that there was reasonable ground for the prosecution and that it was required by the public interests." C. C. P., §560; *State* v. *Cockerham*, 1 Ired., 381.

The condition contained in the first bond subjects the prosecutor to the payment of costs in a contingency not provided for in the statute, to-wit: the entering of a *nolle prosequi* by which, in fact, the case was finally disposed of, and thus the bond is not a mere security for a contingent liability, the hazards of which the principal assumed when he became prosecutor, but it super-adds an obligation not recognized in the law.

The condition set out in the second bond is not in excess of the contingent statutory liability to be imposed by the judge, but it imposes an absolute obligation upon the prosecutor upon the rendition of a verdict of acquittal by the accused, and denies the right to appeal to the judge for his certificate "that there was reasonable ground for the prosecution and that it was required by the public interests," when such was his opinion of the facts whereby the prosecutor would be exempt from the costs.

Both bonds thus became, if their validity be upheld, more than mere securities for the fulfilment of a pre-existing liability resting upon the prosecutor personally, inasmuch as they undertake to impose a further and additional liability upon him and upon his associate obligors, the sureties to the bond.

Again, the statute makes no provision for securing the costs which an insolvent prosecutor may be required to pay, nor does it confer authority upon the court to demand it. It does not discriminate between a solvent and an insolvent prosecutor in this

regard, but imposes upon each, one and the same personal obligation, as it does upon the accused, as the one or the other may be adjudged to pay the costs of the prosecution.

But a more serious objection lies against the bonds in their tendency to obstruct or prevent the due administration of the criminal law, and bringing into activity forces unfavorable to its fair and impartial enforcement. This finds illustration in the course pursued in the conduct of this very indictment. It slumbered for two and a-half years without action on the part of the solicitor, we must suppose, because in his judgment the public interests did not demand a prosecution, and then it is revived by a prosecutor to accomplish, as the result shows, his private interests, and not from any sense of public duty, on condition of providing security for the costs in the event of failure. It seems to have been prosecuted with the same steady purpose until he forces from the accused a large sum of money, and then the prosecution is abandoned and the accused let go free without a trial. The criminal process of the court has thus been successfully used to put money in the prosecutor's pocket, regardless of the demands of public justice on the one hand, or on the other to the oppression of an innocent party. The management of a prosecution should be steadily retained in the hands of the appointed officer of the law, not to be permitted to be pressed at the instigation of a private person when such officer does not deem it his duty to proceed. Nor ought it to be terminated without a trial, if the accused be guilty upon the proofs, because the prosecutor has received money as the consideration of its abandonment and consents to its being done.

It is obvious that these offered and accepted indemnities have in a great degree left the prosecution in private hands, and permitted it to be perverted for the attainment of personal advantages with which the public have no concern. Such fruits indicate the illegality of the source from which they spring.

The principle is too well settled to require more than its mere enunciation, that any instrument taken which tends to obstruct

the *firm* and *impartial* administration of public justice, will not be recognized and enforced.

Thus a bond given in lieu of and for an indemnity against a forged instrument surrendered with an agreement that the person whose name was forged should not appear against the accused, unless summoned, is held to be against public policy and void, *Thompson* v. *Whitman*, 4 Jones, 47;

So, an agreement between persons interested in an estate the consideration of which is that they are not to bid at the administrator's sale, *Ingram* v. *Ingram*, *Ib.*, 188;

And, an agreement by bond to pay a sum of money to the obligee induced by his representation that a relation of the obligor had committed an indictable offence and his promise not to prosecute, *Garner* v. *Qualls*, *Ib.*, 223;

Or, that the obligee will not appear as a prosecutor or witness against the defendant in a criminal prosecution for the offence, *Vanover* v. *Thompson*, *Ib.*, 485.

These are all held to be illegal because they contravene the course of public justice.

To the same effect are *King* v. *Winants*, 71 N. C., 469; *Lindsay* v. *Smith*, 78 N. C., 328.

While the effect was direct and apparent in the cases referred to, the tendency of agreements in the same direction, whether to stifle the prosecution or oppressively make use of it for the furtherance of private ends, is equally fatal to the efficacy of the instrument. In neither case will the courts lend their aid to its enforcement.

For these reasons we declare there is no error in the ruling of the court below and the judgment must be affirmed. It is so ordered.

No error. Affirmed.

L. W. KEENER v. ALEXANDER GOODSON.

Arbitration and Award—Reference under the Code—Judgment, valid without judge's signature—Color of Title—Homestead—Statute of Limitations.

1. Where a cause is referred to arbitrators the submission to be a rule of court, the court enters judgment according to the award. The arbitrators are not bound to find the facts, or to state themselves parately from their conclusions of law, or to decide according to law. Distinction between a reference to arbitrators and a reference under THE CODE, §422, noted by ASHE, J.
2. The validity of a judgment is not affected by the failure of a judge to sign it, since the statute providing for such signing is merely directory.
3. Color of title is a writing which upon its face professes to pass title to land.
4. The assignment of homestead does not constitute color of title. It is not a conveyance, nor does it profess to pass title to the land, but simply attaches to the existing estate of the homesteader a quality of exemption from sale under execution.
5. A homestead will not be allowed against a judgment founded upon a contract made prior to the adoption of the constitution of 1868.
6. The statute allowing actions to be brought *within* a year after judgment of nonsuit, is intended to extend the period of limitation, not to abridge it.

(*Crisp* v. *Love*, 65 N. C., 126; *Gudger* v. *Baird*, 66 N. C., 438; *Hilliard* v. *Rowland*, 68 N. C., 506; *Lusk* v. *Clayton*, 70 N. C., 184; *Pickens* v. *Miller*, 83 N. C., 543; *Cunningham* v. *Howell*, 1 Ired., 9; *Simpson* v. *McBee*, 3 Dev., 531; *Rollins* v. *Henry*, 78 N. C., 342; *Tate* v. *Southard*, 3 Hawks, 119; *Dobson* v. *Murphy*, 1 Dev. & Bat., 586; *Littlejohn* v. *Egerton*, 77 N. C., 379; *Gheen* v. *Summey*, 80 N. C., 187; *Grant* v. *Edwards*, 86 N. C., 513, cited and approved).

EJECTMENT tried at Spring Term, 1883, of LINCOLN Superior Court, before *Shipp, J.*

The plaintiff put in evidence, under objection, the record of an action in the superior court of Lincoln county in which S. W. Keener, Daniel Goodson, and S. V. Goodson, administrator, were plaintiffs against Alexander Goodson, which showed that at the appearance term of said action the following order was made:

"As a compromise, this case is referred to Marcus Wike and James Mullin, with leave to choose an umpire before beginning, if they see proper, and their award or a majority of them to be a rule of this court. Umpire not to act unless they disagree."

On the 17th of September, 1869, being the fall term of said court, the arbitrators made an award as follows:

"We proceeded to investigate this case on the 15th of September, 1869, and after hearing all the testimony produced and examining all the books and papers in the investigation, we beg to report that in our judgment the defendant is due the plaintiffs five hundred and eighty dollars and seventy-five cents, all of which is respectfully submitted." "Judgment according to award."

On the judgment docket there was the following entry: "S. W. Keener, Daniel Goodson and S. V. Goodson v. Alexander Goodson, October 25, 1869; judgment for principal and interest, $580.75; costs, $80.45=$660.20."

The plaintiff gave in evidence an execution issued upon this docketed judgment, a sale thereunder on the 25th of April, 1870, and a sheriff's deed to him dated 16th of May, 1870, for the land in controversy.

The defendant offered in evidence a deed for the land in dispute from the plaintiff Keener to Joseph F. Johnson, dated 21st of July, 1875; and also a transcript of the record of an action in the circuit court of the United States at Greensboro—Joseph F. Johnson v. Alexander Goodson—commenced on the 9th of September for same land, and continued until April term, 1877, of said court, when the plaintiff was called and nonsuited. He also gave in evidence the proceedings of the assignment of his homestead, dated the 29th of October, 1869, which embraced the entire tract of land in controversy, and was valued at nine hundred and sixty dollars.

The defendant testified that he had been in possession of the land for twenty-five years, by inheritance from his father, and in the actual continuous possession thereof, adversely to the

plaintiff and all others, under the assignment of his homestead from the date thereof until the commencement of this action.

The plaintiff then offered in evidence a deed from Joseph F. Johnson, dated the 7th of October, 1879, reconveying to him the land in controversy.

It was agreed that the alleged judgment under which the land was sold and purchased originally by the plaintiff was founded upon certain contracts for building and operating a forge, entered into and to continue from 1862 to 1866, between the plaintiff and others and the defendant, as set forth in the complaint in that action.

The defendant contended:

1. That there was no proceeding and judgment to warrant the sale of the land.

2. That the possession of the land under the homestead was adverse under color of title, and after seven years barred the plaintiff's action.

3. That the action, having commenced more than one year after nonsuit, could not be sustained.

4. That the defendant was entitled to homestead under the pleadings in the action in which judgment and sale of land were had.

There was a verdict for the plaintiff and judgment accordingly, from which the defendant appealed.

Messrs. Hoke & Hoke and *B. C. Cobb*, for plaintiff.
Mr. W. P. Bynum, for defendant.

ASHE, J. The first contention of the defendant was, that the record of the judgment produced in evidence did not show a valid judgment, and that the sale thereunder was void, and the plaintiff acquired no title to the land by the sheriff's deed. The counsel insisted that the judgment upon the award was interlocutory, and that the award itself was defective, because the arbitrators did not find the facts. The counsel argued these

points as if the order of reference was under The Code of Civil Procedure; if it had been so, there would have been a good deal of force in his position; but he seems to have entirely overlooked the distinction between a reference under The Code and a reference to arbitrators, and their award to be a rule of court. The provisions of The Code of Civil Procedure have not repealed the common law practice of reference to arbitrators. That practice is still extant, notwithstanding The Code. *Crisp* v. *Love*, 65 N. C., 126; *Gudger* v. *Baird*, 66 N. C., 438; *Hilliard* v. *Rowland*, 68 N. C., 506.

Arbitrators are not bound to find the facts. The effect of a reference to arbitrators is very different from that of a reference under The Code. Arbitrators may choose an umpire; they are not bound to find the facts separately from their conclusions of law; they are not bound to decide according to law, and their award may be general; thus, "that plaintiff recover $—— and costs." *Lusk* v. *Clayton*, 70 N. C., 184; *Pickens* v. *Miller*, 83 N. C., 543. And where the award is made and no exceptions taken, or, if taken, not sustained, the practice has uniformly been for the court to render judgment according to the award.

In England, where the submission of a cause to arbitrators was made a rule of court, the practice was to grant an attachment for all disobedience of a rule of court to stand to the submission and award. But it has been said by Chief-Justice RUFFIN that, instead of the attachment in this state, the practice, from a period so early that no one of the profession knows when it did not exist, has been to enter judgment for the debt or damages according to the award. *Cunningham* v. *Howell*, 1 Ired., 9; same principle in *Simpson* v. *McBee*, 3 Dev., 531. In the former of these cases, where the judgment was sustained by this court, the entries were very similar to those in this case. There, there was an order of reference submitting the cause to arbitrators, whose award was to be a rule of court. An award was made and returned that Hyatt should pay to the plaintiff the sum of $155, and there was judgment for the sum of $155, according to the award.

The defendent further insisted that the judgment was not valid because it was not signed by the judge. In *Rollins* v. *Henry*, 78 N. C., 342, it was held that "the requirement that the judge shall sign all judgments is merely directory." In that case the judgment docket of the superior court of Buncombe was offered in evidence, which showed a judgment in favor of B. H. Merrimon against W. L. Henry, dated November 20, 1869. Defendant objected to its admission, because it was not signed by the judge and was not a full copy of the judgment-roll. It was, however, admitted, and this court held it was competent.

The second ground of the defendant was, that the homestead as laid off was color of title, and the seven years' adverse possession under it barred the plaintiff's recovery.

We do not concur with this proposition. A color of title is defined to be a writing upon its face professing to pass title to land. *Tate* v. *Southard*, 3 Hawks, 119; *Dobson* v. *Murphy*, 1 Dev. & Bat., 586. The assignment of homestead is in no sense a conveyance of land, nor does it profess to pass any *title* whatever. How can it, when the owner's original title continues in him? It in no way changes his title. It creates in him no new estate. It has no other effect than simply to attach to his existing estate a *quality of exemption* from sale under execution. *Littlejohn* v. *Egerton*, 77 N. C., 379; *Gheen* v. *Summey*, 80 N. C., 187; *Grant* v. *Edwards*, 86 N. C., 513. Our opinion, therefore, is that the proceedings assigning to the defendant his homestead do not constitute color of title.

The defendant's third ground is, that he was entitled to hold his homestead in the land against the demand of the plaintiff.

We think differently. It was agreed on the trial that the judgment under which the plaintiff claimed his title to the land was founded upon a *contract* made prior to 1868. This admission settles that question. We need not at this day cite authorities to show that a land owner has no right to a homestead against a judgment founded upon a contract made prior to the adoption of the constitution of 1868, and if in such

a case it were the duty of the sheriff to have the homestead laid off before sale, he was not bound to do so here, because it was manifest there was no excess to be levied upon, for the defendant's homestead had already been allotted to him, and it was assessed by the appraisers to be worth less than one thousand dollars.

The other ground of the defendant, that the plaintiff's action could not be sustained because instituted more than a year after the nonsuit had been entered in the case of *Johnson* v. *Goodson*, in the circuit court, is without any force.

The statute allowing actions to be brought within a year after judgment of nonsuit, was intended to extend the period of limitation, but not to abridge it.

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

No error. Affirmed.

JOHN W. SCOTT v. CALVIN J. GREEN.

Arbitration and Award—Evidence—Judge's Discretion—Partnership.

1. An award in writing, like a written contract, cannot be added to or varied. It speaks for itself, and is not open to proof of the "understanding" of the arbitrators as to its effect.
2. Where incompetent evidence is received without objection, the party affected by it cannot afterwards complain.
3. It is discretionary with the presiding judge whether he will recall the jury and submit instructions, which were not presented until the charge was finished and the jury had retired to consider of their verdict.
4. Upon settlement of a partnership, the liabilities of the members growing out of the joint business were disposed of, leaving the plaintiff as his separate property an unpaid claim due the firm; *Held*, that such claim no longer constitutes an item in the partnership account, and that the plain-

tiff is entitled to his action to recover the same. (This controversy grew out of relations existing between a creditor and a debtor firm, the defendant being a member of both: the character of the debt in such caste, stated).

APPEAL from a justice's judgment heard at Fall Term, 1883, of ORANGE Superior Court, before *MacRae, J.*

The defendant appealed.

Messrs. Graham & Ruffin, for plaintiff.

No counsel for defendant.

SMITH, C. J. The plaintiff alleges that the partnership firm of Scott, Green & Co. (consisting of the plaintiff, the defendant, and Asa Green) engaged in the business of milling, in the year 1871, sold to the partnership firm of Green & Castleberry, of which the defendant was also a member a lot of lumber at the price of fifty-two dollars and a half, for the recovery whereof the present action was begun before a justice of the peace, and from his judgment removed by appeal to the superior court. That there was a settlement of the parntership matters of Scott, Green & Co., under a reference to arbitrators, and their award made on February 28th, 1877, wherein the present claim was assigned to the plaintiff as his separate property, with other effects of the firm, and, among others, a sum of money awarded to the defendant, to be paid by the plaintiff.

The defendant denied his personal liability for the lumber, asserting that it was furnished to himself and Asa Green by Castleberry, who cut it from defendant's land, carried it to the saw-mill of Scott, Green & Co., to be sawed, and thence removed by Castleberry, who alone is responsible for the work done at the mill.

There were no issues drawn up for the jury, and the evidence was somewhat conflicting. Under the charge of the court, a verdict was found in favor of the plaintiff, and from the judgment the defendant appeals to this court.

On the trial before the arbitrators, H. Wetherspoon, examined for the plaintiff, testified that while the cash and account books of Scott, Green & Co. were not produced, and were said to be lost, "whatever might be due the firm was turned over to J. W. Scott."

On his cross-examination by the defendant's counsel, the witness reiterated the statement that all due the firm on the saw-mill books were to go to Scott, and it was intended to give him all.

The counsel then put this question, which, on objection, was ruled out: Was not the idea of the arbitrators this—that the assets were composed of the debts due from third parties and not from Asa and C. J. Green?

To this ruling the defendant excepts, and this is the first exception shown in the record.

The excluded inquiry was an effort to extract from the witness, not evidence of the terms of the award nor of what was done in pursuance of it, but to show what was the understanding or idea of the arbitrators of the effect of their action in the case, and not what their action and award were. The award was in writing, and must speak for itself. Its terms could no more be added to or varied than could be a written contract between the parties.

We do not say that the evidence elicited by the plaintiff would have been competent, for it seems to trench upon the rule which forbids the introduction of other proof than the writing itself of its terms and import, but no objection was made and the defendant cannot complain that the jury were permitted to hear it.

But the question propounded for the defendant goes further, and seeks to give a meaning to the award, founded on the unexpressed intention of those who made it, and thus give form to their purposes.

This was clearly inadmissible, and the court did not err in refusing to allow the question to be answered.

The defendant's counsel, when the testimony was concluded, asked for instructions, which the court required to be put in writing, and they were not presented until the charge was finished and the jury had retired to make up their verdict.

These instructions were as follows:

1. If the jury believe from the evidence that the defendant was a partner in the saw mill firm with the plaintiff, and received the bill of lumber as a partner, the defendant is not liable.

2. If the account sued on was contracted in 1871, and the award made in February, 1877, the plaintiff is not entitled to recover.

3. If the jury believe that the lumber was furnished to the defendant and Asa Green, partners of the firm of Green & Castleberry, under their partnership agreement that they were to furnish the lumber and Castleberry to pay for the lot, the plaintiff must fail.

4. If the jury find that the logs were cut, and hauled by the teams of Asa and C. J. Green, and cut by the mill of Scott, Green & Co., the plaintiff cannot recover.

The charge delivered by the court was as follows:

If, upon a settlement of the partnership accounts of Scott, Green & Co., it was agreed by the members that Scott should take all the assets, and among the assets was the account against the defendant and Castleberry, who, with Asa Green, composed the firm of Green & Castleberry, and if the plaintiff has proved the account to the satisfaction of the jury, you will find the issues for the plaintiff—the only evidence of the amount delivered being 3,500 feet, which, at $1.50 per hundred, would be $52.50.

If, however, there was no agreement between the partners that the plaintiff should have the firm assets, it is still a partnership matter unprovided for in the settlement of the partnership, and the defendant being a member of both firms, the action will not lie.

The statute of limitations does not bar the action, since up to the award and assignment in February, 1877, if any debt from Green & Castleberry to Scott, Green & Co. then existed, it would not have been put in suit, and the statute did not run.

Understanding the judge when submitting to the jury an inquiry as to an *agreement* between the partners to refer to the results of the arbitration under their agreement and in pursuance of its terms, we can discover no just grounds of complaint furnished the defendant in the manner in which the case was presented to the jury. The views of each were explained, and the law arising from the different aspects of the proofs, as the facts should be found, was properly expounded in a brief manner, so as to enable the jury to pass upon the merits of the controversy and arrive at a just conclusion.

The claim was not in strictness a legal debt, inasmuch as the defendant was a member of both firms, but in a court of equity it was deemed the debt of one firm to another, and as such, was to be taken into account in the adjustment of their business relations. When the affairs of the creditor firm were settled by the arbitration, and the liabilities of the members, *inter sese*, growing out of the joint business fully disposed of, leaving to the plaintiff all the unpaid claims due to the firm, this now in suit was separated as an independent claim against the debtor partnership, and became capable of collection as claims against other persons were, no longer constituting an item in the partnership account to be disposed of in a final settlement.

If this and all other outstanding accounts against debtors to Scott, Green & Co. were assigned, and this the jury in their verdict say, to the plaintiff, we do not see why he may not recover; for there is no longer a common party to each side of the contract, and the indebtedness is to the plaintiff alone.

But if any part of the instructions, if presented in apt time, ought to have been given, it was no error in the judge to refuse (and his refusal is only an implication from his not submitting the instructions) to recall the jurors from their retirement and

reopen the proceedings, to the end that this should be done. This is but the exercise of an unreviewable discretion, and we do not suppose any judge would hesitate to exercise it liberally in a proper case to secure a correct verdict and the fair administration of justice between litigants.

Equally untenable is any objection to the interpretation put upon the statute of limitations, if that defence be regarded as before the jury. There is no error, and the plaintiff is entitled to judgment.

No error. Affirmed.

RICHARD B. THOMPSON v. SARAH E. SHAMWELL.

Partition of Land—Tenants in Common—Practice—Procedendo—Motion in the cause and new action by summons.

1. Partition of land was had, report of the commissioners confirmed, and final judgment entered; *Held*, no error to deny the motion of a complaining tenant to have the report remanded to the commissioners for the correction of an alleged mistake in running a dividing line. But the appropriate course in such case is for the judge to direct his ruling to be certified to the probate court to dismiss the application.
2. This cause being ended, the remedy (if any, after an acquiescence for seven years) is not by motion, but by a new action commenced by summons.

(*Covington* v. *Ingram*, 64 N. C., 123; *Thaxton* v. *Williamson*, 72 N. C., 125; *Jones* v. *Hemphill*, 77 N. C., 642; *Wood* v. *Skinner*, 79 N. C., 92; *Peterson* v. *Vann*, 83 N. C., 118; *England* v. *Garner*, 84 N. C., 212; *Wahab* v. *Smith*, 82 N. C., 229; *Hoff* v. *Crafton*, 79 N. C., 592; *Capps* v. *Capps*, 85 N. C., 408, cited and approved).

SPECIAL PROCEEDING commenced before the clerk of Davidson superior court, and removed to and tried at Spring Term, 1883, of FORSYTH Superior Court, before *Graves, J.*

Under proceedings instituted in the probate court of Davidson and conducted regularly to a conclusion, the lands descended

from the intestate (Joseph H. Thompson) to his heirs-at-law, children and grandchildren, were divided among them and their respective shares assigned in severalty, except that one tract, with expensive improvements and not admitting of partition, was set apart to three of the tenants as their joint share.

Some of the petitioners being infants and represented by their guardians, the final judgment, confirming the commissioners' report and vesting the estates in the allotted shares in severalty, was submitted to the judge of the district and his approval entered on the copy thereof, early in January, 1873.

In the division, separate and adjoining shares, the boundaries of each distinctly defined by natural objects and course and distance, were set apart to the *feme* petitioner, Sarah Shamwell, lot No. 3, and the infant petitioner, Richard B. Thompson, lot No. 4.

In February, 1880, notice was issued by O. M. Shamwell and wife against the other parties to the proceeding, and as the record shows, served on one of them and her husband, of an intended motion to be made before the probate judge on the 3d day of March following, for remanding the report of the commissioners to them, in order that an alleged error in running and describing the dividing line between the above specified lots may be corrected, whereby lot No. 3, containing one hundred and twelve and a half acres, will be increased in area one and a half or two acres, and lot No. 4 be by that quantity diminished.

The probate judge of Davidson being related to the parties, removed the motion, when the same came on for hearing to the probate judge of Forsyth, before whom issues were made upon the allegations and counter-allegations contained in the affidavits, and with the full record transferred to the civil issue docket of the superior court for trial at term time.

The issues eliminated and sent up were in form as follows:

1. Was there a mistake in the report of the commissioners who divided the lands of J. H. Thompson and in the decree confirming the same, as charged in the petition?

2. Is the petitioner's right barred by the statute of limitations?

When the cause was called in the superior court, the respondents moved to dismiss the petitioner's application as not warranted upon the evidence, and His Honor being of opinion that the allegations did not warrant the granting the relief demanded, dismissed the proceeding, and the *feme* petitioner, alone prosecuting her cause since the death of her husband, appealed to this court.

No counsel for plaintiff.

Messrs. Watson & Glenn, for defendant.

SMITH, C. J., after stating the above. Without assenting to the irregular method pursued for obtaining a correction of alleged errors in the records of a court by amendments, the propriety of which rests in the sound discretion of the judge, and of the sufficiency of the evidence of such error he must determine, it is to be observed that the proposition is, not to show that the record does not truly state the action of the court in adopting the report of partition and confirming the distribution of the shares by the well-defined lines which bound them, but to correct misapprehensions in the minds of the commissioners as to the location of the lines as described; in other words, it is to give effect to unexpressed intentions, by conforming the report and confirming judgment, to them.

This, too, the court is asked to do, when ample opportunity was afforded to each tenant to examine the report, and the omission to do so is the result of his own neglect and inattention, after an acquiescence of seven years under the apportionment of the respective shares. Under such circumstances, a court would be reluctant to disturb its own solemn judgments and the rights and interests which have grown up on their assumed stability and permanence, especially upon the suggestion of so small a diminution in the area of the share assigned to and accepted by the complaining tenant.

Nor need we advert to the indefiniteness of the material inquiry to be made by the jury, was there a mistake? not what are the facts wherein it consists, since this could have been rendered more specific and made to conform to the petitioner's allegations if they were any more specific themselves. The entire record was in the superior court, transmitted in conformity to the practice pointed out in *Jones* v. *Hemphill*, 77 N. C., 42, and *Wood* v. *Skinner*, 79 N. C., 92.

While we do not say it was error in the presiding judge, upon an inspection of the papers in the cause, to decline to submit the issues upon his consideration of the merits of the application as presented in the affidavit offered for the petitioner, his action was fully warranted on the ground that the original cause being ended, the remedy, if any, was by a new action, begun by summons, and not by motion, as established by repeated adjudications, *Covington* v. *Ingram*, 64 N. C., 123; *Thaxton* v. *Williamson*, 72 N. C., 125; *Peterson* v. *Vann*, 83 N. C., 118; *England* v. *Garner*, 84 N. C., 212; and originating in the probate court, *Wahab* v. *Smith*, 82 N. C., 229.

While the consequences to the parties are the same, the appropriate course in the superior court upon the ruling was to award a *procedendo* to the probate court wherein the original record was, directing the relief to be refused and the proceeding dismissed, as would clearly have been the mode of proceeding if the adjudication had been favorable to the petitioner and the issues tried, in order that the relief be administered in the probate court, *Hoff* v. *Crafton*, 79 N. C., 502; *Capps* v. *Capps*, 85 N. C., 408.

While we affirm the ruling of the court that the proceeding cannot be sustained, we correct the error in the manner of disposing of the cause by directing the ruling to be certified with a *procedendo* to the probate court for the dismissal of the application, and it is so adjudged. Let this be certified.

No error. Affirmed.

JOHN W. NEAL v. W. H. JOYNER.

Arrest, action for damages for unlawful—Evidence—Malice.

1. A peace officer may justify an arrest without a warrant, when he shows satisfactory reasons for his belief of the fact and the guilt of the suspected party, and that delay in procuring a warrant might enable the party to escape. In such case, proof of the actual commission of the crime is not necessary.
2. A private citizen may likewise arrest where a felony is committed in his presence, and he acts upon reasonable grounds for his belief that the arrested party is guilty. THE CODE, §§1126, 1129.
3. In an action for damages for an unlawful arrest, proof that the defendant did not act from malice towards the arrested party, is no defence.

(*Brockway* v. *Crawford*, 3 Jones, 433, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of ORANGE Superior Court, before *MacRae, J.*

The action is for assault and battery and for false imprisonment in causing the arrest and detention of the plaintiff upon a charge of felony. In answer and defence, the defendant states the arrest to have been made under the following circumstances:

On the day mentioned in the complaint one Weaver came to the defendant (railroad agent and telegraph operator) at Princeton, a station on the North Carolina railroad, and communicated the information that some one had the night before broken into his house and stolen his trunk containing eighty dollars, and he requested the defendant to send telegraphic messages of the robbery to the different points on that and the Wilmington & Weldon railroad, in order that the police might be on the look out for the thief. The telegrams were sent off in accordance with the request. Weaver subsequently met with one Raiford, a section master in the service of the company, and gave him the information, and Raiford, learning from one of the employees of the company (who had that morning before day come up from

Goldsboro on the freight train) that a man had signalled the engineer and stopped and got on the train with a trunk at the Midland railroad crossing, three miles below Princeton, an unusual place for stopping, came to the defendant and gave him this further information, at the same time expressing the belief that this was the guilty man and ought to be arrested. As the train, according to its runnings, was then supposed to be at or near Durham, a message was telegraphed to the mayor of the town to arrest the suspected criminal. The plaintiff was thereupon arrested and detained until the next morning, when an officer, who had come to Princeton on his way to Durham to take possession of the plaintiff, stated that Weaver had obtained information that one Crocker, who had got on the down train at Pine Level, was the man wanted, and thereupon the plaintiff was discharged.

The defendant further avers that, not knowing who the plaintiff was, he was not actuated by malice in causing the arrest, but acted *bona fide* and upon reasonable grounds for believing the plaintiff to be the person who had committed the crime.

To the answer the plaintiff demurs, for that, it does not state facts sufficient to constitute a defence, and that the facts set out therein do not show probable cause and reasonable grounds for belief of the commission of the alleged felony by the plaintiff.

Upon the hearing of the issue made by the demurrer, it was sustained by the court and an order made for a jury to inquire into and assess the plaintiff's damages. From this judgment the defendant appealed.

Mr. R. C. Strudwick, for plaintiff.
Messrs. Graham & Ruffin, for defendant.

SMITH, C. J., after stating the above. At common law, when a felony was committed and a constable received information of the person who did it, he may arrest the offender without warrant and detain him until he can bring him before a justice, though not compellable to do so. 1 Hale P. C., 587.

In like manner a private person may arrest the party who has committed the felony, and use necessary force to overcome his resistance; if he witnesses the act done, he is bound to make the arrest. *Ib.*, 588.

Our former statute embodies in substance the first proposition and imposes upon all peace officers, when a crime has been committed, the punishment whereof for the first or second offense is death, or any part is by whipping or standing in the pillory, and the offender is pointed out by information, the duty to pursue and arrest him, and all citizens of the county are required to assist in apprehending the criminal. Rev. Code, ch. 35, §2.

THE CODE, however, re-enacting the act of 1868–'69, somewhat modifies the preceding law, and restricts the right to arrest without warrant. It confers this power upon the sheriff, coroner, constable, officer of police and others entrusted with the preservation of the public peace, "who shall know or have reasonable ground to believe that any felony or larceny has been committed or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty and shall apprehend that such person may escape, if not immediately arrested. §1126.

The right to arrest is given to any individual where the "felony or other infamous crime" has been perpetrated "in his presence, and he knows or has reasonable ground to believe the party arrested to be guilty of the offense." §1129.

The changes are material and the enactments now in force more nearly conform to the rules of the common law. A peace officer may now justify his arrest, without proof of the actual commission of the crime, when he shows satisfactory reasons for his belief of the fact and of the guilt of the suspected party, and then only when he apprehends an escape unless he acts promptly. So may a citizen where he has personal knowledge of a felony or other infamous crime committed, and acts upon reasonable grounds for the belief that the arrested party is the guilty offender.

While additional safe-guards are thus placed around the lib-

erty of the citizen for his protection against the exercise of arbitrary power by public officers, these latter also are protected against vexatious suits, where their conduct is marked by good faith, and an honest effort is made to bring criminals to justice. Although the arrested party may prove to be innocent, they can defend against actions for false imprisonment, where the arrest is shown to have been made upon information reasonably sufficient to warrant the belief that crime has been committed, and that it was committed by the person arrested, when delay in procuring a warrant might enable him to escape.

The principle of the common law in reference to arrests is thus stated by LORD TENDERDEN in *Beckwith* v. *Philby*, 6 B. & C., 635:

"There is this distinction between a private individual and a constable; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must *prove that an actual felony has been committed*. Whereas, a constable having *reasonable ground to suspect* that a felony has been committed, is authorized to detain the party suspected until an inquiry shall be made by the proper authorities." And to this effect are the authorities in the absence of controlling legislation. *Allen* v. *Wright*, 8 Car. & P., 522; *Rohan* v. *Sawin*, 5 Cush., 281; *Burns* v. *Erben*, 40 N. Y., 463; Cooley on Torts, 175; *Brockway* v. *Crawford*, 3 Jones, 433.

Assuming, as we must in passing upon the demurrer, the facts to be as set out in the answer, what reasonable grounds do they furnish to support the belief that the plaintiff broke into the house and stole and carried away the trunk and money as charged? The only information conveyed to the defendant, besides that of the perpetrated burglary and theft, was, that a person with a trunk stopped a passing freight train by a signal heeded by the engineer in charge, or conductor, at an unusual place for stopping at an intersection with another railroad, and entered a car in the night time. Except the coincidence in time, no circumstance is shown to connect the plaintiff with the crimi-

nal act, or to awaken a just suspicion of his being himself the guilty party, nothing in his manner or conduct, nothing found in his possession but an article carried with them by all travellers going to a distant point, or for a considerable absence. It is no defence against such an invasion of personal security to say that no malicious feeling prompted the act, when the arrest was procured upon information wholly insufficient to warrant it, or reasonably to justify the belief of the plaintiff's guilt.

If we concede, as we do not, that the law gives immunity to the officer who, we may suppose, was acting in regard to what he deemed a duty to the public, the arrest was brought about by the direct procurement of the defendant, and he has rendered himself amendable to the plaintiff's claim for redress.

We therefore affirm the ruling of the court in sustaining the demurrer, and this will be certified for further proceedings in the court below.

No error. Affirmed.

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*J. M. WORTH, Treasurer, v. WILMINGTON & WELDON RAILROAD COMPANY and RALEIGH & GASTON RAILROAD COMPANY.

Taxation—Railroads.

1. A statute imposing a tax upon the gross receipts of some railroad companies and upon the capital stock of others, is unconstitutional, as not levying taxes by a uniform rule.

2. A charter which declares that "the property of a railroad company and the shares therein shall be exempt from any public charge or tax whatever," exempts the company from all taxation, whether upon gross receipts or capital stock, for such charter is a contract and protected by the federal constitution.

(*Gatlin* v. *Tarboro*, 78 N. C., 119; *Belo* v. *Commissioners*, 82 N. C., 415, cited and approved.)

*Mr. Justice MERRIMON having been of counsel, did not sit on the hearing of this case.

CIVIL ACTION tried at January Term, 1882, of WAKE Superior Court, before *Gilmer, J.*

The demurrer was overruled and the defendant appealed.

Attorney-General and *J. W. Graham*, for plaintiff.

Messrs. Geo. Davis and *Stedman & Latimer*, for W. & W. R. R. Co.

Messrs. Merrimon and *Fuller*, for the R. & G. R. R. Co.

SMITH, C. J. In the original act incorporating the Wilmington and Raleigh railroad company, ratified February 3, 1834, which name was, in a subsequent amendment, changed to that the defendant company now bears, as was its projected northern terminus removed from Raleigh to a point on the Roanoke river, is contained the following clause:

"All the property purchased by the said president and directors, and that which may be given to the said company, and the works constructed under the authority of this act, and all profits accruing on said works, and the said property shall be vested in the respective shareholders of the company, and their successors and assigns forever, in proportion to their respective shares, and the shares shall be deemed personal property, and the property of said company and the shares therein shall be exempt from any public charge or tax whatsoever.

In the revenue act of 1876–'77, ch. 156, schedule C, section 1, is contained the following provision:

"Every railroad or canal company incorporated under the laws of this state, and not liable to a tax upon the property of said company, or the shares therein, shall pay to the state a tax on the corporation equal to the sum of one per cent. upon the gross receipts of said company. The said tax shall be paid semi-annually, upon the first days of July and January, commencing upon the first day of July, 1877; and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer of said company to render to the treasurer of the state, under oath

or affirmation, a statement of the amount of gross receipts of said company during the preceding six months; and if such company shall refuse or fail, for a period of thirty days, after such tax becomes due, to make return or pay the same, the amount thereof as near as can be ascertained by the public treasurer, with the addition of two per centum thereto, shall be collected for the use of the state as other taxes are collected: Provided, that when a line of railroad or canal, belonging to any company liable to this tax, lies partly in this state and partly in an adjoining state or states, the part or share of such earnings of the company only shall be subject to the tax, as will be in that proportion to the whole receipts which the length of the road or canal within the limits of the state shall bear to the whole length of such road or canal.

Every railroad or canal company incorporated under the laws of this state, which is liable to a tax upon its franchise and personal property, but exempt from a tax upon its real estate held for right of way, station places and workshop locations, shall, in addition to other taxes, pay as a tax upon said corporation a sum equal to one-half of one per cent. upon the gross receipts of said company.

Every railroad and canal company incorporated under the laws of this state, and doing business herein, and not liable to a tax upon the property of said company, or the tax before mentioned in this section, shall pay a tax of one per cent. upon the actual cash value of every share of its capital stock to the treasurer of the state for its use, on the first day of July, 1877, and each year thereafter."

The same provisions, as to the enforcement of the taxes levied under the first, are annexed to the second and third, and a like apportionment when the road or canal runs into an adjoining state, and the estimate is only to be made upon the gross earnings accruing from April 1st, 1877.

The same substantial enactments are found in the subsequent laws, except that in that of 1881 there is substituted in place of

the tax upon the cash value of the shares of the capital stock, the imposition of "a privilege tax of twenty-five dollars per mile per annum," and payable "on the first day of July, 1881, and each year thereafter."

The defendant company denying its liability for any of the taxes imposed in these statutes, and claiming an exemption therefrom under its charter, the present suit is instituted for their enforcement, and the judgment overruling the demurrer brought up for review by the appeal, presents the single question of the extent and legal effect of the clause in the charter in protecting the company from these public burdens.

It will be noticed that provision is made for the taxation of three classes of roads, and the taxes imposed upon one are not imposed upon the other two:

1. If the road is, by virtue of the contract contained in its charter, exempt from taxation upon its property or shares, a tax is levied upon the incorporation equal in amount to one per centum upon its gross receipts.

2. If it be exempt from liability to taxation upon its real estate held "for right of way, for station places and workshop locations," following the language of the exemption contained in the charter of the North Carolina railroad company, as amended in the act of February 14th, 1855, but is liable to a tax upon its franchise and personal estate, it is subjected to an additional tax levied upon the corporation of one-half of one per centum upon the gross receipts.

3. If the property of the road be exempt, and it be not liable to the preceding tax, it was before subjected to a tax of one per cent. upon the cash value of the shares, and by the act of 1881, instead, to what is termed a privilege tax of twenty-five dollars per annum for each mile of its track through its entire extent.

The first enumertaed tax is not general in its application to railroads and canals, but is special and confined to such only as fall within the descriptive words of the statute, and the same is strictly true as to the others. The obvious result of this legis-

lation is to impose burdens on exempted roads, which are not imposed upon those unexempted, and *pro tanto* to counteract the effect of the discriminating privileges and immunities that would otherwise subsist between them.

If the same general burdens were put upon all alike, whatever might be the subject matter of the taxation, the favored roads would continue to possess and enjoy the privileges conferred in their charter, and not found in the charters of the others. Indirectly, then, the legislation tends to withdraw the immunities secured by their charters, and constituting a contract between the state and themselves, or lessen their value, so that all may proximately, at least, stand upon the same footing, as if none such had been conferred.

We should be reluctant to hold, if there were no question of constitutional right involved, that this method of levying taxes was sanctioned by our own constitution, and consistent with the equality and uniformity which it contemplates.

The "*uniform rule*" to be observed in the exercise of the taxating power seems to be so far applicable to the taxes imposed on "trades, professions, franchises and incomes," as to require that no discriminating tax be imposed upon persons pursuing the same vocation, while varying amounts may be assessed upon vocations or employments of different kinds.

"Although it is not expressly provided that the tax on trades, &c., shall be uniform," in the words of RODMAN, J., delivering the opinion in *Gatlin* v. *Tarboro*, 78 N. C., 119, "yet a tax not uniform, as properly understood, would be so inconsistent with natural justice, and with the intent which is apparent in the section of the constitution above cited (Art. V, §3), that it may be admitted that the collection of such a tax would be restrained as unconstitutional." This uniformity prescribed in the constitution of Illinois, as declared by Mr. Justice MILLER, extends "to the class upon which the law shall operate; that is, inn-keepers may be taxed by one, ferries by another, railroads by another (rule); provided, that the rule as to inn-keepers be uniform as to all inn-keepers; the rule as to ferries be uniform as to

all ferries, and the rule as to railroad companies be uniform as to all railroad companies. *Railroad Tax Cases*, 92 U. S. Rep., 575. The governing principle is not that the same specific tax shall be paid by each, as a form of capitation tax, but that, whether levied upon and measured by the amount of gross or net earnings or other standard, as upon real or personal estate, there shall be no discrimination made among the individuals of a class, based upon privileges and immunities secured to one under contract and not to another. The essential element in all systems of taxation is equality in imposing burdens upon the property of the tax-payers, so that each one, possessing the same species of property, shall pay the same proportionate tax as every other levied upon that property, and in this state such tax is required to be *ad valorem*.

But aside from the operation of the provisions of the constitution of the state, we are confronted with the inquiry whether the terms of the exemption in the recited clause of the charter are not a protection against either of the forms of taxation adopted in the revenue law. Its language is certainly very broad and comprehensive, declaring, after an enumeration of all property obtained by purchase or gift, the works constructed and all profits accruing thereon which are to vest in the shareholders, "that the property of said company and the shares therein shall be exempt from any public charge or tax whatsoever."

We are not left in doubt as to the construction of this clause, as it has been before the supreme court of the United States, and its force and effect as a contract determined. *Railroad* v. *Reid*, 13 Wall., 266. We reproduce a portion of the brief opinion delivered by Mr. Justice DAVIS, where the validity of a tax assessed by the state upon the franchise and rolling stock of the company was drawn in question:

"The general assembly of North Carolina told the Wilmington & Weldon railroad company, in language which no one can mistake, that if they would complete the work of internal improvement for which they were incorporated, their property

and the shares of their stockholders should be forever exempt from taxation. This is not denied, but it is contended that the subsequent legislation does not impair the obligation of the contract, and this presents the only question in the case. The taxes imposed are upon the franchise and rolling-stock of the company, and upon lots of land appurtenant to and joining part of the property of the company, and necessary to be used in the successful operation of its business. It certainly requires no argument to show that a railroad corporation cannot perform the functions for which it was created without owning rolling-stock and a limited quantity of real estate, and that these are embraced in the general term *property*. Property is a word of large import, and in its application to this company included all the real and personal estate required by it for the successful prosecution of its business. If it had appeared that the company had acquired either real or personal estate beyond its legitimate wants, it is very clear that such acquisitions would not be within the protection of the contract."

In reference to the contention that the franchise was not property, in the sense in which that word is used, he proceeds thus: "This position is equally unsound with the others taken in this case. Nothing is better settled than that the franchise of a private corporation, which, in its application to a railroad, is the privilege of running it and taking fare and freight, is property, and of the most valuable kind, as it cannot be taken for public use even with compensation." *Red. Rail.*, 129, §70.

The numerous cases referred to in the elaborate brief of the counsel for the public treasurer, asserting the rule that the words, used in an alleged surrender of any portion of the taxing power, will be construed with great strictness against the claimant, and only conceded when they are free from all ambiguity, have little bearing upon the present case, because the language used has received an authoritative and binding interpretation, and it is settled that all the property of the corporation

appropriate to its business, in whatever consisting, and the shares of stock are perpetually relieved of taxation.

The tax imposed upon companies described in the second class cannot be claimed, since under the decision the defendant company does not belong to it, not being a railroad "liable to a tax upon its franchise and personal property." Nor can it be charged under the descriptive words applied to companies of the third class, since the shares formerly taxed, and the road-bed taxed since it is real estate, are protected by the exemptions in the charter. The one is not less a tax upon the shares, because paid by the company; and the road-bed, though the imposed tax is denominated a privilege tax, is not less real estate; and if it were, in strictness, a privilege tax, this would be a tax upon the franchise, the meaning being the same.

The only portion of the law which can have application is that which exacts a tax laid upon the corporation, whose measure is the one hundredth part of the gross receipts of the company.

If this be a tax on the corporation as an entity, it must be in the nature of a *capitation tax*, or a tax upon the exercise of its corporate functions, in analogy to that required of natural persons in pursuing some employment or avocation. In the latter case the tax is upon the use of its corporate franchises, that is, upon the corporate franchises which are exercised, and this, the decision affirms, is a violation of the contract of exemption. If the tax be upon the gross receipts, not upon the exercise of its franchises by which they are earned, as a fund accumulated thereby, it is most clearly a tax upon personal property owned and undistributed. When divided among the shareholders and entering into the bulk of their respective estates, it ceases to be the property of the corporation, and loses the privilege it before possessed, as corporate funds. It then becomes liable to the imposition of public burdens, without reference to the source from which it was derived, in the hands of the tax-payer.

It is true there are several methods of taxing corporations. The subject matter of taxation may be capital stock—the real

and personal property of the corporation—the receipts or earnings—the shares themselves as property in the hands of the stockholders, and the franchise. The property of the shareholder is a distinct form of taxable property, as is held in *Belo* v. *Commissioners*, 82 N. C., 415, but it is not seen, when the franchise is itself property, and its exercise the use of that property, how any tax can be imposed upon a corporation that is not a tax upon its property.

The act of incorporation brings a new person into existence, and defines and prescribes its faculties and privileges, and while in the absence of a contract that it shall not be done, these may be taxed as are professions and trades, yet the state may, by explicit and unmistakable words, and for a consideration, part with the power, so that its attempted resumption would come in contact with a provision of the federal constitution.

A mere exemption of corporate property from taxation, as an expression of legislative volition, and not embodying the elements of a contract, may be recalled at any time and the property subjected to public burdens, as declared in the cases of *Tucker* v. *Ferguson*, 22 Wall., 527, and *North Missouri Railroad Company* v. *Maguire*, 20 Wall., 46.

"Forbearance to tax," says Mr. Justice SWAYNE, in the first case, "was a bounty voluntarily given by the state. Forbearance for a time, doubtless, increased to some extent the value of the bonds. Never to tax, would have increased their value still. There is no foundation for a claim for one more than for the other."

So, too, it has been held that an exemption is personal to the corporation upon which it is conferred, and that a sale under a decree made upon a mortgage, while transferring the franchises of the company, does not transfer the immunity of the property from taxation in the hands of the purchaser. *Morgan* v. *Louisiana*, 93 U. S. Rep., 217.

While it may be a matter of regret, as has been more than once intimated from the bench of the supreme court of the

United States, and of some of the states, that the right of one general assembly to surrender a portion of the sovereign power to tax, so as to disable itself or its successor to resume it, has been recognized, and that the inalienability of it rendered such attempt void, so that no contract was entered into to be protected by the federal constitution, the contrary in a limited degree has been so long and so often affirmed and adjudged, that it is no longer an open question for the court.

In the forcible language of the court in *Greenwood* v. *Freight Co.*, 105 U. S. Rep., 13: "The opinion in that case (The Dartmouth College case) carried the protection of the constitutional provision somewhat in advance of what had been decided in *Fletcher* v. *Peck*, 6 Cran., 87, and the preceding cases, and held that it applied not only to contracts between individuals and to grants of property made by the state to individuals or to corporations, but that the rights and franchises conferred upon private, as distinguished from public corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute were, when accepted by the corporation, contracts which the state could not impair."

We have discovered no case in which the ruling in *Wilmington & Weldon Railroad Co.* v. *Reid*, and *Raleigh & Gaston Railroad Co.* v. *Reid*, reported in 13 Wall., 264—269, has been impaired or doubted as a controlling authority. It is our duty equally to sustain the constitution of the United States, and declare null any act of legislation that comes in conflict with its provisions, and in doing so to recognize as authoritative the interpretations put upon it by the supreme court of the United States.

While corporations, favored in their early struggles by the kindly hand of state legislation, it would be reasonable to expect, after success has crowned their efforts, and their resources have expanded and become large, would be willing to contribute to the common burden resting so heavily upon the taxable property of the state, and to this end yield at least some of their special

privileges, it is nevertheless our duty to protect all their constitutional rights from infraction or abridgment. The interests of these companies, and of the people of the state whose territory they traverse, are and ought to be identical, and their efforts harmonious and united in building up and maintaining the general prosperity. To us it belongs, however, to expound and enforce the law, and, with this duty performed, we have nothing more to add. The judgment must be reversed, the demurrer sustained and the defendant recover costs.

Error. Reversed.

IN WORTH *v.* RALEIGH & GASTON RAILROAD COMPANY:

SMITH, C. J. This appeal must be disposed of in the same manner and for the same reasons assigned and discussed in the appeal of the *Wilmington & Weldon Railroad Company*. The provisions for exemption in the charters of each are essentially similar, and were both reviewed and passed on in the supreme court in *Raleigh & Gaston Railroad Company* v. *Reid*, 13 Wall., 269.

There is error, and the judgment must be reversed and judgment here entered for the defendant.

Error. Reversed.

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*J. M. WORTH, Treasurer, v. PETERSBURG RAILROAD COMPANY.

Taxation—Railroads—Corporations.

1. The charter of the defendant company exempts its property from any public charge or tax whatever, and a franchise is property. See *Worth* v. *W. & W. Railroad, ante*, 291.

*Mr. Justice MERRIMON having been of counsel, did not sit on the hearing of this case.

2. A tax imposed directly by the legislature upon a corporation, or its gross receipts, or the cash value of the shares of its capital stock, or upon each mile of its road at a certain sum per mile, and not assessed by assessors, is a franchise or privilege tax.

3. The franchise, capital stock, property consisting in land and machinery, &c., shares of capital stock, and profits arising from the business of a corporation, are each the subject of distinct taxation.

4. Where the charter vests the corporate property in the stockholders, and exempts it from taxation, the individual stock is also exempt.

5. Under article five, section three of the constitution, the same rule of uniformity applies to the taxing of "trades, *professions*, franchises and incomes," as to the other species of property therein named; and there must also be uniformity in the mode of assessment.

6. A tax upon an occupation must reach all who follow it—all of a *class*, either of persons or things.

7. The act of 1881, ch. 116, class II, §2, repealing all exemptions of taxation contained in acts of incorporation granted before or since July, 1868, noticed, and its effect considered.

(*Attorney-General* v. *Bank*, 4 Jones' Eq., 287; *Railroad* v. *Commissioners*, 81 N. C., 487; *Gatlin* v. *Tarboro*, 78 N. C., 119, cited and approved).

CIVIL ACTION tried at January Term, 1882, of WAKE Superior Court, before *Gilmer, J.*

The plaintiff, suing as the treasurer of the state of North Carolina, alleged in substance as follows:

1. That the defendant is a corporation formed under the laws of Virginia and this state, and a portion of its line is located in this state, and in the act of incorporation by the state of Virginia it was enacted that "all machines, wagons, vehicles and carriages purchased as aforesaid with the funds of the company, and all other works constructed under the authority of this act, and all profits which shall accrue from the same, shall be vested in the respective shareholders of the company forever in proportion to their respective shares, and the same shall be deemed personal estate, and shall be exempt from any public charge or tax whatsoever." But the assent of the legislature of North Carolina by the act of 1830 was given to said act, with the exception contained in the 8th section thereof, "that this act and every part

and provision thereof shall be subject to be altered, amended or modified by any future legislature as to them shall seem necessary and proper, except so much thereof as prescribe the rate of compensation or tolls for transportation of produce or other commodities allowed to the said company."

2. That by the act of 1876–'77, ch. 156, schedule C, §1, it is enacted: "Every railroad or canal company incorporated under the laws of this state, and not liable to a tax upon the property of said company, or the shares therein, shall pay a tax on the corporation equal to a tax of one per cent. upon the gross receipts of said company; that said tax shall be paid semi-annually, upon the first days of July and January, commencing upon the first day of July, one thousand eight hundred and seventy-nine; and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer of said company to render to the treasurer of the state, under oath or affirmation, a statement of the amount of gross receipts of said company during the preceding six months; and if such company shall refuse or fail for a period of thirty days after such tax becomes due to make return or pay the same, the amount thereof, as near as can be ascertained by the public treasurer, with an addition of ten per cent. thereto, shall be collected for the use of the state as other taxes are collected: provided, that when a line of railroad or canal belonging to any company liable to this tax lies partly in this state and partly in an adjoining state or states, the part or share of such earnings only shall be subject to the tax as will be in that proportion to the whole receipts which the length of the road or canal within the limits of the state shall bear to the whole length of such road or canal. And in said act it was directed that every railroad and canal company, incorporated under the laws of this state and doing business herein and not liable to a tax upon the property of said company or the tax before mentioned, shall pay a tax of one per cent. upon the actual cash value of every share of its capital stock to the treasurer of the state for its use on the first day of July, 1877, and each year thereafter with like provisions

with regard to the return of statements, the enforcement of the tax and apportionment thereof when the road lies partly in this state and partly in an adjoining state, as the one annexed to the first tax.

3. That the same enactments were made in the ensuing revenue laws, except that in that of 1881 a privilege tax of twenty-five dollars per mile per annum was substituted in place of the tax upon the cash value of the shares.

The plaintiff further alleged that the defendant had failed to make the returns required by law and to pay any of the taxes imposed by said statutes, and prayed that the defendant be compelled to make the required return of statements and pay the taxes which shall be ascertained to be due.

The defendant, admitting that the statutes referred to in the complaint were correctly cited, denied that they had any applicability to it.

The plaintiff demurred to the answer. The court sustained the demurrer and gave judgment against the defendant, and the defendant appealed.

Attorney-General and *John W. Graham*, for plaintiff.
Messrs. Merrimon & Fuller, for defendant.

ASHE, J. The plaintiff, by his action, seeks to subject the defendant corporation to the payment of certain taxes alleged to be due and owing by defendant for the years 1877, 1878, 1879 and 1880, under the following provisions of the act of 1876–'77, ch. 156, schedule C, §1, and similar enactments till 1881:

1. "Every railroad or canal company incorporated under the laws of this state, and not liable to a tax upon the property of said company, or the shares thereof, shall pay to the state a tax on the corporation equal to the sum of one per cent. upon the gross receipts of said company."

2. Every railroad and canal company incorporated under the laws of this state and doing business herein, and not liable to a

tax upon the property of said company, or the tax before mentioned in this section, shall pay a tax of one per cent. upon the actual cash value of every share of its capital stock, and the tax of twenty-five dollars per mile per annum as a privilege tax, for the year 1881, required by the act of 1881, chapter 70, schedule C, section 1, to be paid in lieu of the last tax.

In the charter of this company there is the following exemption: "All machines, wagons, vehicles and carriages purchased as aforesaid with the funds of the company, and all their works constructed under the authority of this act, and all profits which shall accrue from the same shall be vested in the respective shareholders of the company forever, in proportion to their respective shares, and the same shall be deemed personal estate, and shall be exempt from any public charge or tax whatever."

It is a very broad and sweeping exemption, and from the long acquiescence of the public authorities of the state in its observance, it was thought, no doubt, by the corporators to be an exemption from every species of burden upon any taxable subject connected with the corporation. But the legislature has seen proper to pass the act imposing a tax on the corporation equal to the sum of one per cent. upon the gross receipts of the company.

The franchise of a corporation, its capital stock, its property consisting of land, machinery, &c., the shares of the stockholders, and the dividends or profits accruing from the management of the property of the corporation, are all severally the subjects of taxation; and a tax upon a corporation can only be effected by imposing it upon some of these subjects; as, for example, a tax upon the property or the capital stock. When the tax is imposed directly upon the corporation, it must be a franchise tax. It is not a tax on capital stock, nor individual shares or profits, nor upon gross receipts, for that is here made the measure of the tax. Cooley on Taxation, 303.

It is held in *Commonwealth* v. *Lowell Gas Light Co.*, 12 Allen, 75, that a tax on a corporation of a certain percentage upon the excess of the value of its capital stock over and above the value

of its real estate and machinery, is a tax upon the franchise. Whenever a tax, as here, is imposed upon a corporation directly by the legislature and is not assessed by assessors, and the amount depends on the amount of business transacted by the corporation, and the extent to which it has exercised the privileges granted in its charter, without reference to the value of its property or the nature of the investments made of it, it is a franchise tax. Burroughs on Tax., 169. To the same effect is *Attorney-General* v. *Bank of Charlotte*, 4 Jones' Eq., 287.

If this, then, is a tax on the franchise, the defendant is not liable to the tax. In *Railroad* v. *Reid*, 13 Wall., 268, it is held that a franchise is *property*, "and of the most valuable kind, as it cannot be taken for public use, even with compensation"; and in *Railroad* v. *Commissioners*, 81 N. C., 487, this court held that the *property* of this defendant corporation was exempt from taxation under the provisions of its charter.

The plaintiff insists that if not liable for the tax to be measured by the gross receipts, it is liable under the other provision of the act of 1876–'77, for the tax of one per cent. upon the actual cash value of every share of its capital stock to be paid to the treasurer of the state.

This tax, like the last, is not to be assessed by assessors, but is required to be paid to the treasurer of the state upon a computation made by him upon a statement rendered by the treasurer of the company of its assets and liabilities, and is, upon the authorities cited, a franchise tax, to which, as we have shown, the defendant is not liable.

But there is another ground upon which the defendant escapes liability to this tax. It is imposed upon the actual cash value of every share of its capital stock. It is not a tax upon the capital stock, but a tax upon every *share* of the capital stock. The capital stock and the shares of the capital stock are very different, and each is the subject of distinct taxation. Capital stock is the amount subscribed, and the shares of capital stock are the integral parts of the capital stock, and are owned by the members in

proportion to the respective amounts subscribed. Burroughs on Taxation, §83.

By the charter of incorporation all the property of the corporation is vested in the *shareholders* of the company in proportion to their respective shares, and is exempted from any public charge or tax; and where there is a general exemption of the property of a corporation from taxation, its effect is also to exempt its stock in the hands of the stockholders. *Gordon* v. *Appeal Tax*, 3 How. U. S. Rep., 133.

The plaintiff further insists that the company is liable for the tax of 1881 of twenty-five dollars per mile on its road lying in this state, under the clause in schedule C, section one, of the act of 1881, which provides that "Every railroad and canal company incorporated under the laws of this state and doing business herein and not liable to a tax upon said company, or the tax before-mentioned in this section, shall pay a privilege tax of twenty-five dollars per mile per annum to the treasurer of the state for its use, on the first day of July, 1881, and each year thereafter."

This, like the other taxes imposed in this section, is a franchise tax. It is paid directly to the treasurer, without any assessment by assessors, and is to be estimated by the length of the road. Besides, it is a privilege tax, and every privilege tax must be a tax on the franchise; for a franchise of a private corporation, in its application to a railroad, is the *privilege* of running it and taking fare and freight, *Railroad* v. *Reid*, 13 Wall., 264; and being a tax on the franchise, the company, by the authority of the decision in that case, has the right to claim immunity from the tax; and this immunity having been derived from a contract with the state, is secured against invasion by the constitution of the United States.

But the defendant is also protected against the enforcement of these taxes by the constitution of this state.

In every enlightened government founded upon principles of justice and liberty, it is, or ought to be, a fundamental principle,

that in the imposition of taxes for the support of the government, the rules of equality and uniformity should be strictly observed; for such burdens imposed by any other standard must inevitably work oppressively upon some portion of the citizens. Hence it is that, so far as we have examined, this principle, announced in varying terms, has been incorporated in the constitutions of the several states of the Union. The principle was evidently in the contemplation of the framers of our state constitution when they framed that instrument. In article five, section three, it is provided that all real and personal property shall be taxed according to its true value in money, and all moneys, credits, investments, stocks and joint stock companies, by *a uniform rule;* and while in the same section it is declared that the general assembly may also tax trades, professions, franchises and incomes, without mentioning by what standard, it must be presumed that the same rule of uniformity was intended to apply to them. Such is the construction given by this court in the case of *Gatlin* v. *Town of Tarboro*, 78 N. C., 119, and in the case decided at this term of the court, *Worth* v. *W. & W. Railroad*, *ante*, 291, where it is held, that the rule of uniformity was violated by the legislation contained in schedule C, section one of the act of 1876–'77, because one species of tax is imposed on one railroad company and different species of taxes upon other railroad companies, the "uniform rule" requiring that all persons and corporations (for corporations for the purpose of taxation are persons) of the same class should be taxed without discrimination. Judge COOLEY, in his work on Taxation, speaking of a license or privilege tax as being essentially of the same nature, says: "It cannot be said to be unequal because reaching one occupation only, if it is to reach all who follow that. Let it reach all of a *class*, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in one particular locality or are scattered all over the state?"

And in Burroughs on Taxation it is laid down that when the provisions (of a constitution) are held to apply to privileges, the tax is held to be invalid, unless, as in the case of property, it

extends to the whole state or district, and applies to all of the *class* to which the tax applies.

But the main objection to the constitutionality of these statutes founded upon a violation of the rule of uniformity is, that the taxes imposed upon the corporations designated in schedule C are to be assessed by a different mode of assessment from other corporations in the state of the same class not mentioned in the schedule.

The provision in our state constitution, with regard to equality and uniformity of taxation, was copied from the constitution of Ohio; and in that state it has been held that "taxing is required to be by a uniform rule, that is, by one and the same unvarying standard. Taxing by a uniform rule requires uniformity not only in the rule of taxation, but also uniformity in the mode of assessment upon the taxable valuation. Uniformity in taxing implies uniformity in the burden of taxation, and the equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of taxation. *Bank of Columbus* v. *Hines*, 3 Ohio St. Rep., 1.

Before concluding this opinion, it may be proper to observe that we have not overlooked the act of 1881, ch. 116, repealing all exemptions of taxation contained in acts of incorporation granted before or since the 4th of July, 1868.

This act could not have the effect of subjecting this corporation to the taxes imposed prior to the passage of the act. Such a construction would be giving to the repealing act a retroactive operation, and would have the effect of impairing, by relation, the obligation of the contract with the state, and interfering with the vested rights of the corporators. The general rule, well established in the construction of statutes, is, that they are not to have a retroactive effect so as to impair previously acquired rights. Potter's Dwarris Statutes, 169, note 9, and authorities there cited.

But the act of 1881 would have had the effect of subjecting the corporation to the tax of twenty-five dollars per mile, pro-

vided in schedule C of that act, except for the constitutional objection hereinbefore discussed and decided.

Our opinion is the demurrer cannot be sustained, the judgment of the superior court is reversed, and the defendant recovers costs.

Error. Reversed.

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*J. M. WORTH v. SEABOARD & ROANOKE RAILROAD COMPANY.

Taxation—Railroads.

See Syllabus in preceding case.

CIVIL ACTION tried at January Term, 1882, of WAKE Superior Court, before *Gilmer, J.*

The plaintiff's demurrer to the defendant's answer was sustained by the court, and the defendant appealed.

Attorney-General and *John W. Graham*, for plaintiff.
Mr. David A. Barnes, for defendant.

ASHE, J. The facts and the pleadings are so identical with those of *Worth* v. *Petersburg Railroad Co.*, *ante*, 301, that we deem it unnecessary to go into an extended view of the case. To do so would only be to reiterate the opinion expressed in that case. We therefore refer to the opinion in that case as our decision in this case. For the reasons there given, the demurrer in this case must be overruled. Judgment of the court below reversed, and costs awarded to defendant.

Error. Reversed.

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*Chief-Justice SMITH did not sit on the hearing of this case.

PHIFER & McBEE v. CAROLINA CENTRAL RAILWAY COMPANY.

Railroads—Common Carriers—Negligence—Damages—Bill of Lading, stipulations in.

1. A stipulation in a bill of lading, given by one of an associated through line of common carriers to transport goods beyond its own line, to the effect that if damage to the goods be sustained by the shipper, that company alone in whose custody the goods were at the time of the loss shall be answerable, is a reasonable one and consistent with public policy; and the shipper who accepts it is bound by its terms and conditions, whether he reads it or not.
2. *Quære*—As to the extent of liability of common carriers by sea, and how far the same has been modified by act of Congress, which exempts the owner of a vessel from responsibility by reason of fire on board ship, unless caused by the negligence of such owner.
3. The stipulation for exemption from responsibility must be just and reasonable in the eye of the law, and hence it is not lawful to so stipulate for the negligence of the carrier or its agents.
4. The facts of this case do not show a copartnership, but merely an association between the lines of road—each undertaking to transport freight safely over its own road and to act as an agent in forwarding the same to the next connecting road.

(*Lindley* v. *Railroad*, 88 N. C., 547; *Phillips* v. *Railroad*, 78 N. C., 294, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of LINCOLN Superior Court, before *Graves, J.*

The defendant appealed from the judgment of the court below.

Messrs. Wilson & Son and *B. C. Cobb*, for plaintiffs.

Mr. W. P. Bynum, for defendant.

SMITH C. J. The plaintiffs, in the month of September, 1880, placed in the custody of the defendant company at Lincolnton, for transportation over its and the associate roads and line of steamers, forming what is known as the "Seaboard Air-Line," and delivery to Hopkins, Dwight & Co., consignees at New York, in different lots, eighteen bales of cotton, taking at each time receipts or

bills of lading, of one of which the following is a copy, the others in all essential respects being similar:

CAROLINA CENTRAL RAILWAY COMPANY,
LINCOLNTON, N. C., September 25, 1880.

Received of Phifer & McBee, for transportation at company's convenience, as per marks and directions herein given, subject to the conditions stated upon this receipt, and to which, by the acceptance thereof the shipper assents, the following described bales of cotton:

MARKS.	NUMBERS.	WEIGHT. Shippers.		CONSIGNEE AND DESTINATION.	NUMBER OF BALES.
M.		Road not responsible.	Copy.	Hopkins, Dwight & Co. New York.	Twenty-three
D.					23 B C

To be shipped *via* S. A. L.
At through rate of $2.90 per bale.

—— ———, Agent.

On the reverse side of the receipt, among other printed conditions, was one in these words:

"It is further stipulated and agreed that in case of any loss, detriment or damage done to, or sustained by, any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage; and the carrier so liable shall have the benefit of any insurance that may have been upon or on account of said goods."

"NOTICE.—In accepting this bill of lading, the shipper or other agent of the property carried expressly accepts and agrees to all its stipulations, exceptions and conditions."

It was shown and not controverted on the trial (if indeed such is not admitted in the paper bearing the signature of the respective counsel and set out in the transcript) that the goods were safely carried over the road of the defendant and delivered to the company whose road next connects with that of the defendant, and forms part of the line of the associated companies designated by the initial letters "S. A. L." on the receipt, and that thence they were also safely transported and delivered to the Old Dominion Steamship Company, the last link in the chain of communication, and were burned while on board of one of its steamers.

The complaint, containing two causes of action, charges in the first that the defendant, as a common carrier, for a valuable consideration contracted to carry the cotton from Lincolnton to New York over its own and the lines of other companies, using the latter as agencies of its own for this purpose; and in the second, that the defendant, as one of a partnership association of common carriers, formed by itself and the Raleigh & Augusta Air-Line Railroad, the Raleigh & Gaston Railroad, the Seaboard & Roanoke Railroad and the Old Dominion Steamship Company, and constituting the SEABOARD AIR-LINE, on behalf of all undertook and agreed to convey the cotton safely along and over the entire route to its terminus in New York.

One of the plaintiffs testified to his having accepted the bill of lading after learning the charge of carriage, but did not read it nor give assent to its conditions, except by accepting it, and did not know what they were until after the cotton was burned.

One M. Duke, for the defendant, stated that he made no contract for transportation other than in the bill of lading, and that when the first one was taken out by the plaintiff McBee, witness asked him if he had read it, to which he replied: "No, he had not; it was no use, as he would never get his pay, as it did not

amount to anything any way," and that the plaintiff had filled up one of the blanks in his own handwriting, as he had before in the bills issued to others. It is needless to set out more of the evidence in the view we take of the appeal.

In whichever capacity the defendant entered into the contract of carriage, assuming an individual or partnership obligation, it is outside of the common law liability attaching to common carriers over their own lines, and has its force in the terms and conditions of a special contract, and the plaintiffs must abide by such of them as are reasonable in themselves and not repugnant to public policy.

The condition entering into the contract, and to which the plaintiffs acceded by receiving the bill of lading, and to which their attention is called by an entry on the face of the paper is, that in case of loss the plaintiffs will look alone to the carrier to whose negligence the loss is owing for compensation in damages. The plaintiffs accept this condition, which places them in the same relations towards the separate carriers, associated to form a through line, and relieve shippers of the necessity of having forwarding agents at each connecting point with increased expense, delay and annoyance incident thereto, as if no such connection had been made among the several companies. In the latter case the shippers would be compelled to seek redress from the carrier in default, and the same remedies are reserved to them against the several companies united in forming a continuous line. Such an arrangement secures manifest advantages to shippers, and it does not seem to us unreasonable that they should be required to hold each carrier only responsible for loss from its negligence and omissions and not one for another, and this is all that the clause recited undertakes to accomplish. It is not a case of notice, but of contract; and the cases wherein the controversy has been, whether it has been brought to the knowledge of a party sending off his goods or not, have no application, since transportation is undertaken on the face of the receipt, "subject to the conditions stated upon this receipt" and contained on the reversed side.

None of the stringent liabilities imposed by the common law are relaxed, and no company in the association is, by this provision, absolved from them, where, by remissness or negligence of its own, detriment has come to the goods in its custody and care. Its only effect is to protect each from the consequences of the acts and neglects of the others, when it has faithfully performed its own individual duty. The agreement with the shipper is to convey over its own road and deliver to the next in connection, and thus each one receiving stipulates to do, until the delivery to the last, and for these advantages he agrees to look only to the one in default for redress.

Such was the undertaking in the bill of lading issued to the plaintiff in *Lindley* v. *Railroad*, 88 N. C., 547.

Is, then, this provision consistent with public policy and valid? If it is not, and the same liability which the defendant incurs in conveying goods over its own road attaches to it still until the goods arrive at the point of destination and then only ceases, the plaintiffs can recover; if not, they fail in the action.

We do not propose to inquire to what extent the liability of common carriers by sea has been modified by the act of Congress, which exempts the owner of vessels from responsibility for loss "by reason or means of any fire happening to or on board the vessel, unless such fire is caused by the design or negligence of such owner," U. S. Rev. Stat., §4282; nor whether the burden of showing that the fire was not the result of design or neglect rests upon the owner who seeks exculpation under its provisions. This question will arise if an action be brought against the steamboat company, but its solution is not pertinent to the present inquiry.

We are clearly of opinion that such limitation is both lawful and reasonable; perhaps indispensable to the formation of long through routes of transportation, which so greatly promote the public convenience. In the absence of such extended lines the shipper would be forced to provide forwarding agencies at all connecting points, which, in the association, constituent com-

panies themselves undertake for him, without impairing any of his just rights to hold each successive carrier up to the full measure of its responsibility.

It is well settled that no conditions in a common carrier's bill of lading can be allowed to exempt it from liability for losses occasioned by the negligence or mismanagement of its own servants and employees; for protection against such injuries is a duty inseparable from their occupation as public agencies. This responsibility cannot be avoided, and a stipulation to this effect will not be enforced against such as may require their services, even when by reference inserted in the contract of transportation, the parties to it in this respect not standing upon equal footing.

Amidst varying adjudications upon the extent to which common carriers may limit their liabilities by special agreement, we are disposed to accept the guidance of those made in the supreme court of the United States, not only because of the great learning and ability of the judges who constitute it, but that there ought to be uniformity in the law and its administration in all the states, and inter-state and local commerce ought to be settled upon a permanent and well understood basis. We shall, therefore, seek instruction from that source to aid in arriving at a satisfactory conclusion as to the question now before us.

Mr. Justice FIELD remarks in reference to such special limitations: "Where such stipulation is made and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement." *York Co.* v. *Railroad*, 3 Wall., 113.

So in *Railroad* v. *Manufacturing Co.*, 16 Wall., 328, Mr. Justice DAVIS says: "Whether a carrier, when charged upon his common law responsibility, can discharge himself from it by special contract is not an open question since the cases of *Navigation Co.* v. *Bank*, 6 How., 344, and *York Co.* v. *Railroad*, 3 Wall., 113. In both these cases the right of the carrier to restrict or diminish his general liability by special contract, which does not cover losses by negligence or misconduct, received the sanction of this court."

After a full and elaborate examination of the authorities, Mr. Justice BRADLEY announces the result in these words:

1. "A common carrier cannot lawfully stipulate for exemption from responsibility where such exemption is not just and reasonable in the eye of the law.

2. "It is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his agents."

In reference to such a provision as that relied on as a defence to the present action, the court use this language in *Railroad* v. *Manufacturing Co.*, *supra:*

"It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country; but the rule that holds the carrier only liable to the extent of his own route and for the safe storage and delivery to the next carrier, is in itself *so just and reasonable that we do not hesitate to give it our sanction.*"

But we are relieved from the necessity of a prolonged discussion of the matter by a recent decision in a case so appropriate to our own, that we shall refer to it in some detail—*Myrick* v. *Railroad*, 107, U. S. Rep. 102:

The plaintiff delivered to the defendant a corporation formed in Michigan, the *termini* of whose road were at Chicago and Detroit, a lot of cattle to be conveyed to Philadelphia, in order to which they had to pass over other connecting roads. The bill of lading which he took was in the following form:

MICHIGAN CENTRAL RAILROAD COMPANY.

CHICAGO STATION, Nov. 7, 1877.

Received from Paris Myrick in apparent good order, consigned order Paris Myrick; notify J. & W. Blaker, Philadelphia, Pa.

ARICLES.	WEIGHT OR MEASURE.
Two hundred and two (202) cattle.	250,000.

Advance charges $11.00. Marked and described as above (contents and value otherwise unknown), for the transportation by the Michigan Central railroad company to the warehouse at ———. WM. GEAGAN, Agent.

On the margin was this:

"NOTICE.—See rules of transportation on the back hereof. Use separate receipts for each consignment."

On the back were the printed rules, of which the eleventh was in these terms:

"Goods or property consigned to any place off the company's road, or any point or place beyond the *termini*, will be sent forward by a carrier or freightman, where there are such, in the usual manner, the company acting, for the purpose of delivery to such carrier, as the agent of the consignor or consignee, and not as carrier."

"The company will not be liable or responsible for any loss, damage or injury to the property after the same shall have been sent from any warehouse or station of the company."

The default imputed was in the wrongful delivery of the cattle after their arrival in Philadelphia, and the circuit court was asked to charge the jury that, as the road of the receiving company terminates at Detroit, the defendant was not bound, in the absence of a special contract, to transport the cattle beyond such terminal point, and that the receipt of freight for a point beyond, and an agreement for a through freight did not of themselves establish such a contract.

This was refused, and the jury were directed that the receipt, termed a bill of lading, under the circumstances in which it was made, was a through contract, whereby the defendant agreed to transport the cattle named in it from Chicago to Philadelphia.

For this assigned error, the case was removed to the supreme court and the ruling reversed.

Delivering the opinion of the court, Mr. Justice FIELD declares the law to be this:

"A railroad company is a carrier of goods for the public, and

as such, is bound to carry safely whatever goods are entrusted to it for transportation within the course of its business to the end of its route, and then deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier, that of a forwarder by the connecting line, that is, to deliver safely the goods to such line, the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for a point beyond its line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it."

The association formed by different carriers of connecting roads for the conveyance of freight along the constituted line, and the apportionment of a single freight charge among them, nothing more appearing, merely imposes upon each the duty to transport safely over its own road and deliver to its successor, and a separate accountability is thus assumed by any one through whose negligence injury may be sustained.

If, indeed, the co-operative association, for a common purpose, should proceed so far as to constitute partnership relations between them and others, based upon a separate liability in each of the constituent members for its own acts and omissions, and not of all the acts and omissions of any one, and this should enter as a stipulation in the contract of the shipper, we cannot see why it should not have all the obligatory force in limiting general responsibility as if the arrangement did not make a copartnership, under the rulings to which references have been made. As the undertaking is for safe carriage beyond the road of the receiving carrier, and outside the obligation imposed by common law, it must, in its nature, be susceptible of such modifications and restrictions as are just and reasonable, and not forbidden by public policy; and such, upon authority, is the condition underlying the contract with the plaintiffs. If any further consideration for the

exemption were necessary, and we think none was necessary outside of the contract itself, it will be found in the increased facilities and lessened expense received by the shipper in the transmission of his goods to a distant destination, requiring several lines to be traversed by means of such an arrangement among the carriers. *Philips* v. *Railroad*, 78 N. C., 294; *Lindley* v. *Railroad*, 88 N. C., 547.

But we do not see in the testimony reported evidence of the formation of a copartnership or of anything more than an association, whereby, for convenience, each undertakes not only to carry over its own road, but to act as a forwarding agency from its *terminus* to the next connecting road, such as existed in the case of *Myrick* v. *Railroad*, *supra*.

If, on the other hand, the defendant assumed the duty and agreed to convey and deliver the cotton in New York, it was by virtue of a special contract, into which entered the element of its non-liability for damage sustained while the goods were in the custody of other companies.

The court erred in permitting the jury to eliminate the provision from a contract of which it formed a part, upon the ground that it was not in force unless read by or known to the plaintiffs, or to one of them, though the receipt upon its face directed attention to the conditions, and it was their own fault if they failed to look at them. Certainly this inattention of the plaintiffs can not change the terms of the agreement to the prejudice of the defendant, and deprive it of a defence under it.

For the erroneous rulings against the defendant the verdict must be set aside and a new trial awarded, and it is so adjudged. Let this be certified.

Error. *Venire de novo.*

JAMES H. AYCOCK v. RALEIGH & AUGUSTA AIR-LINE RAILROAD.

Evidence—Copy of Grant—Landlord's right to damages to land—Railroads, negligence of.

1. A copy of a grant from the register's office, which affirmatively shows that it was issued under the great seal of the state is admissible in evidence, though the registry does not show the impress of the seal, or scroll to indicate it.
2. While the seal in such case may be necessary to authenticate the grant, yet it will be assumed that it was affixed as the law requires.
3. A party, through his tenant, is *prima facie* the owner of the land, in the absence of other evidence, and is entitled to recover damages done to his possessory rights.
4. Where a railroad company permits dry grass or leaves or other combustible rubbish to remain near its track, and the same take fire from ignited sparks emitted from one of its locomotives which had no spark-arrester, and the fire is thereby communicated to the plaintiff's adjoining land, destroying timber, &c.; *Held*, that the injury resulted from the negligence of the defendant company.
5. The negligence is presumed from the facts proved in this case, and the burden is upon the defendant to show that the locomotive was provided with the usual and proper appliances to avoid injury from the escape of burning sparks, and that there was no fault on the part of those managing the train.
6. In such a case, no contributory negligence can be imputed to the plaintiff, the injury being done to land and "the same condition of things" existing.
7. It was negligence to permit the inflammable material in which the fire begun, to remain so near the company's track and liable to ignite from emitted sparks.
8. The defendant company is liable for the consequences of mismanagement of a train in charge of the employees of another company using its track with defendant's knowledge and consent.
9. The suggestion that the complaint does not disclose a cause of action, in that, it does not negative concurring negligence in the plaintiff, has no force; the injury is to land and no agency of the plaintiff could have averted it.

10. Remarks of the court in *Owens* v. *Railroad*, 88 N. C., 502, to the effect that the defendant must show concurring negligence in the plaintiff, approved.

(*Candler* v. *Lunsford*, 4 Dev. & Bat., 407; *Clark* v. *Diggs*, 6 Ired., 159; *McLean* v. *Chisholm*, 64 N. C., 323; *Strickland* v. *Draughan*, 88 N. C., 315; *Ruffin* v. *Overby*, *Ib.*, 369, and cases cited; *Osborne* v. *Ballew*, 12 Ired., 373; *Lamb* v. *Swain*, 3 Jones, 370; *Ellis* v. *Railroad*, 2 Ired., 138; *Herring* v. *Railroad*, 10 Ired., 402; *Scott* v. *Railroad*, 4 Jones, 432; *Anderson* v. *Steamboat*, 64 N. C., 399; *Doggett* v. *Railroad*, 81 N. C., 459; *Durham* v. *Railroad*, 82 N. C., 352; *Troxler* v. *Railroad*, 74 N. C., 377; *Owens* v. *Railroad*, 88 N. C., 502; cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of RICHMOND Superior Court, before *MacRae, J.*

The defendant company appealed from the judgment of the court below.

Messrs. J. D. Shaw and *Burwell, Walker & Tillett*, for plaintiff.
Messrs. Fuller & Snow, for defendant.

SMITH, C. J. This action is to recover compensation in damages for the destruction of timber and other injury done to the plaintiff's land from fire, alleged to have been communicated by sparks escaping from the smoke-stack of an engine running on the defendant's road, in the month of March, 1878. Three issues extracted from the pleadings were submitted to and passed on by the jury.

1. Is the plaintiff the owner of the land described in the complaint?

2. Did the defendant negligently set fire to the timber on the plaintiff's land, and thereby damage the same?

3. If so, what are the plaintiff's damages?

The jury answered the two first inquiries in the affirmative, and, responding to the latter, assessed the damages at three thousand seven hundred and forty dollars.

In order to show title in the plaintiff to the injured land, which was then in possession of one D. N. Cameron, a tenant of the plaintiff under a lease of one year, and at the time of the fire

engaged in making turpentine, he introduced copies duly certified from the registry of deeds of two grants from the state, one dated in February, 1854, and conveying six thousand five hundred acres to J. P. Leak, the other dated in May of the same year, conveying eight hundred and fifty acres to one Freeman, and showed a deed from Freeman to Leak for the latter tract, and then a deed from the latter conveying both tracts to the plaintiff, these being the lands described in the complaint.

The defendant's counsel objected to the admission of copies of the grants, because upon an inspection of the registry, no impress of the great seal of the state and no scroll or figure to indicate its presence were found with the registration. The court overruled the objection and permitted the copies to be read. The exception to this ruling is the first presented in the record that requires examination.

1. The earlier grant, as copied on the register's book, the other differing in this particular only in date, contains the following concluding clause:

"In testimony whereof, we have caused these, our letters, to be made patent, and *our great seal to be hereunto affixed.* Witness, David S. Reid, our Governor, at Raleigh, the 17th day of February, in the 78th year of Independence, and in the year of our Lord one thousand eight hundred and fifty-four.

DAVID S. REID.

By command:

WM. HILL, Secretary of State.

Recorded in the Secretary's office.

WM. HILL, Secretary."

It thus affirmatively appears that the grants were issued under the great seal, and this is shown in the registration. As the purpose of requiring registration is to give notice of the terms of the deed, and this is fully accomplished in the registry, we can see no reason why some scroll or attempted imitation of the form of the seal should be required in addition to the words spoken in the grant. The registry furnishes all the information that

could be derived from an examination of the original, as both utter one and the same language.

2. If in construing the several sections relating to grants and the seal of the state, found in the Revised Code, ch. 53, §18, and ch. 42, §§22 and 24, the seal is necessary in authenticating the grant, it will be assumed to have been affixed, as the law requires, since certified copies, and even abstracts from the secretary's office, not showing the presence of tee seal, are admissible in evidence. *Candler* v. *Lunsford*, 4 Dev. & Bat., 407; *Clarke* v. *Diggs*, 6 Ired., 159; *McLean* v. *Chisholm*, 64 N. C., 323; *Love* v. *Harbin*, 87 N. C., 243; *Strickland* v. *Draughan*, 88 N. C., 315; *Tolson* v. *Mainor*, 85 N. C., 235.

But no harm has come to the defendant by the reception of the copies of the grants, since, under the deed from Leak, the plaintiff was in law in possession through his tenant of all the land therein described up to the boundaries, and, in the absence of other evidence, *prima facie* the owner; and he may recover for all the damage done to his possessory and proprietary rights. *Jackson* v. *Commissioners*, 1 Dev. & Bat., 177; *Ruffin* v. *Overby*, 88 N. C., 369; *Osborne* v. *Ballew*, 12 Ired, 373; *Lamb* v. *Swain*, 3 Jones, 370.

The other exceptions are to instructions asked for the defendant and refused, and to those given to the jury instead, upon the testimony of the witnesses. Without stating the evidence, in unnecessary detail, relating to the origin of the fire, it was shown on the trial that two trains of cars, the latter, if not both, belonging to the Carolina Central raiload company, passed over the track of the defendant's road on the day of the conflagration in the afternoon, and that shortly after the passing of the last train a fire was discovered, some 15 or 20 feet from the end of the cross-ties and on the land appropriated to the defendant for right of way, burning the grass and leaves that were there collected and were dry and inflammable. Efforts were made to put it out that at first appeared to be successful, but the wind fanned the flames until they reached and swept over, with uncon-

trollable fury, from 200 to 300 acres of the plaintiff's land, consuming and injuring the timber thereon and doing great damage thereto.

It was in proof that the last train moving over the road, from which the fire is supposed to have proceeded in ignited sparks falling upon the dry and combustible material near the track, belonged to the Carolina Central railroad company, and was managed exclusively by its officers and agents. There were no business relations between it and the defendant, and it was using the defendant's road on this occasion with its permission, or, in the language of one of the witnesses, "by courtesy."

There was no inquiry made of the engineer of this train, when examined as a witness, and no information extracted from the testimony of any one, as to the careful management of this train on that occasion, or that the smoke-stack of the engine was provided with a sufficient spark-arrester, or other modern appliance, to guard against the emission of large and dangerous sparks, while it was shown that combustible rubbish, consisting of dry grass and leaves, had accumulated near the defendant's track.

Upon this general summary of the testimony, sufficient to present the questions of law involved in the instructions refused and given, though it was full and minute in reference to the first discovery of the fire, its rapid spread and devastation, and the ineffectual efforts made for its suppression, the defendant asked that the jury be instructed:

1. There was no evidence that the fire was caused by the defendant.

2. Nor, if so, by the defendant's negligence; and

3. There was no proof offered of the insufficiency or bad condition of the locomotive, nor of mismanagement or want of due skill and care in the running of the train, and the plaintiff was not entitled to a verdict.

The judge declined so to charge, and directed the jury as follows:

You must be satisfied from the preponderance of the evidence

that the fire was communicated from the passing train, to which running the witnesses have testified; and it is not material whether it belonged to the defendant or to another company permitted to use its track. If the defendant allowed grass or other combustible material to collect and remain near its road-bed on land over which it had a right of way, with other combustible material, thence extending to the adjacent forests and fields, so as to expose them to damage from the ignition of such unremoved inflammable rubbish on its own land, it would constitute negligence in the defendant. If these facts are found, it devolves on the defendant to show that the engine was properly equipped, was provided with usual and proper appliances to avoid doing injury from the escape of burning sparks, and that reasonable precautions had been taken to guard against damage to others; if not thus furnished, and the fire was conveyed from the smoke-stack, and escaping thence through contiguous and continuous dry grass and leaves, to the plaintiff's premises, then there was negligence and the plaintiff should have a verdict.

No point was made in respect to the measure of damages. Upon the return of the verdict and the rendition of judgment the defendant appealed.

The exceptions to the instructions given, negativing those proposed for the defendant, present, in substance, these inquiries:

1. Do the facts proved raise a presumption of negligence to be repelled by the defendant, or was the plaintiff required to go further and show wherein the negligence consists?

2. Was the unremoved combustible matter near the track, in being suffered to remain, negligence in the defendant?

3. Is the defendant responsible for the acts of the officers and agents of the other company operating the train, and using the defendant's road with its knowledge and consent?

4. Was there evidence to warrant the finding that the fire was caused by the passing locomotive?

We are clearly of opinion that there was evidence warranting the conclusion of the jury that the fire was caused by the train

whose passage immediately preceded its discovery, in the absence of any other suggested origin. Without recalling the testimony bearing upon the point, we proceed to notice the other exceptions.

In the early case of *Ellis* v. *Railroad*, 2 Ired., 138, where the action was to recover damages for a fence set on fire and burned by a passing locomotive, the court say, GASTON, J., delivering the opinion: "We hold that where he (the plaintiff) shows damage resulting from their (the defendants') act, which act, with the exertion of proper care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence, which cannot be repelled but by proof of care or of some extraordinary accident which renders care useless."

This rule has been restricted with the subjoined qualification, "things remaining in the same condition," and held not to be applicable to the case of a slave run over while lying on the track by the defendant's train, *Herring* v. *Railroad*, 10 Ired., 402, nor when the injury was done to a straying cow under the attending circumstances, *Scott* v. *Railroad*, 4 Jones, 432, the difference being that the same condition of things did not exist as in the case of injury to land, and, therefore, the principle did not apply.

The same proposition enunciated in the case first cited is asserted by TINDALL, C. J., who says that the law requires of railroad companies, in the exercise of the rights and powers conferred upon them, to "adopt such precautions as may reasonably prevent damage to the property of third persons through or near which their railway passes;" and he adds: "The evidence in this case abundantly shows that the injury, of which the plaintiff complains, was caused by the emission of sparks or particles of ignited coke coming from one of the defendant's engines, and there *was no proof of any precaution adopted by the company* to avert such a mischance. I, therefore, think the jury came to a right conclusion in finding that the company was guilty of negligence, and that the injury complained of was the result of such negligence." *Piggat* v. *Railroad*, 3 Man., Gran. & Scott, 229.

Again, where a barn on the river bank was burned by sparks issuing from the smoke-stack of a passing steamer, which was without a spark-arrester, the injury was held to result from negligence, for which the owners of the boat were liable. *Anderson* v. *Steamboat Co.*, 64 N. C., 399.

There are many cases in which injury has been done to stock that had got upon the track, where the rule laid down by the court in *Ellis* v. *Railroad* would be inapplicable, and it is held that proof of injury done by the defendant was not alone sufficient to warrant a recovery, without also showing negligence in running the train, or want of reasonable precautions to avoid doing the injury. This was corrected by legislation, in which, if the action is brought within six months, the burden of showing there was in fact no negligence, was put upon the company. Bat. Rev. ch., 16, §11, *Doggett* v. *Railroad*, 81 N. C., 459; *Durham Railroad*, 82 N. C., 352.

These cases are unlike the present, since no negligence absolving the defendant from responsibility can be attributed to the plaintiff, for the same condition of things existed previously, where trains had safely, and without injuring the property of others, run over the road, as on the day when the fire occurred, and hence it devolved upon the party causing the damage, and whose means of information are so much greater, to show in exculpation that there was no fault on the part of the officers and agents operating the train on that particular occasion, and that the fire was accidental. We know of no more salutary and just rule to insure care and precautionary prudence in those whose trains are constantly passing over or near the property of others thus menaced with danger, and to afford full and just protection to the latter. The use of a spark-arrester seems to be more urgently demanded in a country where dry pine wood is used in the furnace, the large ignited sparks from which often are blown a distance from the track and more readily set fire to combustible rubbish in which they may fall. There must be less damage from the use of coal, and, therefore, the need of a

spark-arrester the more imperative. And, besides, the peril is greater from this cause in a forest country, the surface of which in early spring is usually covered with leaves and dry vegetation, from which a fire once commenced would rapidly spread, and, perhaps, as in the present case, soon be beyond control.

Our attention was called in the argument to the case of *Railroad* v. *Schurtz*, decided in 1880, and reported in 2 Am. & En. Railroad Cases, 271, and the copious references in the note annexed to it.

The doctrine there announced by GORDON, J., is, "that if reasonable precautions are taken in providing them (the locomotives) with those appliances which are deemed best for the prevention of such damage (from fire communicated), the company, or persons using them, cannot be made liable, though they fire every rod of the country through which they run." Adding: "That the mere fact of the firing of a property will not of itself prove negligence, *where it is shown that approved spark-arresters were in use.*"

A numerous array of cases are cited in the note in support of each side of the question as to the party upon whom rests the burden of proof of the presence or absence of negligence, where only the injury is shown, in case of fire from emitted sparks. While the author favors the class of cases which impose the burden upon the plaintiff, we prefer to abide by the rule so long understood and acted on in this state, not alone because of its intrinsic merit, but because it is so much easier for those who do the damage to show the exculpating circumstances, if such exist, than it is for the plaintiff to produce proof of positive negligence. The servants of the company must know and be able to explain the transaction, while the complaining party may not; and it is but just that he should be allowed to say to the company, you have burned my property, and if you are not in default show it and escape responsibility.

We therefore sustain the judge in this part of his charge.

Again there was negligence in permitting the inflammable material in which the fire began to remain so near the track and

liable to ignite from emitted sparks. *Troxler* v. *Railroad*, 74 N. C., 377; Whart. Neg., §873; Thom. Neg., 162; *Smith* v. *Railroad*, C. C. P., 14; *Salmon* v. *Railroad*, 20 Am. Rep., 366, and note.

The remaining exception is to the charge that the defendant is responsible for the consequences of the negligence of the servants of the Carolina Central railroad company's trains while using its track.

The cases cited in the well prepared brief of the plaintiff's counsel fully sustain the proposition, that the defendant company, leasing the use of its road or permitting the use of it by another company, remains liable for the consequences of the mismanagement of the train in charge of the servants of the latter, and the injury thence resulting, to the same extent as if such mismanagement was the act or neglect of its own servants operating its own train. *Railroad* v. *Barron*, 5 Wall., 90; *Railroad* v. *Mayes*, 15 Am. Rep., 678; *Abbott* v. *Railroad*, 36 Am. Rep., 572; *Railroad* v. *Salmon*, 23 Am. Rep., 214; *Pierce* v. *Railroad*, *Ib.*, 283.

But if this were not so, the failure to remove the heap of dry leaves and grass was a negligent omission of a positive duty which itself creates a liability in the defendant also.

It was suggested that the complaint does not disclose a cause of action, as it does not negative a concurrent negligence in the plaintiff. But this is not a case of concurring negligence conducive to the result. The injury is to the land, and no agency of the plaintiff could have averted the disaster unless he removed all the accumulations of dry grass and leaves from the surface upon which they lay, and this he was not required to do at the peril of losing all redress for the injury directly springing from the defendant's neglect. In a late case, while considering this subject, the court adopted the proposition as a fair deduction from the adjudications, that if, in disclosing the facts which constitute the defendant's negligence, it does not appear whether the plaintiff exhibited the necessary watchfulness and care to avoid the consequent harm or injury, it will be assumed there was no

such want of it on his part; and if the plaintiff in any legal sense were the cause or the concurring cause of his own injury, the duty if so showing in self-exculpation devolves upon the defendant. *Owens* v. *Railroad*, 88 N. C., 502. It was not the plaintiff's duty to do more than prove the injury flowing from the defendant's act or omission; and matter in excuse must come from the wrong-doer.

Upon a calm review of the whole case, we see no error in the ruling of the judge, made matter of exception in the record, and the judgment must be affirmed.

No error. Affirmed.

WILLIAM STANLY v. RICHMOND & DANVILLE RAILROAD COMPANY.

Corporations—Railroads, suits against—Negligence, complaint charging.

1. In a suit against a railroad company, it may be designated as a company by its corporate name, without an averment of its corporate capacity, and if this is disputed, it should be by answer and not by demurrer.
2. The complaint in this case alleging negligence, is sufficiently explicit in the statement of facts constituting such negligence.

CIVIL ACTION tried at Fall Term, 1883, of ORANGE Superior Court, before *MacRae*, *J.*

The plaintiff sues to recover in damages the value of a horse belonging to him, and which he alleges was struck and killed by a train of cars passing over the defendant's road in the month of April, 1882. The complaint charges that this was done negligently at a portion of the road between two designated stations, which ran for half a mile in a straight course on a level surface where there were neither cuts nor embankments. It does not aver the defendant to be a corporate body.

The defendant interposed a demurrer, specifying as the grounds therefor, the absence of any allegation in the complaint of the corporate capacity of the defendant; and secondly, its failure to set out the facts which constitute the negligence, by reason of which defects the complaint does not state facts sufficient to show a cause of action against the defendant.

The demurrer was overruled and the defendant allowed to answer, and from this judgment the defendant appeals.

Messrs. Fuller & Snow, for plaintiff.
Mr. D. Schenck, for defendant.

SMITH, C. J. While the principle seems to be well settled that in actions by corporations of whose existence, or the law of their being, the court cannot take judicial notice, as it must of municipal and public corporations, under our former system of pleading it was not necessary the declaration should aver the plaintiff to be such, there is much diversity in the adjudications as to whether, where the defendant pleads the general issue and denies the right of action, the plaintiff is compelled to prove the corporate capacity in which it sues.

In England and in some of the states, this burden is held to rest upon the plaintiff, and is essential to a recovery, while in many of the states, the defence under such plea is held to be an admission of the plaintiff's existence as a corporate body and to dispense with all proof by it to that point. Ang. & Am. Corp., §§632 and 633, and numerous cases referred to in the notes.

In the case of *Ins. Co.* v. *Osgood*, reported in 1 Duer. (N. Y.), 707, in answer to the objection that the plaintiff's corporate character was not alleged, the court said: "It does not appear on the face of the complaint that the plaintiff is not a corporation. It does not therefore appear that the plaintiff has not legal capacity to sue. Unless that appears a demurrer cannot be sustained, based on that objection."

So where the defendant's counsel insisted that a declaration

describing the defendant as a company without showing whether or not it was a corporation was open to a demurrer, Mr. Justice MAULE said: "There is no positive rule that I am aware of, which requires such a mode of description as the defendant's counsel insists upon in this case, nor is the description which is given at all out of the usual form. *It impliedly amounts to an allegation that the defendant is a corporate body.*" *Wolfe* v. *Steamboat Campany*, 62 E. C. Law Rep., 103.

It seems to have been in the contemplation of the Code of Civil Procedure that while the plaintiff's want of legal capacity, *appearing in the complaint*, to maintain the suit, could be taken advantage of by demurrer, all other objections relating to parties must be made by answer, the answer taking the place of a plea in abatement. §95.

It is difficult to assign any sufficient reason why a corporation suing or sued should be designated by any further description than its corporate name, which does not apply with equal force to a natural person, the only purpose in either case being to point out the party to the action. The appearance and plea to the merits or answer is a concession of the sufficiency of the designation of the person, natural or artificial, and if intended to be disputed it should be under the present practice by answer.

The other assigned cause of demurrer is, in our opinion, equally untenable. Though not stated with accuracy, the complaint alleges negligence in running the train on a straight part of the track with no obstructions to hide the animal from the engineer's view, and striking the horse when proper vigilance and care would have avoided the accident. We do not see how greater particularity could be required in the statement of facts.

There is no error in the ruling, and this will be certified.

No error. Affirmed.

JAMES H. LASSITER v. WESTERN UNION TELEGRAPH CO.

Telegrams, negligence in transmitting—Damages.

1. A stipulation contained in a form used by a telegraph company in its business operations, to the effect that it will not be responsible for mistakes in transmitting unrepeated messages, is a reasonable one.
2. The plaintiff's cotton factor sent to plaintiff the following unrepeated message: "Can get ten and three-eighths for your cotton—answer"; and that delivered to plaintiff contained the word "fourths" instead of "eighths;" and thereupon the plaintiff at once directed a sale of the cotton; *Held*, in an action for damages for loss alleged to have been sustained by reason of the mistake, that the plaintiff is not entitled to recover.
3. In such case, the exemption from liability does not extend to cases where there is gross negligence on the part of the company or its employees.

(Mr. Justice ASHE dissenting.)

CIVIL ACTION tried at July Special Term, 1882, of VANCE Superior Court, before *Graves, J.*

The plaintiff, himself engaged in buying and selling cotton, and having his residence and place of business at Henderson, had consigned a number of bales to J. J. Thomas, his factor and correspondent at Raleigh, with directions to keep him advised of the state of the market, intending to hold the same for an advance in price for cotton of that grade to ten and three-fourths cents per pound.

On June 3d, 1881, the consignee delivered at the defendant's agency in Raleigh, for transmission to the plaintiff, a written message in these words: "Can get ten three-eighths, basis middling, for your cotton. Answer." The message was written upon forms prepared and used by defendant company, at the head of which are printed conditions limiting the company's liability, prefaced with the sentence: "All messages taken by this company subject to the following terms," and a memorandum in large type at the foot, calling attention to the notice and agreement at the top. The condition referred to, so far as material to the present inquiry, is as follows:

"To ward against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeated message, whether happening by the negligence of its servants, or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption of the working of its lines; or for errors in cipher or obscure messages."

Immediately underneath and preceding the writing are the further words: "Send the following message subject to the above terms, which are agreed to."

The message communicated to the plaintiff on the same day varied from that handed in at the sending office in substituting the word "*fourths*" in place of "*eighths*," thus representing the market value to be three-eighths in excess of what it really was and that intended to be conveyed by the sender. Thus changed, the message was transcribed, and on forms also used by the company for deliveries, with a printed notice at the top of which a marginal note on the left side in manuscript, calls attention in these words:

"This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message. Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeated messages. This is an unrepeated message, and is delivered by request of the sender under the conditions named above."

The plaintiff, on receiving the information from his factor, at

once, by telegram, directed a sale, and the cotton was sold on the next day at the price of $10\frac{1}{2}$ cents per pound, the market price having in the meantime advanced to that point. The sum paid by Thomas was for a single transmission of the communication and at the regular charge for one unrepeated. Cotton did, in a few days after the sale, advance to $10\frac{3}{4}$ cents, and the plaintiff demands as the measure of his damages the excess of this sum over that for which the cotton was sold.

It does not appear when, if at all, before bringing his action, the plaintiff expressed his dissatisfaction at the terms of sale, or made complaint of his being misled in giving instructions to sell, by reason of the erroneous communication, at any time, to defendant or to Thomas, before the rise in market value became known to him.

The action begun before a justice of the peace, and, on appeal, retried in the superior court, was defended, and a recovery of any sum beyond that paid for the message resisted on the two-fold ground:

1. That by the express terms of the agreement for this unrepeated message, as understood between the company and both the plaintiff and his agent Thomas, this was to be and is in full compensation; and,

2. The alleged loss does not flow from the act of the defendant, as its legal cause, in any sense that renders the defendant liable for other than nominal damages, even in the absence of the stipulation between the parties.

The court ruled that the plaintiff was only entitled to recover twenty-five cents, the price paid for the transmission of the message, and gave judgment therefor, and for the costs of the action, from which the plaintiff appeals.

Mr. W. H. Young, for the plaintiff.
Mr. M. V. Lanier, for defendant.

SMITH, C. J., after stating the above. While there are cases which with great force question the right of a telegraphic com-

pany, engaged in a form of public service by rules restrictive of the liability incident to its business in conveying messages between remote points, to protect itself from the consequences of gross neglect or unnecessary and inexcusable delay in the delivery of even unrepeated messages (as in *Telegraph Co.* v. *Tyler*, 64 Ill., 168; *Dorgan* v. *Telegraph Co.*, in United States circuit court, southern district of Alabama, reported in 1 American Law Times, 406, and in other cases), as opposed to public policy and in themselves unreasonable, it is established by a great weight of authority, to which we have found but few cases in opposition, that the requirement of a repetition of a transmitted message over the wires to insure its accuracy, and as a condition underlying the company's responsibility for errors in communicating it at an enhanced cost to the sender, as the duplicate is of increased service rendered, is reasonable and proper, and its validity sustained.

The exemption is not, however, extended to acts or omissions involving gross negligence, but is confined to such as are incident to the service and may occur where there is but slight attaching culpability in its officers and employees.

Variations are not uncommon, and are deemed venial in manuscript copyings from an original, and they are much more to be looked for in case where a double translation of a communication has to be made, first into telegraphic signals or sounds and then from these restored to the original language. The electric ticks to be given at one end of the line and to be interpreted and read at the other are not articulate sounds like those of the human voice, and much more liable to be misunderstood; and, then, the individual handwriting of the sender himself and his meaning may be misunderstood. To guard against error from these and other causes to which this mode of conveying intelligence is peculiarly exposed, it is deemed but a reasonable and fair precaution to secure entire correctness that the message should be returned, so that it will be certainly known it has correctly been carried to the person to whom it is addressed, with the added

compensation for its transmission both ways. The cases to this effect are numerous. *Ellis* v. *Telegraph Co.*, 13 Allen, 226; *Redpath* v. *Telegraph Co.*, 112 Mass., 71; *Grinnell* v. *Telegraph Co.*, 113 Mass., 299; *Bartlett* v. *Telegraph Co.*, 62 Maine, 209; *Camps* v. *Telegraph Co.*, 1 Metc. (K. Y.), 164; *Wann* v. *Telegraph Co.*, 37 Mo., 433; *Birney* v. *Telegraph Co.*, 18 Md., 341; *Telegraph Co.* v. *Carew*, 15 Mich., 525; *Sweatland* v. *Telegraph Co.*, 27 Iowa, 432; *Bruse* v. *Telegraph Co.*, 48 N. Y., 132; *Young* v. *Telegraph Co.*, 65 N. Y., 163; *Telegraph Co.*, v. *Fenton*, 52 Ind., 1; *McAndrew* v. *Telegraph Co.*, 84 Eng. Com. Law Rep., 3.

We prefer to reproduce portions of the opinions of some of the eminent jurists, delivered in a few of the cases cited, in vindicating the principle of a limited liability, in place of comments of our own in its support.

In *McAndrew* v. *Telegraph Co.*, *supra*, where the same substantial qualifications were annexed to the sending of all unrepeated messages, and the error in the single message consisted in the substitution of Southampton for Hull, to which the ship was directed to proceed and dispose of her cargo of oranges, and in consequence of which a large loss was sustained in their sale, JERVIS, C. J., quoting the condition, "The company will not be responsible for mistakes in the transmission of unrepeated messages," says: "So far from that being, as my brother BYLES suggests, an unreasonable qualification or limitation of the company's liability, it seems to me to be perfectly just and reasonable that means should be afforded to the company of ascertaining, by repetition, the correctness of the translation of the messages delivered to them for transmission."

CROWDER, J., in the same case remarks: "The public have thus the opportunity of transmitting unimportant messages for a small charge; or, if it be a matter of importance, they may, at a moderate additional charge, have the message repeated, and so obtain a certainty almost of its being transmitted with perfect accuracy."

So WILLES, J., concurring, observes: "If a man wanted to

send a message by the telegraph, which it was important to him should be correctly transmitted, he would naturally repeat it, in order to insure its correctness. Now, the repetition of a message necessarily imposes more labor upon the party sending it, and therefore it is but reasonable that extra labor should be paid for. And it is also reasonable that the company should be paid more for taking upon themselves the risk of insuring the transmission against these accidents which are necessarily incident to a business of this sort."

In *Ellis* v. *Telegraph Co.*, *supra*, Chief-Justice BIGELOW, after pointing out the duties of common carriers of goods and the reasons of policy on which the stringent rule of the common law applicable to them rests, proceeds:

"But the trust reposed in the owner or conductor of a line of telegraph is of a very different character. No property is committed to his hands. He has no opportunity to violate his trust by his own acts of embezzlement, or by his carelessness to suffer others, by means of larceny or fraud, to despoil his bailors of their property. Nor can it be at all times in the power of an operator, however careful or skillful he may be, to transmit with promptness or accuracy the messages committed to him. The unforeseen derangement of electrical apparatus; a breach in the line of communication at an intermediate point, not immediately accessible, occasioned by accident or by wantonness or malice; the imperfection necessarily incident to *the transmission of signs or sounds by electricity, which sometimes renders it difficult, if not impossible, to distinguish between words of the like sound or orthography, but different signification;* these and other similar causes, the effect of which the highest degree of care could not prevent, make it impracticable to guard against errors and delays in sending messages to distant points."

In the later case of *Grinnell* v. *Telegraph Co.*, decided in 1873, GRAY, C. J., and now an associate judge of the supreme court of the United States, distinguishing also between these classes of public agencies, says:

"A telegraph company is entrusted with nothing but an order or message, which is not to be carried in the form in which it is received, but is to be transmitted or repeated by electricity and is peculiarly liable to mistake, which cannot be the subject of embezzlement; which is of no intrinsic value; the importance of which cannot be estimated except by the sender, nor ordinarily disclosed by him, without danger of defeating his own purposes; which may be wholly valueless unless forwarded immediately; for the transmission of which there must be a simple rate of compensation, and the measure of damages for a failure to transmit or deliver which, has no relation to any value which can be put on the message itself." He concludes: "There was no offer at the trial to show any *wanton disregard of duty or gross negligence* on the part of the company or its agents. The offer to prove that there was negligence on the part of the operator in not sending the whole message received, must be understood to mean want of ordinary care. No question, therefore, arises whether the company would be charged by reason of gross negligence, as held in *Telegraph Co.* v. *Gildersleeve*, 29 Md., 282, and suggested in *Ellis* v. *Telegraph Co.*, 13 Allen, 226, 234."

We refer, as sustaining the proposition, also to Abbott's Trial Evidence, 604, and cases cited in note to support the text.

It is unnecessary to consider any other questions which might be suggested, and as what we have said is decisive of the appeal, we forbear the expression of any opinion upon them.

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

No error. Affirmed.

Mr. Justice ASHE dissented ftom the ruling of the court.

BANK OF NEW HANOVER v. BLOSSOM & EVANS.

Practice—Remanding Causes.

Where the transcript of the record fails to set forth facts necessary for the determination of the case on appeal, it will be remanded to the end that the same may be supplied or found by the court below, as the nature of the cause may require. THE CODE, §965.

MOTION to vacate an order of attachment heard at June Term, 1883, of NEW HANOVER Superior Court, before *McKoy, J.*

The motion was denied and the defendants appealed.

Messrs. C. M. Stedman and *D. J. Devane*, for plaintiff.
Mr. Geo. Davis, for defendants.

MERRIMON, J. The record in this action comes before us in a very imperfect and unsatisfactory shape. We have given it much consideration, and are unable to decide the questions sought to be presented by the grounds of error assigned, until the material facts connected with the motion to discharge the attachment and underlying the amendments complained of, shall be admitted or found by the court.

There is set out in the record an affidavit signed by Isaac Bates, that purports to have been filed on the day the warrant of attachment issued, but it likewise appears that there was a contention as to whether or not an affidavit was filed in fact; and if at all, whether or not it was filed at or before the granting of the warrant of attachment. The court failed to find, as it ought to have done, how the fact was.

It is suggested in the record, that an order of publication of the summons as to the non-resident defendant (Blossom) was granted on the 16th day of March, next after the time the summons issued, and such order appears; but it does not appear that

any affidavit, at all events any sufficient affidavit, to authorize such order was filed; nor does it appear that there was any order of publication of notice of the attachment at any time; nor does the order of publication, entered in pursuance of the order of the court extending the time of publication, embrace any notice of the attachment; nor does it appear that any publication of the summons or notice thereof, or notice of the attachment was made at any time.

This court cannot find the facts: it has no authority to do so. In such a case, it is the duty of the superior court to find the facts upon which its orders and judgments rest, and to set them forth in the record. This is necessary to the orderly course of procedure. The record is not regular or complete without such findings, and upon appeal to this court, it is indispensable. How it may turn out in this case, we do not venture to say; but it sometimes happens that important rights are impaired or lost by neglect or inadvertence in setting forth the essential parts of the record.

All this court can do, and what it must do in this case, with a view to justice, is to remand it, to the end that the facts may be found by the court; and it may make such orders and amendments as it may deem just and proper, and put the case in such shape as that, if need be, errors may be corrected upon appeal. This court has power to remand for such a purpose, and we find it necessary to do so in this case. THE CODE, §965. This section enlarges the powers conferred by Revised Code, ch. 33, §17, so as to dispense with distinctions between law and equity, and to embrace all cases, whatever their nature.

Let the case be remanded and this opinion certified to the superior court according to law.

PER CURIAM. Remanded.

MIBRA GULLEY and others v. E. O. MACY, Administrator, and others.

Reference and Referee—Costs.

1. The court will not set aside a report and order a rereference upon the ground of informality, where the report furnishes the information required.
2. In a case like this, the court is vested with discretion in the matter of allowing costs, under THE CODE, §527: each party is ordered to pay his own, and each to pay one-half of the allowance to the referee.

CIVIL ACTION heard upon exceptions to a referee's report at October Term, 1883, of THE SUPREME COURT.

This cause was first tried at fall term, 1878, of WAKE superior court, its purpose being to set aside certain proceedings in the probate court, in which the defendant administrator had obtained a license to sell the real estate of his intestate for assets to pay debts. See 81 N. C., 356.

The judgment being reversed upon appeal, it was tried again at spring term, 1880, of said court, and, upon appeal, a *venire de novo* awarded. See 84 N. C., 434.

And it was again brought to this court by an appeal from the judgment rendered at fall term, 1881, of said court, and the clerk here was ordered to state the account and report, and the cause was retained for further directions. See 86 N. C., 721.

Upon the coming in of the report, exceptions were filed by the defendants and the case was argued by

Messrs. Argo & Wilder and *A. M. Lewis & Son*, for plaintiffs.

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

MERRIMON, J. We think that the report of the clerk of this court substantially and sufficiently complies with the order of reference entered at February term, 1882. His findings of facts

are not so formal and orderly as they might have been made; but they supply the information required by the court.

The court will not set aside a report and order a rereference when that made, however informal, furnishes the information required.

The clerk finds the sum of money paid by the defendant Allen on account of the land purchased by him; the condition of the land in January, 1872, when said Allen took possession of and began to cultivate it; he makes an allowance of one year's rents for the improvements said Allen placed upon the land, and fixes the yearly rental thereof at one hundred dollars; and states the account upon the basis of his findings.

He does not find what sum of money the plaintiff Mibra Gulley paid on account of the land, as the order of reference required him to do; but she does not except to the report, and we must take it that she is satisfied.

Only the defendant Allen excepts to the report. He files sundry exceptions thereto.

After a patient examination of the voluminous testimony reported, and due consideration of the whole matter embraced by the exceptions, we think that no one of them should be sustained, except the third one. As to that, we are of opinion that the allowance for improvements, whether they were strictly such as are termed permanent improvements or not, is not sufficient. The clerk allowed in the report only the rents for the year 1873. To that must be added the rents for the years 1874 and 1875.

In all other respects, the report must be confirmed. The clerk will correct the account stated by him so as to make it conform to this opinion; and that done, a decree will be entered in accordance with the former and present opinions of this court in this case, declaring and settling the rights of the parties. It is so ordered.

SMITH, C. J. This action, as disclosed in the complaint, was instituted upon an allegation of an equitable estate acquired by

purchase made by the plaintiff Mibra for herself for life and the other plaintiffs, her children, in remainder, and to annul the proceedings prosecuted by the defendant Macy as administrator of the intestate, Thomas C. Nichols, for the sale of his lands, under which the defendant Allen bought and received a deed therefor.

The proceedings have been, for irregularities and other causes, adjudged void, and it was declared that while the equitable estate in the land conveyed to the defendant Thompson with a parol proviso for redemption, vested in the intestate, it was chargeable with the purchase money paid by said Allen and used in the payment of the intestate's debts by the administrator, to the rights of which creditors so paid he is entitled to be subrogated, and also with the value of the money advanced by said Mibra in redemption of said land.

The result is that the equitable estate in fee was vested in the intestate, and liable to be sold and converted into assets for the payment of his debts; and is now moreover incumbered with the moneys advanced by the plaintiff Mibra for herself and children, and also those paid by the defendant Allen and used in a due course of administration. There has, then, been no recovery of the land by the plaintiffs, within the meaning of section 276 of the Code of Civil Procedure, but the case falls within the scope of section 278, wherein costs may be allowed or not, at the discretion of the court.

We deem this a proper case to refuse costs to either party and leave each to pay his own, and each one-half of the allowance to the referee.

PER CURIAM. Judgment accordingly.

A. J. HALCOMBE v. COMMISSIONERS OF HAYWOOD.

Action dismissed or Injunction denied, when not res adjudicata—Counties and County Commissioners.

1. An action dismissed for a cause not involving merits, like a nonsuit, does not deprive the plaintiff of the right to bring a new suit for the same cause of action.
2. The denial of an application for injunction on account of the want of a material averment and sufficient evidence, is no obstacle to granting a second similar application sufficient in form and supported by evidence.
3. Under article seven, section seven of the constitution, the approval of a majority of the qualified voters in a county is not required to enable the commissioners to exercise the power conferred by the legislature of levying a tax to meet necessary expenses—here, the building of a court-house. See *Evans* v. *Commissioners, ante,* 154.

(*London* v. *Wilmington,* 78 N. C., 109; *Edney* v. *Motz,* 5 Ired. Eq., 233; *Jones* v. *Thorne,* 80 N. C., 72; *Mabry* v. *Henry,* 83 N. C., 298; *Roulhac* v. *Brown,* 87 N. C., 1; *Wilson* v. *Lineberger,* 82 N. C., 412, cited and approved).

MOTION for an injunction in a suit pending in HAYWOOD Superior Court, heard at Chambers, before *Avery, J.*

From the order refusing to grant the motion, the plaintiff appealed.

Mr. Fred C. Fisher, for plaintiff.

No counsel for defendant.

SMITH, C. J. The aim of the present action is to arrest the collection of county taxes levied in excess of two-thirds of one per centum upon the valuation of the taxable property in the county of Haywood.

Numerous irregularities are apparent in the conduct of the cause from its beginning to the appeal. The summons issued on December 9th, 1882, and served soon after on the commissioners, is returnable to the term of the superior court held in the

month of May of the year following. The plaintiff on the same day filed in the clerk's office a verified complaint, and five days thereafter what he designates a supplemental complaint, similarly sustained on oath. Upon the presentation of these, used as evidence, before the judge of the adjoining district, he obtained a rule upon the defendants to show cause before the judge of the 9th district on a day and at a place mentioned, why an injunction should not issue to prevent the enforcement of the alleged excessive tax, and meanwhile a restraining order.

On January 8th, 1883, according to notice, the parties appeared before the last named judge, when in answer to the rule, the defendants put in what they denominated a demurrer to the complaint, and an amended demurrer, both in form such, and signed by counsel; the latter of which, as appears from the clerk's certificate, was filed in his office on the 6th day of January.

His Honor, Judge Gudger, being a resident and tax-payer in Haywood, declined to entertain the application for an injunction order, or to act in the premises; and thereupon the plaintiff gave notice, which was at once accepted by defendants' counsel, of a similar motion to be made before *Avery*, J., at Morganton, on the 18th day of the same month, and also for leave to amend his complaint. The temporary restraining order was continued in force until the proposed hearing could be had, and the clerk directed to transmit to him all the papers in the cause bearing upon the matter.

Upon the hearing and reading the affidavits and demurrer with the amendment thereto, the judge sustained the demurrer and vacated the restraining order, taxing the plaintiff with the costs.

From this judgment the plaintiff appealed, but failed to perfect the same, and was allowed to amend the summons and complaint.

The plaintiff sued out on January 20th, what is termed an amended summons against the commissioners, and another two days later against them and one A. J. Herren, a justice of the

peace in the county, which were soon after served, returnable to the same spring term of the court.

The plaintiff also filed what he calls an amended complaint in the clerk's office, verified on January 21st, repeating in substance and almost in words the allegations contained in the former, adding an averment that he had paid or tendered the tax due from himself up to the alleged excess, to-wit: two-thirds of one per cent. on the hundred dollars worth of property.

With this corrected affidavit, after due notice to the defendants, the plaintiff made a renewed application to *Avery, J.*, at Morganton, on February 3d, which was also denied, and the plaintiff appealed.

The case stated does not disclose the grounds upon which the motion was refused, nor have we had the benefit of an argument for the appellees in support and explanation of the ruling.

This is a sufficient narration of the successive steps taken, as shown in the record after the initiation of the suit and before the term of the court to which the various writs issued were to be returned, and when in due and orderly course the pleadings were to be made up and the issues presented.

This collateral pursuit of a restraining order, to procure which proofs by affidavit or otherwise are required (and the pleadings themselves put in on oath may be used as such), seems to have been treated as the cause itself, instead of its incident progressing regularly towards a final result.

It is understood and argued by plaintiff's counsel that the denial of his motion was predicated upon the supposed effect of the previous denial, as being a case of *res adjudicata*. We do not concur in the application of the principle to the facts of the present case. The facts set out in the different affidavits or complaints are not the same: the former failed to show that the plaintiff had paid the tax admitted to be legal, an omission fatal to his claim for relief, as decided in *London* v. *City of Wilmington*, 78 N. C., 109, while the last contains an averment of such payment or offer to pay.

Indeed these are not amendments of the original, since the

judge of the adjoining district had before him only the application for the ancillary restraining order and the evidence upon which it was asked, but he had not jurisdiction of the pleadings or processes in the cause. There are two distinct and independent actions, and the last accompanying complaint, though misnamed, is the statement of the cause of action in it. The rejection of the first does not consequently offer an insurmountable obstacle to the granting of a second similar application supported by sufficient evidence. The authorities to this effect are numerous and clear. High on Inj., §998; *Edney* v. *Motz*, 5 Ired. Eq., 233; *Jones* v. *Thorne*, 80 N. C., 72.

If His Honor made his decision upon the ground that the former adjudication precluded him from entertaining the same motion again, it may have been induced by what is declared in *Mabry* v. *Henry*, 83 N. C., 298; and *Roulhac* v. *Brown*, 87 N. C., 1. These cases do not, however, settle a principle that covers the present, nor furnish authority for the ruling in the court below. In those cases attempts were made to reopen an *adjudication previously made after full hearing upon the merits*, and they were properly rejected.

The ruling does not extend to an application supported by sufficient evidence, when the former rejection was for the want of it. The distinction is between non-action, a refusal on account of deficient necessary evidence, and positive action, a refusal founded upon evidence sufficient to determine the question of right and a decision upon the merits of the proposition. An action dismissed for a cause not involving merits, like a nonsuit, does not deprive the plaintiff of the right of bringing a new suit for the same cause of action.

In *Wilson Lineberger*, 82 N. C., 412, after the overruling of a demurrer to the complaint, the court declined to entertain a motion to dismiss, the complaint being unchanged, because its sufficiency in law was involved in the motion, and this had been decided in the issue raised by the demurrer. Had the demurrer been upheld, and the defects in the complaint pointed and been

removed, it would of course have been exposed to a demurrer also. This is in substance the aspect of the present case. The withholding a restraining order on the first application simply adjudges the *insufficiency of the evidence then offered*, and leaves open the question whether it shall be allowed upon another and better showing, and is not conclusive upon the plaintiff.

The act of 1879, ch. 170, which authorizes the construction of a court-house and the issue of bonds and levy of a tax to meet the expenses to be incurred in section eleven, restrains the exercise by the commissioners of the powers conferred until by means of an election the sanction of a majority of those who may vote shall be obtained. It is averred in the complaint, and we must at present assume this to be true, that no such election has been ordered or held.

But this has been dispensed with by the act of 1883, ch. 7 which went into operation on January 16th, four days before the second suit was begun, and which was perhaps not then known to the plaintiff's counsel. The act authorizes the imposition of a special tax, not to exceed thirty-three and one-third cents on the one hundred dollars in value of property subject to tax, and one dollar on the poll, to be levied annually until a sum sufficient to pay for the building is provided, and requiring the ratio between the property and poll-tax to be observed in all levies made.

The complaint shows that the equation has been maintained, while it denies that any popular vote has been taken: it is not necessary under the last act, and is not required under the constitution, article 7, section 7, which applies to other objects, and not to the "*necessary expenses*" of a county; and most clearly the building of a court-house is a necessary expense for the county. The opinion in *Evans* v. *Commissioners of Cumberland*, decided at this term, *ante*, 154, renders a further discussion superfluous.

There is no error in the ruling of His Honor, and the judgment must be sustained. Let this be certified to the court below.

No error. Affirmed.

W. G. DURANT v. T. A. TAYLOR.

Landlord and Tenant—Jurisdiction.

1. In an action brought in a justice's court by a landlord to recover the crop to secure rent alleged to be due under a contract of lease, the defendant tenant denied the contract and set up title to the land; and it appeared there had been an adjustment of the conflicting claims to the land, and an agreement entered into that the defendant should remain in possession of and cultivate the land upon payment of part of the crop as rent; *Held*, that the relation of lessor and lessee existed under the contract, which is supported by a sufficient consideration.
2. *Held further*, that the justice of the peace has jurisdiction, as the title to the land is not in controversy—the action depending exclusively on the contract. But the defendant is not precluded from setting up title in a proper case, since an estate in land, other than a lease, cannot pass by parol.

(*Riley* v. *Jordan*, 75 N. C., 180; *Foster* v. *Penry*, 77 N. C., 160, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of UNION Superior Court, before *Shipp, J.*

This action was brought to recover a part of a crop grown upon land under an alleged contract of lease. The defendant denied the contract and claimed title to the land.

The evidence for the plaintiff was to the effect that he was the owner of the land, having bought the same from the heirs of Thomas Cureton, deceased; that the defendant had been living on the land for some years, professing to hold under one Wolfe; when the plaintiff entered upon the same after his purchase, the defendant indicted him for trespass, and upon the proposition of Wolfe, the matter was settled by an agreement between the plaintiff and defendant (in presence of several parties named) that the defendant should cause a *nolle prosequi* to be entered in the criminal action and become the tenant of the plaintiff at a rental of one-third of the crops raised upon the land, but this contract of

tenancy was to cease, provided the defendant, within a stated time, exhibited title-deeds covering the land, and if not, the tenancy was to continue. The defendant failed to have the land surveyed and show title, and the plaintiff demanded his rent, which being refused, this suit was brought for its recovery.

The defendant testified that the said contract applied only to seven acres, and not to the whole tract, and that he did not agree to become the tenant of plaintiff, unless he failed to show title, and no time was fixed within which he was required to do so.

There was further evidence on behalf of both parties, but it is not necessary to an understanding of the opinion that the same should be stated.

Under the instructions of the court, the jury rendered a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

Messrs. Hinsdale & Devereux and *Covington & Adams*, for plaintiff.

Messrs. Payne & Vann, for defendant.

SMITH, C. J. This action, begun on the 24th of July, 1882, before a justice of the peace and removed by appeal to the superior court, is for the specific recovery of one-third part of the wheat and oats grown upon land cultivated by the defendant, alleged to be due the plaintiff as rent contracted to be paid him.

The defendant denies the contract, and sets up title to the land in himself, in opposition to any such agreement or liability for the use of the land.

The defendant's appeal raises the question of jurisdiction, as involving an inquiry into the title to land, which, if an element in the controversy, places the case beyond the cognizance of a justice and equally so of the superior court upon the appeal.

The action is given the landlord to get possession of the crops raised by the tenant so as to enforce his lien for rent, and here, as it consists in kind, the plaintiff sues not for the whole, but for

his part. The right to recover depends upon the existence of the relations of lessor and lessee between the parties arising under contract, express or implied, supported by a sufficient consideration, and here alleged to be by express agreement under a compromise of conflicting claims as to the land, by virtue of which the defendant was to remain in possession and cultivate it, paying as rent for the use, the one-third part of the specified crops grown thereon.

There is a sufficient consideration shown in the testimony of the plaintiff to sustain the contract, if entered into (and the finding of the jury established the fact that it was), to warrant the exercise of jurisdiction and to uphold the ruling in proceeding to a final determination of the cause.

In this view, the title to the land, whether in the plaintiff or in the defendant, does not come in controversy, and such inquiry is wholly irrelevant to the issue to be decided. If there was a contract between the parties, by which the one left in possession agrees to pay rent to the other asserting a claim, whether well founded or not, as an adjustment of a pending dispute, the obligation may be enforced and no proof of title in the tenant is admissible to defeat the action. Hence, "the title to real estate" does not come in controversy and oust the justice's jurisdiction. The only inquiry in such case is, was the contract made and had it a sufficient consideration? If this issue is answered in the affirmative the plaintiff recovers, if not, he fails in the action.

The maintainance of the present suit does not stand in all respects upon the same ground as one for the recovery of possession of land instituted in a justice's court, and under the same restrictions as to the formation and termination of a tenant's estate; and yet in the latter it is held unnecessary for a person in possession contracting to hold as lessee or tenant, to go out and re-enter, in order to come under the estoppel created under the contract. *Riley* v. *Jordan*, 75 N. C., 180; *Foster* v. *Penry*, 77 N. C., 160.

While the result of this action depends exclusively on contract,

excluding an examination of the defendant's title as an immaterial matter, it may be unnecessary to say that he is not precluded from setting it up in a proper action, since an estate in land, other than a lease, cannot pass by parol. There is no error, and the judgment is affirmed.

No error. Affirmed.

HENRY DUNKART v. WILLIAM W. RINEHEART and others.

Contract, description in—Parol Proof of identity of property conveyed.

1. A contract, wherein the vendor agrees to sell to the vendee, "any of my black walnut trees, not exceeding fifteen in number, that will girth eight feet six inches in circumference and under ten feet, at two dollars each; and all trees measuring ten feet in circumference and upwards, at two dollars and a half each," giving the right of way across the vendor's land to fell and remove the timber, is sufficiently definite to admit parol proof of the property sold.

2. Where the plaintiff vendee brought an action for specific performance against the vendor and those to whom he subsequently contracted to convey the land whereon the trees were standing, *it was held* competent to inquire whether the vendor had a tract of land on which such trees were to be found; and if he had, the identity of the trees could be ascertained by the terms of description in the contract.

3. *Held further:* If there were more than fifteen such trees on the land, the contract was ineffectual to pass title to any, on account of the uncertainty as to which trees were meant. But in this case, the proof that there were not fifteen trees on the land which answered the description in the contract, removes such uncertainty and establishes the title in the vendee.

(*Farmer* v. *Batts*, 86 N. C., 387; *Young* v. *Griffith*, 84 N. C., 715; *Thornburg* v. *Masten*, 88 N. C., 293; *Breaid* v. *Munger*, *Ib.*, 297; *Radford* v. *Edwards*, *Ib.*, 347; *Blakely* v. *Patrick*, 67 N. C., 40; *Mizzell* v. *Burnett*, 4 Jones, 249; *Green* v. *Railroad*, 73 N. C., 524, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of HAYWOOD Superior Court, before *Avery, J.*

The plaintiff appealed.

Mr. G. H. Smathers, for plaintiff.

No counsel for defendant.

SMITH, C. J. The plaintiff, in the statement of his cause of action, alleges that the defendant Rineheart entered into a written contract with him, for the sale of black walnut trees, in the following form:

"WAYNESVILLE, N. C., February 23, 1881.

"I, William Rineheart, of Waynesville, N. C., agree to sell unto Henry Dunkart, of Asheville, N. C., any of my black walnut trees, not exceeding fifteen in number, that will girth eight feet six inches in circumference, and under ten feet, at $2 each, and all trees measuring ten feet in circumference and upwards at $2.50 each. I also agree to give the necessary right of way through my land to get said timber to public road.

"Received on account of above contract, sixteen dollars.

W. W. RINEHEART."

That Rineheart subsequently contracted to sell the land, whereon the said trees were standing, to one Boyd, and executed a bond to make title when the purchase money was paid, and the interest acquired by him has since been assigned to the defendant McCracken, each of whom, before the sale to Boyd, were informed by the vendor of his contract with the plaintiff and his precedent right to the trees specified therein;

That the defendant Herren claims the said timber by virtue of a purchase from his co-defendant McCracken;

That the defendants McCracken and Herren have entered into possession of the land and are cutting down the walnut trees and threaten to fell and remove all of them, including as well those mentioned in the plaintiff's contract.

The prayer is for specific performance in permitting plaintiff to remove his trees—for damages in the sum of five hundred dollars—for an injunction against interfering with the plaintiff's trees and his possessing himself of them, and for general relief.

The defendants McCracken and Herren alone answer, con-

troverting most of the plaintiff's allegations, and asserting that no reservations are contained in the title bond or in the assignment of the interest of the obligee, and that the plaintiff's contract was not registered when the land was sold to Boyd.

It is unnecessary to set out the specific averments in the answer, for reasons that will hereafter appear.

No distinct issues were submitted to the jury, and the trial proceeded upon the idea that the plaintiff must show his right of recovery as under a general denial, according to the former practice. We pause here to remark that this is not the method of procedure established under C. C. P., and in contravention of a rule adopted by this court at June term, 1871, in reference to jury trials in the superior court. 4 Bat. Dig., 433.

Upon the trial the plaintiff offered to show by oral testimony that the defendant Rineheart had but one tract of land upon which walnut trees of the dimensions specified were growing at the date of his purchase, and this was the same described in the title bond of McCracken, and that upon it there were growing, when the plaintiff bought, not more than ten trees of the required size, and these were of great value.

To this evidence the defendants objected, on the ground that the descriptive words used in the contract to designate the subject of sale were too indefinite to be aided by parol, and, as to the defendants McCracken and Herren, the contract in its terms was too vague to put them on notice. The testimony proposed was ruled out, and the plaintiff excepted.

The defendants further insisted that the complaint did not state facts sufficient to constitute a cause of action against those defendants.

The court intimated the opinion that proof of all the allegations in the complaint, subject to the previous ruling as to admissibility, would not entitle the plaintiff to judgment for specific performance, nor to a recovery of damages from McCracken and Herren, though it might admit a claim for damages against the defendant who undertook to make the sale. In submission to

the opinion expressed, the plaintiff suffered a nonsuit and appealed.

We do not concur in the view of the court that the subject matter of the agreement is not sufficiently defined to admit of being ascertained by extrinsic proof. On the contrary, there are marks in the instrument by which the trees are capable of being found and identified. They are described as belonging to the seller "any of my black walnut trees" not below a given size and limited in number, and license is given to the plaintiff to pass over land of the former, "through my land to get said timber to public road."

The owner thus assumes to dispose of a limited number of trees of a particular kind then growing upon his land, with free access to them for the purpose of felling and removal.

It was certainly competent, then, to inquire whether Rineheart had a tract of land upon which such trees were to be found, the conveyance of which to the public road would be over his land; and if there were but one tract owned by him which fully met these requirements, the identity of the trees could be clearly ascertained by the terms in which they are described. Precisely this the plaintiff proposed to prove and was not allowed. The evidence was not to aid an intrinsic imperfection in the writing, for this is clearly inadmissible, but to find the trees by means of the description contained in it; in other words, "to fit the description to the thing described," and this is the proper office of parol proof. This subject has been carefully considered heretofore, and with a reference to some adjudged cases we refrain from a further discussion. *Farmer* v. *Batts*, 82 N. C., 387; *Young* v. *Griffith*, 84 N. C., 715; *Thornburg* v. *Masten*, 88 N. C., 293; *Braid* v. *Munger*, *Ib.*, 297; *Radford* v. *Edwards*, *Ib.*, 347.

If the evidence showed that there were more than fifteen such trees on the land, as, until the number was fixed upon to which the contract was to apply, the uncertainty as to which specific trees out of the larger number were meant, would prove fatal to the plaintiff's claim to any, according to the decision in *Blakely* v. *Patrick*, 67 N. C., 40.

But this difficulty is put out of the way by the fact proposed to be shown that there were not fifteen trees upon the land at the date of the contract that answered to the description; if so, all were embraced in its terms.

Rinehart makes no defence to the plaintiff's claim to the trees because the purchase money may not have been paid, and any objection of this kind, if available to any one, can only come from him.

We are disposed to think that the property in the trees passed under the contract, and that the intent and understanding of the parties that it should so operate appear upon its face. It is true an executory contract for the sale of growing trees is within the purview of the statute of frauds, *Mizzell* v. *Burnett*, 4 Jones, 249, and it has been held that an executed contract of sale of such, in *contemplation of their removal and conversion into personalty*, need not be evidenced by a written memorial, *Green* v. *Railroad*, 73 N. C., 524, and the present instrument ought to be equally effectual in transferring the title. But be this as it may, the value of the trees and the money paid for their removal or destruction certainly belong to the plaintiff; and he being the party in interest, it would seem, as such, can in his own name sue the wrong-doer for compensation in damages.

There was error in the ruling, and the nonsuit must be set aside and a new trial ordered. Let this be certified.

Error. *Venire de novo.*

TIMOTHY ELY v. BUSH, LIPPINCOTT & CO.

Vendor and Vendee—Mortgage—Statute of Presumptions and Limitations.

1. Where A and B, joint vendors of land, take a mortgage and notes to secure the price, payable to each according to their respective shares; *Held*, that

a payment to A, who is also agent of B, discharges proportionately the debt to each, and a subsequent assignee of B cannot have an application of said payment wholly to A's interest.

2. Where, in such case, there has been a verbal agreement between the vendors and an assignee of the vendee to reduce the debt and change or release the respective liabilities of the parties, which agreement was only in part carried out; *Held*, in an action to enforce the mortgage and collect the unpaid residue of the reduced debt, if there are valid subsisting judgments for the unpaid mortgage debt and the vendee does not deny the liability, the assignee of B cannot insist upon the statute of presumption of payment from lapse of time as to the original debt, nor upon a bar by the act of limitations (C. C. P., §31), as to the reduced debt assumed by the assignee of the vendee.

(*Harshaw* v. *McKesson*, 66 N. C., 266, cited and approved).

CIVIL ACTION to foreclose a mortgage tried at Spring Term, 1883, of PASQUOTANK Superior Court, before *Shepherd J.*

Verdict and judgment for plaintiff; appeal by defendants.

Messrs. J. W. Albertson and *Battle & Mordecai*, for plaintiff.
Messrs. Starke & Martin, for defendants.

SMITH, C. J. In the month of September, 1866, Joseph S. Cannon and Thomas D. Warren, then owning, as tenants in common in unequal shares, a large tract of land, known as the "Great Park" estate, in the counties of Pasquotank and Perquimans, sold and conveyed the same to William Underwood and his wife, Lorena, for the recited consideration of three dollars per acre, and describing the land by definite metes and bounds, as containing by actual survey twenty-eight thousand acres, each warranting the title to his respective share. On the 1st day of August, 1868, the land was reconveyed by the grantees to the grantors, by deed of mortgage, to secure their six several notes, given for the purchase money contracted to be paid, in fact, instead of that mentioned in the deed to the latter, all bearing date and interest from that day, whereof three, each in the sum of $6,400, are payable to the said Joseph S. Cannon in one,

two and three years, and three others, each in the sum of $2,000, are payable in like manner to the said Thomas D. Warren.

In the year 1869, William Underwood and wife, and Joseph Underwood and wife, by their joint deed, reciting that the "Great Park" estate and several other tracts described therein had been bought by the grantors in behalf of and in the exercise of an agency for the Land and Lumber Company, a corporation formed under the laws of this state, conveyed said lands for a nominal consideration to the company. The deed has no specific date, but was proved for registration on the 25th day of September of that year.

To avoid controversy growing out of the execution of the first conveyance, an agreement was, on February 13th, 1872, entered into between the company and the grantors, Cannon and Warren, by the terms of which the latter stipulated to release to the former all claim and title to the land under the mortgage; to surrender their claims on said William Underwood for the purchase money due from him, represented in his several notes, except they retain a draft of his for a portion of it, then in the hands of said Cannon, and to reduce the debt outside of the draft to the sum of $15,665; and in consideration thereof, they are to be relieved of their obligation as to the quantity and title of the land, it having been ascertained that there was a deficiency in the supposed area of the land to the extent of about ten thousand acres; and the company agrees to assume the reduced indebtedness, estimated as of January 1st, preceding, and therefor to give four several drafts, to become due at short intervals, in different sums, the equivalent of $5,000, paid as of that date, but increased by accruing interest to the date of their maturity, and to execute notes for the residue in varying sums, with interest to accrue until they become payable on the 1st day of January of the successive years 1873, 1874, 1875 and 1876.

These notes were moreover to be secured by a deed in trust executed by the company, and conveying the said land; and this and the other written instruments, to carry the agreement into

effect, were to be delivered into the hands of a designated person for surrender to the parties entitled, upon the fulfillment of their several stipulations.

The drafts were drawn and paid to the said Cannon at maturity, and the notes and deed in trust were executed and placed in the hands of the selected holder, but not the release; nor did the said Cannon and Warren, by surrendering the evidences of the indebtedness of said Underwood, or giving a release in order to his discharge, comply with their undertaking in this behalf.

Cannon died in April, 1882, leaving a will and appointing an executor, who has assigned his interest and claim to the fund and the mortgage given to secure it to the plaintiff in the action.

It is stated in the answer, and not denied, that the defendants and their deceased partner, constituting the firm of Cannon, Bush & Lippincott, purchased and acquired the share of said Warren in the land, after the payment of the drafts executed under the compromise agreement. Since which sale the said Warren has died intestate, and no letters of administration have issued upon his estate. The shares held by him were 5-21 parts, and by Cannon 16-21 parts of the whole.

The action was begun on August 31, 1880, and the plaintiff seeks for a judgment of condemnation and sale of the land embraced in the mortgage to satisfy his share, to-wit: sixteen twenty-one parts of the sum of $10,665, the residue of the amount agreed to be taken for the mortgage debt, with interest thereon from January 1, 1872.

The defendant Underwood, in his answer, makes no opposition to the decree for relief.

The foregoing are the material facts gathered from the pleadings and the findings of the jury upon issues submitted to them.

The plaintiff had judgment for the sale of the land for the satisfaction of his share of the sum due under the compromise contract, unless the same was paid before a date fixed in the judgment, and therefrom the defendants interested in the premises appeal to this court.

The exceptions presented in the record and material to be considered will be stated and examined separately.

I. The defendants insist that the assignee's share should be reduced by the full sum of $5,000, and not by his ratable part only, inasmuch as all the fund went into the hands of Cannon.

The appropriation, in our opinion, was a proper and legal appropriation of the payment. The answer states that the purchase was made by the firm after the receipt of the money upon the drafts of Warren's "share or claim against the 'Great Park' estate," according to the adjustment attempted, but not perfected, under the agreement of February, 1872, which, in the absence of the instrument or evidence of the terms of the verbal assignment, we understand to mean the unsatisfied claim resting upon the land due to Warren. This is an application fortified by what is said in the amended answer, that the notes which were to be given were divided between the creditors, the said Warren having his separated from those of his associate, and thus placing them in the hands of the depositary to be delivered under the contract to them respectively, and that *those executed for the benefit of Warren* have been purchased by defendants Cannon, Bush & Lippincott.

The drafts were given for the benefit of both parties, and the money paid in discharge belonged to both, according to their respective interests. As Cannon acted for himself, and as agent of Warren, in making the contract and in taking the drafts, this fund was their common property, when received by either; and the other could call on him for his own share. This demand and right to a distribution of the money among themselves constitutes in no just sense a "share or claim" *against the land*, so as to pass over to the purchasing firm and vest in the surviving members. The money thus received was therefore properly applied in discharge of so much of the general indebtedness as remained, and the land subjected to the assigned part of Cannon held by the plaintiff.

II. The defendants further insist that the statutory presump-

tion of payment is raised by the lapse of time as to the original indebtedness of Underwood, and that assumed by the corporation in place of it is barred by the act of limitations. The answer to this objection is obvious.

1. The debtor, Underwood, in his answer admits that the notes have not been paid in full, while some partial payments have been made.

2. The notes have been reduced to judgment in the circuit court of the United States; two of them at June term, 1870, and the other at the same term in 1872, which, as the case states, are alive and in full force.

3. The action is not to enforce the obligations of the corporation under the contract made by it in February, 1872, but so much of the mortgage debt incurred by Underwood as was agreed to be accepted by the creditors in discharge of the whole, and it is not material to inquire whether the undertaking of the company be, or not, barred by the statute.

4. If the limitations prescribed in the Code be applicable to the transaction, and were available to the other defendants, when not set up as a defence by the debtors, the mortgage is protected by the recognition of the indebtedness on the part of the corporation then owning the land encumbered, by the third clause of section 31 C. C. P., in the payment subsequently made of the drafts.

5. Unless express provisions be made for an earlier foreclosure and sale, when debts are payable in installments, the power of closing the trust is conferred to be exercised upon the failure to pay the last installment, and the forfeiture does not sooner arise, as is held in *Harshaw* v. *McKesson*, 66 N. C., 266.

We see no error in the other exceptions to the rulings of the court in respect to the evidence, and the remarks of counsel, and, indeed, they are not pressed in the argument for the appellants.

The essential defect in the argument consists in a misapprehension of the plaintiff's grounds for relief, as presented in his complaint. The action rests for support wholly upon the indebt-

edness recognized and evidenced by notes in the mortgage of 1868 and the agreement of the company in modifying it in 1872, never perfected by the compliance of either party with its terms, is referred to only as reducing the demand of the plaintiff, he assenting to abide by the reduction then agreed on. Of this the appellants cannot complain, for the value of their equity of redemption in the premises is proportionately increased thereby.

There is no error. Judgment will be entered in accordance with this opinion and the cause remanded.

No error. Affirmed.

J. M. HARDIN v. JESSE RAY and others.

Judge of Superior Court, power of—Judgment rendered after adjournment of Court.

A judge has no power to render judgment after the expiration of the term of court without the consent of parties, except in cases where the law clothes him with jurisdiction at chambers.

EJECTMENT tried on exceptions to a referee's report at Spring Term, 1882, of ASHE Superior Court, before *Avery, J.*

Appeal by defendants.

Mr. D. M. Furches, for the plaintiff.

Messrs. J. W. Todd and *Q. F. Neal*, for defendant.

ASHE, J. The main question presented by the record for our consideration is whether a judge, after the adjournment of court, can render a judgment in a case tried before him at court, without the consent of the parties, it not being a case of which he was by law clothed with jurisdiction at chambers.

This cause was referred to a referee, who filed a report at fall term, 1881. Upon hearing the report of the referee, the excep-

tions thereto, and the argument of counsel, the court overruled the exceptions; and it appearing that a deed executed by the defendant to the plaintiff, under which he claimed title to the land, though absolute on its face, was admitted to have been intended to secure the payment of a sum of money, and the referee having found that a portion of the debt was still unpaid, the court held that the plaintiff was entitled to a writ of possession, and that the defendant Ray would be entitled to a reconveyance upon the payment by him of the unpaid residue of the debt mentioned in the referee's report.

The court announced before the adjournment, that it would be presumed that no objection would be taken to the signing of decrees and orders after the expiration of the term, and that counsel would be expected to submit orders and decrees, as drawn, to counsel appearing on the other side before asking the signature of the judge.

A judgment in favor of the plaintiff, embodying many points not decided by the court, was signed without examination by His Honor, after the expiration of the term and without having been submitted to the counsel for the defendant before the "signing."

The defendants excepted to the judgment, and in the statement of the case on appeal by His Honor, it is stated that the defendants' right to except to the judgment is conceded.

The judgment cannot be allowed to stand. It is reversed and a new trial ordered. Let this be certified to the superior court of Ashe county.

Error. *Venire de novo.*

D. F. KINNEY v. P. F. LAUGHENOUR.

Seduction—Judge's charge.

In an action by a step-father to recover damages for the seduction of his step-daughter, a recovery cannot be had unless the plaintiff had, at the time, the control of her services. Such action arises by the fiction of the law

from the relation of master and servant, and not from that of parent and child; *Therefore*, it was error in the court to refuse to charge that, if the jury should find she was seduced by the defendant while she was away from the house of the plaintiff and not in his service, but in the employ of a third person, the plaintiff cannot recover.

(*Briggs* v. *Evans*, 5 Ired., 16; *McAuley* v. *Birkhead*, 13 Ired., 28; *McDaniel* v. *Edwards*, 7 Ired., 408; *State* v. *Dunlap*, 65 N. C., 288; *Long* v. *Pool*, 68 N. C., 479; *Brink* v. *Black*, 77 N. C., 59, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of DAVIDSON Superior Court, before *Graves*, *J.*

Verdict and judgment for plaintiff; appeal by defendant.

Messrs. J. M. McCorkle and *M. H. Pinnix*, for plaintiff.
Messrs. Watson & Glenn, for defendant.

MERRIMON, J. The plaintiff brought this action to recover damages for the seduction of his step-daughter by the defendant.

The contention of the plaintiff as to the matters involved in the question before this court was, that his step-daughter had been a member of his family ever since she was six years of age, and she had been occasionally absent from his house in the employment of other people as a house servant, a cook, always regarding his house as her home, and when there, helping her mother about her domestic work; and he introduced testimony tending to prove his allegations.

On the other hand, the contention of the defendant was, that the step-daughter, after the age of sixteen years, was not a member of the plaintiff's family; that she left his house and he had no command or control over her; that she controlled herself in all respects—made contracts, stipulated for wages, worked when and where she pleased, received her wages and disposed of them at her pleasure; and that at the time of the seduction, she was in the employment of one Jones, and on her own sole account, and not under the command or control of the plaintiff; and he introduced testimony tending to prove his allegations.

On the trial, the defendant prayed the court to give the jury the following, among other special instructions:

"That if the jury find from the evidence, that Delia Blackburn was seduced by the defendant while in the employment of the witness Jones, or when she was away from the house of her step-father, and while not in his service, the plaintiff cannot recover, although she afterwards returned and was confined at her step-father's house." The court declined to grant the prayer, and the defendant excepted.

It has been repeatedly held, that if a step-father has taken his step-daughter into his family and treated her as one of his household, he can maintain an action for seduction against her seducer, just as her deceased father could do if living; he has the same rights against the seducer that the father would have, if living.

But the step-father must actually stand *in loco parentis* to the step-daughter; she must be living in his family or absent temporarily with his consent, and be under his control. The same right exists in favor of any person who stands *in loco parentis* to the female seduced. *Maguinay* v. *Sandek*, 5 Sneed (Tenn.), 146; *Birney* v. *Kibbe*, 31 Barb., 273; 5 Wait, Act. & Def., 660, 661; Wood Mast. & Servt., §§244, 255, 256.

It has been likewise held that when a step-daughter leaves the house of her step-father and is seduced while in the service of a third person, he cannot maintain an action for the seduction, although before the birth of the child she returns to his house, engages his services and is there nursed and cared for during her confinement. 5 Waits' Act. & Def., *supra*, and Wood's Mast. & Serv., §245.

The action for seduction does not grow out of the relation of parent and child, but that of master and servant and the loss of service. It is true this is a fiction of the law—the common law method established in the course of judicial procedure, whereby the party injured may recover damages for the injury sustained; still, in order to sustain the action, some service, however trivial, must be shown to have been done by the servant, and it must appear that the plaintiff had the right to command and control the services of the female seduced, at his will and pleasure.

Briggs v. *Evans*, 5 Ired., 16; *McAuley* v. *Birkhead*, 13 Ired., 28; *McDaniel* v. *Edwards*, 7 Ired., 408; 3 Waits' Act. & Def., 662; Wood's Mast. & Sev., §§245, 246.

While the step-father may maintain the action for seduction, as stated above, the defendant may show in his defence that the seduced step-daughter was in the service of a third person at the time of the seduction; that she was not residing with the plaintiff at that time; that she then controlled herself, made her own contracts, controlled her wages, and that the plaintiff had no right to command her services. Wait, *supra*, 668.

Now, applying these principles of law to the case before us, and in view of the contentions of the parties and the evidence set out in the record, we think the defendant was entitled to the special instruction prayed for, or the substance of it. There was evidence sufficient to fairly entitle him to have such a view of the case submitted to the jury. The defendant had the right to avail himself of such a defence, and there was evidence tending to support it, the force of which ought to have been determined by the jury in the light of such instruction.

The record gives us a very meagre and unsatisfactory account of the instructions the court gave the jury, bearing upon the question before us now. We must take it, however, as the special instruction was simply denied without a word of explanation, that the substance of it was not given in any part of the charge. The defendant complains and excepts, and we cannot see that his exception is groundless by anything that appears in the record.

When a party to the action prays for a special instruction to which he is entitled, and the court fails to give it, or the substance of it, it is error. The court is not bound to adopt the language or form of the instruction prayed for, but the substance or meaning of it must be given, unimpaired by any material qualification. *State* v. *Dunlop*, 65 N. C., 288; *Long* v. *Pool*, 68 N. C., 479; *Brink* v. *Black*, 77 N. C., 59.

If the party is not entitled to the instruction prayed for, in its

entirety, then, of course, the court will modify it and explain to the jury how the facts bear upon it.

There is error. The judgment must be set aside and a new trial awarded. Let this be certified.

Error. *Venire de novo.*

TOBIAS KESLER v. JOHN W. MAUNEY, Administrator.

Judge's Charge—Witness—Section 590 (343).

1. There is no evidence in this case that the plaintiff mortgagee agreed to give his attention to securing and applying the crops conveyed as an additional security for his debt, and the court below erred in not so instructing the jury.
2. A witness, principal debtor, in an action by the plaintiff against the estate of his deceased surety, is not disabled by THE CODE, §590 (C. C. P., §343), from testifying for the defendant administrator as to what occurred in a transaction between the plaintiff and the deceased, or as to what the deceased swore on a former trial. And the plaintiff, in his testimony in reply, is restricted to the transaction to which the evidence of the first witness was directed.

(*Macay ex-parte*, 84 N. C., 63; *Whitehurst* v. *Pettipher*, 87 N. C., 179; *Murphy* v. *Ray*, 73 N. C., 588; *Knight* v. *Killebrew*, 86 N. C., 400; *Barnhart* v. *Smith*, *Ib.*, 473; *Woodhouse* v. *Simmons*, 73 N. C., 30, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of ROWAN Superior Court, before *Gudger, J.*

Verdict and judgment for defendant. Appeal by plaintiff.

Mr. John S. Henderson, for plaintiff.

Messrs. McCorkle & Kluttz, for defendant.

SMITH, C. J. When this cause was before us on the former appeal, it was held that the defendant, surety to the note in suit, was a guarantor, whose duty it was to see that the debt was paid,

and that the collateral security provided in the mortgage by the principal debtor is made available and applied thereto in the absence of any undertaking on the part of the creditor to do so. 82 N. C., 456.

Since the decision and during the progress of the cause in the court below, the defendant died, and the present defendant, who took out letters of administration on his estate, has been substituted in place of his intestate.

On the last trial two issues were submitted to the jury, to each of which an affirmative answer was returned:

1. At the time of the execution of the note and mortgage, was there an agreement between the plaintiff and the intestate Linker that the plaintiff would attend to the securing of the property conveyed in the mortgage?

2. Was the property conveyed in the mortgage lost or destroyed by the negligence of the plaintiff?

When the evidence was concluded, the plaintiff asked the court to charge the jury that there was no evidence of any agreement between the plaintiff and the defendant's intestate that the plaintiff would attend to the securing and appropriating the fund provided in the mortgage. The instruction was refused, and the plaintiff excepted. This and other exceptions to the rulings in receiving and rejecting evidence are presented for review by the plaintiff's appeal.

The mortgage deed was exhibited in evidence, conveying growing crops of wheat, corn and tobacco to the plaintiff, and in form capable of being at once enforced for the payment of the secured debt.

The mortgagor and principal debtor (Lowder) testified that the plaintiff said, at the time when the note was given, he would like to have a mortgage in addition to the surety, Linker, and that the latter then drew the mortgage; that while preparing the instrument he inquired of the plaintiff to whom the property should be conveyed, and the latter answered, "to me, of course"; that Linker did not say that he himself would give attention to

the mortgage; that the property assigned was ample in value to pay the debt, but no effort was made by the plaintiff to get possession and thus apply it.

The same witness was allowed to repeat from memory the testimony of the intestate delivered on the former trial, wherein he swore that the mortgage was to be made to the plaintiff, and after execution was handed to him.

The above testimony was received after objection from the plaintiff as contravening the provisions of section 343 of the Code of Civil Procedure.

M. L. Holmes, introduced by the plaintiff, stated that he wrote the note in suit and heard of no demand for further security; that he represented to the plaintiff the sufficiency of the surety, with which he seemed to be content, and witness assured Linker that the plaintiff was satisfied with him as surety.

The plaintiff, examined on his own behalf, denied having required the mortgage to be given, and offered also to prove by his own oath that neither when the deed was made, nor at any time, did he say he would see to the securing and appropriating the crops to the trusts of the mortgage. This testimony was rejected for incompetency, and to this ruling the plaintiff also excepted. This was all the evidence adduced in support of the first issue.

The court was asked by counsel of the plaintiff to charge the jury that there was no evidence to warrant the affirmative finding upon the first issue. This was refused, and after verdict and judgment, the plaintiff appealed.

There is no well founded objection to the testimony of Lowder as to what occurred at the time of the making the mortgage, seen and heard by him; nor does it lie against the reproduction of the testimony given by the intestate at the former trial. If the witness were alive he would be competent to testify, and the recalling what he before swore to is but a substitute, allowed from necessity, in place of living testimony. *Macay ex-parte*, 84 N. C., 63; *Whitehurst* v. *Pettipher*, 87 N. C., 179.

The admission of the evidence, however, authorized the exami-

nation of the plaintiff as to the transaction to which that evidence was directed, by the express words of the concluding clause of section 343. *Murphy* v. *Ray*, 73 N. C., 588; *Knight* v. *Killebrew*, 86 N. C., 400.

But it did not authorize the plaintiff to go further and testify that at no other time did he assume this duty, for though negative, it might be confronted with an affirmative if the intestate were alive, and thus falls under the rule settled in *Woodhouse* v. *Simmons*, 73 N. C., 30.

The blending together of testimony, competent and incompetent, and offering it undivided in a single proposition, takes away from the plaintiff the force of an objection which would lie against the ruling out of the part that by itself was admissible, and error cannot be assigned for the rejection of it as an entirety according to the proper practice. *Elliott* v. *Piersol*, 1 Peters, 328; *Barnhardt* v. *Smith*, 86 N. C., 473.

There was error, in our opinion, in refusing the instruction asked for the plaintiff, and we look in vain for any evidence of the fact, or from which the fact can be deduced, that the plaintiff undertook or agreed with the intestate to look after the mortgage and see that the property conveyed was secured and applied to the mortgage debt. No witness so states, nor are circumstances disclosed in the testimony from which an inference of the plaintiff's assuming this duty can be fairly drawn. There is no pretence that the agreement was entered into at any time except when the mortgage deed was executed, and no one present testifies to its having been then made. The evidence most favorable for the defendant is only that the plaintiff demanded further security from the principal debtor, and when asked, directed the assignment to be made to himself, without any declaration of the use to be made of it.

For this error there must be a new trial, and it is so adjudged. Let this be certified.

Error. *Venire de novo.*

W. W. McCANLESS *v.* FLINCHUM & FLINCHUM.

Deed, when fraudulent—Judge's Charge.

A voluntary deed, executed by an insolvent person, is void *per se* as to creditors; where the deed is made upon a fair consideration it is not necessarily void; and where the transaction is between an insolvent father and his son, a rebuttable presumption of a fraudulent intent arises from the close relationship of the parties; *Therefore*, where there was evidence tending to show that the deed was supported by a valuable consideration, and the judge charged the jury that if at the time it was executed the bargainor did not retain property sufficient to pay his debts, then in law the deed is void, and failed to submit the question as to the *bona fides* of the transaction, *it was held* to be erroneous.

(*State* v. *Bethune*, 8 Ired., 139; *Morris* v. *Allen*, 10 Ired., 203; *Gibson* v. *Walker*, 11 Ired., 327; *Hardy* v. *Simpson*, 13 Ired., 132; *Satterwhite* v. *Hicks*, Busb., 105; *Jenkins* v. *Peace*, 1 Jones, 413; *Jessup* v. *Johnston*, 3 Jones, 335; *Black* v. *Caldwell*, 4 Jones, 150; *Winchester* v. *Reid*, 8 Jones, 377, cited and approved).

EJECTMENT tried at July Special Term, 1882, of STOKES Superior Court, before *Gilmer, J.*

Verdict and judgment for plaintiff; appeal by defendant.

Messrs. Fuller & Snow and *E. C. Smith*, for plaintiff.
Messrs. Watson & Glenn, for defendant.

MERRIMON, J. This action was brought to recover possession of the land described in the complaint. The plaintiff claims to derive title from the defendant James Flinchum, senior, by virtue of a sheriff's deed, made to him in pursuance of a sale of his land under executions issued upon two judgments against him in favor of the plaintiff, dated the 6th day of February, 1871.

The defendant James Flinchum claims to own the land by virtue of a deed executed to him by his father and co-defendant, James Flinchum, senior, conveying to him the fee-simple therein, dated the first day of March, 1870.

The plaintiff contended that at the time the father made the deed to his son, he was embarrassed with debt; that the deed was voluntary, and therefore fraudulent as to his creditors, and that, at all events, it was made to him to hinder and delay his creditors, and was, therefore, fraudulent and void, and the sheriff's deed passed the title to the plaintiff.

To support this contention, the plaintiff introduced testimony tending to show that the defendant James Flinchum, senior, was in debt, more than he could pay, and embarrassed therewith at the time he made the deed to his son; that the deed was voluntary, and that it was made to hinder and delay the father's creditors.

The defendant contended to the contrary, and introduced testimony tending to show that the defendant was not in debt at all at the time the deed in question was executed; that this deed was not voluntary, but was made for a valuable and adequate consideration, and was not made to hinder and delay creditors, but *bona fide*.

The counsel for the plaintiff prayed the court to give, and the court gave the following, among other special instructions, to the jury: "That if at the time the defendant made the deed to his son, he did not retain property fully sufficient and available for the satisfaction of all his then creditors, that then, in law, the deed is fraudulent and void as to such creditors.

In this, there is error. The instruction given is as broad and sweeping as it can be, and it is not true as an abstract legal proposition. Every sale of real or personal property made to a son by his father, at the time embarrassed with debts beyond his ability to pay them, is not necessarily fraudulent and void as to creditors. If the son honestly buys the land or other property from the father in such circumstances, and pay for it a fair price, such a sale is good and valid as to everybody, and it stands on the same footing as if it had been made to a stranger. There is no reason why a father, unable to pay his debts, may not sell his property to his son, and the only difference between such a sale

and one to a stranger is, that the close relationship between the father and son, if the *bona fides* of the sale shall be questioned, is a circumstance of suspicion, and evidence tending to show a fraudulent intent.

A voluntary deed of land or other property made to a son by a father unable to pay his debts, is void *per se*, as to creditors; indeed, such a deed to any person is void; and such a deed appearing, the court declares it void in law. It is the well settled law in this state, that no voluntary deed can be upheld as against creditors, when the bargainor is unable to pay his debts at the time of the execution of the deed. This rests upon the wholesome doctrine that all men must be just before they are generous.

When a father is unable to pay his debts and sells his land or other property to his son for less than its reasonable value, and this appears, the presumption is that the sale is fraudulent as to creditors; but this presumption may be disproved, and whether the sale is fraudulent or not is a question for the jury. In such a case the relationship between the parties is evidence, and generally strong evidence, of a fraudulent motive and intent. And when the law raises such a presumption, the jury, under instructions from the court, must find the fraudulent intent, unless the presumption is rebutted by proof satisfactory to them.

This is not so in another class of cases, when the fraudulent character of the deed depends on a variety of facts and circumstances connected with the transaction going to show the motive and intent. In such cases the broad question whether the deed is fraudulent or otherwise as to creditors is left to the jury, with proper instructions as to what in law constitutes fraud. *State* v. *Bethune*, 8 Ired., 327; *Morrison* v. *Allen*, 10 Ired., 132; *Gibson* v. *Walker*, 11 Ired., 327; *Hardy* v. *Simpson*, 13 Ired., 132; *Satterwhite* v. *Hicks*, Busb., 105; *Jenkins* v. *Peace*, 1 Jones, 413; *Jessup* v. *Johnston*, 3 Jones, 335; *Black* v. *Caldwell*, 4 Jones, 150: *Winchester* v. *Reid*, 8 Jones, 377.

In the case before us, the instruction excepted to embraces

every sale that may be made by the father to a son, whether made for a fair and honest consideration or for a price less than the reasonable value of the property, or whether the deed was purely voluntary. The charge was erroneous and bore directly against and to the prejudice of the defendant. If the jury might have found that the father owed debts he was unable to pay; that his son bought the land for a fair price and honestly, nevertheless, under the instruction given, they were bound to find that the deed was fraudulent; or, if they might have found that the price paid was less than the full value of the land, but that the sale was open, fair and honest, was not secret, nor made to defraud creditors; that the indebtedness of the father was trifling; still, under the instruction, they must find that the deed was fraudulent. Under the instruction given, the deed was void in any case, unless the father reserved "property fully sufficient and available for the satisfaction of all his then creditors."

The charge given seems to have rested on the supposition that the deed was voluntary. If so, this was erroneous, because the contention of the defendant was that the son purchased the property openly, fairly and for a valuable and adequate consideration; at all events, for a valuable consideration, in good faith and with no fraudulent motive or intent, and that the deed was not voluntary. There was evidence tending to support this contention on the part of the defendant, and there was likewise evidence tending to prove the allegations of the plaintiff.

It was for the jury to find how the material facts were under proper instructions from the court, putting the case before them in every proper aspect. If the court had said to the jury, "if you find that the deed was *voluntary*, and the father did not at the time of the execution thereof retain property 'fully sufficient and available for the satisfaction of his then creditors,' then the deed is void in law as to creditors," the defendant could not have complained. The instruction as given was wholly unwarranted, except upon the supposition that the deed was voluntary, and whether it was so or not was a question put directly in issue by the evidence.

This charge may have misled the jury—probably did—to the prejudice of the defendant. The court put the case before them in several aspects, giving instructions to meet each, but he did not correct his error in this leading and perhaps controlling one.

There is error, for which the defendant is entitle dto a new trial. Let the judgment be reversed and a new trial awarded.

Error. *Venire de novo.*

CHARLES H. WESSELL and wife v. MARTIN RATHJOHN and wife.

Jurisdiction—Deed of parent to child—Fraud—Undue Influence—Judge's Charge.

1. The legislature has given to no court exclusive equitable jurisdiction, and whether this court has power to prescribe such a jurisdiction in pursuance of article four, section eight of the constitution, conferring jurisdiction over "issues of fact"—*Quære.*
2. A deed executed under undue influence will be rejected, such influence being fraudulent and controlling.
3. Where a father, having two daughters, executes a deed to one of them, though not founded upon adequate consideration, the deed will not be cancelled at the instance of the other daughter, unless actual fraud or undue influence be shown, and the burden to show such is upon the party alleging it. The law presumes such transaction to be proper, unless the contrary is shown. The relation of parent and child distinguished from that of guardian and ward, &c.
4. Where, in such case, after the death of the father, an action is brought by one daughter against the other (the grantee), demanding a cancellation of the deed and a division of the land, alleging that the same was executed under undue influence exerted by the grantee over the grantor, whose ill health had impaired his mind; and there was evidence not inconsistent with the integrity of the deed, the grantor having expressed himself satisfied with it; and the court charged the jury in substance that sufficient capacity must exist at the time of the act performed, otherwise the act would not be valid, although the party recovers such capacity, unless he afterwards acquiesced in the act or ratified it; *Held,* no error.

(*Leggett* v. *Leggett*, 88 N. C., 108; *Shields* v. *Whitaker*, 82 N. C., 516; *Lea* v. *Pearce*, 68 N. C., 76; *Wright* v. *Howe*, 7 Jones, 412; *Horah* v. *Knox*, 87 N. C., 483; *McConnell* v. *Caldwell*, 73 N. C., 338; *Rippy* v. *Gant*, 4 Ired. Eq., 443, cited and approved).

SPECIAL PROCEEDING commenced in the probate court and tried at Fall Term, 1882, of NEW HANOVER Superior Court, before *MacRae, J.*

This proceeding was instituted by the plaintiffs to obtain partition of certain lots in the city of Wilmington, of which John H. Heins is alleged to have died seized and possessed, and the *feme* plaintiff Anna S. Wessell and the *feme* defendant Margaret E. Rathjohn are his only children and heirs-at-law, and are jointly seized of the descended property.

In answer to the plaintiffs' petition, it is alleged that the *feme* defendant is the sole owner of the property under a deed from her father, and in reply the plaintiffs say that said deed is not the act and deed of John H. Heins, for the reason that at the time of its execution he was not of sound and disposing mind, and that the making of the same was procured by undue influence exerted by the *feme* defendant, and the plaintiffs therefore ask for a decree of cancellation and that the land be divided.

Thereupon the following issues were framed and submitted to the jury:

1. Was John H. Heins of such unsound mind, at the time of the execution of the deed, as to render him incapable of executing a deed? Answer, No.

2. Did the *feme* defendant Margaret procure its execution by exerting an undue influence over her father, the said John H. Heins? Answer, No.

The plaintiffs and defendants introduced a number of witnesses: the testimony of the former tended to support the allegation of a want of soundness of mind of the grantor, caused by protracted ill health; and that of the latter, to support the contrary.

The plaintiffs requested the court to charge the jury, "that in

order to enable a man to make a deed of his property so as to pass the title, he must have sufficient mental capacity to understand the nature of the act in which he is engaged, in its full extent and effect, and this capacity must exist at the time of the act performed; if it does not then exist, the act would not be valid, although the party might thereafter recover such capacity." This was given, and His Honor added, "unless he acquiesced in it or ratified it afterwards," to which addition the plaintiffs excepted. The substance of other instructions of the plaintiffs which were refused by the court below, is stated in the opinion of this court.

Under the charge of the judge, the jury responded to the issues as indicated above, and the plaintiffs appealed from the judgment rendered.

Messrs. MacRae & Strange, for plaintiffs.
Messrs. E. S. Martin and *Junius Davis*, for defendants.

MERRIMON, J. 1. The appellants insist in this court that this is a case exclusively within the equitable jurisdiction of the superior court, and, therefore, that court ought to have proceeded to hear and determine it as a case in equity; and they suggest that it be remanded with instructions to that court to so treat it.

We are not prepared to admit that this is a case exclusively equitable in its nature; but if it were, it appears that the appellants consented, first in the court of probate and afterwards in the superior court, to have the issues of fact arising in their action tried by a jury in the ordinary method of procedure. Equitable rights may be settled and administered, and actions purely equitable in their nature may be tried under this method, and when the parties choose at first to proceed in that way, they cannot afterwards, certainly not without the common consent of all the parties and the assent of the court, change the method of procedure to that of the court of equity, as established in this state before the present method of code-procedure was estab-

lished, or some other like it. Indeed, the legislature has not provided for any exclusive equitable jurisdiction under the present constitution of the state. To what extent and how this court, or the superior court, has power to ascertain and prescribe such a jurisdiction in pursuance of article four, section eight, of the constitution, has not been settled; and we do not deem it proper or expedient to undertake, in the absence of any legislation on the subject, to indicate a method of procedure in equity, until a case shall arise requiring us to do so. When such a case presents itself, we will feel called upon to decide a grave constitutional question, perhaps more than one, not at all free from embarrassment.

We have said as much in *Leggett* v. *Leggett*, 88 N. C., 108, and we have no disposition to modify what was there said.

This court cannot examine and consider the evidence submitted upon issues before a jury, for the purpose of setting aside or modifying their verdict, if in any case, certainly not when and after litigants have consented to a trial by jury in the ordinary way. It does not comport with the propriety, fairness and integrity of judicial proceedings to allow litigants to test their fortune in one competent jurisdiction, under one method of procedure, and failing in that, to try another method before the same tribunal. *Leggett* v. *Leggett*, *supra*; *Shields* v. *Whitaker*, 82 N. C., 516.

2. As to the first exception specified in the record, the court gave the special instruction prayed for by the appellants, and added, "unless he acquiesced in it, or ratified it afterwards."

This addition was proper and just, if not really necessary, because there was evidence tending to prove that after the deed was executed, the maker thereof repeatedly knew of, recognized and acquiesced in and was satisfied with the deed. The court is not bound in all cases to give the instruction as prayed for; indeed, it ought not to be so, when facts are in evidence bearing upon the instruction given, which the jury ought to consider in connection with it. To give the instruction without qualification or explanation might mislead the jury. In the absence of such

testimony, the plaintiffs might be entitled to have the instruction given as prayed for, or the substance of it, unqualified by words that might impair its force. Under the circumstances of this case, however, the plaintiffs were not entitled to the instruction prayed for without qualification, and the exception cannot be sustained.

3. Numerous other exceptions taken by the appellants appear in the record, and we have examined them with care. We do not deem it at all necessary to consider them separately, as they may be condensed and all considered together more conveniently and satisfactorily.

Stripped of extraneous matter, the embodied substance of them is, that where the relation of parent and child exists, and the latter becomes the beneficiary under a deed from the former, such a deed will be looked upon with suspicion; and if it is not founded upon adequate consideration, and the mental condition of the father be such (arising from debility) as to make him easily subject to importunity and undue influence, and the beneficiary has opportunity and position to exercise such influence and control, such a deed will be rejected, although there might be no actual fraud or undue influence shown. This is the substance of the special instructions prayed for and denied by the court.

The proposition thus contended for on the part of the appellants, taken in its entirety and in its broadest sense, implies that the facts stated appearing, the deed is void in law, and the court must so declare. This cannot be true, and we take it that the meaning to be attributed to it is, that nothing else appearing—in the absence of proof to the contrary—there arises a presumption of fact that the deed is void, and the jury must be instructed by the court to so find, unless the defendants shall show by proof satisfactory to the jury that the deed was made in all respects fairly and in good faith. Taking this to be the proper view of the proposition, we think it is not true, and that the court properly declined to give the instruction.

The facts stated are not inconsistent with the entire integrity of the deed, that is, the facts may be true as stated, and the deed may have been executed in good faith and without the slightest improper act or conduct on the part of the grantee. The facts stated are evidence, not amounting to a presumption, to go to the jury upon a question of *mala fides* when raised.

It is not strange or unnatural that a father, feeble in health, of weak mind, and easily influenced by a daughter having opportunity to exercise such influence, should give his daughter a house and lot and execute to her a deed for it. It is natural that the father should provide for his daughter: this is a proper and orderly thing to be done. It is what the paternal feelings of good men prompt them to do: it is what just men commend and the law tolerates. Why should the law cast suspicion upon such a transaction? When the transaction, the deed, is right in itself, such as the law tolerates and the common sense of men approves as just, reasonable and commendable, and there is the absence of the relations of suspicion founded on motives of policy, no adverse presumption arises; on the contrary, the law presumes such deed or transaction in all respects proper and just, until the contrary is made to appear. The burden is on him, who alleges the contrary, to prove it. There is no material presumption, nor is there any founded in motives of policy, that parent and child will take advantage of one another: the laws of human nature forbid this, and he who alleges the contrary must prove it.

It may be that there are cases where a parent conveys property to his child in which the presumption of fact is so strongly adverse to the latter, that the court ought to instruct the jury that they ought to find against the deed, unless the child shall prove to their satisfaction that it was fairly and honestly made; but in such a case, there must be evidence tending to show, not simply that there might have been, but that there was *mala fides*.

The relation of parent and child, as to presumptions of fraud and the *onus* of proof to rebut the same, in business transactions between them, does not stand upon the same footing as the relation of trustee and *cestui que trust*, guardian and ward, attorney

and client, principal and agent, and the like relations; it belongs to a different class of fiduciary relations, in which the presumption is not so strong, nor does it arise under the same circumstances. Besides, the presumption is always against the party having the superior or dominant position or control, and this in the case of parent and child is that of the parent. *Lee* v. *Pearce*, 68 N. C., 76; *Wright* v. *Howe*, 7 Jones, 412; *Horah* v. *Knox*, 87 N. C., 483; *McConnell* v. *Caldwell*, 73 N. C., 338; Big. on Fraud, 190, 264, 265; Best on Presumptions, 43 *et seq.*

4. The court told the jury that "undue influence is a fraudulent and controlling influence," and the plaintiffs insist that in this there is error.

"Undue influence" in any application of the phrase savors of what is meant by fraud. There may, however, be instances in which "undue influence" is not fraudulent in the strict legal sense of that term. It is often defined by the courts to be a "fraudulent and controlling influence," and it is sometimes properly so. Under the circumstances of this case, we think it was not inappropriately so defined, and we cannot see that the appellants suffered in the least degree by the explanation given by the court. This court has so regarded the meaning of the phrase in numerous cases. *Rippy* v. *Gant*, 4 Ired. Eq., 443.

We have examined with care the instructions given by the court to the jury, and are impressed by its intelligence and fairness. If the court erred at all, it was in favor of the plaintiffs, and we are satisfied they have no just grounds of complaint.

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

No error. Affirmed.

SOLOMON OVERCASH v. DAVID KITCHIE.

Ejectment—Issues—Judge's Charge—Comments of Counsel—Tenants in Common.

1. In ejectment, the court submitted an issue to the jury under which the location of a disputed line could be found by them, but refused to submit one proposed by defendant, as to whether the plaintiff agreed to the running and marking the line by a surveyor, and that defendant might take possession under said agreement; *Held*, no error, as the same was not material to the case or raised by the pleadings.
2. The comments of counsel in this case are not of such a character as will warrant a new trial; the rule, as heretofore laid down, announced and approved.
3. A judge, in granting a prayer for instructions, may add any explanation of the law bearing upon the facts embraced in the instructions.
4. One of several tenants in common may sue in ejectment and claim the entire estate, and, upon a recovery, will have judgment for such share in common as he shows himself entitled to. But, here, there are no facts to support the instruction asked by defendant in reference to the alleged tenancy in common.
5. Where there is evidence of a variation of the compass in running a disputed line, and the court submitted it to the jury in connection with the other testimony as to its proper location; *Held*, no error.

(*Mitchell* v. *Brown*, 88 N. C., 156; *Bronson* v. *Paynter*, 4 Dev. & Bat., 393; *Holdfast* v. *Shepard*, 6 Ired., 361; *Camp* v. *Homesley*, 11 Ired., 211; cited and approved).

EJECTMENT tried at Spring Term, 1882, of IREDELL Superior Court, before *Eure, J.*

The following issues were submitted to the jury:

1. Is the plaintiff the sole owner and entitled to the possession of the land described in the complaint?

2. Does the dividing line between the plaintiff and defendant run from the pine designated in the plat to the red oak? If not, to what point does it run?

3. Is the defendant in the wrongful possession of any part of the land?

4. What damages is plaintiff entitled to?

1. During the trial the defendant introduced evidence tending to show that the plaintiff had at one time agreed to allow one Campbell (county surveyor) to run and mark the line of the disputed territory and to abide by the result; and that Campbell, not acting, however, as a regular processioner, had run the line according to defendant's claim. The evidence of the plaintiff controverted the fact in reference to said agreement, and showed that the dispute about the line had been settled by arbitrators in his favor.

The defendant contended that the said alleged agreement of plaintiff to abide by the line as run by Campbell was an estoppel *in pais* against plaintiff, and asked the court to submit the following issue: "Did plaintiff agree that the processioner might run and mark the line from the pine south to the stake, and defendant take possession of the land in dispute under said agreement?" His Honor said that the jury could consider all these controverted matters of evidence in regard to what occurred between the parties—both the alleged survey which defendant never offered to show was a processioning under the act of assembly, and the award offered by plaintiff—in making up their verdict on the issue as to where the true line was, and declined to submit the issue. The defendant excepted.

2. The plaintiff's counsel argued to the jury that the whole controversy depended upon the finding of the second issue, "and that the argument on the other side upon the issue of sole ownership was a departure from the evidence and calculated to mislead the jury, and, so far as the facts were concerned, was dodging the main issue."

"The defendant's counsel interrupted, as he had done several times before in relation to other matters, and said that plaintiff's counsel had at a former term submitted an issue as to sole ownership."

"The plaintiff's counsel then expressed the desire not to be further interrupted, and then the defendant's counsel presented

to the court issues tendered by plaintiff at fall term, 1880, as follows:

1. Is plaintiff entitled to the *locus in quo*, in dispute in this action, in possession, title and ownership?

2. If plaintiff is so entitled to recover as above stated, how much damage has he sustained? and remarked to the court that they (plaintiff's counsel) themselves submitted an issue as to sole ownership. No request was made of His Honor, nor was anything further said by defendant's counsel." "It did not appear that these issues were ever settled as the issues in the case: they were not referred to in settling the issues on the trial, and were never accepted by the defendant, as the issues, at the time they were filed." "The defendant excepted."

3. The instructions prayed by the defendant in reference to *termini* and calls in a deed, were based upon the rulings in *Clark* v. *Waggoner*, 70 N. C., 706, and *Safret* v. *Hartman*, 7 Jones, 199, cited in the statement of the case, and His Honor in giving them "explained their meaning to the jury, and referred to the evidence touching the location of the disputed corner, saying that the corner claimed by plaintiff was described by several witnesses, as having a body resembling a black oak and leaves resembling those of a red oak; and that defendant had introduced evidence tending to locate the corner at the stake," and that the jury must consider all the testimony bearing on the question of location, and say where the corner was. Defendant excepted.

The facts upon which the other exceptions are grounded are sufficiently stated in the opinion of this court.

Verdict and judgment for plaintiff; appeal by defendant.

Messrs. Robbins & Long, for plaintiff.
Mr. D. M. Furches, for defendant.

MERRIMON, J. We have examined the several exceptions of the defendant and are of opinion that no one of them can be sustained.

1. The defendant introduced testimony tending to show that the plaintiff at one time before the bringing of the action agreed to allow the county surveyor, not, however, acting as a regular processioner, to run and mark the line in question along the disputed part thereof. The plaintiff introduced testimony tending to show the contrary, and, further, that this line as claimed by him had been settled in his favor by award.

The counsel for the defendant asked the court to submit the following issue: "Did the plaintiff agree that the processioner might run and mark the line from the pine south to the stake, and defendant take possession of the lands in dispute under such agreement?"

The court declined to submit the issue to the jury, saying that all these controverted matters of evidence in regard to what had occurred between the parties, both as to the alleged survey which the defendant had not offered to show was a processioning under the act of assembly, as also the award offered by the plaintiff, could be considered by the jury in making up their verdict upon the issue as to where the true line was, and he did not deem it rightful to submit the issue proposed any more than an issue as to the alleged award. The defendant excepted to the denial of his motion and to the issues submitted.

The complaint alleges in substance that the plaintiff is the owner of and entitled to the possession of the land specified therein; that the defendant is in the unlawful possession thereof, and unlawfully withholds the same; and demands judgment for possession of the land, for damages and for costs. The answer denies the allegations of the complaint. These are the material allegations on the part of the plaintiff and denied on the part of the defendant. All else in the complaint and answer is immaterial, redundant matter in the pleadings; much of it is made of evidential facts that might be put in evidence on the trial—indeed, some of them were.

Now, the issues raised by the pleadings are manifest to the legal eye. Those submitted to the jury embody the substance of

them. The second one might have been dispensed with; the facts involved in it might have been given in evidence upon the first one. The general fact, and the facts in detail involved in the issue presented by the defendant, was competent, and might have been introduced as evidence to lead the jury to find the issues submitted in favor of the defendant. The issue proposed was not raised by the pleadings, nor was it material as one issue.

It was for the court to determine what issues must be submitted. The plaintiff and the defendant, or both, may prepare issues to be submitted; the court may accept or reject them, and must submit such and only such as are raised by the pleadings. *Miller* v. *Miller*, decided at this term, *ante*, 209; *Mitchell* v. *Brown*, 88 N. C., 156. The first exception is, therefore, groundless, and must be overruled.

2. The counsel for the plaintiff had the right to insist upon the pertinency and importance of one issue over another, just as the defendant's counsel had the right to insist upon the contrary, and we cannot see that he transcended the bounds of propriety in what he said, especially, as he was interrupted repeatedly by the counsel for the defendant, who brought matter, not in evidence, to the attention of the court, in the presence of the jury, tending to show that the counsel for the plaintiff had changed his views as to the issues and their materiality.

Freedom and earnestness of debate as to the questions raised, and within the compass of the evidence, must be allowed, and it rests very largely with the presiding judge to regulate and determine its manner, temper and fairness. If counsel should grossly transcend the bounds of propriety in the course of his argument upon the facts to the jury, and to the manifest injury of the party against whom he was appearing, and the court would not check him, as it ought at once to do, or would not properly caution the jury, this might be assigned as error in the conduct of the trial, such as this court could correct upon appeal, by directing a new trial.

But the exception under consideration presents no such case;

indeed, we see nothing in the substance of what was said, of which the defendant can complain. There was the ordinary earnest contest of counsel. The language, "dodging the main issue," was scarcely graceful or courteous in debate, but this did not affect the substance of the discussion adversely to the defendant. Jurors are, for the most part, plain, honest men, and generally regard with favor fair and manly discussion. Justice and fairness command the respect of good men everywhere, and in the jury box as well. The second exception of the defendant must be overruled.

3. The third exception has no foundation upon which to rest. The court gave the jury the special charge prayed for, and the explanations he gave as to the contentions about the disputed corner, and the conflicting testimony in relation thereto, were eminently proper. The court was not bound to give the special charge asked for and say no more—in this case he ought to have added the explanations given and called the attention of the jury to such of the testimony as bore upon the matter embraced by the charge. As appears from the record, what the court said was fair to both the plaintiff and the defendant. The exception is general, and no special ground of complaint is assigned.

4. The facts relied upon to raise the fourth exception are these: In 1834, Neil Brawley devised to his grandsons, John L., James A. and Robert M. Brawley, the tract of land known as the "Anderson tract." James and Robert afterwards died without issue, leaving as their only heirs-at-law the said John L., his brothers William and Singleton Brawley, and their sister Julia, wife of Levi Vanderburg. Afterwards, said William died, without issue, leaving his said surviving brothers and sister his only heirs-at-law. Afterwards the said Singleton died leaving issue, infants, his only heirs-at-law, and one J. W. Brawley was duly appointed their guardian.

The tract of land claimed by the plaintiff in the complaint, and that claimed by the defendant, were *carved* out of the said "Anderson tract." The plaintiff derived title to his, by deed

executed in 1873 to him, by the said John L. Brawley and his wife, and Julia Vanderburg and her said husband, and J. W. Brawley, as guardian of the infant children and heirs-at-law of the said Singleton. It does not appear that the said guardian had any proper authority to convey the interest of his said wards in the land.

The defendant derives title in this way: The said John L. Brawley executed sometime in 1858 to the said Levi Vanderburg a deed in trust, with power of sale, of the aforesaid "Anderson tract" (in terms). The respective deeds to plaintiff and defendant do not cover the same land at all; but the calls in the one correspond with the calls in the other as *adjoining* tracts, and each purports to be a *part only* of the aforesaid "Anderson tract," with the respective contents in each specified. There was no evidence produced, except the deeds, to show an actual partition of said "Anderson tract" among the parties interested at any time. The land in dispute was woodland until a short time before this action was brought.

The defendant prayed the court to charge the jury, that if the plaintiff and defendant and others were tenants in common (as he insisted they were) of the land claimed by the plaintiff, then he could not recover in this action, and that the burden was on the plaintiff to show a complete title in himself. The court gave the instruction, and added, "that the deeds under which the respective parties claimed called for distinct parcels of land, except that the question remained as to where the true line between them was, and this was for the jury to determine." The defendant excepted.

The facts as to whether the whole, or what particular part of the "Anderson tract" was embraced by the deed executed by John L. Brawley to Levi Vanderburg in 1858, are vague and indistinct. The deed could only operate to pass his interest in the part he undertook to convey, and it appears to us that he only sold his interest in the tract carved out of the "Anderson tract," claimed by the defendant. The deeds are not sent up with the case, and we must take the facts as stated in the record.

If the deed of 1858 was intended to convey and did convey John L. Brawley's interest in the whole of the "Anderson tract," the defendant ought to have made this appear. It appears that two tracts, one claimed by the plaintiff and the other claimed by the defendant, were carved out of that tract: it was cut into at least two tracts, perhaps more. When this was done does not appear; and in 1873, John L. Brawley joined in a conveyance to the plaintiff. This is inconsistent with the view that he conveyed his interest in the whole tract in 1858. It is probable he did not. It was competent to cut the tract into sundry tracts, and that he should convey his interest in one of them; and it appears to us that he did convey his interest in the tract of the defendant. This is the only reasonable solution of the matter, taking the facts as they appear in the record.

Then, the defendant had no interest in the land claimed by the plaintiff in his complaint, neither as tenant in common, nor otherwise.

It is said, however, that the infant heirs of Singleton Brawley are tenants in common with the plaintiff, because the deed of their guardian could not pass their title to him, in the absence of a judicial decree authorizing the sale, and that the plaintiff can not sue alone. This is a misapprehension of the law. One tenant in common may sue in many cases without joining his co-tenant. Each has a separate and distinct freehold, and he may sue to recover possession when he has been disseized. There are cases in which they must sue jointly, as where they make a joint demise of their common estate, reserving rent; in such case the action to recover must be joint. If, however, one of the several tenants in common bring an action to recover the possession of land of which he has been disseized, and claim the entire estate instead of his proper undivided share, he will not be nonsuited, but will have judgment for such share in common as he shows himself entitled to. And it has been held, that one of two joint tenants may recover the entire estate in an action of ejectment against one who has no title. *Bronson* v. *Paynter*,

4 Dev. & Bat., 393; *Holdfast* v. *Shepard*, 6 Ired., 361; *Camp* v. *Homesley*, 11 Ired., 211; *Robinson* v. *Johnson*, 36 Vt., 74; *Chandler* v. *Spear*, 22 Vt., 388; Wash. on Real Property, 572. There is, therefore, no ground for the fourth exception, and the court might have told the jury that there were no such facts in the case as warranted the prayer.

5. There was some evidence of a variation of the compass, and the court properly left it to the jury, in connection with all the other evidence in the case, to aid them in reaching a conclusion as to the proper location of the boundary line. The judge was careful not to give this evidence any undue weight, but threw it into the scale for what it was worth, and fairly left it to the jury to determine that in connection with all the other evidence before them. This exception cannot be allowed.

6. As to the sixth exception, the court gave the instruction prayed for, and told the jury "it was their duty to consider it as bearing upon the facts in this case." The court then properly directed the attention of the jury to such parts of the evidence as bore upon the matter embraced in the special charge. This the court ought to do ordinarily, and it was proper in this case. We can perceive not the slightest unfairness, or bias, in the explanations and directions given by the court. It is a mistake to suppose that the court must give the charge just as asked for; he may do so; he may modify it; he may give the substance of it; explaining and applying the law and the evidence, always leaving it to the jury to weigh the testimony in connection with the law as explained and applied by the court. If the court erred, then the error ought to be specified intelligibly. There is no ground upon which the exception rests.

There is no error. Judgment affirmed. Let this be certified.

No error. Affirmed.

A. J. BYNUM v. J. F. MILLER & CO.

Mortgage—Evidence—Agency.

1. Evidence as to whether the mortgage debt has been paid is immaterial, in an action by the mortgagee against the vendee of the mortgagor, for the conversion of the personal property conveyed in the deed.
2. A mortgagor conveys a stock of goods on hand and any other goods he may buy to replenish the stock, with power of sale if the debt is not paid by a certain time; *Held*, that by accepting the deed, the mortgagee assented to its provisions—to the mortgagor's continuing the business with the right to sell and replenish the stock, and constituting him an agent for that purpose.

CIVIL ACTION tried at Spring Term, 1883, of CLEAVELAND Superior Court, before *Shipp, J.*

This action was brought to recover a stock of goods or damages for the conversion of the same.

The plaintiff proved a demand and refusal, and the conversion was admitted; and he claimed the goods under two chattel mortgages, executed by W. H. Miller, duly registered in Cleaveland county.

The plaintiff testified that under the mortgages the debts of Bynum & Miller had not been paid by the mortgagor, according to the provisions of said mortgages, though he had paid some of the debts. The plaintiff was then asked how much of the indebtedness secured by the mortgage had been paid, and, on objection by defendants, the question was ruled out as being immaterial.

The defendants claimed the goods under an alleged purchase from W. H. Miller, the mortgagor, in the spring of 18..., after the execution and registration of plaintiff's mortgages.

On the question of ownership, there was evidence tending to show that plaintiff, after and at the time of executing the mortgages, gave Miller authority to sell the goods as plaintiff's agent, but the plaintiff denied that any such authority was given, and gave evidence tending to support said denial.

By request of the defendants, the court charged the jury, that

if the plaintiff gave to Miller the authority contended for by the defendant, to-wit: to sell the goods for him, he had the right to sell the goods, either by retail or in bulk, and the plaintiff could not recover.

His Honor also charged the jury, "that he had carefully examined the plaintiff's mortgages, and could find no authority given in them for W. H. Miller to sell the goods as plaintiff's agent." The defendants excepted to this construction of the mortgages.

The first mortgage, of date 20th April, 1878, conveyed all of the mortgagor's stock of goods, or general merchandise, in the storehouse lately occupied by Bynum & Miller; also any goods that he might buy before December 1st, 1878; but if he should fail to pay the debt by that time, then the mortgagee might sell, &c.

The second mortgage, dated April 27th, 1878, contained the following: "All my right, title and interest in the stock of goods of Bynum & Miller, in the house known as the 'John L. Moore stand,' and occupied by Bynum & Miller, and whatever goods may be bought by me from time to time to replenish said stock, consisting of dry goods, groceries, notions, hardware, crockery, furniture, &c., to have and to hold the same," with condition to be void, and with power of sale if the debts secured were not paid by the 15th of November, 1878.

On the question of damages, there was evidence tending to show that at the time of the conversion there was on hand, of the stock of goods originally conveyed, from two to seven hundred dollars' worth, and that the whole stock at said time was worth from $2,000 to $2,500, the increased value being additions to the stock made by W. H. Miller, the mortgagor, after the execution of the mortgages in the usual course of his business, and before the alleged purchase by the defendants.

The court, on this point, charged the jury that plaintiff could recover, if at all, the value of the whole stock at the time of the conversion, including both that portion of the stock originally

conveyed and the portion subsequently purchased by the mortgagor. The defendants excepted; and the jury found a verdict for the plaintiff for $1,300. There was judgment according to the verdict, and the defendants appealed.

Messrs. Hoke & Hoke, for plaintiff.
Messrs. Reade, Busbee & Busbee, for defendants.

ASHE, J. The first exception taken to the ruling of His Honor in excluding the evidence as to the amount of the debts paid by the defendant, as His Honor held, was immaterial, and cannot be sustained.

But we think His Honor committed an error in the construction of the mortgages upon the point of agency.

The mortgagor in the deed of April 27th, 1878, conveyed all his right, title and interest in the stock of goods and any of the goods that may be bought by him, from time to time, to replenish the stock, &c. The plaintiff by accepting the deed assented to this provision. The plaintiff then assented to the mortgagor's continuing the business, with the right to *replenish* the stock until the 15th November, 1878.

The right to replenish necessarily involved the right to sell. Replenish from the Latin words *re* "again," and *plenus* "full," means literally to fill again, to fill up. Nothing can be filled up that is already full. If the goods were to remain in the hands of the mortgagor, to be kept *in statu quo* until the 15th of November, there would be nothing to replenish. To replenish a thing necessarily implies exhaustion, reduction or diminution in the quantity of the commodity. There could have been no other mode of reduction in the quantity of these goods in the contemplation of the parties other than by a sale.

In common acceptation, when a merchant speaks of replenishing his stock of goods, it is understood that he means to fill up his stock that has been reduced by sales.

The consent then given by plaintiff to defendant to replenish the stock from time to time, gave him the right to sell, and con-

stituted him his agent for that purpose; and especially is this to be so considered, when the deed provides that the entire stock on hand on the 15th of November, including not only the original stock, but the stock as increased by new purchases, should belong to the mortgagee.

While our conclusion is there was error in the instruction given by His Honor to the jury upon the question of agency, we do not decide the question as to the extent of the agent's authority; but as there was error, we do not know but that the misdirection of His Honor may have affected the cause of the defendants.

This opinion must therefore be certified to the superior court of Cleaveland county, that a *venire de novo* may be awarded.

Error. *Venire de novo.*

W. N. MEBANE v. DANIEL LAYTON and others.

Homestead—Reversionary Interest—Judgment, date of.

1. A homestead is exempt from sale under execution, except (1) for taxes; (2) for obligations contracted for the purchase of the premises; (3) for mechanic's and laborer's lien; (4) for debts contracted prior to the adoption of the constitution. THE CODE, §§501 to 524 inclusive.
2. There is a presumption of fact in favor of such exemption, and the creditor who seeks to subject the homestead to the payment of his debt, must bring himself within one of the exceptions by proper averment and proof.
3. A sale without laying off the homestead (unless in case of the above exceptions) is void, and passes no title to the land or to the "reversionary interest."
4. The date of a judgment will be taken as the date of the debt upon which it was rendered, unless the contrary appear of record.

(*Andrews* v. *Pritchett*, 72 N. C., 135; *Hill* v. *Oxendine*, 79 N. C., 331; *Edwards* v. *Kearsey*, 74 N. C., 241; *Lambert* v. *Kinnery*, *Ib.*, 348; *Gheen* v. *Summey*, 80 N. C., 187; *Poe* v. *Hardie*, 65 N. C., 447; *Waters* v. *Stubbs*, 75 N. C., 28; *Hinsdale* v. *Williams*, *Ib.*, 430, cited and approved).

MEBANE *v.* LAYTON.

EJECTMENT tried at Spring Term, 1883, of GUILFORD Superior Court, before *Gilmer, J.*

The plaintiff appealed from the judgment of the court below.

Messrs. Scott & Caldwell, for plaintiff.
Mr. James T. Morehead, for defendants.

MERRIMON, J. The facts stated in the record in this action are meagre and indefinite. Necessary facts should always be stated with care and precision.

It appears that on the 9th day of November, 1878, W. N. Mebane obtained before a justice of the peace in Guilford county, a judgment against Charles Layton for the sum of $11.09, and for costs, and duly docketed the same in the superior court of that county; that thereupon, sometime before the year 1881, an execution was issued, and the sheriff levied upon and sold the land specified in the complaint as the land of the defendant in the execution, the plaintiff being the purchaser at the price of one dollar, and taking the sheriff's deed therefor.

The defendant in the execution was, at the time of the taking of the judgment and the sale, a resident of this state; the land sold was all that he owned, and it was of the value of $150.

At the time of the sale, and at the time of his death, which took place in the year 1881, before this action was brought, he had no wife, she having died before the sale; and at his death, all his children were over the age of twenty-one years.

This action was brought by the plaintiff, the purchaser of the land, to recover possession thereof against the defendants, who are the heirs-at-law, including the administrator of the said Charles Layton, deceased, and he claims title by virtue of the sheriff's deed.

The defendants insist that the land was the homestead of the said Charles Layton, their ancestor, and was not subject to levy and sale under said execution, and therefore, the deed passed no title to the plaintiff. The court so held, and the plaintiff excepted.

The plaintiff insisted that the debt upon which the judgment was founded was contracted prior to the present state constitution, and therefore, the defendant in the execution was not entitled to have a homestead, as against this judgment.

There was no evidence offered to show when the debt was contracted. The court held, in the absence of such evidence, that it was contracted as of the date of the judgment, and the plaintiff excepted.

The court gave judgment for the defendants, and the plaintiff appealed to this court.

The constitution, article ten, section two, provides that "every homestead * * * shall be exempt from sale under execution, or other final process obtained on any debt," with three exceptions; first, it is not exempt from sale under such process, for taxes; secondly, nor for payment of obligations contracted for the purchase of the land comprising the homestead; thirdly, nor from the payment of debts secured by a laborer's or mechanic's lien.

There is also a fourth exception: it is settled by judicial authority, that it may be sold under such process, to pay any debt contracted anterior to the adoption of the present constitution of this state.

Then, generally, the homestead is exempt from sale under execution. There are but four exceptions to this. The presumption of fact is, that the exemption exists; and whoever will bring himself within the exceptions, or any one of them, must aver and prove himself to be so entitled. Ordinarily this averment should be made in the pleadings in the action in which the judgment is obtained, upon which the execution issues. There may be cases in which, after judgment, it may be proved in a summary way, as the court may direct.

In the absence, therefore, of proper averment and proof to support it, that the debt, to pay which the land mentioned in the complaint was sold, was contracted before the adoption of the present constitution of this state, the presumption of fact is, that

it was contracted afterwards, and the exception of the plaintiff in that respect cannot be sustained. *Hill* v. *Oxendine*, 79 N. C., 331.

Before, at, and continuously next after the date of the judgment, and until his death, Charles Layton was entitled to and had homestead in the land in controversy. The homestead had not been assigned, nor was the land as much in value as the law allowed; nevertheless, he had and owned it unassigned, per force of the constitution, and it was not subject to be sold to pay that judgment. The assignment of homestead does not, nor is it necessary to create or establish the right to it: assignment only serves to indicate where it is, and whether there be any excess subject to levy and sale to pay judgment creditors. *Edwards* v. *Kearsey*, 74 N. C., 241; *Lambert* v. *Kinnery*, 74 N. C., 348; *Gheen* v. *Summey*, 80 N. C., 187.

But the assignment of homestead is essential in the just and reasonable assertion of the rights of judgment creditors; indeed, it is essential, looking to the interests of all creditors, and the debtor as well. Judgment creditors are entitled to sell the excess under execution; this, and no more. In the very nature of the matter, how can this be done intelligently, justly to the debtor and creditor, without knowing what is the excess and where it is? The purchaser, without assignment, might buy something; he might get nothing; he might get something at one place; he might get it at another. No prudent man would purchase at such a sale; at all events, he would not pay any reasonable price for property sold under such circumstances of doubt and uncertainty. Such a sale, as to injured parties, might be treated by a court of equity, in the absence of any statutory regulation, as fraudulent and void. This court held a sale made under similar circumstances to be fraudulent and void, at the instance of a complaining creditor. *Andrews* v. *Pritchett*, 72 N. C., 135.

The legislature has provided by statute a remedy for the mischief indicated, and has made wise provision for the protection of the rights and interests of debtors and creditors in this respect;

and for perfecting and executing effectually the provisions of the constitution in respect to the right of homestead.

It is provided in THE CODE, §516, that the officer, usually the sheriff, shall, before levying upon real estate, lay off in the manner prescribed to the execution debtor his homestead, if he be a resident of this state; and, further (§505), that the excess over the homestead may be levied upon and sold. The sheriff, or other officer charged in that respect, is obliged to lay off the homestead, and if he shall levy and sell without doing so, he may be indicted and sued upon his official bond. A sale without laying off the homestead, unless in case of the several exceptions mentioned above, is unlawful and void. It not only contravenes the statute, but it contravenes justice and the orderly course of fair dealing among men. Courts of justice cannot sustain such sales. They are forbidden by the spirit of the statute, if not by the very letter.

It turns out in this case there was no land in excess of the homestead. It appears that the value of the land was but $150. So the deed passed nothing in the shape of excess over the homestead. If it had been laid off, there was no excess.

But it is said, it operated, at all events, to pass the estate in the land remaining after the homestead was over, and as this terminated at the death of Charles Layton, therefore the plaintiff is entitled to come into possession of what he purchased; he insists that he bought the land subject to the homestead. It does not appear that the sheriff undertook to levy upon or sell such an interest. He levied upon and sold the land without assigning, and without regard to the homestead. This he could not do. The constitution securing the homestead and the statute in aid of it stood in the way.

Then, it is insisted that this unlawful sale was broad enough and had virtue enough to sweep the estate in the land, commonly called the reversionary interest. Upon general principles of justice, this ought not to be so. But the statute (Bat. Rev., ch. 55, §26), in force at the time of the supposed sale, forbids in

terms the levy and sale under execution, for any debt, of the reversionary interest in lands included in a homestead, until *after* the termination of the homestead interest itself. It seems that this section of the statute has not been brought forward in THE CODE. This court has held that this statute was valid and has repeatedly given it effect. *Poe* v. *Hardie*, 65 N. C., 447; *Waters* v. *Stubbs*, 75 N. C., 28; *Hinsdale* v. *Williams*, 75 N. C., 430.

The purpose of this act was, not to enlarge the homestead, or to deprive the creditor of the estate or property after the homestead right should be at an end, but it was to have the property preserved and the right of the creditor to have the same sold postponed until it might be sold for its reasonable value. Hence it was provided that the statute of limitation should not run against debts affected by it.

The plaintiff did not—could not—purchase and get title by virtue of the sheriff's sale to the land specified in the complaint, nor did the deed operate so as to pass the estate in the land after the homestead therein was over. This was not leviable; there was no levy upon nor sale of it in contemplation of law.

The other exceptions set forth in the record are immaterial, and are disposed of in effect by this opinion.

The judgment of the superior court, in so far as it is affected by the exceptions of the plaintiff, must be affirmed, and it is accordingly so ordered.

Let this be certified.

No error. Affirmed.

L. W. MILLER v. BETSY J. MILLER.

Homestead, duty of sheriff in laying off—Deputy Clerk, powers of—Sheriff's Deed—Execution Sale—Evidence.

1. Where land is subject to the payment of debts against which, under the constitution, the right of homestead does not prevail, and the debtor has no other property but the land which is of less value than one thousand dollars, the sheriff need not have the homestead laid off in order to a sale under execution. See preceding case—*Mebane* v. *Layton.*
2. And the deed of the sheriff to the purchaser in such case is not affected by his failure to lay off the homestead.
3. A deputy clerk has power to issue executions in the name of the clerk, and may perform all the duties of the office, except such as are judicial in their character, or where a statute specifically provides otherwise.
4. Recitals in a sheriff's deed are *prima facie* evidence of an execution sale, notwithstanding the return upon the execution may be imperfect. The fact that there was a sale may also be proved by parol.
5. *Held further*, that parol testimony is admissible to show that the land levied upon was sold as one tract, though described in the sheriff's deed as two tracts. (The evidence in this case goes to show that the land was designated and sold in one body).
6. *Held also*, that the deed in such case, reciting in substance the execution under which the land was sold, and purporting to convey title to the purchaser and his heirs, shows that the sheriff exercised his power in the premises, and conveys the title of the defendant in the execution.

(*Wilson* v. *Patton*, 87 N. C., 318; *Albright* v. *Albright*, 88 N. C., 238; *Shepherd* v. *Lane*, 2 Dev., 148; *Coletraine* v. *McCain*, 3 Dev., 308; *Sudderth* v. *Smyth*, 13 Ired., 452; *Hardin* v. *Cheek*, 3 Jones, 135; *McKee* v. *Lineberger*, 87 N. C., 181; *Rollins* v. *Henry*, 78 N. C., 342; *Jackson* v. *Jackson*, 13 Ired., 159; *Houston* v. *McGowen*, 78 N. C., 370, cited and approved).

EJECTMENT tried at Spring Term, 1882, of ASHE Superior Court, before *Avery, J.*

The facts bearing upon the exceptions taken, necessary to an understanding of the case, are sufficiently stated in the opinion of this court. The defendant appealed from the judgment of the court below.

Mr. Q. F. Neal, for plaintiff.
Mr. J. W. Todd, for defendant.

MERRIMON, J. We think that no one of the exceptions specified in the record can be sustained.

1. It is insisted that the court erred in refusing to charge the jury that the sheriff's deed was void, because he failed to have a homestead laid off to the defendant in the land sold.

The constitution provides that the homestead shall not be exempt from sale under execution or other final process for the payment of obligations contracted for the purchase of the premises. Art. X, §2.

It appears that the debt for which the land was sold was contracted for, and only for, the purchase money of the land; that the defendant had no personal property; that the land sold was all she had at the time of the docketing the judgment, and next thereafter, until the sale was made, and that it was not worth one thousand dollars. It would have been nugatory to lay off the supposed homestead; indeed, there was nothing to lay off, for the whole was subject and necessary to the payment of the judgment creditor's debt for the land. Where it appears that the debt for which the land is to be sold is for taxes; for the purchase money of the land; is secured by a laborer's or mechanic's lien; or for a debt contracted before the adoption of the state constitution, and that the land is worth less than one thousand dollars, and the same is all the property the debtor has that may be sold to pay such debt, it is not necessary that the sheriff shall have the homestead laid off, because, in such case, the land is not exempt from sale and cannot be. It would be idle to go through with the empty form of seeming to lay off to the debtor something, when in fact he is to get nothing! The law does not require a vain thing to be done.

Where the homestead prevails, the creditor gets what is over the exemption, and the law requires it to be laid off, to the end that what remains may be seen and sold. But where the home-

stead does not prevail, the debtor takes what is left after the debt is paid. If nothing is left, the laying off the homestead would have nothing to operate upon, and it would be useless. It would be otherwise, however, if the debtor had property sufficient to pay the judgment, against which no exemption prevails, and judgments whose liens antedate the last mentioned judgment; for the law favors the homestead. And if the debt that may, if need be, prevail against it, can be paid without selling it, this must be done. The classes of debts that prevail against the homestead do not so prevail necessarily and at all events, but they do so only when to sell it is necessary to pay them. *Wilson* v. *Patton*, 87 N. C., 318; *Albright* v. *Albright*, 88 N. C., 238.

If the personal property over the exemption and the real property of the debtor will more than pay the judgment that prevails against the homestead, then, in that case, the homestead should be laid off, so that the excess may first be sold; and the sheriff will be in peril if he fails to have this done. Indeed, the sheriff will not be safe in any case when he fails to have the homestead laid off, unless it turns out that the debtor could not have homestead in any measure. It may happen that the debtor will get a homestead of less value than one thousand dollars: it cannot exceed that sum.

So, the court properly refused to charge the jury that the deed was void because the homestead had not been laid off.

2. It is also insisted that the court erred in declining to charge the jury that the execution under which the sheriff sold the land was void, because it was issued by the deputy clerk of the court.

Such clerks are allowed by law. THE CODE, §75. They are required to take an oath of office, and, for a period in the past, have generally issued writs in the name of their principal. They may do all acts the clerk may do, except such as are judicial in their character, or such as a statute may require specially to be done by the clerk himself. While perhaps there is no decision of this court affirming the power of such clerks to issue

writs or executions in the name of their principal, it has repeatedly impliedly recognized such power as existing. At the present term, the court has held in *Jackson* v. *Buchanan*, *ante*, 74, that a deputy clerk might issue a warrant of attachment. See also *Shepherd* v. *Lane*, 2 Dev., 148; *Coletraine* v. *McCain*, 3 Dev., 308; *Sudderth* v. *Smyth*, 13 Ired., 452. If the deputy clerks were not allowed to do such service, much of their usefulness would be destroyed. The very purpose of creating the office of "deputy clerk" was to help the dispatch of public business, and to provide for the same when the clerk might be necessarily absent from his office, or unable for any cause to give personal attention to his official duties. Rev. Code, ch. 19, §15. The exception is groundless.

3. It is further objected that there was no sufficient evidence of a sale of the land by the sheriff.

The judgment and the execution under which the land was sold were in evidence. The return of the sheriff upon the execution was imperfect, but this is by no means a fatal defect. That a sale was made, might be proved by parol evidence. But the deed of the sheriff was in evidence, and the recitals in it are competent to show, *prima facie*, that a sale was made. The deed recites that the land was sold for cash on the 29th day of April, 1878, at the court-house door, &c. *Hardin* v. *Cheek*, 3 Jones, 135; *McKee* v. *Lineberger*, 87 N. C., 181; *Rollins* v. *Henry*, 78 N. C., 342. This exception cannot avail the defendant.

4. It was objected that the execution, in terms, was levied upon one tract of land, while the sheriff's deed specified two.

Now the docketed judgment was a lien upon all the defendant's land in the county of Ashe. The levy was not essential: it only served to indicate the land to be sold, and this might be done otherwise. It sufficiently designated the land embraced by the deed. The material part of it is in these words: "Levied this execution upon the tract of land whereon the defendant now lives, on the waters of Bear creek, adjoining the lands of Jo.

Bass and others—number of acres not known—this execution being for the purchase money for said land." In the deed the land is specifically described as two tracts. It appears from the record that the judgment indicated the land described in the deed; that the deed described the land where the defendant lived at the time of the levy and sale; that the whole body contained sixty acres, and was considered as one tract and known as the land on which the defendant lived at the time of the levy and sale. The defendant said she lived on one of the two adjoining tracts, and got her wood off the ten-acre tract on which she had no clearing. It further appeared that the note on which the judgment was founded was given for the land embraced by the deed. The evidence all goes to show, and the jury in effect found, that the land was designated and sold as one body. In such a case it was competent to show by parol testimony that the land levied upon, although specifically described as two tracts, was regarded and levied upon and sold as one. *Jackson* v. *Jackson*, 13 Ired., 159; *Houston* v. *McGowen*, 78 N. C., 370.

5. It is insisted that the deed of the sheriff does not convey the *title of the defendant.*

This objection cannot be sustained. The deed recites the substance of the execution against the defendant, the levy of the same "on the lands and tenements of the said Betsy Jane Miller, herein defendant," the sale, &c., and then it purports to convey to the purchaser and his heirs "all the right, title and interest of the said land * * * to have and to hold said land and premises with its improvements and appurtenances," &c. The sheriff had power by virtue of the judgment, the execution and his office, to sell the land and convey the title thereto as the land of the defendant. The deed upon its face and by its terms, by its recitals, its purpose and its force and effect, shows that the sheriff did exercise his power and authority to sell and convey the title to the land of the defendant, and all her interest in the same.

There is no error, and the judgment must be affirmed. It is accordingly so ordered. Let this be certified.

No error. Affirmed.

LYDIA PATTERSON and others v. JOHN W. WADSWORTH, Admr.

Jurisdiction of Supreme Court over questions of fact—Executors and Administrators.

1. In an action at law, this court cannot look into the evidence to see what facts it warranted a referee in finding.
2. An administrator will be held responsible if he is guilty of gross negligence in failing to collect a debt due the intestate's estate; but otherwise, where he in good faith does not engage in a fruitless litigation at the expense of the estate, and his management of the same is such as a prudent man would display in his own business.

(*Hawkins* v. *Savage*, 75 N. C., 133; *Bruner* v. *Threadgill*, 88 N. C., 361; *Deberry* v. *Ivey*, 2 Jones' Eq., 370; *Nelson* v. *Hall*, 5 Jones' Eq., 32; *Mendenhall* v. *Benbow*, 84 N. C., 646, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of ROWAN Superior Court, before *Graves, J.*

This action is upon the bond of the defendant, as administrator of Chauncey Burnett, deceased, and was referred to a referee to state an account of the administration of the assets of the intestate's estate. Upon return of the report, the plaintiffs filed exceptions thereto, which were overruled by the court, report confirmed, and judgment rendered accordingly, from which the plaintiffs appealed.

Mr. Kerr Craige, for plaintiffs.
Mr. J. S. Henderson, for defendant.

SMITH, C. J. Chauncey Burnett, a temporary resident in Rowan county, engaged in manufacturing and selling wheat fans before and up to the commencement of the late war, soon after left the state and returned to New York, the state of his domicil. A portion of his property here was thereafter seques-

tered under an act of the Confederate congress, passing into the hands of J. I. Shaver, receiver, by whom its proceeds were paid over to that government. At the close of hostilities, Burnett returned and collected a considerable amount of his effects, and some money from parties who had bought at the receiver's sale. He then went back to New York and died on June 9th, 1866. Two administrations were there granted on the intestate's estate; first, general, to Emily Burnett, and upon her decease, *de bonis non*, to A. Eugene Burnett. No administration was granted in this state until August 6th, 1878, when letters issued to the defendant and he executed the bond now in suit. Shaver died in 1873. No action has ever been instituted to recover the sequestered fund from him or his personal representative, though he was, and his estate now is, solvent.

The appeal brings up for examination a series of exceptions to the report of the referee of the defendant's administration, which, upon the hearing, were overruled by the court, and judgment rendered in favor of the relators for one-half of the sum found due to them and other distributees not parties to the action.

The first three exceptions, presented in different aspects, refer to the defendant's failure to return an inventory, which involves only nominal damages, and, as the relators recover judgment and their costs, are not deemed material.

The last two exceptions are to the referee's omission to charge the administrator with two small specified sums ($32.40 and $15.02), in regard to which there are no facts found to enable us to see whether in law the exceptions are well taken, and that they ought to be charged against the defendant.

This being an action at law, we cannot look into the evidence to see what facts it would warrant the referee in finding, and it is only upon facts ascertained that a question of law can arise, to which, in this appeal, we are confined.

The exceptions, numbered 4, 5 and 6, together, present the question whether the defendant, by his inaction and failure to

prosecute suit for the recovery of the sum claimed to be due for the seizure and conversion of the intestate's effects by Shaver, has made himself personally liable therefor. Indeed, this was the only matter pressed in the argument in this court.

In our view, the exceptions which seek to fasten this responsibility upon the defendant for his alleged laches are untenable, for reasons we proceed to state:

1. The intestate did not assert such claim against the receiver while he was in the state looking after and gathering up his effects, of which some were obtained from persons who had purchased from the receiver, and the defendant might well infer from this omission that the claim could not be successfully maintained. He has but followed the course pursued by the intestate and shown equal diligence.

2. The action could have been brought by the intestate, while it was barred by the statute of limitation when the letters of administration issued to the defendant, and this was a complete defence.

The cause of action, having accrued before the introduction of the new mode of procedure, is controlled by the limitations prescribed in the Revised Code, ch. 65, and but for the force of the suspending enactment, would have begun to run during the life of the intestate, and did begin to run as soon as that enactment ceased to operate in repressing it. In three years from January 1st, 1870, the bar became complete, for there was no such extension of time to prevent, as is provided in C. C. P., §43. *Hawkins* v. *Savage*, 75 N. C., 133; *Bruner* v. *Treadgill*, 88 N. C., 361.

We cannot see how a dereliction of duty can be imputed to the defendant in refraining, after his appointment, from prosecuting an action which had to encounter certain defeat if the defence under the statute was interposed, and with every assurance that it would be for the protection of the estate of Shaver.

3. Good faith and reasonable diligence is the measure of the responsibility of fiduciaries in the management of trusts committed to them, such as prudent men would, under the circumstances,

be expected to exercise. It is not a test of liability whether the claim if sued on could possibly have been collected, but whether the defendant was called on to institute a hazardous suit, at the expense of the estate, with no assurance of success and to encounter certain defeat if resisted.

"A personal representative, guilty of gross negligence or willful default in failing to collect a debt due the estate, will be personally chargeable with it: otherwise, where his conduct was such as a prudent man, in the management of his own business, would have displayed, and he has made proper exertion to collect and has acted in good faith," Schouler Exrs., §308; or, it may be added, when it is plain such exertion would have proved fruitless.

"An executor is not an insurer," remarks NASH, J., "nor to be held liable as such in taking care of the assets which came to his hands, nor in collecting them. He is answerable only for that *crassa negligentia*, or gross negligence, which evidences *mala fides*." *Deberry* v. *Ivey*, 2 Jones' Eq., 370.

"Executors should not be held responsible, as insurers," is the language of MANLY, J., reiterating the rule. "All that a sound public policy requires is that *they shall act in good faith and use ordinary care*." *Nelson* v. *Hall*, 5 Jones' Eq., 32. To the same purport is *Mendenhall* v. *Benbow*, 84 N. C., 646.

We therefore sustain the rulings of the court and affirm the judgment.

No error. Affirmed.

P. C. HUMBLE and others v. W. M. MEBANE and others.

Reference—Guardian—Administrators—Statute of Limitations—Sureties.

1. A reference to take an account is irregular where a defence is set up to the entire action, and the allegations of fact, if found to be true, would defeat

the plaintiff's recovery, and in such case the court should direct the issues to be tried; but otherwise, where the defence relied on is no obstacle to the recovery.

2. A guardian who has received money by virtue of his office and for his ward, cannot exonerate himself from liability by showing that the money was due to the ward's father, who is a distributee of the estate from which it was derived.

3. Such distributee has the same redress against the administrator of the estate for his share thereof, as if the alleged misapplication had occurred in any other way; and the court *intimate* that, in case of the insolvency of the administrator, he may pursue the fund in the hands of the guardian who wrongly received it.

4. The plea of the statute of limitations in this case is defective, in that, it fails to state when the cause of action accrued, and when the wards arrived at full age. An allegation to show that the statute has run, and bars the action, is essential.

5. The statute protecting sureties, remarked upon by SMITH, C. J.

(*Earp* v. *Richardson*, 75 N. C. 84; *Means* v. *Hogan*, 2 Ired., Eq., 525, cited and approved).

CIVIL ACTION on a guardian bond tried at Fall Term, 1883, of GUILFORD Superior Court, before *MacRae, J.*

The defendant Mebane, in February, 1866, was appointed guardian to the relators (Preston C. and Rebecca Humble and Libby Louisa, now the wife of the other relator) by the county court of Guilford, and entered into bond as such in the penal sum of $2,000, with the other defendant and one R. P. Shaw, sureties, with conditions required by law.

The relators having arrived at full age on August 14th, 1879, instituted this action to recover the trust estate in the hands of the guardian, and assign several breaches of the obligation, and especially his failure to come to an account and pay over what is due, collected on their behalf.

The defendants deny the breaches assigned, and say that the moneys received by the guardian and supposed then to belong to the wards, in fact, did not, but were part of an estate left by their father's mother, to which their father, Simon Humble, alone was entitled as distributee, and which were paid to the guardian by the administrators of the intestate, wrongfully.

At fall term, 1880, on motion of plaintiffs' counsel, resisted by the defendants, on the state of the pleadings, a reference was made to the clerk and he was directed to take and report the guardian account with the several relators.

Before the referee, the defendants offered to show that the funds, with which it was sought to charge the guardian, were derived from the estate of the relators' paternal grandmother, and paid by her administrators; and that their father, who was entitled thereto, was still alive. The evidence was rejected for the reason that, in the opinion of the referee, the matter was not embraced in the terms of the order.

The referee made his report, in which he finds that the guardian, in his character as such, on a note passed to him by the administrators as part of the distributive share claimed for the infants, recovered judgment and raised by execution sale of the debtor's land the sum of $250; and also collected other moneys for the wards, with which, and without interest, for reasons which are given, the guardian is charged, the aggregate sum being $647.71.

Upon the return of the report, the defendants filed a series of exceptions, the issues presented by which, as well as the defence already stated and that under the statute of limitations, they demanded should be submitted to the jury.

This was declined, and the defendants having withdrawn exceptions numbered 3, 4 and 5, the others were overruled, and, it being admitted on the record that all of the estate, to which the relators claim to be entitled, came from the estate of their grandmother, the court proceeded to render judgment for the sum reported by the referee. From these rulings the defendants appealed.

Mr. J. T. Morehead, for plaintiffs.
Messrs. Scott & Caldwell, for defendants.

SMITH, C. J., after stating the above. It would be clearly irregular and unjust, where a defence is set up to the entire

action, to leave it undisposed of and direct a compulsory reference to have an account taken, and then, upon the coming in of the report, refuse to hear or to submit an issue, as to the facts upon which it depends, to the jury, if those facts found true would defeat the plaintiffs' recovery. And it was not less erroneous in the referee to hear and report the evidence when offered, since it tended to show, according to the defendants' contention, that nothing to which the plaintiffs were entitled had passed into the guardian's hands which was covered by the bond. The very object of the reference is to ascertain what the guardian has received or ought to be charged with, and how the same has been administered. If no estate belonging to the wards has been or could have been recovered, no liability has been incurred, as none would be if the fund has all been legally disbursed and nothing is due. In either case the plaintiffs must fail. But if the defence relied on forms no obstacle in the way of the plaintiffs' recovery, then the course pursued by the court and by the referee, in shutting out an inquiry into the truth of the alleged facts upon which the defence is based, has done no harm to the defendants of which they can complain.

The entire controversy, then, hinges upon the point whether, where the guardian, by virtue of his representative agency, has reduced into possession moneys recovered by a successful assertion of his wards' right thereto, can exonerate himself from liability to them therefor by showing that the moneys were legally due, not to them, but to their living father, the rightful distributee to the estate from which they were derived, who is now claiming the same.

Assuming that the fund paid to the guardian belonged to the father, the rightful distributee of the intestate, and should have been paid to him by the administrators, does this fact authorize the guardian to retain what he collected *by virtue of his office and for his wards* and refuse to account for it to them?

Contrary to our first impressions produced by the argument for the defendants, our examination and reflections bring us to

the conclusion that the defence cannot be available by proof that the relators' father has the supreme right, as distributee to the intestate's estate, in the hands of the representatives.

The report shows that the administrators, recognizing the relators' right, paid over to the guardian *for them*, in money and in a bond, which he, in their behalf and as their guardian, afterwards sued on and collected by selling the debtor's land under execution, and with which he is charged in the account. He thus receives the moneys in trust for his wards and is accountable therefor, as their estate, which he cannot be permitted to dispute.

That the administrators should have paid the money to another does not authorize the guardian to withhold from his wards what was paid to him for them, and constitutes the estate that he receives and covenants to manage and at their majority deliver to them. The administrators may have committed a *devastavit* in this disposal of the intestate's estate, as they might do by any other wrongful act, but they remain responsible to the distributee, and he has the same redress against them upon their bond as if the waste and misapplication had occurred in any other way. He loses none of his rights as against them by reason of their maladministration of the estate in which he has a distributive share. *Means* v. *Hogan*, 2 Ired. Eq., 525.

A party may be sued separately by different claimants to the same property, and a recovery made by each. It would be no obstacle to the recovery by the rightful owner, that a previous plaintiff had wrongfully effected a recovery and been paid. So it would be no defence to an action by the father against the administrators, that they had paid the amount of his distributive share to the relators, or to their guardian for them.

It may be, we do not say it is so, the distributee, in case of the insolvency of the administrators, may pursue the funds into the hands of the guardian who has wrongfully received it, and this right would be unquestionable if there had been collusion between the parties, but this does not warrant the guardian in retaining a fund, where no steps have been taken to reclaim,

which he collected and holds in trust for his wards, and cannot dispute their right to it.

So if there were any sufficient reasons for apprehending an action against the guardian to be brought by the father, and a recovery effected, he may have a right, before paying the money, to have from his wards an indemnity against such claim; but even this would not obstruct the plaintiffs' recovery of judgment for the sum ascertained to be due, and relief could be obtained by suspending the enforcement by execution until the indemnity, if necessary, can be given.

The defendants also plead the statute of limitations, without stating the facts from which it can be seen that the remedy against the surety is barred, and that there are any controverted allegations of fact calling for the issue to be submitted to the jury. *Earp* v. *Richardson*, 75 N. C., 84.

There is no allegation in the pleadings as to when the cause of action accrued, and to show whether it was before or after the introduction of the new limitations contained in C. C. P., nor at what time the several infants attained full age, so as to put in operation the old statute protecting the sureties to the bond after three years from that period. The defence is set up jointly, and there was no statute formerly limiting the time within which actions must be brought on bonds, except the provision in favor of the surety; and the bar is unavailable under the present act, unless there has been an account audited (§33) for the guardian, or unless there has been a lapse of three years from the breach of the bond (§34, sub. 6) in favor of the surety. There should have been some averment to show that in law the statute has run and bars the action.

We cannot assign error, therefore, in the omission of the court to submit this issue to the jury. The judgment must be affirmed.

No error. Affirmed.

L. M. LITTLE v. J. R. DUNCAN, Admr.

Executors and Administrators—Statute of Limitations.

1. The plea of an administrator of "fully administered and no assets" must be disposed of by submitting an issue to a jury or by reference.
2. Where an administrator had assets and sets up the statute of limitations against a debt of his intestate (Rev. Code, ch. 65, §11), he must aver and prove that he has properly administered the same, in order that his plea may avail him. If it is ascertained he has no assets, the statute is a complete bar.

(*Heilig* v. *Foard*, 64 N. C., 710; *Ray* v. *Patton*, 86 N. C., 386; *Bailey* v. *Shannonhouse*, 1 Dev. Eq., 416; *Reeves* v. *Bell*, 2 Jones, 254; *Cooper* v. *Cherry*, 8 Jones, 323; *McKeithan* v. *McGill*, 83 N. C., 517; *Cox* v. *Cox*, 84 N. C., 138, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of UNION Superior Court, before *Shipp, J.*

The plaintiff brought this action on the 27th day of November, 1879, before a justice of the peace in the county of Stanly, upon a note under seal for $15, dated the 18th day of September, 1860, and due twelve months next thereafter, executed by one A. J. Duncan, in his life-time, to J. J. Hasty. It appears that said Duncan died in 1863, and in July of that year the defendant duly qualified as administrator upon his estate. There was judgment before the justice of the peace for the plaintiff, and the defendant appealed to the superior court. The defendant pleaded payment; that he had fully administered the assets that came, and ought to have come into his hands as administrator; no assets; that the note had not been duly presented for payment within the time prescribed by law, and that more than seven years had elapsed next after the death of his intestate and before the date of the bringing of this action.

The jury found upon issues submitted to them, that the intestate of the defendant did execute the bond sued upon as alleged;

that it had not been paid; that defendant did not give notice for creditors to present their claims to him according to law; and that more than seven years had elapsed next after the date of the death of the intestate of the defendant and the bringing of this action.

Thereupon, the plaintiff moved for judgment in his favor. The court refused to grant this motion, upon the ground that there had been no evidence offered upon the plea of "fully administered and no assets."

The plaintiff then prayed the court that an issue upon that plea be submitted to another jury. This motion the court declined to grant. The plaintiff then prayed that the court make a proper order referring it to the clerk of the court to inquire, state an account, and make report of the condition of the assets that came and ought to have come into the hands of the defendant, and what disposition he had made of the same. This motion was likewise refused.

The defendant prayed judgment of the court, that he go without day, and for costs, upon the ground that it appeared that more than seven years had elapsed next after the death of the intestate of defendant and the bringing of this action. The court, being of opinion that the defendant had not shown on his part a full and sufficient compliance with the statute, declined to grant this motion.

The court then gave judgment in favor of the plaintiff for the debt, and in favor of the defendant for costs. Whereupon, both the plaintiff and defendant appealed.

Messrs. Covington & Adams and *Hinsdale & Devereux*, for plaintiff.

Messrs. Payne & Vann, for defendant.

MERRIMON, J., after stating the above. *Plaintiff's Appeal*— The estate in the hands of the defendant was and is subject to the statutes touching the administration of estates of intestate

deceased persons, prevailing before the first day of July, 1869, except as to the courts having jurisdiction of such matters. THE CODE, §1433. The plaintiff was entitled to have his rights ascertained and settled in respect to the assets in the hands of the defendant subject to be applied to the payment of his debt, or otherwise, under these statutes, and according to the course of procedure and practice under them, changed only in respect to the courts having jurisdiction of them and the forms of procedure therein.

The court held properly, that the statute of limitations pleaded and relied upon by the defendant could not avail him. (See opinion on defendants appeal in this case).

Then it seems to us manifest that the court, having given judgment in favor of the plaintiff for his debt, ought to have disposed of the plea of "fully administered and no assets." In the case settled by the judge upon appeal for this court, it is said * * * "the plaintiff asked for judgment, which was refused, upon the ground that there had been no evidence upon the plea of "fully administered and no assets." It is further said, however, that "the plaintiff then asked that an issue be made upon that point and submitted to another jury, which was refused. He then asked that a reference be made to the clerk or other person to report the condition of the assets, &c. This was likewise refused." No reason is assigned for such refusal. The issue as to "fully administered and no assets" was raised by the pleadings, and the plaintiff was entitled to have it tried, at the term when the court gave judgment for the debt, by reference or otherwise; or, at all events, to have his motion allowed, and then continued to a subsequent term to be tried. *Heilig* v. *Foard*, 64 N. C., 710; *Ray* v. *Patton*, 86 N. C., 386.

The court erred in refusing to dispose of the plea of "fully administered and no assets," as prayed for by the plaintiff, either by submitting one or more proper issues to a jury, or by a reference to take an account. For this error the case must be remanded, with directions that the court proceed to try the issue

raised by the pleadings in respect to assets, according to law. It is accordingly so ordered. Let this be certified.

PER CURIAM. Cause remanded.

IN SAME CASE UPON DEFENDANT'S APPEAL:

MERRIMON, J. The facts in this case are the same as those stated in the plaintiff's appeal.

Among other defences, the defendant relied upon the statute of limitations (Rev. Code, ch. 65, §11), and it was at the trial found as a fact, that more than seven years had elapsed next after the death of the intestate of defendant before the bringing of this action. The defendant thereupon moved for judgment that he go without day.

The court properly denied this motion, because the statute was not a bar, at all events; if there were assets in the hands of the defendant, this plea would not be good and avail him, unless he should, in that case, aver and prove that he had paid such assets to the persons entitled to the same, and taken from them proper refunding bonds for the benefit of creditors; or had paid the same to the trustees of the University, as required by law. (Rev. Code, ch. 46, §§24, 27). *Bailey* v. *Shannonhouse*, 1 Dev. Eq., 416; *Reeves* v. *Bell*, 2 Jones, 254; *Cooper* v. *Cherry*, 8 Jones, 323; *McKeithan* v. *McGill*, 83 N. C., 517; *Cox* v. *Cox*, 84 N. C., 138.

It does not appear that the defendant had assets, and it has been held in *McKeitkan* v. *McGill*, *supra*, that if the administrator had no assets, he need not and could not make such averment and proof. But in this case it does not appear that the defendant did not have assets; he pleaded "fully administered and no assets," and the issue presented by this ground of defence remains undetermined. The plaintiff is entitled to have it tried. If it turns out that defendant had no assets, then his plea of the statute of limitations will avail him, and he will then be entitled to the judgment he prayed for; if, however, it shall be ascer-

tained that he had assets, then it will not, and the plaintiff will be entitled to have judgment for his debt, and the assets applied to his judgment accordingly as he may be entitled.

Where the administrator has assets and he relies upon the statute of limitations (Rev. Code, ch. 65, §11), such plea must be supported by the averment and proof to sustain it, made by the administrator, that he has paid the assets to those entitled to have them, and taken refunding bonds, or, that he has paid the same to the trustees of the University, accordingly as the statute requires, to make it effectual. Whatever contrariety of opinion and conflicting judicial decisions may have prevailed in the past in respect to the statute of limitations mentioned and the kindred statute, Rev. Code, ch. 65, §§12, 13, 14, the authorities cited *supra* settle the construction of the one under consideration, as here stated.

As this case naw stands, whether the plaintiff can recover at all or not, depends upon whether the defendant has or has not assets; if he has, then the plaintiff, without regard to the amount or how the same may be applied, is entitled to judgment; if he has not, then the statute is a complete and effectual bar, and the defendant will be entitled to judgment. So that, the court ought to have deferred giving judgment for the debt, or judgment at all, until the question of assets shall be settled.

The order of the court, denying the motion of the defendant, from which he appealed, was a proper one, and the same must be affirmed. There is no error; judgment affirmed. Let this be certified.

No error. Affirmed.

OTWAY B. DAVIS and others v. PERRY & PERRY, Executors.

Statute of Limitations.

Where, in a suit on a guardian bond, one of the plaintiffs, a *feme* covert, arrived at full age in 1865, married in 1867, and commenced the suit in 1876; *Held*, that the statute did not bar her right to recover. The interval

of two years between the termination of the disability of infancy and the commencement of that of coverture, is bridged over by the act suspending the operation of the statute from May, 1865, to January, 1870.

(*Lippard* v. *Troutman*, 72 N. C., 551; *Davis* v. *Cooke*, 3 Hawks, 608, cited and approved).

CIVIL ACTION tried at Fall Term, 1881, of CARTERET Superior Court, before *Shipp, J.*

This action was instituted on July 26, 1876, on the bond executed by Samuel E. Davis, on his appointment by the county court of Carteret in 1857, as guardian to the infant relators, against the defendants, the executors of Benjamin L. Perry, one of the surety obligors, to recover what is due to them respectively from the administration of the trust estate.

The only defence to be considered on the appeal arises upon the statute of limitations.

There was a reference, a report showing what was due to each, which, in the absence of exceptions, was confirmed, and a verdict response to several issues submitted to the jury.

The facts found by the jury and bearing upon the defence are, that the relator Polly was born on the 22d day of March, 1844, and married the relator Otway B. on the 29th day of August, 1867, being then more than two years above the age of twenty-one years; and that the relator Lurenza was born on the 17th day of March, 1852, and married to the relator Martin F. on the 15th day of April, 1871, not having attained her majority.

The court was of opinion and ruled that the relators Martin F. and wife, Lurenza, were entitled to recover her share of the estate, but that the relators Oway B. and wife, Polly, were not, their claim being barred by the lapse of time under the statute.

Judgment was rendered accordingly, and the relators last named appealed.

Mr. H. R. Bryan, for appellants.

No counsel *contra*.

SMITH, C. J., after stating the above. It will be seen that the case is not one of overlapping disabilities, the one running into

the other, but there is a distinct interval of over two years separating the termination of the disability of infancy from the commencement of that of coverture, and this space is bridged over by an act suspending the statute of limitations. The question presented is, does the suspending act so connect the two disabilities as to produce the same legal effect, as if one supervened upon the other?

If the question were an open one, we should be disposed to concur in the ruling of the court that the statute of limitations, not extinct, but slumbering until the first of January, 1870, then awakened into life and activity and operated against the *feme* relator, though under coverture, as it would have done on her arriving at full age, but for the suspension; and that the effect of the suspension was to eliminate from the count of time so much as was covered by it.

But we do not feel at liberty to depart from the express adjudication of the point in the case of *Lippard* v. *Troutman*, 72 N. C., 551, the facts of which are substantially the same as the present. There, the court say, SETTLE, J., delivering the opinion, "that as the *feme* plaintiff did not become of age until 1866, the suspension of the statute of limitations *saved her rights until the first day of January*, 1870. But before that time, to-wit: in 1869, she went under the disability of coverture"; and upon this ground the statute was held not to obstruct the recovery.

There is some inaccuracy in the reference to section 28 of the Code, which is part of chapter 2, and confined to actions relating to real estate. It is not applicable to that, nor to this suit, both being on guardian bonds.

But our case is governed by the limitations prescribed in the Revised Code, the right of action having accrued before the Code of Civil Procedure took effect, and the principle of cumulative disabilities is recognized as law under the former enactments, in *Davis* v. *Cooke*, 3 Hawks, 608, and universally acted on, as such, since.

The ruling in the case first cited is that the interval separating

the disabilities is blotted out by force of the suspending act, and they are thus made in law to touch, as if the one began at the expiration of the other.

Abiding by this interpretation of the law, as a precedent, we reverse the judgment against the appellants, and judgment will be here entered for them for the amount due.

Error. Reversed.

JAMES MASK v. LEWIS TILLER and others.

Statute of Limitations, in fraud and mistake—Equity, not withheld on ground of lapse of time—Exceptions to the rule.

1. The statute of limitations barring actions for relief on the ground of fraud after three years from the discovery of facts constituting fraud, prior to the amendatory act of 1879, ch. 251, does not apply to a case where no fraud, but only a mistake, is alleged.
2. The enforcement of an equity will never be denied, on the ground of lapse of time, where the party seeking it has been in continuous possession of the estate to which the equity is an incident.
3. The court will lend its aid in every such case, except where, by laches, the party has abandoned his right and acquiesced in its enjoyment by another in a manner inconsistent with his own claim.

(*Stith v. McKee*, 87 N. C., 389, cited and approved).

EJECTMENT tried at Spring Term, 1883, of RICHMOND Superior Court, before *MacRae, J.*

The plaintiff alleged that he was the owner in fee-simple of the land in dispute, and that defendants unlawfully withheld possession thereof. In support of his title, the plaintiff offered in evidence a deed from Walter F. Leak and wife to him, dated December 3, 1872.

The defendants specifically denied each allegation of the complaint, and by way of counterclaim, alleged that Jack Ledbetter,

their father, employed the plaintiff to purchase the land from said Leak, who was then the owner of it; that it was agreed that the deed should be made to the plaintiff, and the land by him conveyed to said Ledbetter, or that the deed should be made directly to Ledbetter; that Ledbetter furnished the purchase money, and the plaintiff took the deed to himself; that Ledbetter went into possession of the land, and he and those claiming under him have had possession ever since; that said Ledbetter is dead, and the defendants are his children and heirs at law. The defendants, therefore, ask that the plaintiff be declared a trustee for their benefit, and that he be ordered to make them a title to the land.

The plaintiff, replying, denied each of the allegations set up in the counterclaim, and pleaded the statute of limitations.

Much evidence was offered on each side as to the question whether there was such an agreement as that alleged in the counterclaim, and whether Jack Ledbetter had paid the purchase money for the land.

It was in evidence on the part of the defendants that Ledbetter died on the 9th of January, 1873; that he built a house on the land, and lived there about a year before he died, and his widow and children lived there until she died, and the defendants, the children, have continued to live there ever since; that the defendant Fannie Black also lived there a while with the widow, but had moved away.

It was agreed that the deed from Walter F. Leak was made to the plaintiff, and that the defendants Ella Tiller (wife of Lewis Tiller) and Thomas and Allen Ledbetter were the children of Jack Ledbetter, deceased; and there was evidence that they were all minors at the commencement of this action.

The following issues were submitted to the jury:

1. Did the plaintiff agree to buy the land for Jack Ledbetter? Yes.

2. Did Jack Ledbetter pay the purchase money for the land? Yes.

3. Is the defendants' claim barred by the statute of limitations? No.

4. What damage, if any, has the plaintiff sustained by reason of defendants' unlawfully withholding possession?

It was admitted by plaintiff's counsel that the jury should find in the affirmative in response to the first and second issues, and they were instructed by the court that they should so find.

Plaintiff's counsel insisted that defendants' claim was barred by the statute of limitations, under the provisions of sub-division 9 of section 34 of the Code of Civil Procedure, and requested the court to charge the jury that if they believed the evidence, the plaintiff was entitled to recover; and further, that if Jack Ledbetter in his life-time had notice that the deed was made to plaintiff, and plaintiff refused to convey to him, the defendants' claim was barred by the statute.

His Honor declined so to instruct the jury, but charged them that upon the evidence the defendants' claim was not barred, and that they should find in the negative in response to the third issue. The plaintiff excepted. The jury responded as above indicated. Judgment for defendants; appeal by plaintiff.

Messrs. Frank McNeill and *J. D. Shaw*, for plaintiff.
Messrs. Burwell, Walker & Tillett, for defendants.

ASHE, J. The only question raised by the pleadings is whether the counterclaim set up by the defendants was barred by the statute of limitations. The plaintiff insists that it is barred by the Code of Civil Procedure, §34, sub-sec. 9, which bars actions after three years, and as originally enacted, reads:

"An action for relief on the ground of fraud, in cases which heretofore were solely cognizable by courts of equity, the cause of action in such cases not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting fraud."

This act was amended by the act of 1879, ch. 251, by inserting after the word "fraud," wherever it occurs, the words "or mistake."

So that, prior to the act of 1879, there was no statutory bar of three years to an action for relief on the ground of mistake.

In relying upon this enactment, the plaintiff sets up a discreditable defence. He says to the defendants, "I know I purchased this land as your father's agent, and that he paid the purchase money, and I ought to be bound in conscience to make you a deed for it, but I committed a fraud on you by taking the deed to myself, and I now avail myself of that fraud to defeat your claim."

The statute of limitations was mainly intended to suppress fraud, by preventing fraudulent and unjust claims from being asserted after a long lapse of time. It ought not, therefore, to be so construed as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation. Angel on Limitations, §186. The like spirit should govern the construction of the facts and circumstances of a transaction so as to take it out of the operation of the statute, where gross injustice would be worked by its application.

Viewing the facts of this case in that light, we do not think the statute of limitations, relied on by the plaintiff, can avail him.

The defendants, in the statement of the facts of their counterclaim, do not charge the plaintiff with fraud in taking the deed in his name. They allege that it was agreed, either that the deed should be made to the plaintiff and the land by him conveyed to Ledbetter, or that the deed should be made directly to Ledbetter. And on the trial, one Sandy Leak, introduced as a witness by the defendants, testified "that the plaintiff told witness that Jack Ledbetter furnished him the money to buy the land, and old man Walter Leak made the deed wrong, and that they were to meet to exchange the deeds." So that whatever purpose the plaintiff may have entertained subsequently to defraud the defendants, the evidence tends to establish the fact that there was no fraud practiced by the plaintiff in the execution of

the deed, but that it was executed by the vendor through a mistake (which was natural enough, as the money was handed to him by the plaintiff); whereas the section of the Code of Civil Procedure upon which the plaintiff relies for barring the defendants' claim, as originally passed, only applied to an action for relief on the ground of fraud; and as there was no fraud alleged in this case, but only a mistake, the enactment has no application. Nor in its amended form, as enacted by the act of 1879, did it have any application, for Jack Ledbetter died in 1873, before the act of 1879 was passed. Nor did it apply to the defendants after the amendment in 1879, for the reason that the defendants who were the heirs-at-law of Jack Ledbetter at that time, were all minors, under the disability of infancy, and continued to be so until the commencement of this action.

But aside from that view of the question, and conceding that this was a constructive trust, which could only be enforced under the former practice, by a court of equity, and that the deed was obtained by fraud, it does not follow that the defendants are barred by the statute. Jack Ledbetter took possession of the land soon after the purchase by the plaintiff as his agent, and he and his heirs, the defendants, have held the peaceable possession of it ever since; and in *Stith* v. *McKee*, 87 N. C., 389, Mr. Justice RUFFIN, speaking for the court, said, "that one may preclude himself by his laches from asserting a right which otherwise a court would help him to enforce, there are abundant authorities to show; but to do so in any case, there must be something on his part which looks like an abandonment of the right, or an acquiescence in its enjoyment by another, inconsistent with his own claim or demand, and accordingly we have searched in vain for a single instance in which the court has withheld its aid in the enforcement of an equity, on the ground of the lapse of time, when the party seeking it has himself been in the continued possession of the estate to which that equity was an incident."

We are of opinion there is no error in the judgment of the superior court. It must therefore be affirmed.

No error. Affirmed.

M. M. RANDOLPH and another v. W. H. HUGHES and others.

Wills, reprobate of—Caveat.

1. Where a script has been proved by the executor without citation or notice to those interested in the decedent's estate, they are entitled to have the probate set aside, and, to an order for repropounding the will, if applied for within a reasonable time after notice of the former probate, to the end that its validity may be inquired into; and under the present statute, the application need not set forth the grounds upon which the script is impeached.
2. The law relating to the method of procedure in entering a *caveat*, and the decisions bearing upon the question, commented on by SMITH, C. J.

(*Armstrong* v. *Baker*, 9 Ired., 109; *McNorton* v. *Robeson, Ib.*, 256; *Moss* v. *Vincen*, 2 Car. L. R., 414; *Jeffreys* v. *Alston, Ib.*, 364; *Ralston* v. *Telfair*, 1 Dev. & Bat., 482; *Etheridge* v. *Corprew*, 3 Jones, 14; *Syme* v. *Broughton*, 86 N. C., 153; *King* v. *Kinsey*, 71 N. C., 407, cited and approved).

MOTION to set aside the probate of a will, heard at Spring Term, 1882, of NORTHAMPTON Superior Court, before *Bennett J.*

The court refused the motion, and the defendants appealed.

Mr. R. B. Peebles, for plaintiffs.

Messrs. Mason, Bowen, Calvert and *Batchelor*, for defendants.

SMITH, C. J. The receipt, in form of and purporting to be the will of Samuel Calvert, on the 2d day of February, 1882, was produced before the probate judge by the executor, W. H. Hughes, and proved without citation or notice to the heirs-at-law or next of kin of the deceased, and letters testamentary issued. On the 4th day of the next month two of his children, (Margiana M. Randolph and Eliza C. Barrow) appeared in said court and entered their caveat to the probate, and gave bond as required by law to secure the costs incurred, in case of their failure to prosecute their suit with effect.

The probate judge thereupon issued his order to the executor

to suspend all further proceedings, except for the collection of debts and the preservation of the estate, until the issue can be decided.

After service of a copy of this mandate, the executor gave notice to the caveators of his intended application, and on the 30th day of the same month moved the probate judge to dismiss the proceeding upon which the mandate issued to him was based, on the ground that it was not based upon any facts set forth in a petition supported by affidavit or otherwise, and for the further reason that no facts are set out in the mandate or citation to raise an issue as to the valid execution of the script. This motion was denied, and on appeal renewed, and denied in the superior court by the judge, the devisees uniting with the executor after becoming parties, and from this ruling the appeal brings the case to this court for revision.

The only inquiry to which we are requested to respond is as to the regularity and legal sufficiency of the method of proceeding adopted to obtain a repropounding of the instrument, to the end that an issue may be raised and submitted to the jury in regard to its validity.

Under the former practice, a petition contained a verified statement of the facts upon which application was made in the county court (in which the jurisdiction was vested) for an order setting aside the *ex-parte* probate and directing the instrument to be again offered for probate, in order that the contestants might have an opportunity of being heard in opposition; and it should be made to appear, in the language of Chief-Justice RUFFIN, delivering the opinion in *Armstrong* v. *Baker*, 9 Ired., 109, that, "by allowing it (the probate) to stand, it would be a prejudice to persons who would succeed to the property if there were no will, and who can show that there is no will, if allowed the opportunity?" and that this is "the sole foundation for recalling a probate." The same judge declares again, in *McNorton* v. *Robeson*, *Ib.*, 256, that such an application "must rest on merits," and that "it cannot be granted unless it be shown that

the former proceeding resulted wrong, and that the interest of these persons (not parties to the former proceedings) was not duly defended by those who undertook it," and were parties. *Moss* v. *Vincent*, 2 Car. Law Rep., 414; *Jeffreys* v. *Alston*, *Ibid.*, 634. Yet the authorities as unequivocally assert the right of persons interested in a decedent's estate, when the will has been proved without citation or notice to any of them, to require a recall of the probate and an order for repropounding the script, unless lost by laches and unreasonable delay in its enforcement.

Discussing the two methods of proving the instrument, an early writer on the subject says: "The difference of form worketh this diversity of effect, namely, that the executor of the will, proved in the absence of those who have interest, may be compelled to prove the same again in due form of law." Swinb. on Wills, 449. To the same effect is the law laid down by other authors. 1 Williams, Exrs., 193; *Lovelace* v. *Mills*, 23 Law Lib., 409.

In *Bell* v. *Armstrong*, 2 En. Eccl. Rep., 139, Sir JOHN NICHOLS declares that "the next of kin, *as such merely*, are entitled to call for proof *per testes* of any decedent's will of *common right*."

The same principle is announced by DANIEL, J., delivering the opinion of the court in *Ralston* v. *Telfair*, 1 Dev. & Bat., 482, and by PEARSON, J., in the later case of *Etheridge* v. *Corprew*, 3 Jones, 14, wherein the matter is elaborately examined, and from the opinion in which case we quote:

"As a matter of common justice," he remarks that "no one should be deprived of his rights without an opportunity of being heard. Hence no order, sentence or decree made *ex-parte* is conclusive, and all persons affected by it are entitled, *of common right*, to have it set aside."

Again, "the next of kin are entitled, *of common right*, to have such probate set aside, so as to give them an opportunity of contesting its validity, and having a probate *per testes*, or by the verdict of a jury. *The right of the next of kin may be acted*

upon at any time, unless it be forfeited, which may be done in two ways, i. e., by acquiescence or by unreasonable delay after notice of the former probate."

After pointing out the distinction between a probate wholly *ex-parte*, and a probate when some of the next of kin, but not all, have been cited, in reference to the right of such as were omitted, he proceeds as follows: "It would seem, therefore, to result that, upon its being made to appear that the applicants are interested in the estate, if the will is not established, and the probate has been without notice to any one, they are entitled to a trial of the issue of the validity of the script, *without showing the grounds on which it is impeached*, unless the right has been lost by laches and delay."

Without undertaking to reconcile the rulings in the earlier and later cases referred to, or to lay down the rule of practice to be observed in the assertion and enforcement of this right in the next of kin, it is sufficient to say, that the caveators seem to have strictly observed the requirements of the statutory enactments now in force, and regulating the method of procedure. "At the time of application for the probate of any will, or *at any time thereafter*, as prescribed by law, any person entitled under such will, or interested in the estate, may appear in person or by attorney, before the probate court, and enter a *caveat* to the probate of such will." C. C. P., §446. The next section declares that upon the giving bond with sufficient surety in a prescribed sum to cover the costs, if they shall be adjudged to pay such, "the probate judge *shall transfer* the cause to the superior court for trial," and it is directed that citation issue to all parties in interest in the state, and publication made for such as are non-resident, "to appear at the term of the superior court to which the proceeding is transferred, and to make themselves proper parties to the said proceeding if they choose."

Section 448 directs the issuing of the order, as was done in this case, to the executor restraining him from further action, except to preserve the estate and collect debts until the issue is determined.

The caveators have done everything that the law requires to enable them to bring the script to a contest, and make opposition to its probate.

It is not controverted that the caveators are the children of the decedent, and entitled to share in his estate, if he died intestate; and their relationship, when no negligence or unreasonable delay in entering the caveat can be imparted, seems to be the only matter open to dispute, and to be preliminarily disposed of, when the application is made to the probate court. The exercise of this diligence may be involved in the qualifying words, "as prescribed by law," which follow those conferring the right to enter the caveat, "at any time" after the *ex-parte* probate. It is noticeable that the executor is not divested of all his representative powers; nor is the first probate vacated absolutely, when the issue touching the will is made up to be tried; nor is there a necessity, meanwhile, for the appointment of an administrator, *pendente lite*. The functions of the executor are suspended only until the controversy is ended, and he still is required to take care of the estate in his hands, and may proceed in the collection of debts due the deceased. *Syme* v. *Broughton*, 86 N. C., 153. This confirms the construction of the statute, which authorizes the entry of the *caveat*, without the formal allegations and proof necessary under the former practice.

We therefore uphold the ruling of the court and affirm the judgment.

Pursuing the course adopted in *King* v. *Kinsey*, 71 N. C., 407, this will be certified to the superior court and a *procedendo* ordered to be there issued to the probate court, directing the issue to be made up and transmitted for trial to the superior court.

PER CURIAM. Judgment accordingly.

T. M. OSBORNE and others v. G. W. LEAK and others.

Wills, probate of—Evidence.

1. A script was offered for probate in the proper court and a *caveat* entered, and an issue *devisavit vel non* drawn and the case docketed for trial; the matter was compromised by the parties, and, by agreement, a verdict finding the script not to be the will of the deceased was recorded; *Held*, in an action to recover possession of land, the writing cannot be put in evidence as a muniment of title, with an unreversed judgment against it in the probate court; nor can the same be set up and established as a will in a collateral proceeding.
2. The probate of a will in the proper court is an indispensable prerequisite to its validity as a conveyance of real or personal estate. THE CODE, §2174.
3. Since the passage of this act in the Revised Code, all wills must be admitted to probate under its directions, without reference to the date of the execution of the will or death of the testator; and an exception that its retroactive operation impairs vested rights cannot be sustained.
4. The law, as it formerly existed under the Revised Statutes, ch. 122, §9, and the establishment of the will in an action to recover possession of the devised land, under the English practice, discussed by SMITH, C. J.

(*Redmond* v. *Collins*, 4 Dev., 430; *Morgan* v. *Bass*, 3 Ired., 243; *Gash* v. *Johnson*, 6 Ired., 289, cited and approved).

EJECTMENT tried at Spring Term, 1883, of FORSYTH Superior Court, before *Graves, J.*

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

Messrs. Watson & Glenn, for plaintiffs.
Mr. J. T. Morehead, for defendants.

SMITH, C. J. The plaintiffs claim title to the land sought to be recovered in the suit, under a claim in the script which in form purports to be, and they allege is, the will of David Dalton, the former owner, executed in March, 1842, wherein the

land is devised to his son, Don Ferdinand Dalton, for life, with remainder in fee to his children, who, with the husbands of such as are married, are plaintiffs in the cause. Two of them of tender age were living at their grandfather's death, in 1847, and the others have been born since.

Soon after the death of the alleged testator, the script was propounded for probate in the county court of Stokes by Christina Dalton, the widow and executrix, and four of the children and devisees, and a *caveat* was entered thereto by the said Don Ferdinand and two other of the sons, also devisees.

Thereupon, an issue of *devisavit vel non* was drawn up and the cause entered on the docket for a jury trial. While so pending, a compromise was arranged among the contesting parties, whereby it was agreed that a verdict should be entered finding the script not to be the will of the deceased, and the verdict was so recorded without the introduction and examination of a witness.

Don Ferdinand, the life tenant, died in 1877, and in November of the same year the summons in this action was sued out.

The defendants derive title from some of the heirs-at-law of the deceased, to whom, in the partition of the lands among them, that now in dispute was allotted and assigned in severalty.

Upon the trial, the plaintiffs offered the script in evidence, and proposed to prove its due execution by the deceased. The defendants objected to the admission of the writing and the testimony in its support upon two grounds:

1. For that it had never been admitted to probate in the proper court; and

2. For that, when offered in the court having jurisdiction, it had been rejected, and the sentence remained unrecalled and in full force.

The objections were overruled and the defendants excepted.

The plaintiffs thereupon proceeded to show the death of both subscribing witnesses, and to prove the genuineness of their respective signatures, as also that of the deceased, at the foot of the instrument.

Upon this proof, after objection made and overruled, the plaintiffs' counsel were permitted to read the script to the jury, and to this the defendants except.

This brief statement is sufficient to present the only question in our view needful to be considered in passing upon the appeal. Was it competent, upon the trial, to set up and establish the legal efficacy of the instrument as a muniment of title with an unreversed judgment against it in the probate court?

Much and earnest discussion was indulged in the hearing before us upon the point whether, since the act of 1777, making probates of wills in the county court sufficient testimony for the devise of real estate, and copies certified from the office admissible evidence, and the act of 1784, requiring such probate and the submission of issues to the jury in contested cases, it was admissible, in accordance with the English practice, to make such proof in support of title in an action to recover the possession of devised land.

Although in several cases it is said this can be done (as in *Richmond* v. *Collins*, 4 Dev., 330, by RUFFIN, C. J.; and in *Morgan* v. *Bass*, 3 Ired., 243, by GASTON, J.; and in *Gash* v. *Johnson*, 6 Ired., 289, by DANIEL, J.), yet no case was referred to, and we have found none in which such evidence was in fact received in an action for recovering the possession of land. The convenience of having the validity of a will disposing of property of either kind determined in a single conclusive trial, instead of being contested in every case when the title to any land devised under it is controverted, must have suggested the legislation to which reference has been made, as well as the successive enactments that place devises of real estate and bequests of personalty upon the same footing, and require the same formalities in the testamentary disposition of either. Acts 1840–41, ch. 62; Acts 1846–47, ch. 54; Rev. Code, ch. 119, §2.

But whatever doubt may have been entertained as to the purpose and scope of the act of 1784, as found in the Revised Statutes, ch. 122, §9, it is put aside by the clear and unambiguous

terms in which its amended form appears in the Revised Code, ch. 119, §20.

"*No will shall be effectual to pass real or personal estate unless it shall have been duly proved and allowed in the probate court;* and the probate of a will devising real estate shall be conclusive as to the execution thereof against the heirs and devisees of the testator, whenever the probate thereof, under the like circumstances, would be conclusive against the next of kin and legatees of the testator."

Had there never been a propounding of the will and no sentence against it, the proof of it in a collateral proceeding would give it no efficacy in conveying land, since the probate in the proper court is an indispensable prerequisite to its validity as a devise, as is required the registration of a deed in order to its operation as a conveyance. It as unavoidably follows that a sentence *against* the script in a proceeding for probate is equally conclusive against it while it remains unrecalled.

But it is argued for the appellees that the amended enactment, as part of the Revised Code, did not go into effect until the first day of January, 1856, after the execution of the will and the death of the maker, and to give it this retroactive operation would be an impairment of vested rights.

The argument cannot be maintained. Since that date all wills, whenever the testator may have died, must be admitted to probate under the directions of the act, with the conclusive consequences of the sentence pronounced in the court having jurisdiction. The change consists in the substitution of a single trial, wherein all interested under or against the instrument may be heard, the adjudication in which, while it stands, determines the question of the execution and validity of the script, in place of allowing the issue to be raised and contested in every action which a devisee may bring for the recovery of devised land. It deprives no one of a right nor interferes with its enforcement as effectually as before. The will must be established under the English rule by one deriving title through it in an ejectment—

no more is demanded by the present law—a single decision under an exclusive jurisdiction in one suit settles the question once for all.

If the probate be *ex parte*, of course a repropounding may be required by an interested party, as we have decided in *Randolph* v. *Hughes* at the present term, *ante*, 428, but in all cases the judgment in the probate court remains in force until annulled or modified by a direct proceeding in that court to that end. The whole policy of our legislation would be disturbed if an instrument, contested and declared by verdict not to be the will, in a court of special and exclusive jurisdiction, could be set up in a collateral action, as was allowed in the present case, when proof of handwriting alone had to be resorted to after a lapse of more than thirty years, and evidence upon the point of capacity, the want of which seems to have been the basis of the compromise, must be so difficult of attainment. The facts of this case vindicate the wisdom and propriety of our legislation on the subject.

There is error. The judgment is reversed and there must be awarded a *venire de novo*. It is so ordered.

Error. *Venire de novo.*

K. J. McKROW *v.* JOHN PAINTER and another.

Wills.

The testator devised land and bequeathed personal property to his wife, "if she remains a widow, and if she marries she is only to have a child's part"; and in a subsequent clause says: "I do authorize my wife with authority and power that, at her death, to divide this property among our children as she sees proper"; *Held*, that the widow takes a fee-simple estate in the land. The contingent limitation in case of her marriage is referable only to the personal property.

(*Alexander* v. *Cunningham*, 5 Ired., 430, cited, distinguished and approved).

EJECTMENT tried at Fall Term, 1882, of RUTHERFORD Superior Court, before *Graves, J.*

The question involved in this case is, whether a fee-simple or an estate for life was conveyed by the will of George Painter to his wife, Rebecca. The court below held that it conveyed a fee-simple. There was judgment accordingly, and the defendant appealed. The facts upon which the decision of this court is based are sufficiently set out in its opinion.

Mr. M. H. Justice, for plaintiff.
Messrs. Hoke & Hoke, for defendants.

SMITH, C. J. It is conceded that, by virtue of the sale under execution against Rebecca Painter and the sheriff's deed, the plaintiff acquired either an estate in fee or for her life in an undivided moiety of the land described in his complaint; and that the duration of the estate thus transferred depends upon the construction of a devise in the will of her husband, George Painter.

The will, executed in August, 1829, after several nominal bequests to numerous children, contains the following clause:

"I also give my dearly beloved wife one hundred and seventy acres of land where I now live, and my mill and my machine; and I also give my wife, Rebecca Harris Painter, two negroes, a boy called Major, and a girl called Chaney, and Chaney's increase; and my horse, beast and all my cattle, and my household furniture, and my working tools, and all my farming instruments; and all that I possess in this world beside the above stated, if she remains a widow; and if she marries she is only to have a child's part."

Proceeding then to make a small intermediate bequest, and to nominate his executor, the testator adds: "And I do authorize my wife, Rebecca, with authority and power, that at her death, to divide this property among our children as she sees proper."

If this last recited clause is to be construed as embracing the

land as well as the personal property previously given to the wife, and to operate upon the devised estate so as to restrict its duration to the term of her life, with a power of disposing of the remainder among the children, the plaintiff's title became extinct upon her death, soon after the suit was begun, and he fails in the action; but if an estate in fee vested, he is entitled to a moiety of the land.

The legal effect of this provision is, therefore, the only matter in controversy presented in the appeal.

The act of 1784 construes every devise of real estate made in general terms a devise of an estate in fee-simple, unless the intent to convey an inferior estate shall appear by express words, or be plainly implied in the will. The Code, §2180.

In support of the construction that the intent to limit the estate is shown, or necessarily implied, *in conferring* authority upon the devisee to divide the property, and in the mandatory direction for the division and apportionment among the children, according to her judgment, we are referred in the brief of defendant's counsel to *Alexander* v. *Cunningham*, 5 Ired., 430, as decisive of the question.

Upon an examination of the will so interpreted in that case, its provisions will be found essentially different from those contained in the will we are now to interpret. The intention of the testator, in that case, to convey a life estate only, was manifest in the language employed to express it. His words are these: "I do hereby will to my son, Moses W. Alexander, all my estate, real and personal, for his own use and benefit, and *then to be divided off and distributed amongst 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 among his children.*" It is plain the testator meant to give the devisee but an estate for life, that is, that he should have the *use* and enjoy the *profits* arising from his possession, while the land was itself to go to the children, between whom he had power to distribute it only. The use and profits are distin-

guished from the estate, and while the former are to be enjoyed by the devisee, the latter is to pass to the children, under a power of appointment reserved to their father. In the opinion, the Chief-Justice adverts to the phraseology employed, in that the testator does not say that the son *may dispose* of the residue of the estate after his own enjoyment, but "merely that he *shall divide and distribute* them among his children." No such mandatory words are found in our case, and no residuary interest is secured to the children, but the power is given to be exercised at the discretion of the wife, without control, for a disposal at her death among the children, if any, as she may see proper.

It can scarcely be supposed that a limitation over was intended of property which, most of it, if not all, must have been destroyed and worn out during the many years of the wife's survivorship, and which must have been, in the contemplation of the testator, unless as to such as should remain, and this he places at her disposal, with no obligatory requirements imposed upon her to make any disposition. The devise is not, therefore, cut down to a less estate by the subsequent words.

But if it were otherwise, and the subsequent words have the force attributed to them, we do not think, from the context, that the testator intended to apply them, as a qualification, to the devise of the land, but to the personalty only, which might remain at his wife's death.

This part of his property, as separate from the land, was manifestly in his mind when he made the contingent limitation in case of his wife's marriage, by which she was then "only to have a child's part," following the language of the statute in distributing an intestate's personal estate, to-wit: "If there are more than two children, then such widow shall share equally with all the children, she being entitled to a child's part." The Code, §1478 (2).

In like manner the authority is given in the final clause to divide among the children "*this property*"—that is, the property already separated in the testator's mind is to be equally divided

between mother and children in the event of her marriage, and distributable among them, according to her judgment, if she remains a widow up to her death.

This construction best effectuates the dispositive purposes of the testator, and is the proper rendering of the terms in which they are expressed.

We, therefore, concur in the ruling of the court, and affirm the judgment.

No error. Affirmed.

ANTHONY DAVIS, Ex'r, v. RICHARD KING.

Wills—Latent Ambiguity, parol proof admissible in case of.

Where, upon the face of the writing itself, a doubt arises as to whether it was intended to be a will, parol testimony is admissible to explain the meaning of the supposed testator. The writing offered in this case, as operating a revocation of the will of the testator, contains none of the elements of a testamentary paper, and hence cannot be helped by evidence *aliunde*.

(*Clayton* v. *Liverman*, 7 Ired., 92, cited and approved).

ISSUE *devisavit vel non* tried at Fall Term, 1883, of LENOIR Superior Court, before *Philips, J.*

The execution of the alleged will and codicil, and the testamentary capacity of the alleged testator, Richard W. King, were proved on the trial; and thereupon the defendant caveator, for the purpose of showing that there had been a revocation, offered in evidence, as a testamentary paper, certain proceedings had before the clerk of the superior court, to-wit:

"The petition of Richard W. King, Mary E. Taylor and Richard Taylor, respectfully showeth unto your worship, that your petitioners reside in the said county of Lenoir; that the petitioner, Richard Taylor, was born on the 17th day of January, 1864; that your petitioner, Mary E. Taylor, is the mother,

and your petitioner, Richard W. King, is the putative father of said Richard Taylor, who was begotten and born out of lawful wedlock; that the said Richard W. King was unmarried at the time of the birth of the said Richard Taylor; that both of said parents are living, and the said Richard Taylor has no estate, and resides with his mother, Mary E. Taylor; that the said Richard W. King desires and intends to adopt the said Richard Taylor for his, the said Richard Taylor's life, to which adoption the said Mary E. Taylor hereby assents, as is signified by her signing and becoming a party of record to this proceeding, and also desires that said Richard Taylor may be declared his legitimate child in pursuance of sections 7 and 8, of chapter 9, of Battle's Revisal. Your petitioners further show, that the said Richard Taylor desires to change his name from Richard Taylor to Richard King.

"Wherefore, your petitioners pray your worship to sanction and allow such adoption, by an order granting letters of adoption, and to decree that the name of the said Richard Taylor may be changed to Richard King, and that they may have such other relief as the case requires; and also to declare the said Richard Taylor the legitimate child of the said Richard W. King." (Signed by Richard W. King, Mary E. Taylor, Richard Taylor and also the attorney of the petitioners, and verified by Richard W. King).

Thereupon, the following decree was made: "Upon reading the foregoing petition and affidavit, the court doth declare that the facts set forth in said petition are true, and it is thereupon decreed that the name of said Richard Taylor be and the same is hereby changed to Richard King. And it further appearing that the said Richard W. King is a proper and suitable person, the adoption prayed for in said petition is hereby sanctioned and allowed, and it is ordered that letters of adoption of the said Richard Taylor be granted and issued to the said Richard W. King, and that the said Richard Taylor be, and he is hereby declared to be, the legitimate child of the said Richard W.

King, in pursuance of sections 7 and 8, of chapter 9, of Battle's Revisal, and this order shall have the effect forthwith to establish the relation of parent and child between the said Richard W. King and the said Richard Taylor, for the life of the said Richard Taylor, with all the duties, powers and rights belonging to the actual relationship of parent and child; and should the said Richard W. King die intestate, the said Richard Taylor shall inherit the real estate and be entitled to the personal estate of the said Richard W. King in the same manner and to the same extent said Richard Taylor would be entitled to do if he had been the actual lawful child of the said Richard W. King. It is further decreed that this order be recorded in the office of the clerk of the superior court of Lenoir county. This 25th day of October, 1882." (Signed by the clerk, and approved by the judge of the superior court).

This decree was enrolled in the office of the superior court clerk of Lenoir county, on the 28th of October, 1882. And a certificate was issued by the clerk to Richard W. King, to the effect that, in pursuance of these proceedings, he had adopted said Taylor as his child, and that the relation of parent and child was established between them.

These proceedings were never offered for probate, as a testamentary paper, but the caveator insisted that they were intended by the testator to be, and were a revocation of the will and codicil theretofore published by him; and in support of this position, he offered witnesses to prove that the said petition was signed by Richard W. King, in presence of Mary Taylor and Richard Taylor (the defendant), and that they signed the same in his presence and at his request. There was also proof that said testator had stated to witnesses that he desired his son, the defendant, to inherit his property, as he had no other child, and that in order to secure the same to him the said proceedings for adoption were had.

To all of this evidence the plaintiff propounder objected, upon the ground that it is incompetent to show by parol testimony

that the said proceedings for adoption were testamentary in their character and intended to operate as a revocation of the will; and further, that they could not be received as evidence on the trial of this issue, until propounded for probate in the proper court and established as the will of said Richard W. King.

His Honor sustained the objection and ruled out the evidence, and the defendant excepted. Verdict for plaintiff; judgment; appeal by the defendant.

Mr. George Davis, for plaintiff.

Messrs. Strong & Smedes, Hinsdale & Devereux and *Reade, Busbee & Busbee,* for defendant.

MERRIMON, J. In this state, the revocation of written wills is regulated by statute, and to that statute we must look to see if the evidence offered by the caveator in this action was competent for the purpose of proving a revocation of the written will of Richard W. King, set out in the record.

Sections 41, 42, 43 and 44, of chapter 119 of Battle's Revisal, provide as follows:

"41. No will or testament in writing, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his direction and consent; but all wills or testaments shall remain and continue in force until the same be burnt, cancelled, torn or obliterated by the testator, or in his presence and by his consent and direction; or, unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, signed by him, or some other person in his presence, and by his direction, and subscribed in his presence by two witnesses at least; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, all of which shall be in the handwriting of the testator, and his name subscribed thereto, or inserted

therein, and lodged by him with some person for safe keeping, or left by him in some secure place, or among his valuable papers and effects, every part of which will or codicil, or other writing, shall be proved to be in the handwriting of the testator by three witnesses at least."

"42. Every will made by a man or woman shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heirs, executors or administrators, or the person entitled as his or her next of kin, under the statute of distributions."

"43. No will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances."

"44. No conveyance or other act made or done subsequently to the execution of a will of, or relating to any real or personal estate therein comprised, except an act by which such will shall be duly revoked, shall prevent the operation of the will with respect to any estate, or interest in such real or personal estate as the testator shall have power to dispose of, by will, at the time of his death."

These sections comprise all the statutory provisions of this state in respect to the revocation of written wills.

We have examined with care the paper-writing offered in evidence by the caveator on the trial of the issue *devisavit vel non*, to prove a revocation of the will in question. It is the transcript of the record of adoption, legitimation and change of name of an illegitimate son of the testator. It does not purport in terms or effect to be a testamentary paper. There is not a word in it that can, in our judgment, be construed to have a testamentary meaning, nor does it in the remotest degree refer to any will executed or to be executed by the testator; nor in terms or effect does it purport to be a writing signed by himself, or by some other person for him, by his consent and direction in his presence; nor is it a paper-writing, all in the testator's own handwriting and his name subscribed thereto, or inserted therein, and lodged by him with some person for safe keeping, or left by

him in some secure place or among his valuable papers and effects, to be proved to be all in his own handwriting by three witnesses, the object being to revoke the will in question, or any will. In no sense is it testamentary, and this was so manifest that it was not offered for probate.

In the absence of all testamentary and revocatory words that might possibly be construed to be such, and in the absence of any intention expressed in words or by implication, or otherwise, in the paper-writing to revoke the will, the parol testimony offered to show the meaning and purpose of the testator in relation to the paper-writing offered, would be incompetent. To allow such testimony to be received on the trial of the issue would be practically to revoke a will by oral declarations and ignore the plain requirements of the statute.

It is only when upon the face of the writing it is doubtful whether it is testamentary in its purpose, that parol testimony can be received to explain the meaning of the supposed testator. There must be something arising upon the face of the writing that will warrant the testamentary meaning the party offering it attributes to it. It must be capable of a possible construction, such as that given it by the person offering it as a testamentary paper. *Robertson* v. *Dunn*, 2 Mur., 133; *Clayton* v. *Liverman*, 7 Ired., 92; 1 Williams Exrs., 296; *Thorne* v. *Rooke*, 2 Curtis, 799.

The court below properly refused to receive the paper-writing mentioned in the exception, and the parol testimony tending to show the alleged testamentary character of the same.

There is no error. The judgment must be affirmed and it is so ordered. Let this be certified.

No error. Affirmed.

LAURA A. PAGE v. MARY FOUST and others.

Wills—"Effects."

The word "effects" used by a testator in disposing of his estate, will be construed to include land, where it can be collected from other parts of the will that such was the testator's intention.

(*Owen* v. *Owen*, Busb. Eq., 124, cited and approved).

SPECIAL PROCEEDING for dower, commenced before the clerk and heard on appeal at Spring Term, 1883, of ROWAN Superior Court, before *Graves, J.*

The controversy between the parties arose upon the construction of the will of Dempsey Page, deceased, which is set out in the opinion of this court. The ruling of the judge in the court below was in favor of the plaintiff, and from the judgment rendered the defendants appealed.

Mr. J. W. Mauney, for plaintiff.
Mr. Kerr Craige, for defendants.

SMITH, C. J. The plaintiff, the widow of John A. Page, who died intestate and without issue, brings this suit against the *feme* defendants, his sisters and heirs-at-law, and their husbands to procure an assignment of dower in the land described in her petition, whereof she alleges the intestate was seized and possessed of an estate in fee.

The defendants resist the plaintiff's claim, and say that the intestate derived title to the land under the will of his father, Dempsey Page, made in 1879, by the provisions of which an estate for life only was devised to the said intestate, if he died without issue, with remainder to the defendants, Mary and Laura, in fee.

The solution of the controversy in respect to the title depends,

therefore, upon the construction of the testator's will, so much of which as bears upon the issue is contained in the first four clauses, and is as follows:

"Item 1. I give and devise to my beloved son, John Allison, the plantation on which I now live, containing about 94 acres, lying on the north side of Sherrill's Foard road, adjoining Mrs. Krider, Mrs. Kestler, and others; also one-half of my old plantation, containing about 78 acres, lying on south side of Witherow's creek and joining M. A. File, Mrs. Krider and others; also, my two-horse wagon and harness, together with two mules (his choice), one bedstead and furniture (his choice), one bureau (his choice), and provisions enough to last him and mules until he can make and gather a crop."

"Item 2. I give and devise to my beloved daughter Mary May, seventy-five acres of land, to be taken off from the Sloop place, on which they now live, to be taken off from said place next to M. A. File's fifty acres, being that run off by W. A. Houck and the other 25 acres, joining James F. Cowan and M. A. File; to have and hold during their life-time, and then to go as hereinafter provided."

"Item 3. I give and devise to my beloved daughter Laura E., one-half of my old home place, of which mention is made in item first; and also, what will remain of the Sloop place, after Mary's share is taken off; also, she is to have one year's provisions laid off to her for her and her two children."

"Item 4. It is my will that if any of my children die without legal bodily heirs, or children, then, and in that case, the *effects* herein willed to them to return to the balance of my children then living, or their children, if they are dead and have left any legal bodily heirs. In case of Mary and her husband, should she die first, her husband is to have the use of her effects during his life-time and then return as afore stated."

The result of the controversy depends upon the interpretation put upon the word "effects," used by the testator in the contingent dispositions made in the event of the death of any of

the devisees without issue. If it comprehends the lands previously given as well as the personal estate, the title of the intestate ceased at his death, and the right to dower does not attach; if the term is used in its more restricted and common acceptation, and confined to the personal property bequeathed, the plaintiff is entitled to an allotment of dower in the lands devised to her husband.

"The fundamental rule in the construction of wills," as is said by BATTLE, J., "is to ascertain the *intention* of the testator, and for that purpose all the parts of the will are to be taken in view, and effect is to be given, as far as possible, to every clause." *Owen* v. *Owen*, Busb. Eq., 124.

It is also a well established rule of construction that a testator is presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless from the context it appears that he uses them in a different sense; in which case, the sense in which he thus appears to have used them, will be the sense in which they are to be construed. Wig. Wills Prop. 1, page 58.

That the term *effects* is capable of expansion, so as to embrace real and personal estate, when it is seen that such is the testator's intention, from an inspection of the provisions of the instrument, is established by past adjudications.

"I take effects," says LORD MANSFIELD, in interpreting a residuary disposition of all the testator's effects, both real and personal, "to be synonymous to worldly substance, which means whatever can be turned to value; and that, therefore, real and personal effects mean all a man's property." *Hogan* v. *Jackson*, Cowp., 304.

So, Sir WILLIAM GRANT, master of the rolls, declares in *Campbell* v. *Prescott*, 15 Ves., 507, "there is no case for the restricted sense which the grandchildren put upon the words '*all my effects whatsoever*;'" adding, "LORD MANSFIELD says, that the word '*effects*' is equivalent to property or worldly substance."

To the same general purpose are the cases of *Chilcot* v. *White*, 1 East., 394; *Andrews* v. *Lainchbury*, 11 East., 290; *Franklin* v. *Trout*, 15 East., 394; 2 Williams Exrs., 854; Theo. Law of Wills, 159.

In a recent case which came before the Vice Chancellor, Sir RICHARD MALINS, the authorities were carefully reviewed, and it was decided that by the use of the words "I give all the rest, residue, moneys, chattels, *and all my other effects*," notwithstanding the association of the latter words with articles of personal property before enumerated, "the testator meant to include everything he had in the world, whether *real property* or *personal property*." *Smyth* v. *Smyth*, 8 Law Rep., Chan. Div., 561.

There are cases where the will disposes of "effects" with very comprehensive descriptive terms following, such as "of what nature soever," *Hick* v. *Dring*, 2 M. & S., 448; or where the language is, "all my effects," *How* v. *Easles*, 15 M. & W., 450, in which it is held that land was not embraced; but in all, it is conceded that a larger scope will be given to the disposition where it can be collected from other parts of the will that such was the testator's intention.

Thus, in the former of the two cases last cited, it is said: "If the court can see that the testator meant by it to pass his real estate, then the judgment must be for the plaintiff."

The inquiry recurs as to the meaning of the testator in the use of the word found in the clause limiting the property given in remainder, and we are at no loss in arriving at the sense in which he employs it.

1. Land only is devised to Mary, and in the concluding part of the fourth item it is in direct terms provided that, in case of survivorship, her husband shall have the use of *her effects* during his life-time. "*Effects*" are here applied to the devised land, and can have no other significance, for there is no other property to which they can attach.

2. Land is also given to the defendant Laura, with an allowance of provisions for the support of herself and children for

one year. It cannot be supposed that articles intended to be consumed were to return to the other children in the event of the death of Laura without issue, and there is nothing but her land upon which this devise over can operate, so that it must have been in the mind of the testator when he described it as part of the "effects" thus limited.

Whatever may be the significance of the word unexplained by the context, it is plain that in choosing it the testator meant to include the devised lands given to each of his children, and in this sense we must give it operation.

There is error in the ruling of the court, and there must be judgment that the defendants go without day and recover their costs.

Error. Reversed.

A. R. BEAM and others v. E. B. JENNINGS and others.

Wills—Land directed to be sold—Legal estate in the heir until execution of power.

1. A testator directed his land to be sold at public auction, and the money arising therefrom to be divided among his children; *Held* that upon the death of the testator, the legal estate does not vest in the executor of the will, but descends to the heir, to be held until the power is executed.
2. If the will does not devise the land, but creates a power to sell it, then, upon the execution of the power, the purchaser is in under the will; but in the meantime, the land descends and the estate is in the heir. The power is not the estate, but only an authority over it and a legal capacity to convey it.

(*Ferebee* v. *Proctor*, 2 Dev. & Bat., 439, cited and approved).

EJECTMENT tried at Spring Term, 1883, of CLEAVELAND Superior Court, before *Shipp, J.*

The plaintiffs claimed the land in dispute as children and heirs-at-law of Annie Beam, who was the daughter and heir of John Long, who died about the year 1819 or 1820, and the said Annie

married Peter Beam during the life of her father. The plaintiffs showed the title out of the state, and that said John Long bought the land from Samuel Irwin, and they offered evidence tending to establish the fact that John Long had occupied and claimed the land for more than seven years under his deed from Irwin, but the years were not specified.

The defendants introduced a deed from John Long to one Henry Smith, dated in 1816, for a part of the land, to show that the title to so much thereof was not in the plaintiffs, and that they could not recover the part embraced in that deed. The plaintiffs excepted to the introduction of that deed, because, as they contended, they had alleged in their complaint that the defendants claimed title to the land from Peter Beam, the husband of the said Annie, and they had not traversed the allegation, and were estopped to deny that they claimed otherwise than under Peter Beam.

The defendants also offered in evidence the will of John Long, the ancestor of the plaintiffs, in which, among other things, he directed:

That his homestead plantation, and his other lands, several negroes, and all other property not disposed of by the will, be sold at public auction, and the money remaining after payment of his debts and expenses, should be divided among his three daughters and his son Henry Long, if Henry be living, and if not, then it was to be divided among his three daughters. The testator appointed three executors of his will.

There was evidence tending to show a sale of the negroes and other property after the testator's death, but at that sale there was no sale of the land.

The defendants contended that under the above clause of the will, Annie Beam took no land of her father, but that the same was, by the will, converted into personalty, and that the plaintiffs could not recover in this action.

The following issues were submitted to the jury:

1. Are the plaintiffs the owners of the land in controversy, or any part thereof? No.

2. Do the defendants wrongfully withhold the possession thereof? No.

3. What damages, if any, are the plaintiffs entitled to for the unlawful detention (if so found) of said land?

The court charged the jury that, under the will of John Long, the plaintiffs' remedy, if they have any, was by bill in equity to compel the executors to execute the power of sale, and the plaintiffs could not recover the land in this form of action. The plaintiffs excepted to this charge.

The jury responded in the negative to the first and second issues, as indicated above. Judgment for the defendants, and appeal by plaintiffs.

Messrs. Hoke & Hoke, for plaintiffs.
Mr. W. P. Bynum, for defendants.

ASHE, J. The only question arising on the appeal is, whether there was error in the judge's charge to the jury, and that involves the inquiry whether in a devise of lands to be sold, and the money arising from the sale to be divided among certain persons, the legal estate is vested, upon the death of the testator, in the executors of the will, or descends to the heirs, to be held by them until the power is executed.

On this question there is, in the decisions of the courts and among the text-writers, considerable diversity of opinion. Some hold, with whom is Mr. HARGRAVE, in his note on Coke Litt., 113, that whether the devise be to the executors to sell the land, or that the executors shall sell, or that the land be sold by the executors, a fee-simple will be vested in the executors; but in Sugden *on* Powers, 133, and Williams on Executors, 579, it is laid down that, until a sale by the executors, where a power of sale of land is given by the will, the land descends in the interim to the heirs-at-law.

The counsel for the defendants strenuously resisted this latter position, contending that the land, upon the death of the tes-

tator, was converted at once into personalty, and consequently the legal estate could not vest in the heirs, and, therefore, they could not maintain the action.

On the other hand, the plaintiffs' counsel, admitting the doctrine of an equitable conversion, contended that it was a maxim of the common law that the freehold of land must vest in some one; that unless the land was devised to the executors so as to vest the legal estate in them, it gave them a mere naked authority; and, until the power was executed by them, the legal estate necessarily descended to the heirs; "for in this state," the counsel said, "the doctrine *in nubibus* does not obtain, and it had never been very well settled in England."

When there are conflicting authorities upon a question of law, and the court finds itself at sea, tossed here and there by adverse currents of decisions and opinions, it will be very sure to find a safe roadstead where it can anchor upon a judicial opinion of that eminent jurist, Chief-Justice RUFFIN. In the case of *Ferebee* v. *Procter*, 2 Dev. & Bat., 439, which was a case very much like this, where the testator directed "all his lands not given away, to be sold, and after my debts are paid, the residue of my estate to be divided between my wife, son and daughter," the question was presented, whether the land descended to the children and heirs of the testator until the power of sale was executed, and the Chief-Justice used the following language:

"We concur with him (the judge below), then, in thinking the premises were not devised to the executors, nor to the wife and children; but we do not concur in the opinion that they did not descend to the children; on the contrary, we think that they did descend, for the very reason that they were not devised, and therefore necessarily descended. Nothing can defeat the heir but a valid disposition to another. Whatever is not given away to some person must descend. The heir takes, not by the bounty of the testator, but by the force of the law, even against the express declaration of the testator to the contrary. If the will does not devise the land, but creates a power to sell it, then, upon the execution of the power, the purchaser is in under the will, as if his

name had been inserted in it as devisee. But in the meantime the land descends, and the estate is in the heir. The power is not the estate, but only an authority over it, and a legal capacity to convey it." This, we think, settles the question.

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

Error. *Venire de novo.*

D. T. MOORE, Trustee, v. WILLIAM HINNANT and others.

Deed, operative between the parties—Fraud and Fraudulent Conveyances.

1. A deed of trust was executed to secure creditors (naming them), and authorized the trustee to divide the proceeds of the sale of property conveyed *pro rata* "amongst the said subscribing creditors, parties of the third part," but it was signed only by the trustor and trustee, and the trust accepted by the latter; *Held*, that the deed is binding on those who executed it, although it appeared that when it was drawn the secured creditors should also sign, and the same was properly admitted to probate and registration.
2. A deed is in law fraudulent upon its face, and so to be declared by the court, when a purpose appears to secure a benefit to the maker or to defraud creditors. And the court will also declare it to be so, where a fraudulent intent (the essential vitiating element) is found as a fact by the jury. But if the sole purpose of the maker be to discharge an honest debt, the deed does not fall within the operation of the statute of fraudulent conveyances.

(*Hafner* v. *Irwin*, 1 Ired., 490; *Dukes* v. *Jones*, 6 Jones, 14, cited, distinguished and approved).

CONTROVERSY submitted without action and heard at Spring Term, 1882, of JOHNSTON Superior Court, before *Shipp, J.*

One H. L. Watson being indebted to divers persons in various amounts, executed a deed of trust to the plaintiff, dated November 28th, 1881, conveying all his "merchandise, wares

and stock in trade, and all money due or coming to him on mortgages, bonds, notes, book accounts, to have and to hold unto the said trustee upon the trust following, viz.: In trust to sell and dispose of the goods, &c., at public or private sale at the trustee's discretion, and to collect all the sums of money aforesaid and divide the whole proceeds and collections, after deducting usual charges, amongst the said subscribing creditors of the third part, in proportion to their respective debts."

The deed recites that it is made between "H. L. Watson of the first part, D. T. Moore (trustee) of the second part, and the creditors each and every one (names and residences of a great number being set out), and any and all creditors who may have been overlooked, as parties of the third part, witnesseth," &c.; and was signed and sealed only by H. L. Watson and D. T. Moore. It was admitted to probate on the 9th of December, 1881, and registered on the following day. The plaintiff accepted the trust and took possession of the property conveyed.

After the registration of the deed, some of the creditors sued out attachments against the trustor, upon the ground that he had left the state to avoid the service of process, and placed the warrants in the hands of the defendant, who, by virtue thereof, seized and took from the plaintiff the property conveyed in the trust deed. The debts of the attaching creditors (who were made parties defendant) are of sufficient amount to absorb the property. The other facts stated in the case are not necessary to an understanding of the points decided by this court.

The question submitted to His Honor in the court below was, whether the deed of assignment is a valid instrument, complete in itself, and effectual in transferring Watson's title to the property to Moore, at or before the levy of the attachments?

His Honor held that there was nothing upon the face of the deed which suggested fraud, or which would authorize a court to declare it void; that the object was to convey property to a trustee to pay all the trustor's debts *pro rata*, without any reservation for the benefit of the debtor; that while the debtor

might have contemplated the signing by the creditors, yet such signing was not necessary under the facts of this case, and the validity of the deed is not affected by their failure to sign it; and that the deed was sufficient to pass the title to the property to the trustee. Judgment accordingly, and the defendants appealed.

Messrs. Battle & Mordecai and *Reade, Busbee & Busbee*, for plaintiff.

Messrs. MacRae & Strange and *T. M. Argo*, for defendants.

SMITH, C. J. The result of the action depends upon the determination of the inquiry as to the validity of the deed in trust under which the plaintiff claims title to the goods. The appellant presents objections to the legal efficacy of the conveyance, which may be resolved into the following:

1. The deed, indicating upon its face the intended execution of creditors, is imperfect and inoperative.

2. It is fraudulent and void upon the facts agreed and set out.

3. The further execution by creditors being necessary to complete the instrument, the registration is of a part of it only, and not in accordance with the requirements of the statute.

It is to be remarked in noticing these several exceptions, that the facts stated constitute the whole case upon which judgment is to be rendered, and as none can be withdrawn, so none can be added thereto, from which other facts may be inferred.

The deed, notwithstanding the imperfections which appear to indicate an intention that all the secured creditors were to become parties by their several signatures in order to its completion, was, in fact, in its present form and without further signing, delivered by the maker to the assignee and accepted by the latter, as the act and deed of the former; and, as such, proved and registered. This rendered it obligatory and effectual between these parties, and they assenting thereto, its efficacy cannot be impeached by the attaching creditors. This proposition, reasonable in itself, is fully supported by authority.

In *Jackson* v. *Stamport*, 19 Ga., 14, where the purchaser at an execution sale sought to intervene in a foreclosure proceeding and defend his own title by assailing the mortgage, which in its body purported to be executed by two persons, while in fact it was executed by only one of them, LUMPKIN, J., in refusing the application, uses this language: "That the form of the instrument may be suggestive of the fact that it never was finally executed, and might be relied on as evidence to support a plea by the party to that effect, I can readily understand; but that it should render the deed absolutely void, cannot be maintained."

So, when a similar objection was made to the sufficiency of the deed when offered in evidence, the supreme court of California held it to be untenable, and said: "The deed shows clearly, upon inspection, that several of the persons named in the body of the instrument signed their names to it; and to that extent at least it was executed and properly admissible in evidence. This objection was made to a similar deed in the case of *Cotten* v. *Seavey*, 22 Cal., 496, and was overruled." *Tuston* v. *Faught*, 23 Cal., 237.

In *Scott* v. *Whipple*, 5 Greenl., 336, the principle was declared applicable to a covenant executed by some only of the persons named in the body of it, who delivered it, and it was accepted by the covenantee, in that form and condition, as a complete instrument.

The result may be thus stated: If the deed is delivered with intent to operate as to those who do execute it in its present condition, and be binding upon them, although it had been understood when the deed was drawn that the others named were also to execute it, the instrument is effectual and operative, and its provisions binding upon such as execute. In other words, the deed operates as far as it can upon such.

2. The fraudulent intent which vitiates the conveyance is as truly a fact itself as those facts which are stated in the case, and afford ground for an inference of its existence. A deed is in

law fraudulent upon its face, and so to be declared by the court, when a purpose appears to secure a benefit to the assignor, or to delay or defraud creditors, and the assignment is the means employed to this end. It is also to be adjudged when the fraudulent intent is found to exist, as a fact, deduced from other facts and declarations preceding or accompanying the transaction.

The statute avoids, on behalf of creditors, alienations "contrived and devised of fraud to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts," and declares that all such alienations made "to or for any intent of purpose" theretofore mentioned, "shall be void against such creditors and others." Bat. Rev., ch. 50, §1; 13 Elizabeth.

The *intent* is the essential and poisonous element in the transaction, and not merely the effect; since in every conveyance and appropriation of property the property conveyed is placed beyond the creditor's reach, and he is so far obstructed in the pursuit of his remedy against the debtor's estate. But the inquiry is, was this the purpose of the assignment; and if so, and it was participated in by the assignee or party to take benefit under it, the assignment is invalid, though the debt or liability professed to be the object to be secured be *bona fide* due, and itself tinged with no vicious ingredient.

In the language of LORD ELLENBOROUGH in *Mieux* v. *Howell*, 4 East., 1–13: "The act of parliament" (and ours conforms to it) "was meant to prevent deeds, &c., *fraudulent in their concoction*, and not merely such as in their effect might delay or hinder other creditors."

The principle is reiterated and enforced in interpreting the statute substantially similar in the following cases: *Wilder* v. *Winne*, 6 Cowan, 284; *Farmer's Bank* v. *Douglass*, 13 Smed. & Marsh., 22; *Dance* v. *Seaman*, 11 Grattan, 778; *Bellamy* v. *Bellamy*, 6 Fla., 62; *Hollister* v. *Land*, 2 Mich., 309; *Church* v. *Drummond*, 7 Ind., 17; *Hoffman* v. *Mackall*, 5 Ohio, 124, and in decisions in other states.

It is stated in emphatic terms by GASTON, J., delivering the opinion in *Hafner* v. *Irwin*, 1 Ired., 490, thus: "Every conveyance of property by an insolvent or embarrassed man, to the exclusion of the claims of some of his creditors, has necessarily a tendency to defeat or hinder his other creditors in the collection of their demands. But if the sole purpose of such a conveyance be the discharge of an honest debt, it does not fall under the operation of the statute of fraudulent conveyances."

"It is clear, however, from the language of the statute of 13 Elizabeth," remarks a recent author after a full discussion of the subject, and as his conclusion from a review of adjudged cases, "that its provisions were directed exclusively against *conveyances made with an actual intent* on the part of the debtors to hinder, delay or defraud creditors, as distinguished from the mere effect or operation of such conveyances. The expressions in the preamble, '*devised and contrived*,' to the end, purpose and intent, &c., leave no room for doubt on this point. Hence it has been sometimes very expressively designated, as the statute against fraudulent intents in alienation." Burrill on Assign., §332.

As then the fraudulent intent, conclusively inferred from the provisions of the instrument and not open to explanation, or shown *prima facie*, but admitting evidence in rebuttal, or to be drawn from antecedent, attending and subsequent circumstances dehors the instrument, and in the latter case as an independent fact forming an ingredient in the transaction, is a material element not stated in the case, we cannot, from inspection nor by deduction, supply the omission and pronounce the instrument void for that reason.

3. The next inquiry is as to the sufficiency of the registration of the deed in its present form.

It is insisted that the instrument is incomplete in the absence of the contemplated execution by the creditors for whose security only the property is conveyed, and the registration is consequently inoperative, upon the authority of *Dukes* v. *Jones*, 6 Jones, 14.

We do not admit the force of the objection, and are at a loss to find any part of the agreement left out of registration. Between these parties, it is accepted as a complete instrument, and is in law such.

As the assignor and the assignee could have stricken out all words looking to the signing by others, so they may make it effectual in its present form between themselves. This they have undertaken to do, and in our opinion, under the cases cited, they had the right to do. If it can operate as a conveyance, it will be allowed to do so, and the signatures of creditors would not have affected in any degree the operation of the deed. It would only signify their assent and acceptance of its provisions.

4. The remaining point to be considered is as to the construction of the conveyance, and to ascertain if any effectual trust has been declared to uphold the plaintiff's title.

From an inspection of the instrument, its obvious purpose is to secure all the creditors of the assignor, in the ratio of their respective demands. A large number of these and their places of residence are mentioned by name, and then it is added, "and any and all creditors which have been overlooked" who are, with those specially designated, to constitute the "parties of the third part." As the scope of the trust is commensurate with the assignor's indebtedness, all must share *pro rata* in the trust, or none can take. The trustee is directed "to divide the whole proceeds and collections after deducting usual charges *among* the said subscribing creditors of the third part in proportion to their respective debts." If putting the signatures to the instrument is an indispensable prerequisite to any participation in the fund to be distributed, then as none have subscribed, none can come in and take a benefit under the deed.

In our opinion, the consummation of the conveyance by delivery without the creditors' signatures did in fact, and was so intended, dispense with those subscriptions, and the inadvertent retention of the participle in providing for the distribution and describing the beneficiaries, does not defeat the assignment, nor

its designed practical results. The creditors, a very large number, are mentioned by name and residence, and then following is the sweeping clause that takes in all who are unremembered; and that word, in order to give effect to the general purpose of the parties, must be rejected as repugnant and as a variance with the other language directing a division "amongst the said" (that is, enumerated) subscribing creditors, none having in fact then signed.

The maxim "*res magis valeat quam pereat*" forcibly applies to protect the assignment from what might otherwise be fatal to its efficacy. This method of interpretation is not only sanctioned by the words of the deed, but is supported by the further fact that the creditors, scattered in remote places, and some entirely unknown and equally included in the scope of the trust, could not be expected to sign, and some could not possibly sign in any reasonable time before probate and registration. The only alternative to an absolute annulling of the deed is an interpretation that rejects the qualifying participle as incompatible with the general purpose and structure of the instrument in its adopted form, or gives to it the meaning of assenting, of which the assigning would be proof, and thus to let in all the creditors to a share of the fund.

We must, therefore, uphold the deed upon the facts stated, and affirm the ruling of His Honor in this regard.

No error. Affirmed.

STATE v. DANIEL WHITE.

Larceny, evidence in—Recent Possession.

1. On trial of an indictment for larceny, charging the defendant with stealing a hog, the property of some person to the jurors unknown, *it was held*, that the testimony of witnesses, living in defendant's neighborhood, to the

effect that they lost hogs about the time when the defendant sold "dressed hogs" and brought them to a witness in a cart covered with a cloth, one with its head off, the defendant denying the sale, and then admitting it in the same conversation, constitutes some evidence pertinent to the issue, and was properly left to the jury.

2. When a combination of facts and circumstances reveal the dignity of evidence, stated by MERRIMON, J., and the duty of the court in such case pointed out.

3. The charge of the court below upon recent possession approved.

(*Cobb* v. *Fogalman*, 1 Ired., 440; *State* v. *Vinson*, 63 N. C., 335; *Wittkowsky* v. *Wasson*, 71 N. C., 451; *State* v. *Massey*, 86 N. C., 658, cited and approved).

INDICTMENT for larceny tried at Spring Term, 1883, of BERTIE Superior Court, before *Philips, J.*

The defendant is charged with stealing a hog, the property of some person to the jurors unknown.

The substance of the testimony is as follows: One Keter testified that the defendant lived within a mile and a half of him, and that he knew the defendant's hogs. In February, preceding the trial, defendant asked witness if he had accused defendant of stealing hogs, and one Bailey, who was present, said to defendant: "Haven't you sold some pork?" "Not a pound," replied the defendant. "Haven't you sold some salted meat?" "Not a pound." Bailey then said: "I know you have sold some." And defendant replied: "Yes, I sold one shoat to Ward, and I can prove that it weighed 120 pounds." Ward came up, and, upon being asked if he had bought pork of defendant, replied: "Yes, 120 pounds."

Miles Bailey testified that defendant told him he had only two shoats to make his meat; that witness' hogs had strayed off, and defendant said his had strayed off also; the defendant had a sow and pigs which he said he was raising on shares, and also a sow and two shoats which witness said would not weigh over 60 pounds gross; that the defendant said he had been accused of stealing, denied having sold any pork, but in the course of conversation confessed that he had sold one shoat to Ward, weighing 120 pounds, and Ward, who was present, said he bought the

same of defendant; that defendant said he had killed six hogs, but the only meat he had sold was to Ward. Witness testified he had lost his hogs.

George Smith testified that he lives in one mile of the defendant, and that he also lost hogs, but could not say what became of them.

M. F. Parker testified that defendant sold him two dressed hogs, one of them with its head off, and the two weighed 182 pounds; that they were brought to him in a cart, and were covered up with a cloth.

These transactions took place in the fall and winter, preceding the finding of the indictment. The defendant introduced no testimony.

The defendant's counsel requested the court to charge the jury that the evidence was not sufficient to warrant a conviction. This the court declined to do, but submitted the whole testimony, with instructions to the jury to determine its weight.

The defendant filed the following exceptions:

1. For that the court declined to charge the jury that the evidence was not sufficient to convict.

2. Because the court instructed the jury that they might consider the facts that the witnesses had lost hogs in the neighborhood about the time the defendant sold two hogs to Parker.

There was a verdict of guilty; judgment; appeal by the defendant.

Attorney-General, for the State.

No counsel for defendant.

MERRIMON, J. It is well settled law, that the court must decide what is evidence, and whether there is any evidence to be submitted to the jury, pertinent to an issue submitted to them. It is as well settled, that if there is evidence to be submitted, the jury must determine its weight and effect. This, however, does not imply that the court must submit a *scintilla*—very slight evi-

dence; on the contrary, it must be such as, in the judgment of the court, would reasonably warrant the jury in finding a verdict upon the issue submitted, affirmatively or negatively, accordingly as they might view it in one light or another, and give it more or less weight, or none at all. In a case like the present one, the evidence ought to be such as, if the whole were taken together and substantially as true, the jury might reasonably find the defendant guilty.

A single isolated fact or circumstance might be no evidence, not even a *scintilla;* two, three or more, taken together, might not make evidence in the eye of the law, but a multitude of slight facts and circumstances, taken together as true, might become (make) evidence that would warrant a jury in finding a verdict of guilty in cases of the most serious moment. The court must be the judge as to when such a combination of facts and circumstances reveal the dignity of evidence, and it must judge of the pertinency and relevancy of the facts and circumstances going to make up such evidence. The court cannot, however, decide that they are true or false; this is for the jury; but it must decide that, all together, they make *some evidence*, to be submitted to the jury; and they must be such, in a case like the present, as would, if the jury believed the same, reasonably warrant them in finding a verdict of guilty. *Cobb* v. *Fogalman,* 1 Ired., 440; *State* v. *Vinson,* 63 N. C., 335; *Wittkowsky* v. *Wasson,* 71 N. C., 451; *State* v. *Massey,* 86 N. C., 658; *Imp. Co.* v. *Munson,* 14 Wall., 442; *Pleasants* v. *Fonts,* 22 Wall., 120.

In this case, there is, in our judgment, evidence to be submitted to the jury. The facts and circumstances of the case, as stated in the record, taken all together, were such as, if true, and the jury believed them to be true, would reasonably warrant them in finding a verdict of guilty. The facts were pertinent and relevant, and each tended to prove the allegation contained in the indictment, and, taken all together, they constitute *some evidence* to be submitted to the jury.

The fact that the witnesses, residing in the immediate neighborhood of the defendant, each had lost hogs, as testified to by them, was pertinent; it tended materially, if true, in connection with the other facts in evidence, to establish the guilt of the defendant.

The court, in respect to the possession of the pork, substantially told the jury that the possession thereof did not raise a presumption against the defendant, unless it was so recent after the alleged larceny as excluded the opportunity of others to steal the property. It was fairly, indeed favorably, for the defendant, left to the jury to find whether the possession of the property was recent or otherwise. The exceptions to the charge cannot be sustained, and having carefully examined the whole record, we are of the opinion that the judgment of the court below must be affirmed.

No error. Affirmed.

STATE v. GEORGE McCOY.

Indictment—Larceny—Landlord and Tenant.

1. An indictment against a tenant for the larceny of crops raised by him, which lays the property in the landlord and tenant as their joint and undivided property, cannot be sustained.
2. A general owner of goods may be indicted for stealing the same from the special owner or bailee, but in such case the indictment must lay the property in the special owner.

(*Lucas* v. *Wasson*, 3 Dev., 398; *State* v. *Webb*, 87 N. C., 558, and cases cited, approved).

INDICTMENT tried at Spring Term, 1883, of MADISON Superior Court, before *Avery, J.*

The bill contained two counts, one for larceny and the other as follows, to-wit:

"And the jurors for the state, upon their oaths aforesaid, do further present, that the said George McCoy, on the day and year aforesaid, with force and arms, at and in the county aforesaid, two bushels of corn of the value of two dollars, of the goods, chattels and moneys of one J. G. Roberts and the said George McCoy, the said two bushels of corn being the joint and undivided property, goods, chattels and moneys of the said J. G. Roberts and said George McCoy, the said J. G. Roberts and George McCoy each owning one undivided half of the said two bushels of corn, as landlord and tenant, the said J. G. Roberts being the landlord and owner of the land upon which the corn had been grown, and the said George McCoy being the tenant of the said J. G. Roberts, who grew the said corn, the said corn being undivided and then and there being found, feloniously did steal, take and carry away, against the form of the statute in such case made and provided and against the peace and dignity of the state."

The solicitor entered a *nolle prosequi* as to the first count.

The defendant demurred to the bill of indictment and moved that it be quashed. The court sustained the motion, and from this ruling the solicitor for the state appealed;

Attorney-General, for the State.

No counsel for the defendant.

ASHE, J. The bill charges that the corn alleged to have been stolen was *of the goods, chattels and moneys of one J. G. Roberts and the defendant George McCoy.*"

LORD HALE says: "Regularly a man cannot commit felony of goods whenever he hath property. If A and B be joint tenants or tenants in common of an horse, and A takes the horse, possibly *animo furandi*, yet this is not felony, because one tenant in common, taking the whole, doth but what by the law he may do." Vol. I, p. 515. And the reason for this is, that there is

in fact no taking, for he is already in possession, and *taking* is a material ingredient in the crime of larceny.

It is true there are circumstances in which a man may commit larceny of property of which he is the general owner, as where he takes it with a felonious intent from the special owner in order to charge him with the value. 2 East. P. C., 654; *Rex* v. *Wilkerson*, 1 Russ. & Ry., 470; *Palmer* v. *People*, 10 Wend., 105. But this doctrine only applies to those cases in which the person in possession sustains to the owner such a relation as to be legally chargeable with the loss of the goods; and in every such case the indictment should lay the property to be in the special owner. Bishop Crim. Pro., §682, and Bishop C. L., §802. Hawkins, in his Pleas of the Crown, lays down the doctrine "that any indictment of larceny must have the words *felonice cepit* as well as *asportavit;* from whence it follows that if the party be guilty of no *trespass* in taking the goods, he cannot be guilty of felony in carrying them away." Vol. I, p. 142.

Where, then, as in the case before us, two persons are joint owners or tenants in common of a personal chattel, the one has as much right to the possession as the other, and one cannot maintain an action against the other for a trespass upon his possession; though it is held he may sustain the action of trover, where the joint property has been destroyed, or, if of a perishable nature, has been so disposed of that the other cannot recover it, which is held to be equivalent to destruction. *Lucas* v. *Wasson*, 3 Dev., 398.

The law appertaining to the relative rights and possession of landlord and tenant, and the liability of the latter to criminal prosecution for larceny, has been pretty fully expounded in the recent cases of the *State* v. *Webb*, 87 N. C., 558, and *State* v. *Copeland*, 86 N. C., 691.

Possibly an indictment for a misdemeanor might be sustained against the defendant, under THE CODE, §1759, but this bill of indictment cannot be sustained, and was properly quashed by His Honor in the court below.

There is no error. Let this be certified to the superior court of Madison county.

No error. Affirmed.

STATE v. SAMUEL FREEMAN.

Larceny of Money—Recent Possession—Judge's Charge.

1. The evidence in this case was sufficient to warrant the jury in finding a verdict of guilty.
2. Indictment charged the larceny of "thirty dollars in money," and the proof was that defendant stole "three ten dollar bills"; *Held*, no variance. THE CODE, §1190.
3. Where, in such case, the court, in reference to the ten dollar bill found in defendant's possession recently after the theft, charged the jury that if they were satisfied it was one of the bills stolen, its possession by the defendant (although no presumption against him) was a fact which they might consider with the other testimony in the case; and if they found it was not a part of the money stolen, they should dismiss that fact from their consideration in passing on the other testimony; *Held*, that the charge is as favorable to the defendant as he had a right to expect, and his exception thereto is groundless.

INDICTMENT for larceny tried at Fall Term, 1883, of BUNCOMBE Superior Court, before *Gudger, J.*

The prosecution was commenced in the inferior court before T. F. Davidson, chairman, and associates, where the defendant was convicted, and from the sentence pronounced appealed to the superior court. In the latter court, His Honor reviewed the matters of law raised on the trial below and sent up with the statement of the case, and affirmed the judgment, from which the defendant appealed.

Attorney-General, for the State.

No counsel for the defendant.

ASHE, J. The defendant was charged with stealing "one purse and thirty dollars in money, and a trunk key, of the goods, chattels and moneys of one Fannie P. McGill."

On the trial in the inferior court, it was in evidence that the defendant was in the employment of one Wedden, who was the proprietor of a livery stable and line of hacks, and that on the —— day of ——— 1883, he was sent by his employer to a house in Asheville, with a vehicle to get some baggage to be carried to the train passing Asheville that afternoon. When he went to the house where the baggage was, he was accompanied by a man named Williams. A young lady, from whom the property was alleged to have been taken, was in a room, partially undressed, sitting on the floor writing, with her writing materials and purse, containing three ten dollar bills, some small bills and a key, on the floor near her. Hearing persons approaching the room in which was the baggage, she hastily stepped in an adjoining room, where she remained until two men had carried out the baggage. She returned, resumed her writing, and in a half hour or so thereafter missed her purse. No one had been in the room since she left it except the two men who came for the baggage.

Williams, who accompanied the defendant, testified, that as they went in the room the defendant stooped down, as if to pick up something on the floor, and exclaimed, "Oh, hell!"

The state then offered to prove by one Levi, that some three or four hours after this, the defendant came to his store and purchased some goods, and gave witness a ten dollar bill, from which he took the amount due him. The bill was torn almost across, and there was no evidence whether any of the bills stolen were torn or not. This testimony was objected to, but admitted.

The witness Williams was under indictment for the same offence, but in a separate bill.

The court charged the jury that if they were satisfied the defendant stole the money as alleged, it was their duty to so find, even if they were convinced that the man Williams participated in the commission of the crime. The defendant excepted.

Defendant asked the court to instruct the jury that there was no evidence sufficient to warrant a conviction. The court declined, and the defendant excepted.

He then asked the court to charge the jury that he could not be convicted under the bill, as it charged the stealing thirty dollars in money, and the proof of stealing three ten dollar bills was not sufficient. Refused, and defendant excepted.

The court, in reference to the ten dollar bill in the possession of the defendant recently after the larceny, charged the jury that if they were satisfied it was one of the bills stolen, its possession by the defendant, while it raised no presumption of his guilt, was a fact which they might consider, with the other facts in their inquiry, as to who was the thief. That the defendant had offered testimony, which he insisted was sufficient, to show that the bill passed by him was not a portion of the stolen property; and if they concluded that it was not a part of the money lost, they would dismiss the fact entirely from their consideration, and confine their investigation to the other facts embraced in the other testimony in the case.

We are not informed, and we do not perceive upon what ground the first charge of the court to the jury was excepted to, and the second charge was as favorable to the defendant as he had any right to expect or demand. And then the exceptions taken to the refusal of the court to give the instruction asked are so trivial that it must be they were taken with no expectation of being sustained, but for the purpose of postponing the "evil day."

As to the first exception, we think the evidence was amply sufficient to warrant the jury in finding a verdict of "guilty."

And as to the other exception, in reference to the instructions refused with regard to the proof of stealing *three ten dollar bills*, which it was contended was a variance from the charge in the bill of stealing *thirty dollars in money*: All that is necessary in a bill of indictment for the larceny of money or United States treasury notes, or any note of any bank whatever, is to describe it as

money, and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or treasury note, or bank note, although the particular species of coin of which such an amount was composed, or the particular nature of the treasury note or bank note, need not be proved. THE CODE, §1190.

Under this section, the description in the bill of indictment of the property stolen, *as thirty dollars in money*, is a good averment, and, by the provisions of the same section, it will be sustained by proof that it was a bank *note* or treasury note that was stolen, and it would be the same if it was called in the evidence a ten dollar bill, for that description embraces a treasury note as well as a bank note of that description. In common parlance they mean identically the same thing. When one speaks of a *ten dollar bill*, it is universally understood he means a bank bill of the denomination of ten dollars, or a treasury note of the same denomination. There is no other institution that we are aware of, besides banks, which issue what are called "bills," to be used as current money. Three *ten dollar bills*, then, must be taken to be three *bank* notes of the denomination of ten dollars, and, under the act of 1876–7, the proof offered in the case of the loss of three ten dollar bills sustains the indictment, and there is no variance.

There is no error. Let this opinion be certified to the superior court of Buncombe county, that a certificate may be issued by that court to the inferior court of that county, to the end that it may proceed with the case according to law.

No error. Affirmed.

STATE v. LEANDER WHITAKER.

Larceny and Receiving—Informal Verdict, duty of court in relation thereto.

1. On trial of an indictment for the larceny of cotton and receiving the same, knowing it to have been stolen, the jury found the defendant "guilty of

receiving stolen cotton"; *Held*, that the verdict is defective, in that it is not responsive to the charge in the indictment, and a *venire de novo* must therefore be awarded.

2. It is the duty of the court to look after the form and substance of a verdict, and, if it be informal, to direct the jury to reconsider it.

(*State* v. *Arrington*, 3 Mur., 571; *State* v. *Edmund*, 4 Dev., 340; *State* v. *Hudson*, 74 N. C., 246, cited and approved).

INDICTMENT for larceny tried at Spring Term, 1883, of HALIFAX Superior Court, before *Philips, J.*

The indictment contained two counts—one for stealing a quantity of cotton, the property of James H. Parker, and the other for feloniously receiving the cotton, knowing it to have been stolen. Upon the trial in the inferior court of Halifax, before Thos. N. Hill and associate justices, in which the prosecution commenced, the defendant pleaded "not guilty," and the jury returned for their verdict that the defendant "is guilty of receiving stolen cotton." On motion of the defendant, judgment was arrested, and the state appealed to the superior court, where the judgment of the inferior court was affirmed, and the state appealed to this court.

Attorney-General, for the State.
Mr. J. E. O'Hara, for the defendant.

ASHE, J. The record does not disclose upon what ground the judgment was arrested, but we presume it was because it was considered that the verdict of the jury was insensible, or not responsive to the issue presented for their consideration.

The charge was that the defendant received the cotton of one James H. Parker, knowing it to have been stolen, and the jury find "he is guilty of receiving stolen cotton." The finding is very informal and uncertain, and not responsive to the indictment. What cotton do they find was received? To whom did it belong? Did the defendant, at the time of receiving it, know that it had been stolen? According to the verdict, the cotton received

may have belonged to any other person than him who is alleged in the indictment to be the owner; or, the defendant may have received the cotton without any knowledge, at the time of receiving it, that it had been stolen. To constitute the offence charged in the second count of the indictment, the goods must be shown to be the property of the person alleged to be the owner. They must have been stolen before their reception by the defendant, and he must have a knowledge of that fact at the time of receiving. But this verdict, in its general terms, cannot be construed to have found any of these essential facts, save that of receiving some stolen cotton. It is not sufficiently responsive to the issue; and whenever a verdict is imperfect, informal, insensible, or one that is not responsive to the indictment, the jury may be directed to reconsider it with proper instructions as to the form in which it should be rendered. 1 Arch. Cr. Prac. & Pl., 176, note 4; *State* v. *Arrington*, 3 Mur., 571.

But if such a verdict is received by the court and recorded, it would be error to pronounce judgment upon it. The most regular course would be to set aside the verdict and order a *venire de novo*. 1 Chitty Cr. Law, 646. This, no doubt, is the proper and regular practice in such cases. It was so held in *State* v. *Edmund*, 4 Dev., 340. But in a similar case before this court the judgment was arrested. *State* v. *Hudson*, 74 N. C., 246. So it would seem that advantage has been taken of such a defect in the verdict by both courses in this court. But it is held that the practice of directing a jury to reconsider their verdict, or ordering a *venire de novo*, is a harsh rule of the common law, which has been so far relaxed as not to apply to cases where the verdict in *terms* or *effect* amounts to an acquittal. 2 Hawk., ch. 47, §§11, 12; 1 Chitty C. L., 648; *State* v. *Arrington, supra.*

To avoid embarrassment in cases like this, it would be well to follow the suggestion of Mr. BISHOP, "that in every case of a verdict rendered, the judge or prosecuting officer, or both, should look after its form and its substance, so far as to prevent a doubtful or insufficient finding from passing into the records of the

court, to create embarrassment afterwards, and perhaps the necessity of a new trial." 1 Bish. Cr. Pro., §831.

Apprised as we are of the learning and ability of the presiding officer of the inferior court of Halifax county, we are assured the judgment could not have been arrested in that court for the reason the "receiving" was charged to have been done "feloniously"; and we are unable to discover from the record any other grounds for arresting the judgment than the defective verdict. But we are of the opinion, that instead of arresting the judgment, a *venire de novo* should have been ordered. Let this opinion be certified to the superior court of Halifax county, that a certificate may be issued from that court to the inferior court of said county that a *venire de novo* may be awarded.

Error. *Venire de novo.*

STATE v. JAMES F. CRAIGE.

Larceny—Asportation—Constructive Possession—Motion in Arrest—New Trial—Presumption of correct verdict.

1. The bare removal from the place where goods are found by the thief (here, wheat from one garner into the defendant's adjoining garner at a mill) is a sufficient asportation to constitute larceny; and a severance from the constructive possession of the owner is also sufficient.
2. A motion in arrest of judgment cannot be grounded upon a variance between allegation and proof; it lies only for defects in the indictment.
3. A new trial will not be granted by this court for a variance between the allegation and the proof, where no exception is taken in the court below. The presumption is, that every fact necessary to sustain the verdict was proved on the trial.

(*State* v. *Green*, 81 N. C., 560; *State* v. *Walker*, 87 N. C., 541; *State* v. *Jones*, 69 N. C., 16; *State* v. *Potter*, Phil., 338; *State* v. *Cowan*, 7 Ired., 239; *Honeycut* v. *Angel*, 4 Dev. & Bat., 306, cited and approved).

STATE *v.* CRAIGE.

INDICTMENT for larceny tried at Spring Term, 1883, of ORANGE Superior Court, before *Gilmer, J.*

The state introduced as a witness one Orren Suggs, who testified that he and one C. P. Suggs were millers, and kept the mill of Mrs. Purifoy, in Orange county; that they both took charge of the mill in January, 1883, and at that time the defendant had wheat at the mill, in garner No. 54, amounting to forty and a half bushels, for which he gave defendant a receipt; that he moved the defendant's wheat at the time he measured it into garner No. 53, and owing to certain circumstances, witness again removed defendant's wheat from garner No. 53 to garner No. 51; that at the time of this last removal he again measured defendant's wheat in garner No. 51, and there were twelve and a half bushels of wheat in that garner more than there ought to have been, and this twelve and a half bushels he poured in the other garners in the mill containing wheat of other persons, from which wheat had been missing; that J. W. Cheek, Jr., had two garners in the mill containing wheat (Nos. 49 and 50), and the wheat in these garners belonged to J. M. Cheek, Jr.; that garner No. 50 was only separated from defendant's garner, No. 51, by an inch plank partition, which did not extend to the top of the garners.

The witness further testified, that in the month of March last the defendant came to the mill, and, after waiting some little time in the first story of the building, the defendant went up-stairs into the second story, where the garners were. In a short time the witness went up-stairs and saw defendant leaning over garner No. 50, containing J. M. Cheek's wheat, and with his hands rapidly throwing the wheat from garner No. 50 into garner No. 51, containing the defendant's wheat; and the witness stood and watched him; that the defendant, after discovering the witness, began to throw the wheat up and let it fall back into the garner containing J. M. Cheek's wheat, and thereupon the witness told defendant that he had been suspecting him for some time, and now he had caught him, and was going to prose-

cute him. Defendant asked what he (defendant) was doing? Witness replied, "throwing J. M. Cheek's wheat from his garner into defendant's." Defendant said he was only examining the wheat, and threw it back into the same garner. Witness replied: "I know you did that after you saw me." Defendant then acknowledged it and tried to get him not to prosecute him.

Witness also, on cross-examination, said that neither the defendant nor any one else would have gotten from the mill, by his consent, any more wheat than his receipt called for, and that defendant would not have gotten more than forty-and-a-half bushels.

Defendant's counsel asked His Honor to charge the jury that under the facts of the case there was no asportation, and defendant could not convicted, but this instruction was refused, and defendant excepted.

The jury returned a verdict of guilty, and the defendant moved for a new trial, which was refused, and he appealed from the judgment pronounced.

Attorney-General, for the state.
Messrs. Graham & Ruffin and *John Manning*, for defendant.

ASHE, J. The only exception taken in the court below was to the refusal of His Honor to give the instruction asked, that there was no asportation of the wheat. There was no error in the refusal of the court to give the instruction.

Larceny is defined to be the felonious taking and carrying away the personal goods of another. 4 Blk., 229. There must not only be a taking but a carrying away to constitute the crime. Arch. C. L., 190. And it is held by all the authorities that a bare removal from the place where the goods are found by the thief, though he does not make off with them, is a sufficient asportation or carrying away. Thus if a thief, intending to steal plate, take it out of a chest in which it was, and lay it down on the floor, but be surprised before he can make his escape with

it; so where the defendant drew a book from the inside pocket of the prosecutor's coat, about an inch above the top of the pocket, but while the book was still about the person of the prosecutor, the prosecutor suddenly put up his hand, upon which the defendant let the book drop and it fell in the prosecutor's pocket; it was held in both of these cases that there was a sufficient asportation to constitute larceny. Arch. C. L., 190.

In further illustration of this doctrine, it has been held, by the unanimous opinion of the twelve judges of England, where the prisoner got into a wagon, and taking a parcel of goods which lay in the forepart, had removed it near the tail of the wagon where he was apprehended, that as the prisoner had moved the property from the spot where it was originally placed, with an intent to steal it, was a sufficient *taking* and *carrying away* to constitute the offence. 2 East P. C., 556. And again, where the prisoner was indicted for robbing the prosecutrix of a diamond ear-ring, it appeared that as she was coming out of an opera house, the prisoner snatched at her ear-ring and tore it from her ear, which bled, and she was much hurt, the ear-ring fell into her hair, where it was found on her return home. On a case reversed the judges were of opinion that this was a sufficient taking to constitute robbery, it being in the possession of the prisoner for a moment, separated from the owner's person, though he could not retain it, but probably lost it again the very instant it was taken. *Rex* v. *Lassiter*, 1 East P. C., 557; *State* v. *Green*, 81 N. C., 560.

To apply the principle announced in those cases to that before us: Here, the wheat in garner No. 50 was the property of Cheek, and though in the actual possession of the prosecutor, who was the miller, the constructive possession was in Cheek, and while a severance from the possession of the owner is necessary to constitute larceny, it matters not whether the severance is from his constructive or actual possession. 3 Arch., C. Pl., 366.

The transfer of the wheat by the defendant from garner No. 50 to garner No. 51, containing his own wheat, was a sufficient

asportation to constitute the offence of larceny, and it could make no difference whether in fact he would derive any benefit from the transfer of the wheat, for the felonious quality consists in the *intention* of the defendant to defraud the owner and apply the thing stolen to his own use.

In this court, defendant's counsel moved in arrest of judgment, upon the ground that the bill of indictment charged the ownership of the property to be in Marion Cheek, while the evidence in the case showed it to be in J. M. Cheek, Jr. The motion cannot be sustained upon any such ground. The judgment in a criminal prosecution can only be arrested for defects in the bill of indictment when it shows substantial defects upon its face. The court cannot look to extrinsic evidence to ascertain the defects. *State* v. *Walker*, 87 N. C., 541.

The defendant contended that if the motion in arrest could not be sustained, that the defendant was entitled to a *venire de novo*, upon the ground that there was a variance between the proof and the allegations in the bill of indictment. But whatever force there may have been in this point, if it had been raised at the proper time, it cannot avail him here. There was no such exception taken in the superior court, and this court will not consider an exception which was not taken in the court below. *State* v. *Jones*, 69 N. C., 16; *State* v. *Potter*, Phil., 338; *State* v. *Cowan*, 7 Ired., 239. And we must assume that Marion Cheek and J. M. Cheek, Jr., are the same, for when there is no exception or statement to the contrary, the court must presume that every fact was proved which was necessary to sustain the verdict. *Honeycut* v. *Angel*, 4 Dev. & Bat., 306.

No error. Affirmed.

STATE v. WILLIAM BRAY.

Special Verdict—Larceny—Intent must be found.

1. A special verdict must find, as a fact, the intent with which the offence charged was committed, in cases where the intent is an ingredient of the offence.
2. Where a special verdict is defective, a *venire de novo* will be awarded.

(*State* v. *Blue*, 84 N. C., 807, and cases there cited; *State* v. *Watts*, 10 Ired., 369, cited and approved).

INDICTMENT for larceny tried at Fall Term, 1883, of ORANGE Superior Court, before *MacRae, J.*

The jury found a special verdict, in substance as follows: George Piper, the prosecutor, was the owner of the piece of mutton alleged to have been stolen by the defendant, and the defendant came to his wagon in the town of Hillsboro and took up the mutton, saying it was for Mrs. Webb, "I will take it to her and be back with the money in five minutes." He went off with it; did not carry it to Mrs. Webb, but converted it to his own use; did not bring back the money, nor pay for the mutton. Mrs. Webb gave the defendant no authority to buy it for her. The defendant afterwards returned and told the prosecutor the mutton was for his own use, and he would pay for it. Thereupon the court held that the defendant was not guilty, and the state solicitor appealed.

Attorney-General, for the State.
Mr. A. W. Graham, for defendant.

MERRIMON, J. The special verdict in this case is defective in a material respect, and the court is, therefore, unable to determine, upon the facts found, whether in law the offence charged in the indictment was committed or not.

In every special verdict, the jury must find all the facts essential to constitute the offence charged in the indictment. The

court cannot supply facts, nor draw inferences from evidence set forth in the verdict: it must say upon the facts found that in law they constitute or do not constitute the offence charged, and thereupon the verdict of the jury is entered in accordance with the opinion of the court. When the special verdict is thus defective, the court will direct a *venire de novo*. *State* v. *Wallace*, 3 Ired., 195; *State* v. *Curtis*, 71 N. C., 56; *State* v. *Long*, 74 N. C., 121; *State* v. *Blue*, 84 N. C., 807.

The special verdict in this case is defective, in that the *intent* is not found as a fact. There may be evidence of intent, but the fact is not found by the jury. In larceny, the intent is an essential ingredient: the taking must be *felonious*, that is, done *animo furandi*, and there is no larceny without such intent. And this material fact must be found in the special verdict—not simply *evidence* from which the intent may be inferred. The jury must find the fact from the evidence before them, and the intent is a question for the jury. Arch. Cr. Pl.; 172; *State* v. *Watts*, 10 Ired., 369; *State* v. *Curtis*, *supra*.

Whether, if the fact of *felonious* intent were found in the special verdict, the facts would constitute the offence of larceny, or the offence of obtaining goods by false pretence, or some other offence, is not a question we are now called upon to decide.

There is error. The judgment must be reversed, the special verdict set aside, and a *venire de novo* awarded, and it is accordingly so ordered.

Error. *Venire de novo.*

STATE v. S. P. and J. W. BRITTAIN.

Homicide—Son fighting in defence of his father—Tales-juror—Misconduct of Jury, impeachment of verdict of.

1. Where a prisoner makes an assault upon A, and is re-assaulted so fiercely that the prisoner cannot retreat without danger of his life, and the prisoner kills A; *Held*, that the killing cannot be justified upon the ground

of self-defence. The first assailant does the first wrong and brings upon himself the necessity of slaying, and is therefore not entitled to a favorable interpretation of the law.

2. The killing being established, the offence is murder; and it is incumbent upon the prisoner to show circumstances of mitigation or excuse to the satisfaction of the jury, unless the same arise out of the evidence adduced on the part of the prosecution.

3. And if such proof puts the offence of murder out of the way, the law of this state is that it is still incumbent upon the prisoner to show, in like manner, the circumstances of justification; and if he fails to do this, the offence is manslaughter.

4. If two men fight upon sudden quarrel and equal terms, the one upon provocation and the other upon a predetermined intention to kill, the fact that the latter would be guilty of murder if he slew his adversary cannot excuse the former if he should be the slayer.

5. Though a son may fight in the necessary defence of his father, yet the act of the son must receive the same construction as the act of the father would have received.

6. A juror of the original panel is not subject to be challenged upon the ground that he had served upon a jury in the same court within two years: only *tales-jurors* who have thus served are disqualified by the statute. THE CODE, §1733, *proviso*.

7. A juror cannot be examined as a witness to impeach the verdict of the jury of which he was a member.

8. Where the circumstances are such as merely put a suspicion on the verdict by showing, not that there *was*, but that there might have been, undue influence brought to bear upon the jury because of the opportunity for it; *Held*, that the granting a new trial is discretionary with the presiding judge.

(*State* v. *Ta-cha-na-tah*, 64 N. C., 614; *State* v. *Frank*, 5 Jones, 384; *State* v. *Willis*, 63 N. C., 26; *State* v. *Ellick*, 2 Winst., 400; *State* v. *Johnson*, 3 Jones, 266; *State* v. *Haywood*, Phil., 376; *State* v. *Smith*, 77 N. C., 488; *State* v. *Vann*, 82 N. C., 631; *State* v. *Johnson*, 75 N. C., 174; *State* v. *Cockman*, 2 Winst., 95; *State* v. *Smallwood*, 78 N. C., 560; *State* v. *Tilghman*, 11 Ired., 513, cited and approved).

INDICTMENT for murder tried at Fall Term, 1883, of HENDERSON Superior Court, before *Gudger*, *J.*

The prisoners are charged with the killing of Samuel P. Cunningham, and upon the trial they made several exceptions, based upon facts which are substantially as follows:

One Shipman, a juror of the original panel, when called was challenged by the prisoners on the ground that he had served as a juror in that court within two years of that term of the court, but the challenge was disallowed and the prisoners excepted.

A difficulty occurred between the prisoners, Samuel P. Brittain and John W. Brittain, and one J. H. Fanning, in reference to the lease of a store in the town of Hendersonville, known as the "Few store."

Dr. Egerton, a witness for the state, testified that on the day of the difficulty, the deceased and himself were standing at the rear end of the store of the deceased, and, upon hearing rapid firing down the street, in the direction of the "Ewart building," the deceased stepped out on the street in front of witness, and jumping back, said, "I am shot.". The ball entered the back of his right hand, and lodged against the skin on the inside of the hand. Dr. Few and the witness extracted the ball. The witness saw the deceased at his store the day after the shooting; his hand was very much swollen, and he complained that it gave him great pain, and he afterwards died.

Dr. Few, who was examined without objection as an expert, testified that he had assisted in extracting the ball from the hand of the deceased. On the Sunday after he received the wound, he became his physician and attended him till his death, and gave as his opinion that he died of blood poison, produced by the wound. In answer to questions by prisoners, the witness stated that he had the house rented when the difficulty occurred, and had sublet the house to the prisoner, S. P. Brittain, from the 1st day of January, 1883. He did not lease to Fanning. He was shown the lease he had made to S. P. Brittain, and identified it, and stated that Brittain had paid the rent due for the first month.

Dr. Fletcher was examined as an expert, and stated that he had had a consultation with Dr. Few on the condition of the deceased, and concurred with him in the opinion that deceased

died of blood poison, and that his death was caused by the wound producing blood poison.

J. H. Fanning was next introduced, and testified that on the day in question he had been bird hunting, and on his return left his gun in Whitted's drug store and went to the billiard saloon. He found that his meal and corn had been moved out of the Few store, and, finding the door of the same unlocked, he went in, moved his meal and corn back into it where it had been. He then nailed up the door and windows and went out by a window. He met S. P. Brittain, who asked him what he was doing? and Fanning replied he had been putting his meal and corn back in the store, and was nailing up the door and windows, and did not want him or any one else to put them out again. He and Brittain had rented the store together, and he was to be a secret partner, and they were going into the whiskey business. When he told Brittain not to carry out the corn and meal, Brittain said "by G—d, he would go in in less than three minutes." He walked off rapidly towards Main street, and witness did the same. He saw the prisoners, S. P. and J. W. Brittain, coming across the street to the court-house and back to the "Ewart building," and both the prisoners went into the drug store and stayed a few minutes. J. W. Brittain pulled off his overcoat, pulled a pistol out of his overcoat pocket and put it in his right coat pocket. They then walked out and towards the Few store. The witness picked up his gun and started to his billiard saloon, by way of the Few store, where his meal and corn were, and, seeing S. P. Brittain knocking at the door, said, "don't go in." S. P. Brittain said "by G—d, I am going in," and bursted the door open with his shoulder and went inside. J. W. Brittain followed, and witness also went in, saying, "I have as much right to go in as you; I own one-half of the store; I am in possession; my meal and corn are in here; I have a right to protect it." S. P. Brittain drew a piece of scantling and J. W. Brittain drew a pistol. S. P. Brittain said "G—d d—n you, get out of here or I will break your head." He stepped

out on the sidewalk two or three steps, S. P. Brittain followed with the scantling and J. W. Brittain came to the door. They talked about the room, and witness said he had as much right to the room as before. S. P. Brittain struck him on the head with the scantling, saying "d—n you, you will not go in there." The witness remembered nothing more, except that when he was struck the jar caused his gun to fire. He was then carried to Mr. Tom's store, where his wounds were dressed.

On cross-examination, the witness stated that S. P. Brittain was to do the renting and they were to be partners; he paid half of the first month's rent, and used the room in the store to sell his meal and corn, with the consent of S. P. Brittain. Witness had two guns, and was in the habit of putting his gun in Whitted's drug store. He did not tell Maxwell and Justice he was going to use his gun. He and S. P. Brittain had dissolved their partnership that morning, before he went hunting, except as to this room in dispute. They had been partners in a whiskey shop called "Hole-in-the-wall." Brittain owed him, and he told him to pay it over to Few for the next rent due.

He further stated that when S. P. Brittain knocked the store door down, he was standing six or seven feet from the door, and said "boys, don't knock the door down." "I stepped in the store after the prisoners, with my gun in my hand, with the muzzle down to the ground and the breech under my arm." When S. P. Brittain told him to go out, he did so, going backwards to the street, and he then turned and walked up the street ten or twelve feet. S. P. Brittain followed and witness turned toward him, when Brittain struck and the gun went off. He did not know that the gun was cocked, nor did he tell J. B. Arledge, or any one else, that morning, that he wanted a pistol, as he was going to kick up "a little hell" that day; did not tell S. P. Brittain that he would kill the first person who went into the store. When he got his gun from the drug store he started to his billiard room, intending to go through the Few store, but he did not intend a difficulty. He carried one key

and S. P. Brittain another. He had left his key on his key-ring at his trunk in the billiard room, and in his absence that morning some one had taken it off. He told Maxwell in the billiard room there might be some trouble, but he did not desire a difficulty.

John Maxwell was next called by the state. His testimony was the same as that of the witness Fanning to the point when the prisoners came out of the drug store. S. P. Brittain then had a hatchet, but he never saw the hatchet afterwards. J. W. Brittain had a pistol in his pocket with his hand on the handle. They went up to the store-door, and Fanning came out of the drug store, and told them not to go in. S. P. Brittain kicked open the door, and then entered, followed by Fanning. S. P. Brittain said to Fanning, "G—d d—n you, go out," and as Fanning came out, S. P. Brittain said "shoot, d—n you, shoot." Fanning got out about midway the sidewalk with his gun in his hand, with the muzzle down toward his feet, about midway between himself and S. P. Brittain, and it went off and took effect in the ground. S. P. Brittain struck with the scantling; the witness thought "the gun fired a little first, but near about the same time with the blow." When S. P. Brittain came out he had the scantling drawn. J. W. Brittain came to the door as S. P. Brittain struck the second blow; the gun fired again and took effect in the wall of the house, and J. W. Brittain fired. This was all about the same time. S. P. Brittain struck again and the gun was thrown up and broken by the blow. J. W. Brittain kept shooting. Fanning threw up his hand and ran up the street, and J. W. Brittain, who had come out on the sidewalk, shot a time or two as he went up the street; all were on the sidewalk and the firing was towards Cunningham's (the deceased store. Fanning fired two shots, the one in the ground and the other rather down the street not in the direction of Cunningham's store. Before the difficulty, Fanning said if he had to fight he would do it, and, pointing to his gun, said, "that is all the friend I need."

On cross-examination, the witness stated he did not hear S. P. Brittain say anything up to the time he went in the store. When Fanning came out of the drug store his gun looked as if it was cocked. J. W. Brittain shot after Fanning had turned and run up the street. Fanning said they had had a fuss that morning and he had put S. P. Brittain out, and their business was broken up. While going to put his meal and corn back, Fanning said he expected a row and would not be run over.

W. D. Justice, a witness for the state: The testimony of this witness was, in the main, of the same import as that of the witness Maxwell. He stated that when Fanning came out of the store he had a shot gun in his hand, and S. P. Brittain a piece of scantling, and he said "shoot, d—n you, shoot;" the gun was discharged, taking effect in the ground, and S. P. Brittain struck with the scantling, and another blow was struck with the scantling, and a pistol fired from the door. The third shot was the shot gun. Fanning gave back up the street. S. P. Brittain kept striking, and continued until Fanning turned and ran up the street. While Fanning was going back, five shots were fired at him by J. W. Brittain, four of them after the gun was discharged the last time. The first shot fired by J. W. Brittain was while he was standing in the door; he then stepped down on the sidewalk and moved towards Fanning. He thinks the pistol was fired once after Fanning turned to run. When Fanning fired the second shot he was in a position as if aiming to shoot. There were two gashes on his head.

On cross-examination, the witness stated that the scantling S. P. Brittain had was a piece that had been nailed across the door. Fanning said he and S. P. Brittain had rented the store and he had paid the rent and Brittain would not pay him back.

G. A. Williams, a witness for the state, testified as to the shooting, and said Fanning stooped and ran up the street at the last shot, and was about thirty or thirty-five steps above the Few store at the last shot, and twelve steps from J. W. Brittain, who had advanced about twenty steps. Fanning had his gun in a

shooting position part of the time, and J. W. Brittain had a Smith & Wesson pistol, calibre 32. It was about one hundred yards up the street from the Few store to Cunningham's store. The witness saw the ball when it was cut out of deceased's hand, and it looked like a ball of calibre 32. The scantling S. P. Brittain had was six or seven feet long, two inches wide and one inch thick, of pine, and had some nails in it.

W. D. Miller, for the state, testified that he saw S. P. Brittain when he commenced kicking and pushing the door, and told him to stop and let the door alone. Brittain said "I'll go in or die." Fanning walked towards the drug store and came back with his gun. The prisoners entered the store, followed by Fanning, who was ordered out. Fanning came out on the side-walk and was followed by S. P. Brittain. They stood facing each other, as if combating a subject, and while talking in this position a gun fired, and S. P. Brittain made a remark and an assault with a piece of plank he had brought out of the store with him. He struck Fanning, and firing commenced rapidly. When Fanning was struck he reeled and retreated ten or twelve steps, while J. W. Brittain advanced, firing, and witness told him to stop and he desisted. J. W. Brittain was firing in the direction of Cunningham's store. The second shot of Fanning's gun was in the direction of Few's store.

Samuel P. Brittain, one of the prisoners, was introduced and testified in their behalf. He stated that he had proposed to Fanning to rent the billiard room. Fanning did not agree to rent, but proposed a partnership, and they went into business. "I became dissatisfied, and told him I wanted to dissolve. He said 'all right.' We settled, and he wanted to continue to board with me. A final settlement was made, and all our business was closed on the morning of the shooting." He had paid rents out of the billiard room concern, and that was accounted for. They were not partners in the Few store, though they had spoken of it. About three hours after their settlement, on coming

down the street, he heard nailing, and went to see about it, and found Fanning nailing up the store. He told him there was no use of that. There was some cursing between them. Fanning swore he would kill the first man who entered. Witness went to a lawyer, who advised him he had a right to enter, and he went in. Fanning followed, with his gun in his hand towards him. Witness ordered him out, and he went out, having his gun pointed at his breast. Witness struck at him, struck the gun down, and it fired. He pointed the gun at J. W. Brittain and witness again struck at him several times. He stated that the relations between himself and his son and Fanning had always been of the kindest character.

On cross-examination, the witness said he went to look for his son to tell him the store had been broken open. He knew his son had a pistol, but did not see it when he pulled off his overcoat. When Fanning backed out of the house he followed him, but did not hit him the first blow; he struck at the gun; that he did not tell him to shoot, but did tell him to get out, and as he turned, he did say "d—n you, you may kill us, but you can't scare us"; that he struck several blows with the scantling, knowing that Fanning's gun was a breech-loader, and that such guns could be loaded very rapidly.

M. S. Justice, witness for prisoners, testified that he saw Fanning's gun, after the fight, on the counter of Mr. Tom's store. There were two cartridges lying by it that were bloody, and the witness thought they were loaded. The gun could still have been fired.

J. B. Arledge, examined for prisoners, stated that before the fight Fanning came to his store and said he wanted to buy a pistol, and, as he stepped out, said there would be the "biggest little hell kicked up after a while." J. W. Brittain was in the habit of carrying a pistol, and was and is in feeble health.

Dr. Whitted, the next witness examined for the prisoner as an expert, supported the testimony of the experts examined on the part of the state.

Preston Garren testified that about one-half hour before the fight, while he was standing on the platform of the billiard saloon, Fanning handed him his gun and asked him to put it in the drug store, and he handed it to Reeves and asked him to put it in the store.

The prisoners offered some evidence to show that the gun was empty immediately after the fight, and was broken.

The state, in reply, offered some evidence showing that Fanning was badly bruised, and was in a dangerous condition for five or six days, and the wounds on his head were such as to produce temporary derangement.

There was further testimony on both sides, but none that is deemed material to the points decided by this court.

The prisoners requested the court to charge the jury:

1. That the prisoners, upon the testimony, could not be convicted of murder.

2. That, although in indictments for murder, when on the trial it is admitted by the accused or proved by the state that the accused had committed the alleged homicide, the burden would be on the prisoner to show facts and circumstances to the satisfaction of the jury to mitigate the offence from murder to manslaughter, or excusable homicide, yet, where, upon the testimony, the offence could not be murder, and the question was whether it was a case of manslaughter or excusable homicide, the burden was upon the state to satisfy the jury beyond a reasonable doubt that the crime was manslaughter, and that in this case, unless the jury were satisfied beyond a reasonable doubt that the prisoners were guilty of manslaughter, it would be their duty to acquit.

3. That if, in this case, either from the testimony of the state's witnesses, or the witnesses of the prisoners, the jury, under the charge of His Honor, should find that the prisoners are not guilty of murder, then, before the jury could convict the prisoners, they should be convinced beyond a reasonable doubt

that they were guilty of manslaughter, and, unless the jury were so convinced, it would be their duty to acquit.

4. Where, on the trial of an indictment for murder, the state's testimony shows that the accused is not guilty of murder, it will not be presumed that the accused committed the homicide upon the *furor brevis*, or in the heat of passion, but the burden will be upon the state to show to the jury beyond a reasonable doubt that the killing was done under such circumstances as to make the accused guilty of manslaughter. So in this case, if the state has failed to make out a case of murder against the prisoners, it will be the duty of the jury to acquit them, unless the state has satisfied the jury, beyond a reasonable doubt that they are guilty of manslaughter.

5. And on the trial of an indictment for murder, if the state fails to make out a case of murder against the accused, but the testimony of the state would make out a case of manslaughter, yet if the testimony offered by the accused would be sufficient to raise a reasonable doubt in the minds of the jury whether or not the accused was guilty of manslaughter, it would be the duty of the jury to acquit. So in this case, if the state has failed to make out a case of murder against the prisoners, but the testimony of the state is sufficient to satisfy the jury beyond a reasonable doubt that the prisoners are guilty of manslaughter, yet, if the testimony of the prisoners is sufficient to raise in the minds of the jury a reasonable doubt as to whether or not they are guilty of manslaughter, it will be the duty of the jury to acquit. The jury must be satisfied beyond a reasonable doubt upon the whole case, taking into consideration as well the testimony of the prisoners as the testimony of the state, that the prisoners are guilty of manslaughter, or it will be their duty to acquit. It is not the duty of the prisoners, as between manslaughter and excusable homicide, to satisfy the jury that it is a case of excusable homicide, but the burden is always upon the state to satisfy the jury beyond a reasonable doubt that it is a case of manslaughter; and this is so, even in a case where it is

left to the jury to say whether the prisoners are guilty of manslaughter or of justifiable or excusable homicide. For, once the question of murder being got out of the way, there is no longer any presumption against the prisoners from the fact of the killing being admitted by the prisoners or proved by the state; but the state must then satisfy the jury beyond a reasonable doubt that the prisoners are guilty of manslaughter, and it will be sufficient for the prisoners to satisfy the jury of such facts and circumstances as will produce in their minds a reasonable doubt of the guilt of the prisoners to entitle them to an acquittal.

6. That if, upon the testimony, the jury should find that the prisoner S. P. Brittain leased the Few store for one year, and was sole lessee thereof, and the witness Fanning had no interest in said lease, but had nailed up the windows and doors of the said store, the said S. P. Brittain had the right to repossess himself of said store, and for this purpose to break open the doors and windows thereof, and that he might call to his assistance his co-defendant, J. W. Brittain.

7. That in order to repossess himself of the store, if the jury find that he was the sole lessee thereof, and that the doors and windows thereof had been nailed up by Fanning, the said S. P. Brittain might use all necessary force short of an actual breach of the peace, and might call to his assistance his co-defendant, J. W. Brittain.

8. That if, from the evidence, Fanning, when he entered the store, had killed the Brittains, or either of them, he would be guilty of murder.

9. That if Fanning entertained malice against the prisoners, just prior to the difficulty at the door, the law will presume that this malice extends up to the time of the fight.

10. That if J. W. Brittain had the pistol in the house, and not presented, he had a right to have it, if from the evidence the jury should believe that the house belonged to S. P. Brittain, and J. W. Brittain had a right to be there.

11. That if the jury should believe that Fanning entered the house, not having a conveyance of or right of possession to it, and then abandoned the same, Brittain had the right of entry, and could enter into the house at any time, even though he broke the door down to enter.

12. That if the jury believe that the Brittains entered the fight willingly, and Fanning had pressed them to the wall, so that they believed that to save their lives it was necessary to slay Fanning, then they would not be guilty of either murder or manslaughter.

13. That if the jury believe that Fanning assaulted the Brittains with his gun, and they believed he was about to do them some great bodily harm or take their lives, they would have been justified in fighting in self-defence, even though it resulted in the death of Fanning, and they had a right to pursue Fanning until they had disarmed him, although that resulted in the death of Fanning.

14. That if the jury should believe that S. P. Brittain rented the storehouse for himself and son, J. W. Brittain, to carry on the business of liquor dealers as partners, then J. W. Brittain had an equal interest in the house with S. P. Brittain, and as much right to be there as S. P. Brittain; or if they should believe that J. W. Brittain was in the house by invitation, then he had a right to be there.

These instructions were refused and the prisoners excepted.

The court, after defining in general terms murder, manslaughter and excusable homicide, to which no exceptions were taken by the prisoners, charged the jury as follows:

1. That their first inquiry was, Did the deceased, Samuel P. Cunningham, die of a wound at the hands of the prisoners, or either of them? That as to this they must be satisfied beyond a reasonable doubt, and if the evidence failed so to satisfy them, they should acquit the prisoners.

2. Upon a trial for murder, when the fact of killing with a deadly weapon (and a pistol is a deadly weapon) is proved or

admitted, the burden of showing matter of mitigation or excuse or justification is thrown upon the prisoner, unless it arises out of the testimony produced against him. It is incumbent on him to establish such matter, neither beyond a reasonable doubt nor by a preponderance of testimony, but to the satisfaction of the jury. Homicide is murder unless attended with extenuating circumstances, which must appear to the satisfaction of the jury, and if they are left in doubt on this point, it is still murder. Matter of mitigation or excuse may appear from the state's evidence or that offered for the defence, but in either case it is for the prisoner to satisfy the jury of the matters of mitigation or excuse. *State* v. *Boon*, 82 N. C., 637.

3. If one man deliberately kill another to prevent a mere trespass on his property, whether that trespass could or could not otherwise be prevented, it is murder. A man shall not, even in defence of his person or property, except in extreme cases, endanger human life nor inflict great bodily harm. *State* v. *Morgan*, 3 Ired., 186.

4. If the prisoners went to the house (Few store) intending to go in, and in case they were resisted by Fanning, to kill him, or to do him some great bodily harm, and if in the attempted execution of this purpose a shot from the pistol of John W. Brittain took effect upon Cunningham and killed him, it is murder.

5. If the prisoners went to the house, intending to go in and provoke Fanning to resist, and, if he resisted, to kill him or do him some great bodily harm, and if Fanning resisted them and they attacked him, the one with a scantling, the other with a pistol, and one of the shots took effect upon Cunningham and killed him, it is murder.

6. If the prisoners went to take possession of the house, and that was objected to by Fanning, and a sudden quarrel sprung up, and the prisoners, or either of them, was assaulted by Fanning, and they fought from passion and in heat of blood, and Cunningham was stricken and killed, it is manslaughter.

7. If the prisoners went to the house to go in it, and were willing to enter into a conflict with Fanning, and a conflict ensued between them and Fanning, and the prisoners acted in heat of blood, and if in this conflict a shot fired by one of them took effect upon Cunningham and slew him, it is manslaughter.

8. If the prisoners and Fanning had a contest about the house, and in this contest the prisoners and Fanning were willing to enter into a fight with each other, and they did have a fight, and if the prisoners in such fight acted in heat of blood and from passion, and if a shot from the pistol of one of them struck Cunningham, and from the wound he died, it is manslaughter.

9. If the prisoners went to take possession, not intending to enter into a conflict with Fanning, and were followed by Fanning, and S. P. Brittain was assaulted by Fanning, the prisoners not having brought on or provoked the conflict, and if S. P. Brittain had reason to believe, and did believe, he was about to be killed or suffer great bodily harm from the assault, if there was such assault, or from the conduct and acts of Fanning, he had a right to strike to protect and defend himself from such injury, and if John W. Brittain saw this assault, and had reasonable ground to believe, and did believe, that his father, Samuel, was about to receive such injury or suffer death, as has just been stated, he had a right to fight in defence of his father, and to use such force as was necessary to extricate his father from such danger, and if the prisoners thus fought, it is self-defence, and the prisoners should be acquitted. It is for the jury, and not the prisoners, to judge of the reasonableness of the prisoners' apprehensions.

10. If the prisoners went to the house to take possession, but with no intention to bring about a conflict, nor had provoked or brought about a fight with Fanning, and if Fanning made an assault upon either of the prisoners, such as endangered his life or put him in danger of great bodily harm, he had the right to defend himself, and each to defend the other, and to use such force as was necessary to free himself from this peril, and the

amount of force thus used will not be weighed with nicety, but if the force used is manifestly disproportionate to the attack, the law will not excuse him, if he uses such excess of force.

11. If the prisoners, by their conduct and action and language, provoked or brought about a conflict with Fanning, and were assaulted by Fanning, they cannot justify their assault upon him, if they did assault him, and if in such conflict Cunningham was slain, it would be murder or manslaughter as you shall find the facts under the preceding instructions, unless in the progress of the fight they were so sorely pressed—that is, put to the wall, so that there was no escape for them, and that they, or either of them, must kill or be killed or suffer great bodily harm.

To the charge, as given by the court, the prisoners excepted. Verdict of guilty of manslaughter.

The prisoners moved for and obtained a rule for a new trial:

1. For the refusal of the court to give the special instructions prayed for by the prisoners.

2. For error in the charge as given to the jury.

3. For that improper influences had been brought to bear upon the jury after the charge had been delivered to them and they had retired to make up their verdict.

In reference to this ground for a new trial, the court states the facts as found as follows: The charge of the court was given to the jury on the morning of Saturday, August 25th, and about the hour of 12 M. of said day the jury retired to consider of their verdict. They were in charge of a sworn officer, who had been instructed by the court to hold no communication with the jury, or any of them, except what was necessary to supply and attend to their necessary wants.

On Saturday afternoon or Sunday, the 25th or 26th, the deputy sheriff, who had charge of the jail (and before the jury had agreed on a verdict), called to the officer of the jury and informed him where he could be found in case the jury should agree and prisoners wanted in court; and while in conversation

with the officer of the jury, the deputy sheriff informed him (the officer) "that the prisoners' counsel had about given up their case, and that there was a great deal of anxiety about the case."

The officer stated this in the hearing of part of the jury, but did not think all of them heard it. Some of the jury said "that must be intended to influence the jury, but it would not influence them," and the officer stated that he did not suppose the deputy sheriff intended to influence them or to have that effect.

On Monday, August 27th, at about the hour of 9 A. M., the jury came into court and requested that the charge of His Honor should be repeated to them, which was done, in the presence of the prisoners and their counsel and the solicitor, and they again retired to consider of their verdict. At about 1 o'clock of the same day the jury returned into court and rendered a verdict of guilty of manslaughter as to both the prisoners. The jurors were then polled by direction of the court, and each juror responded that he found both the prisoners guilty of manslaughter, and the verdict was then recorded and the jury were discharged.

These facts, except such as were in the knowledge of the presiding judge, were shown to the court by affidavits.

The prisoners asked that some of the jurors who tried the case might be examined as to this charge of improper influence. The judge said he had doubts as to the propriety of examining the jurors to impeach their verdict, and referred to the case of *State* v. *McLeod*, as reported in Busbee's Digest, 336, No. 217 (1 Hawks, 344); and after some hesitation, he would himself take the statement of such of the jurors as were willing to make it, and called five of these jurors who had sat upon the case and asked them as to their willingness to testify in regard to this matter; four of them signified their willingness to be examined, and one of them stated that he would prefer to be excused. These jurors were sworn, and the judge was proceeding to examine the

first of them whom he called, telling counsel he (the judge) would himself take their statements, but that he thought it best not to permit the counsel on either side to examine them. The prisoners objected to this mode of proceeding, and insisted on their right to examine them by counsel. The court declined to allow this, and directed the jurors to stand aside without examination, and the prisoners excepted.

4. The prisoners then offered the same jurors as witnesses to be examined (in reference to what occurred in their presence) by their counsel, and cross-examined by the solicitor if he desired so to do. This the court refused, and the prisoners again excepted. The rule for a new trial was disallowed.

The prisoners then moved in arrest of judgment:

1. That the indictment did not sufficiently set forth the facts and circumstances of the alleged homicide.

2. That the bill of indictment stated in general terms that the wound inflicted upon the deceased was a mortal wound, while the evidence showed that it was not a *mortal wound*, but that blood poisoning supervened upon the wound, and that the immediate cause of the death of the deceased was blood poisoning. The indictment should have set out the cause of the death of the deceased with greater particularity.

The court refused to arrest the judgment and the prisoners excepted.

The judgment of the court was pronounced, and the prisoners appealed.

Attorney-General, for the State.
Messrs. J. H. Merrimon and *J. C. L. Harris*, for prisoners.

ASHE, J. It was not contended in the argument before us, nor does it seem to have been insisted upon in the court below, but that Cunningham, the deceased, came to his death in consequence of a wound received from a pistol fired by the prisoner, J. W. Brittain, at Fanning, in the rencountre between him and the prisoner. We therefore take that fact as conceded.

We do not think we are called upon to consider whether the evidence disclosed any feature of the crime of murder, for the prisoners having been found guilty of manslaughter only, the question for us to decide is, whether they were convicted of that offence according to law.

The prisoners prayed for numerous specific instructions, which were severally overruled by His Honor, and the prisoners excepted to each of his rulings. And we proceed, in the first place, to dispose of the exceptions in the order in which the instructions were asked.

The first exception to the refusal to give the instruction that upon the testimony the prisoners could not be convicted of murder, we deem immaterial. For the ruling of the court upon this instruction, in either way it may have been given, could not have influenced the verdict of the jury, for upon a careful review of all the testimony in the case, and upon the testimony of S. P. Brittain himself, we are of opinion there were no facts or circumstances disclosed in the evidence that would have warranted the jury in a verdict of excusable homicide.

Take the testimony of S. P. Brittain himself, and it fails to make out a case of excusable homicide. He says, after consulting counsel: "I went in, and Fanning followed, with his gun in his hand towards me. I ordered him out. He came out, having his gun pointed at my breast. I struck at him, struck the gun down and it fired," and on cross-examination he said he struck several blows with the scantling, which is shown by other testimony to have been a deadly weapon. Can any one who reads this, aside from the other testimony in the case, doubt who was the aggressor? They are in the house together; Fanning is ordered out, and he goes out, and Brittain follows him out of the house into the street with a deadly weapon, and a fight immediately ensues; and he says in all this he was acting in self-defence. We attach no importance to the fact that Fanning, while retreating from the house, if it be so, held his gun pointed at the prisoner, for it was most natural for him to have done so,

to prevent the assault of the prisoner with the scantling; but the fact that Fanning was retreating and never fired the gun until the blow was made by the prisoner with the scantling, when he had every opportunity to shoot before that, is conclusive to our minds that he was acting with forbearance, and had no purpose of using his gun, unless he was assailed. So far from Fanning's being the assailant, the combat was evidently brought on by the assault of the prisoner, S. P. Brittain, and although, after the combat had commenced, he found it impossible to retreat as the law required him to do, to save his own life he had killed Fanning, he could not have sheltered himself under the plea of self-defence.

LORD HALE lays down the law on this point that, "if A assaults B first, and upon that assault B reassaults A, and that so fiercely that A cannot retreat to the wall or other *non ultra*, without danger of his life, and then kills B, this shall not be interpreted to be *se defendendo*, but to be murder or simple homicide, according to the circumstances of the case; for otherwise we should have all the cases of murder or manslaughter, by way of interpretation, turned into *se defendendo*. The party assaulted indeed shall, by the favorable interpretation of the law, have the advantage of this necessity to be interpreted as a flight, to give him the advantage of *se defendendo*, when the necessity put upon him by the assailant makes his flight impossible; but he that first assaulted hath done the first wrong, and brought upon himself this necessity, and shall not have advantage of his own wrong to gain the favorable interpretation of the law, that that necessity which he brought on himself should, by the way of interpretation, be accounted a flight to save himself from the guilt of murder or manslaughter."

This puts the plea of self-defence out of the question, and we are, therefore, unable to see how it is possible that the refusal to give such an instruction could have prejudiced the prisoners. When the facts of a case are such as to leave it an open question for the consideration of the jury whether the prisoners are

guilty of murder or manslaughter, or are excused upon the principle of self-defence, we can well understand how such a refusal might work to the prejudice of the prisoners; for every practitioner, who has had any experience in the trial of capital cases, knows how prone juries are to compromise a capital case upon the middle ground of manslaughter; but there is no room for such a compromise where the evidence, as here, is of such a character as to exclude any consideration of excusable homicide.

The prisoners, in support of this exception, relied upon the case of the *State* v. *Ta-cha-na-tah*, 64 N. C., 614; but that case is distinguishable from this, in that, there, there were circumstances (and this court so intimated) that might have justified a verdict of acquittal, and when the court below charged the jury "that if there was malice, the defendant was guilty, and if he fought with the deceased only in defence of his life, but yet had malice towards the deceased, then he was guilty of murder," this court held the instructions to be erroneous, because they could not see "that they did not operate prejudicially to the appellant." But in our case we cannot see how the ruling of the court could possibly operate to the prejudice of the prisoners, and even admitting the ruling upon the facts of the case to be erroneous, if it was in no degree prejudicial to the cause of the prisoners, it is no ground for a *venire de novo*. *State* v. *Frank*, 5 Jones, 384.

The propositions contended for in the second, third, fourth and fifth instructions prayed for, are all to the same effect, and substantially maintained the proposition that in all capital cases the burden of proof is on the state to prove all the material allegations in the bill of indictment; and if on the whole evidence—that produced by the state as well as that offered by the prisoner—the jury have a reasonable doubt whether the prisoner is guilty of the crime charged, they are bound to acquit.

This is one of the propositions insisted upon by Judge WILDE, in his dissenting opinion in the famous case of *Commonwealth* v. *York*, 9 Metc., 93, and was urged before this court by counsel

for the prisoner in the case of *State* v. *Willis*, 63 N. C., 26. But this court, in that case, emphatically repudiated the proposition, and reiterated the doctrine that in all indictments for homicide, where the intentional killing is established by the proof, the killing is presumed to be malicious, and of course amounting to murder, until the contrary appears from circumstances of alleviation, excuse or justification; and it is incumbent upon the prisoner to make out such circumstances to the *satisfaction* of the jury, unless they arise out of the evidence against him. This doctrine has been announced, not only in *State* v. *Willis*, but in *State* v. *Ellick*, 2 Winst., 400; *State* v. *Johnson*, 3 Jones, 366; *State* v. *Haywood*, Phil., 376; *State* v. *Smith*, 77 N. C., 488.

The prisoners' counsel contended that, conceding that the proof of the intentional killing raised a presumption of malice, and without more showing the crime would be murder, but when by the proof adduced in the case, the offence of murder is put out of question, the burden is then shifted upon the state, and it must establish the crime of the prisoner; and if it leaves a reasonable doubt on the minds of the jury as to the grade of the crime, the prisoner must be acquitted. But this is not the law in this state. When the killing is once shown, either by the proof offered by the state or by the admission of the prisoner, the burden of proving all circumstances of mitigation, excuse or justification devolves upon the prisoner, and continues to rest upon him through every stage of the trial, for no distinction is recognized between the cases where the question is, whether the homicide is murder or manslaughter, and whether the killing is murder or excusable or justifiable homicide. *State* v. *Willis*, *supra*; *State* v. *Vann*, 82 N. C., 631; 1 East P. C., 279. And the principle of "*reasonable doubt*" has no application to the doctrine of mitigation. The rule in regard to that is, that the jury must be *satisfied* by the testimony that the matter offered in mitigation is true. *State* v. *Ellick*, *State* v. *Willis*, and *State* v. *Vann*, *supra*.

The sixth, seventh and eighth exceptions, touching the right of S. P. Brittain to enter the store, we do not regard as material to the question whether the prisoner, S. P. Brittain, was guilty of manslaughter; for the criminality of his conduct, in that view of the case, did not arise until he had left the house and followed Fanning into the street with a deadly weapon, after entering the store, as he unquestionably had the right to do. If he had remained there, this deplorable scene of bloodshed would most probably not have occurred.

The eighth and ninth exceptions, in regard to what would have been the character of the crime of Fanning if he had slain Brittain, involved questions that were altogether irrelevant; for whatever malice might have influenced Fanning, and what might have been his guilt in that event, could not in any degree have affected the criminality of the prisoners. If two men fight upon a sudden quarrel, upon equal terms, the one upon provocation and the other upon a predetermined intention to kill, the fact that the latter would be guilty of murder if he slew his adversary, cannot excuse the other if he should be the slayer.

The tenth exception, relating to J. W. Brittain's right to have his pistol in his father's store: He certainly was guilty of a violation of the law in carrying it along the street, concealed about his person; and he had no right to have it in the store if he carried it there, as the testimony very strongly tends to show, to use it against Fanning in the event of a difficulty with him.

The twelfth and thirteenth exceptions are without foundation, for His Honor, in the ninth instruction in the series given by him to the jury, substantially gave the instructions as prayed for by the prisoners.

The fourteenth exception is without evidence to support it, for there is no evidence in the case that S. P. Brittain rented the store for himself and his son, J. W. Brittain, to carry on the business of liquor dealers as partners.

There were no specific exceptions taken to the charge of His Honor, and we are of the opinion the principles of law, as

applicable to the facts of the case, were correctly expounded by him in the several instructions given to the jury; but those on the point of murder are subject to the observations above made on the exception to the first instruction asked by the prisoners.

Our conclusions are equally applicable to the cause of J. W. Brittain as to that of his father, S. P. Brittain, for, although a son may fight in the necessary defence of his father, yet in such cases the act of the son must have the same construction as the act of the father should have had, if it had been done by himself; for they are in mutual relations to one another. *State* v. *Johnson*, 75 N. C., 174; 1 Hale P. C., 484.

While impanelling the jury, a juror of the original panel was called, who had served on the jury within two years in the same court. The prisoners challenged him for cause. The challenge was overruled by the court, and the prisoners excepted. The jury, however, was made up without exhausting the challenges of the prisoners. The exception was properly disallowed; it was no ground for a *venire de novo*. *State* v. *Cockman*, 2 Winston, 95.

The prisoners' counsel moved for a new trial, on the ground that improper influences had been brought to bear upon the jury after they had retired to make up their verdict, and before they had agreed. It was shown by affidavits to the court that while the jury were in consideration, a deputy sheriff, in conversation with the officer of the jury, said to him "that the prisoners' counsel had about given up their case, and that there was a good deal of anxiety about the case." This the affiant stated he repeated to a part of the jury, but he did not think all the jury heard it; that some of the jury said "that must be intended to influence the jury, but it would not influence them," and affiant stated further "that he did not suppose the deputy sheriff intended to influence them or to have that effect."

The counsel of the prisoners requested that some of the jury might be examined as to the alleged improper influence. His Honor, doubting his right to examine a juror for the purpose of

impeaching his verdict, said he would take the statement of such jurors as would voluntarily submit to be examined, and five of the jurors were called, four of whom expressed a willingness to be examined, but the fifth declined. The prisoners' counsel insisted upon the right of cross-examination, and thereupon His Honor declined to examine them. The prisoners' counsel then called the jurors and proposed to examine them, but His Honor refused to permit it, and the prisoners excepted.

In the ruling of His Honor upon these points there was no error. It is well settled that a juror cannot be examined as a witness to impeach the verdict of the jury of which he was a member. Thomp. and Mer. on Juries, §§364, 6; *State* v. *Smallwood*, 78 N. C., 560. And whether a new trial should have been granted to the prisoners, on account of the "communication" made to the officer in the hearing of part of the jury, was a matter not reviewable in this court. When the "circumstances are such as merely to put suspicion on the verdict by showing, not that there *was*, but that there might have been, undue influence brought to bear on the jury, because there was opportunity and a chance for it, it is matter within the discretion of the presiding judge." But if the fact be that undue influence was brought to bear upon the jury, as if they were fed at the charge of the prosecutor or prisoner, &c., then it would be otherwise. *State* v. *Tilghman*, 11 Ired., 513, cited in *Morris' case*, 84 N. C., 756.

Failing in the motion for a new trial, the prisoners' counsel moved in arrest of judgment for alleged defects in the form of the bill of indictment, but upon examination of the document, we find it drawn in the usual manner according to precedent.

Our conclusion upon the whole case is, that there is no error. This opinion must, therefore, be certified to the superior court of Henderson county, that the case may be proceeded with according to law.

No error. Affirmed.

STATE v. FRANK MERRITT.

Indictment—Removal of Crop.

An indictment for removal of crop, in violation of the act of 1876–77, ch. 283, §6, charging the defendant with removing the same "without satisfying all liens on said crop," is defective. The words of the statute, "before satisfying all liens held *by the lessor or his assigns* on said crop," should have been followed.

(*State* v. *Stanton*, 1 Ired., 424; *State* v. *Thorne*, 81 N. C., 555; *State* v. *Liles*, 78 N. C., 496, cited and approved).

INDICTMENT for a misdemeanor tried at Spring Term, 1883, of HARNETT Superior Court, before *MacRae, J.*

The defendant is charged with the violation of the act of 1876–77, ch. 283, §6, in removing crops. The jury found a verdict of guilty, and thereupon the defendant moved in arrest of judgment, upon the ground that the indictment charged that the corn and fodder alleged to have been removed was removed "without satisfying *all liens* on said crop"; whereas the statute provides, in respect to such removal, * * * and "before satisfying all liens held by the *lessor or his assigns* on said crop." The judge sustained the motion, and from the judgment rendered in favor of the defendant the solicitor for the state appealed.

Attorney-General, for the State.
No counsel for the defendant.

MERRIMON, J. We think the court properly arrested the judgment. An essential part of the offence intended to be charged in the indictment is the removal of the crop, or any part thereof, from the land "before satisfying all liens held by the *lessor or his assigns* on said crop;" not necessarily *all liens* that may be on it. The indictment does not contain the words of the statute, or the substance of them. The words substituted

for them are "without satisfying *all liens* on said crop." These words do not charge the offence. *Non constat*, that the lessor or his assigns had any lien at all on the crop. It does not appear upon the face of the indictment that any offence is charged. It must be alleged in the indictment, and proved on trial, that the "*lessor or his assigns*" held liens on the crop undischarged.

The jury found a general verdict of guilty. The court, seeing the indictment and the verdict, could not tell that any criminal offence had been committed; that the crop, or any part thereof, had been removed from the land "before satisfying all liens held by the *lessor or his assigns* on said crop." It may be the jury found that liens in favor of other persons had not been satisfied, in which case no offence has been committed. The issue submitted to the jury was broad and unlimited as to liens in favor of any person, and the verdict had like compass.

The rule is, that in describing a statutory offence, the pleader should employ, as nearly as may be, the very words of the statute, or words that certainly imply in substance the same thing. It is always safer to follow the material words and phraseology of the statute. *State* v. *Stanton*, 1 Ired., 424; *State* v. *Thorne*, 81 N. C., 555; *State* v. *Liles*, 78 N. C., 496.

There is no error. Judgment affirmed. Let this be certified.

No error. Affirmed.

STATE v. WESLEY WRIGHT.

Indictment for Burning Mill—Punishment.

On conviction of a defendant, indicted under the Revised Code, ch. 34, §2, for the wilful burning of a mill house, the court may sentence him to imprisonment in the penitentiary for not less than five nor more than sixty years. (Term of imprisonment, where indictments are drawn under different statutes, pointed out by SMITH, C. J.).

(*State* v. *England*, 78 N. C., 552; *State* v. *Thorne*, 81 N. C., 555; *State* v. *Upchurch*, 9 Ired., 454, cited and approved).

STATE *v.* WRIGHT.

PETITION for writ of *certiorari* heard at October Term, 1883, of THE SUPREME COURT.

Attorney-General, for the State.
Messrs. Hinsdale & Devereux, for defendant.

SMITH, C. J. The defendant's application for the writ of *certiorari*, to bring up the record of the superior court of Bladen, with the view of revising the judgment against him, as erroneous in law, presents the following facts:

The defendant was tried upon his plea of not guilty, on an indictment which charged (omitting formal parts) that he "unlawfully, wilfully, maliciously and feloniously did set fire to and burn a certain grist mill house, the property of one James McR. Robinson, there situate, contrary to the form of the statute," &c., and, being convicted, was sentenced to hard labor in the penitentiary for twenty-five years. He is now undergoing the judgment of the court. The defendant prayed an appeal, and perfected it as he was advised, but for some reason unknown to him it was not prosecuted.

Previous to the adoption of the constitution of 1868, which prohibits the death penalty except for the crimes of murder, arson, burglary and rape (Art. XI, §2), the offence charged in the bill was a capital felony. Rev. Code, ch. 34, §2.

In accord with this constitutional restriction, the general assembly proceeded the next year to define and prescribe the punishment for certain enumerated offences, among which is not mentioned the burning of the building with which the defendant is charged, and enacted that:

§6. Every person convicted of any crime whereof the punishment has hitherto been death by the laws of North Carolina, existing at the time the present constitution went into effect, other than the crimes before specified in this act, shall suffer imprisonment in the state's prison for not less than five nor more than sixty years." Acts 1868–69, ch. 167. (Bat. Rev., ch. 32, §13).

The indictment before us cannot be sustained under the act of April 10, 1869, because a mill house is not within its terms, nor the act of March 22, 1875, since a material constituent element in the offence therein punished is omitted in the charge, to-wit, that the burning was done "with intent thereby to injure or defraud" any person. *State* v. *England*, 78 N. C., 552; *State* v. *Thorne*, 81 N. C., 555.

The criminal act imputed to the petitioner is described among the offences enumerated in the section of the Revised Code first referred to, which specifies the "wilful burning of any dwelling house, or any part thereof, or any barn, then having grain or corn in the same, or store or warehouse, *grist or saw mill house*," the penalty whereof is modified to a confinement in the state's prison for not less than five nor more than sixty years. Bat. Rev., ch. 32, §13.

It may be suggested that the case falls under section 9, instead of section 6, of the act of 1868–69, which declares that "every crime or offence whatever heretofore punishable by the laws of North Carolina, when the present constitution went into effect, *with public whipping* or other corporal punishment, shall hereafter, in lieu of such corporal punishment, be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years." Bat. Rev., ch. 32, §29.

But the heavier penalty being prescribed for capital felonies, to which this offence belongs, it can hardly be supposed that the legislature meant to reduce it to that inferior class of felonies provided for in section 9, and which obviously embraces such only as are not included in the previous clauses of the act.

The "corporal punishment" mentioned in connection with and immediately following the words "public whipping," evidently refers to punishment short of death, inflicted upon the living body of the criminal, and, with the preceding sections, comprehends every form of punishment prohibited in the constitution, and provides a substitute.

We have not overlooked the case of the *State* v. *Upchurch*, 9 Ired., 454, in which the act of 1846 is construed as a repeal of so much of the preceding enactment as makes the burning of a mill house a capital felony, by force of the unrestricted words, "*or other building*," used in designating the house to which it applies. But while constrained to put this interpretation upon the enactment, the court proceeded to say, there is much force in the argument that the legislative intent was to constitute a new class of criminal offences, leaving untouched those already such.

In the Revised Code the phraseology of the enactment is modified so as to make it declare and effectuate the legislative will, by confining its operation to a house or building not mentioned in preceding sections 2, 7 and 30 of the chapter 34, in which the latter is contained, §103. Thus the very qualifying words are supplied, the absence of which rendered the former interpretation necessary, and defeated the supposed object of the enactment in this respect. This decision does not, therefore, contravene our view of the relations subsisting between the several enactments in the form in which they appear in the Revised Code, leaving the section in the act of 1869 to operate, under the inhibitions of the constitution, upon the unchanged offences specified in section 2, only in a substitution of a different penalty.

Upon the petitioner's own showing, then, the imprisonment which he is now undergoing was within the limit of the discretion of the judge before whom he was tried, and in the judgment there is no error. The application for the writ must be denied.

PER CURIAM. Motion denied.

STATE v. ROBERT COSTIN.

Embezzlement—Master and Servant.

1. Where goods come into the possession of a servant, out of the ordinary course of his employment, but in pursuance of special directions from the master to receive them, and the servant embezzle the same, he is indictable under the statute.
2. *Therefore*, where one employed by a merchant "to sweep out the store, and wait about the store, but not as clerk," was authorized by the merchant to take a lot of shoes and sell them during his visit to a neighboring town, which he did, and converted the money to his own use; *Held*, that he was a servant within the meaning of the embezzlement act, and received the goods by virtue of his employment.

INDICTMENT for embezzlement tried at October Term, 1883, of NEW HANOVER Criminal Court, before *Meares, J.*

The defendant is charged with the embezzlement of money, the property of R. G. Gause & Co., and the proof was that he had been in their employment about six weeks, for the purpose of sweeping out their store and waiting about the store, but not as a clerk; that on the 27th of June, 1883, their was an assemblage of people at Point Caswell, in Pender county, about forty miles by water from the city of Wilmington, the prosecutor's place of business; that the defendant took passage on a steamer to attend the occasion of his own accord, but with the knowledge of his employers; that the firm had for sale in their store thirty-two pairs of children's shoes, and before his departure the defendant proposed to one of the firm to take the shoes and sell them at Point Caswell, which proposition was agreed to, with the instruction to defendant that he should not sell them for less than fifty cents a pair. During the trip the defendant was principally engaged in selling soda water, lemonade, &c., on his own account, to passengers on board the steamer, and while on the steamer he also sold the lot of shoes to one Sherman at only

twenty-five cents a pair. Sherman keeps a store at Point Caswell, and paid the defendant in cash for the shoes. After the defendant's return to Wilmington, he told Gause several times that he had sold the shoes to Sherman, but had not received the money for them, having sold the same on credit, and that he promised to pay for them whenever the defendant should come after the money. The money was never collected of the defendant.

The instruction asked by the defendant, and refused by the judge, is set out in the opinion. Verdict of guilty; judgment; appeal by the defendant.

Attorney-General, for the State.

No counsel for defendant.

MERRIMON, J. In this case the defendant is indicted for embezzlement under Bat. Rev., ch. 32, §136.

On the trial he prayed the court to give the jury this instruction: That if the defendant was employed only for the purpose of sweeping out the store and waiting about the store of R. G. Gause & Co., and during such employment he was allowed to take the shoes to Point Caswell, for the purpose of selling them at fifty cents per pair, and he sold them at twenty-five cents per pair, he could not be convicted, because he was not a servant in contemplation of the statute, at the time of the sale, and because he sold for a less price than he was authorized to do."

The court declined to give the jury such instruction, and the defendant excepted.

The exception cannot be sustained. In our judgment, the defendant was a servant within the meaning of the statute, and what he did constituted the offence of embezzlement under it.

The manifest purpose of the statute is to protect individuals and partnerships against frauds upon them in respect to money, goods and chattels, and the several species of credit mentioned

in it, on the part of their agents, clerks and servants; and corporations in like manner, against their officers, agents, clerks and servants; and other persons and corporations in like manner, when money, goods and chattels, and such other things, shall come into their possession, or under their care, by virtue of such office, or such other employment. It is intended by it to sustain, protect and preserve the integrity of an essential and important confidential relation, that is almost universal in the business ramifications of life. It is broad and comprehensive in its purpose, and it is scarcely less so in its terms, as we shall see. And it must be construed in this broad view of the purpose of the legislature in enacting it.

Trust and confidence are raised by the relation specified in the statute, and a breach of this trust and confidence is of the essence of the offence denounced. In their absence, there can be no offence. Whenever the officer ,agent, clerk or servant, by virtue of such relation, directly or indirectly, in the regular course of his business, or *pro hac vice*, a special service is assigned him and he accepts the same, and money, goods and chattels, or any of the credits specified in the statute, shall come into his possession, or under his care, and he commits a fraudulent breach of the trust and confidence so subsisting, the offence is complete. The language of the statute in respect to the possession of the money, goods and chattels and credits named is, "which shall have come into his possession or under his care *by virtue* of such office or employment." The possession and care are not confined to such as come in the ordinary course of business, but as well such as come *by virtue* of the relation. The words "*by virtue*" are very broad, and serve well to effectuate the object for which they were employed. Hence, it has been held, in construing a statute similar to the one under consideration, that where the thing embezzled came into the possession of the servant, out of the ordinary course of employment, in pursuance of a special direction from the master to receive it, the act came within the meaning of the statute. *Rex* v. *Smith*,

Russ. & R., 516; *People* v. *Dalton*, 15 Wend., 581; *Rex* v. *Hughes*, 1 Moody, 370.

The relation of employer and agent or clerk, or master and servant, does not depend on the length of time it shall continue, if it is established at all; if for but one occasion or transaction, that will be sufficient. There are no words of limitation in this respect in the statute. *Rex* v. *Hughes, supra; Rex* v. *Spencer*, Russ. & R., 299; Whar. C. L., §1905, *et seq.*; 2 Russell, 178; 2 Bish. C. L., §359, *et seq.*

In the case before us, it appears that the defendant "had been in the employment of the firm of R. G. Gause & Co. about six weeks, and that he was employed for the purpose of sweeping the store, and *waiting about the store*, but not as clerk.

Now, to *wait about the store* implies that he who is to so wait is ready to do, and will do such service, and in variety, as his employer may command him to do, generally or specially, in connection with the business of the store. He is not regularly a salesman, but very considerable trust must be reposed in him. He is essential about such a business, and in many instances, indispensable. He must come in contact with goods of greater or less value, each day of his service; especially, his duties are varied. He is to sweep the floor, make the fires, bring water, put packages of goods in order, go on errands, deliver packages of goods to customers, and receive the money for them when commanded to do so. He is to be in and around the store, and a man-of-all-work in that connection. He is not regularly a salesman, and yet, occasionally, he might do special service of that character, if commanded. His place is one of considerable responsibility, requiring integrity of character. His employer might necessarily repose a considerable degree of confidence in him. That he waits about the store, a place where merchandise is set up in greater or less quantities to be sold, makes such employment the more important. We think this not an unreasonable sphere of duties for one who "waits about the store."

Such employment establishes the relation of master and servant, in contemplation of the statute. It would be unreasonable to suppose that it was not intended to embrace and protect such a business relation. It is a common one, an essential one, and one of importance. There are small, insignificant stores, and no great importance attaches to the servants about them, and there are great ones too; but the statute embraces and protects the proprietors of all against the frauds of faithless servants.

The defendant was the servant of his employers, in the sense of the statute, and if he got possession of their money by *virtue of this relation* to them, then he would be guilty.

We think, also, that apart from the defendant's relation to his employers, as servant waiting about the store, the same relation was established as to the transaction developed by the evidence as to the shoes. He agreed with his employers to take the shoes to Point Caswell, sell them for fifty cents a pair, and deliver the money he might get for them to his employers. If he did not accept the service as to the shoes by virtue of being servant about the store, he was entitled to compensation specially for selling them, and the relation of master and servant, as to the shoes, was raised in the eye of the law. In any view of the case, the defendant was a servant, as charged in the indictment. *Rex* v. *Hughes, supra;* 2 Bish. C. L., §340.

The defendant insists, that as he sold the shoes for a less sum than fifty cents per pair, as he was instructed to do, but sold them for twenty-five cents per pair, and received the money for them at that price, he is not guilty of embezzlement.

The defendant agreed to sell the shoes as instructed, get the money for them and deliver it to his employers. He sold them for a less price than he was authorized to do, received the money for them for his employers, and fraudulently disposed of and applied it to his own use. The money was not his; he received it for his employers; it belonged to them, at all events, until they disowned the sale, and this they did not do.

An agent, clerk or servant cannot thus throw off his relation to his employer and evade the statute. It does not lie in the

mouth of the defendant to say that he did not sell the shoes for his employers, and the money was not theirs. He is estopped in this respect. He cannot be allowed thus to take advantage of his own wrong and evade the law. *Nullus commodum capere potest de injuria sua propria* is a wholesome maxim of the law, and we see no substantial reason why it should not apply in a case like this.

The statute is too comprehensive, too practical and thorough in its spirit and purpose to allow so subtle a distinction as that insisted upon to impair, indeed destroy, in large measure its purpose and usefulness.

If such a shift could be held to save offenders from its penalties, the statute would become almost a practical nullity in some of its most important features. Dishonest agents, clerks and servants would constantly contrive to repudiate—throw off—their relation to their employer by a fraudulent departure from their instructions in respect to property in their possession and control, and thus evade the law. We cannot think that the legislature, or the statute in its terms or spirit, ever contemplated such an interpretation of its meaning. We do not think it reasonable, and we cannot so construe its meaning. There is no good reason that we can conceive of why the statute should receive the construction contended for by the defendant. All the considerations that prompted its enactment lead us to construe it as we have done. 2 Bish., *supra*, §§351, 367; *Ex-parte Hadley*, 31 Cal., 108.

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

No error. Affirmed.

STATE v. JERE LANIER.

Embezzlement—Married Women, separate estate of.

1. An indictment for embezzlement of money need not state the name of the person from whom the money was received; and the averment that the defendant is neither an apprentice nor under the age of sixteen years, is a substantial compliance with the statute.
2. Distinction between our statute, which makes embezzlement a felony punishable *as* larceny, and the English statute which makes it larceny, noted. The charge of larceny in this indictment may be rejected as surplusage.
3. A married woman is not incapable of making a contract in respect to her separate property; she may recover and hold it and the income derived from it, to her own use.
4. Verdicts and judgments are presumed to be correct until the contrary be shown.

(*State* v. *Perkins*, 82 N. C., 681; *State* v. *Slayle*, *Ib.*, 652; *State* v. *Upchurch*, 9 Ired., 454; *Honeycutt* v. *Angel*, 4 Dev. & Bat., 306; *Whitesides* v. *Twitty*, 8 Ired., 431; *Manning* v. *Manning*, 79 N. C., 300, cited and approved).

INDICTMENT for embezzlement tried at May Term, 1883, of NEW HANOVER Criminal Court, before *Meares, J.*

The bill of indictment is in substance as follows: The jurors, &c., present that Jere Lanier, &c., with force and arms, &c., being then and there employed as a servant of Addie P. McClammy, by virtue of his employment, and whilst he was so employed, did receive and take into his possession certain money, to-wit: seven dollars and fifty cents for, and in the name of, and on account of the said Addie P. McClammy, his mistress and employer, the said Lanier not being an apprentice, nor under the age of sixteen years; and the said money then and there fraudulently and feloniously did embezzle. And so the jurors, &c., do say, that said Lanier, in manner and form aforesaid, the said money, the property of said Addie P. McClammy, feloniously did steal, take and carry away, against the form of the statute, &c.

It was in evidence that Mrs. McClammy was a married woman, living with her husband, in the city of Wilmington, and that she owned several milch cows, and carried on and conducted the business of selling milk, in her own name, and that her husband had nothing to do with her milk business; that she took into her employment the defendant, whose duty it was to deliver the milk from day to day to her customers, and collect the money for the same and pay it over to her; the defendant sold and delivered to George Chadbourn, in the months of September and October, 1882, during a period of four consecutive weeks, eight dollars worth of milk, and during that time he collected and received two dollars per week from the purchaser, in payment of the same, and the defendant paid over only one dollar of the amount to his employer.

The counsel for the defendant asked the judge to instruct the jury, that Mrs. McClammy, being a married woman, and not a "Free Trader," was incapable in law of making a contract with, or employing the defendant as her servant, and therefore he could not be convicted; refused, and the defendant excepted.

After a verdict of guilty, the defendant moved in arrest of judgment, upon the following grounds:

1. For want of certainty, because the indictment fails to set out the name of the person from whom the defendant received the money.

2. Because the indictment does not negative the fact that the defendant is not an apprentice under the age of sixteen years, and does not come within the exception contained in the statute.

The motion was overruled, and the defendant appealed from the judgment pronounced.

Attorney-General, for the State.

No counsel for defendant.

ASHE, J. Upon a careful examination of the record, we are unable to discover any ground upon which the judgment should be arrested.

The first ground relied upon by the defendant is without foundation. It was not necessary to state in the indictment the name of the person from whom the money was received. The name of the person from whom the money is received is never set forth in the precedents of indictments for embezzlement. It could, therefore, make no difference whether the money was received from Chadbourn or his servants; but it no where appears in the record that it was received from a servant of Chadbourn.

The second ground is equally untenable. The indictment does expressly negative the fact that the defendant was an apprentice and under the age of sixteen years. The negation is that "the said Jere Lanier, not being then and there an apprentice, nor under the age of sixteen years." It follows substantially the words of the statute.

We at first thought that the bill might be defective, because it purports to charge a larceny. When this case was before us at a former term (88 N. C., 658) we called the attention of the draughtsman to the distinction between an indictment under our statute (Bat. Rev., ch. 32, §136), which makes embezzlement a felony and punishes it *as* in larceny, and an indictment under the English statute of 7th and 8th GEORGE, which makes embezzlement larceny. The suggestion seems to have been disregarded, and the case comes back on a second bill of indictment, drawn after precedents under the English statute. But, upon consideration, we have come to the conclusion that the indictment is good for embezzlement, notwithstanding the charge of larceny. For it is a general principle, applicable to all legal proceedings, that mere surplusage does not vitiate. *Utile per inutile non vitiatur.* So, if an indictment charge an act to be feloniously done, and the facts amount only to a misdemeanor, still, if by rejecting the surplusage there is enough left of the allegation to constitute a good charge of misdemeanor, the defendant may be convicted of the misdemeanor. Bish. C. L., §819; *State* v. *Perkins*, 82 N. C., 681; *State* v. *Slagle*, *Ib.*, 653; *State* v. *Upchurch*, 9 Ired., 454. And the same doctrine obtains in regard to felo-

nies: a man may be indicted for robbery, and if the property be not taken from the person by violence or putting in fear, the defendant may be convicted of the simple larceny. 2 Hale P. C., 203.

In our case, then, the words "and so the jurors, upon their oath, do say that the said Jere Lanier, then and there, in manner and form aforesaid, the said money, the property of the said Addie P. McClammy, feloniously did steal, take and carry away," may be stricken out, and there is enough left to constitute the offence of embezzlement. The words are superfluous and unmeaning in an indictment under our statute, for they do not constitute a charge of larceny, though they would do so in an indictment under the English statute. There is no ground for the arrest of the judgment.

The defendant excepted to the refusal of His Honor to instruct the jury, as requested, that Mrs. McClammy, being a married woman, and not a "Free Trader," was incapable in law of making a contract. The cows and the products of the dairy either belonged to the husband or to the wife, as her separate property. If they belonged to the husband, the exception should have been sustained; but if they were the separate property of the wife, it was properly overruled.

No exception was taken upon the ground that the property of the cows was not properly laid in Mrs. McClammy. The point seems to have been conceded. The *case* states that "she owned several milch cows, and carried on and conducted the business of selling milk, in her own name, and that her husband had nothing to do with her milk business." If she was the owner, the inference follows that she was the owner of the property as her separate estate; and the conclusion is supported by the legal presumption that the verdict of the jury was correct. *Honeycutt* v. *Angel*, 4 Dev. & Bat., 306. See, also, the opinion of Chief-Justice RUFFIN, in *Whitesides* v. *Twitty*, 8 Ired., 431.

If, then, Mrs. McClammy owned the cows as her separate estate, she had the right to make the contract and employ the

defendant as her servant in the business of selling milk. She is entitled, under article ten, section six, of the constitution, and chapter 69, section 70, of Battle's Revisal, to recover and hold, to her own use, her separate property, and also the income derived from it. And agents appointed by her, whether before or after marriage, must account with and pay to her what they have received, either before or after marriage. *Manning* v. *Manning*, 79 N. C., 300.

There is no error. Let this be certified to the criminal court of New Hanover county.

No error. Affirmed.

STATE v. WILEY MITCHELL.

Assault with Intent to Commit Rape—Evidence.

On trial of an indictment for an assault with intent to commit rape, evidence that the prosecutrix, while going alone to the house of an acquaintance, in the night time, was pursued by the defendant, who seized her around the neck with both hands and threw her down and put his hand over her mouth to prevent her from making outcry, was held to have been properly left to the jury upon the question of intent, and warranted a verdict of guilty; *Held further*, that evidence of what the prosecutrix told a witness, into whose house she sought refuge, in regard to the assault upon her, was admissible in corroboration of the testimony of the prosecutrix.

(*March* v. *Harrell*, 1 Jones, 329; *State* v. *Laxton*, 78 N. C., 564; approved; *State* v. *Massey*, 86 N. C., 568, distinguished).

INDICTMENT for an assault with intent to commit rape, tried at Spring Term, 1883, of EDGECOMBE Superior Court, before *Gilmer, J.*

The prosecutrix testified that during Fair Week, in the town of Tarboro, in the fall of 1882, she started after night (the night being very dark) to see a female acquaintance in the town, and was accompanied by her little nephew; that when she reached a

certain street-crossing, she was alone, the nephew having stopped on Main street; she there observed a man standing behind a tree near the corner; passing down the cross-street, she soon thereafter saw some one following her, in consequence of which she made an attempt to enter the gate of a person living near by, but finding the gate locked, she crossed the street and sought refuge in the house of one Mrs. Winborne, whom she knew, and as she was ascending the steps of the house some one seized her around the neck with both hands and threw her down; that she screamed loudly, and the assailant released her, having first tried to put his hand over her mouth, but without succeeding in preventing her from screaming; that the door of Winborne's house was also locked, but as soon as she made herself known she was admitted; that by the aid of the light from the door (after it was opened) and the window of the house, she recognized the defendant, who was standing near, and that no one else was seen by her on the street at the time.

The state also introduced Winborne, who testified that, upon hearing some one screaming on the street and knocking at her door, she opened it, and the prosecutrix came in greatly frightened; and she further testified (the defendant objecting) as to what the prosecutrix told her about having been followed and caught by a man, in the manner testified to by the prosecutrix. This conversation was admitted as corroborative evidence, and the defendant excepted. There was no other testimony introduced.

The defendant requested the court to charge the jury:

1. That there was no evidence fit to be left to the jury as to the intent charged in the indictment, and that the matter of intent being so much in the dark, the jury cannot reasonably convict the defendant.

2. That there is no sufficient evidence to sustain the charge of an assault on the prosecutrix with a felonious intent to have carnal knowledge of her person by force and against her will.

3. That the evidence should show, not only an assault, but that the defendant intended to gratify his passion, and that he intended to do so at all hazard.

The court declined to give the first and second instructions, but gave the third.

Verdict of guilty; judgment; appeal by the defendant.

Attorney-General, for the State.
Mr. J. B. Batchelor, for defendant.

MERRIMON, J. It sufficiently appears from the record in this case, that the cross-examination of the prosecutrix tended and was intended to impeach her. Hence, the corroborative testimony introduced by the state to sustain her, was competent and properly received. *March* v. *Harrell*, 1 Jones, 329; *State* v. *Laxton*, 78 N. C., 564.

The testimony of the corroborating witness was admissible on other grounds, to which we need not now advert.

The testimony of the prosecutrix was pertinent, and tended strongly to prove the intent charged in the indictment, if the jury believed it. It was such as might fairly, reasonably warrant them in finding a verdict of guilty. We cannot hesitate to hold, that there was evidence to go to the jury tending to prove the intent charged. This case is very different, in respect to the facts, from that of the *State* v. *Massey*, 86 N. C., 658, and it is made stronger as to the question of intent, than that of the *State* v. *Neely*, 74 N. C., 425.

No error. Affirmed.

STATE v. J. D. BARBER and others.

Evidence—Impeaching Testimony—Leading Question—Time and Place—Separation of Jury.

1. Evidence was offered to impeach a witness, and exceptions taken to its rejection; *Held*, that this court will not consider the same, where the case fails to set out the testimony of the witness sought to be impeached. The facts necessary to show the alleged error should be stated.

2. *Held further*, that the rejection of the proposed evidence is sustained upon the further grounds, that the question put was a leading one, and the "time and place" preparatory to proof impeaching the witness, were not stated.

3. In misdemeanors of the lesser grade, the question of new trial on account of the separation of the jury, is a matter of discretion with the presiding judge.

(*Whitesides* v. *Twitty*, 8 Ired., 431; *State* v. *Shule*, 10 Ired., 153; *State* v. *Lytle*, 5 Ired., 58; *State* v. *Miller*, 1 Dev. & Bat., 500; *State* v. *Tilghman*, 11 Ired., 513; *State* v. *Wiseman*, 68 N. C., 203, cited and approved).

INDICTMENT for assault and battery tried at Spring Term, 1883, of JOHNSTON Superior Court, before *MacRae, J.*

On the trial, Charles B. Olive was examined as a witness on behalf of the state, and, on his cross-examination, was asked by defendants' counsel if he did not tell the defendant Beasley that he (Beaseley) was innocent, and that he (witness) would have Beasley's name stricken out of the indictment; and the witness denied having told Beasley anything of the kind.

One Kennedy was examined by the defendants, and was asked the following question: "Shortly after this difficulty at Fuller's store in Smithfield did Charles B. Olive say anything to Beasley, in your presence, about having Beasley's name stricken out of the indictment, and his not believing that Beasley had anything to do with the difficulty; if so, what was it?"

The witness testified that he did not hear all that he said; that Olive and Beasley were in conversation about this matter when witness came up, and that he could not give the substance of the whole conversation, but that he heard all that was said after he came up. His Honor refused to allow the question to be answered, and the defendants excepted.

The jury returned a verdict of not guilty as to the defendant Richard Barber, and guilty as to the other defendants.

After verdict, the defendants moved for a new trial, upon two grounds:

1. Because the court refused to permit the witness, Kennedy, to answer the question propounded to him.

2. That two of the jurors, while the jury were out considering of their verdict, walked down towards the river from their fellows, and, upon returning, declared themselves in favor of finding defendants guilty, without deliberating upon the case at all.

The motion was overruled, and the defendants appealed from the judgment pronounced.

Attorney-General, for the State.
Mr. T. M. Argo, for the defendants.

ASHE, J. We are of the opinion that there was no error in overruling the first ground; for we are unable to see how the defendants were prejudiced by the ruling of the court on this point. The question put to Kennedy was for the purpose of impeaching the credibility of the witness Olive; but the "case" does not set forth the testimony of Olive on his direct examination. It may be that his testimony did not implicate the defendant Beasley in the assault and battery, and his connection with the affair may have been proved by other testimony on the trial. How that is, does not appear. But at all events, it was necessary that his testimony, or so much thereof as tended to establish the guilt of Beasley, should have been stated, so that the court might see whether the statement of Olive, in the alleged conversation with Beasley, was in conflict with his testimony-in-chief; for if there was no contradiction, then the question put to him on the cross-examination was irrelevant and his answer conclusive. *Whitesides* v. *Twitty*, 8 Ired., 431: where Chief-Justice RUFFIN says:

"From the nature of a bill of exceptions, it is incumbent on the party excepting, when the error alleged consists in rejecting evidence, to show distinctly in it what the evidence was, in order that its relevancy may appear, and that it may be seen that a prejudice has arisen to him from the rejection. * * * For verdicts and judgments are presumed to be right and according

to law and justice, until the contrary be shown; and the bill of exceptions is required to state all the facts necessary to show the error clearly."

Besides this, there are other grounds upon which we think the ruling of the judge may be sustained:

1. The question put to Kennedy is leading in its character, because suggestive of the answer. *State* v. *Shule*, 10 Ired., 153. The witness should have been asked simply to state whether he heard the alleged conversation with Beasley, at the time and place designated; and if so, to relate what passed in the conversation. 1 Phillips on Ev., 269, 270.

2. The testimony of Kennedy was obnoxious to the further objection, that on the cross-examination preparatory to the impeachment of the testimony of the witness Olive, he was not asked as to the *time and place* involved in the supposed contradiction, or some other circumstances sufficient to point out the particular occasion. Starkie on Ev., 240; 1 Greenl. on Ev., 462.

The other ground urged by the defendants for a new trial, based upon the separation of the jury, is without any merit. It has been repeatedly decided by this court, that a temporary separation of a juror from his fellows is no ground for awarding a *venire de novo*, though it may be a reason for applying to the discretion of a judge in the court below for a new trial. *State* v. *Lytle*, 5 Ired., 58; *State* v. *Miller*, 1 Dev. & Bat., 500; *State* v. *Tilghman*, 11 Ired., 513. The exception to this rule is where there is a *legal necessity* arising from the duty of the court to guard the administration of justice from fraudulent practices, as in case of tampering with the jury or keeping back the witnesses of the prosecution by the prisoner; but the exception does not embrace misdemeanors, except such where infamous punishments are awarded. In misdemeanors of the lesser grade, like this, the question of new trial, on account of the separation of the jury, is always addressed to the discretion of the court. *State* v. *Wiseman*, 68 N. C., 203.

Finding no error to the prejudice of the defendants in the judgment, it must be affirmed. Let this be certified to the superior court of Johnston county.

No error. Affirmed.

STATE v. JOHN T. SUGGS.

Evidence—Confessions—Silence of Party—Comments of Counsel.

1. A voluntary confession of one accused of crime, whether made before his apprehension, or after his commitment, is admissible against him.
2. Parol proof of such confession at a preliminary trial is also admissible, where it is affirmatively shown that the magistrate failed to reduce the same to writing.
3. The silence of a party, when a declaration is made in his presence and hearing, imputing to him the commission of a crime, is presumptive evidence of his acquiescence in the truth of the statement. See also, *Guy* v. *Manuel*, *ante*, 83.
4. Exceptions to remarks of counsel must be taken in apt time. No abuse of privilege appears in this case.

(*Adams* v. *Utley*, 87 N. C., 356; *State* v. *Efler*, 85 N. C., 585; *State* v. *Parish*, Busb., 239; *State* v. *Irwin*, 1 Hay., 112; *Knight* v. *Houghtalling*, 85 N. C., 17; *State* v. *Johnston*, 88 N. C., 623, cited and approved).

INDICTMENT for highway robbery tried at Fall Term, 1882, of CRAVEN Superior Court, before *McKoy*, *J.*

On the trial, one Henry Rouse, a witness for the state, testified that there had been a preliminary examination of the charge against the defendant, in which, declarations of Peter Donan, the person alleged to have been robbed, were used as his dying declarations, and the defendant was committed; that afterwards, Peter Donan came to Newbern, when Thomas Stanley, the justice of the peace before whom the said examination was had, caused the defendant to be taken from the jail to his office (a different place from that of the trial) for the purpose of the

identification of the defendant by Donan. When the defendant arrived, Donan and a crowd were assembled in the office. Some one asked Donan, "do you know who robbed you?" He looked at the defendant, and answered, "I don't know, but the man who passed by and told Henry Rouse that I was a robber, was the man who robbed me"; that the man, "he had on a blue shirt and a black coat, and wanted to ride with me, but I objected"; and he stated further, that the man who robbed him said he was an officer, and grabbed him and beat him, and took $18.75 from him.

The witness (Rouse) then said to Donan, "then say who robbed you." This, as well as what Donan said, was spoken in the presence of the defendant, who was at the time in the custody of the sheriff, and the defendant said to the witness (Rouse), "Henry, I am willing to bear my part, you must bear your part," and then Donan said, "Henry did not help in the matter."

The witness also stated that there was no trial going on at the time, nor did the justice of the peace take down anything in writing.

Thomas Stanley, the justice, a witness for the state, testified that the trial of the defendant was held by him before that time, and at a different place, and defendant was, on the occasion alluded to by Rouse, ordered before him for identification; that he had no recollection of the conversation testified to by Henry Rouse, nor did he remember that any trial was had that day, or whether anything was taken down in writing, though he might have asked some questions.

The defendant objected to the admission of this testimony, but the court finding as facts, that the conversation testified to by Rouse was in the presence and hearing of the defendant at a time when no trial was going on; that there were no threats or promises made to defendant; that what defendant said was voluntary, as there was no evidence that any one requested or urged him to say anything, and that there was no proof that the conversation was ever reduced to writing, overruled the objection, and the defendant excepted.

This constitutes the first ground of the motion for a new trial, and the second is to the comments of the prosecuting attorney in addressing the jury, which the defendant contends was an abuse of his privilege, and that the court erred in not stopping him.

The remarks complained of: One of the witnesses having stated that he heard the defendant had been in the penitentiary, the counsel said: "Now, I do wish, in the interest of a fair trial, if that is not true, the defendant had some witness to deny it. But then, I thought only the defendant knew whether that was true, and the law does not permit counsel to comment upon the defendant's failure to testify." The alleged breach of privilege was not objected to or called at the time to the attention of the court, but on the next day after the verdict, in the statement of the grounds for a new trial.

Verdict of guilty; judgment; appeal by defendant.

Attorney-General, for the State.

No counsel for defendant.

ASHE, J. There is no force in the first exception. His Honor, having found that the admission of the defendant was voluntary—not induced by any word or act of intimidation, or promise held out to him, and that it was not made in the course of any judicial proceeding—the conversation in the hearing of the defendant and his statement at the time were clearly admissible.

The admissions of a party are always admissible against him. *Adams* v. *Utley*, 87 N. C., 356; *State* v. *Efler*, 85 N. C., 585. A free and voluntary confession by a person accused of an offence, whether made before his apprehension or after his commitment; whether reduced to writing or not; in short, any voluntary confession, made by a defendant, to any person at any time or place, is strong evidence against him. Whar. Pl. and Ev., §683.

The declarations of the defendant, in this case, do not fall

within the rule applicable to the admission of statements made by a prisoner during a preliminary inquiry before a justice of the peace, where, by statute, it is made the duty of the justice to write down the statement; for here, there was no trial, no judicial proceeding, no inquiry, in which the justice was required by law to write down anything. But even if it had been such an inquiry, parol proof of the declaration of the defendant would have been admissible; for it was affirmatively proved by the testimony of the witness, Rouse, that the justice "did not take down anything in writing." *State* v. *Parish*, Busb., 239; *State* v. *Irwin*, 1 Hay., 112.

The conversation deposed to by the witness, in the presence and hearing of the defendant, would have been admissible if the defendant had remained silent: for a declaration in the presence of a party to a cause becomes evidence, as showing that the party, on hearing such a statement, did not deny its truth; for if he is silent when he ought to have denied, there is a presumption of his acquiescence. And where a statement is made, either to a man or within his hearing, that he was concerned in the commission of a crime, to which he makes no reply, the natural inference is that the imputation is well founded, or he would have repelled it. *Guy* v. *Manuel*, *ante*, 83; Whar. Ev., §1136, and cases there cited. Much stronger, then, is the case where he does reply, and makes a confession or statement, as in the case before us, from which his implication in the commission of the crime may be inferred.

As to the second exception: We are of the opinion it was not such an abuse of the "privilege of counsel" as constituted a ground for a new trial. The objection to the remarks was not made until the next day after the verdict was rendered, upon the motion for a new trial. It came too late. It was not made in apt time, and for that reason cannot be entertained, as has been frequently decided by this court. The party complaining of the "abuse of privilege" by the opposing counsel should object at the time the objectionable language is used, so that the court,

when it comes to charge the jury, may correct the error, if one was committed, and put 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." *Knight* v. *Houghtalling*, 85 N. C., 17; *State* v. *Johnston*, 88 N. C., 623.

There is no error. Let this be certified to the superior court of Craven county, that the cause may be proceeded with in conformity to this opinion and the law of the state.

No error. Affirmed.

STATE v. ABRAM BRYAN and others.

Indictment for Defacing Jail—Motion in Arrest—Comments of Counsel.

1. A motion in arrest of judgment should point out definitely the alleged defect in the indictment.
2. The indictment in this case is sufficient to charge the defendant with the offence of defacing and damaging the jail. The general purpose of the statute (Bat. Rev., ch. 32, §§93, 28, 11) to protect houses from wilful injury, discussed by MERRIMON, J.
3. Counsel will not be allowed to impeach a witness by reading a paper, in his argument to the jury, which had not been put in evidence.
4. It is only in extreme cases of the abuse of the privilege of counsel, and when the same is not checked by the presiding judge and the jury not properly cautioned, that this court will interfere and grant a new trial.

(*State* v. *Underwood*, 77 N. C., 502, cited and approved).

INDICTMENT for injuring and defacing the county jail, tried at Spring Term, 1883, of CRAVEN Superior Court, before *Philips, J.*

The jurors, &c., present that defendants, &c., the common jail of said county, did feloniously, wilfully, unlawfully and violently beat, strike and cut with axes, chisels, mallets and heavy

sticks of wood, whereby the inner and outer walls and part of the window and cage of said jail were broken, defaced, disfigured, injured and damaged; and the said defendants, the said common jail, by the means aforesaid, did then and there feloniously, wilfully, unlawfully and violently, greatly injure and damage, contrary, &c.

The state introduced the written examination taken down by the magistrate at the preliminary trial of the defendants, and proved by him that they were duly advised of their right to decline to answer any question put to them on that occasion, and that their refusal should not be used to their prejudice at any stage of the proceeding. The examination was then read to the jury, without objection, for the purpose of showing that the statements made by defendants at the preliminary trial were contradictory to those made by them to witnesses who testified upon the trial of the issue in court.

On cross-examination, the magistrate stated that he reduced all the evidence to writing, including that of the witness Fulcher, who had been previously put upon the stand; and during the argument to the jury, one of the defendants' counsel proposed to argue that said Fulcher had made certain statements in his examination before the magistrate, and began to read from a paper and comment thereon, in relation to this matter. The paper proposed to be read had not been put in evidence, or offered to be put in evidence; nor was the same identified by the magistrate as the evidence reduced to writing by him at the preliminary trial. To this the state objected; objection sustained, and the defendants excepted.

The defendants' counsel spoke abusively of the state's witnesses, without objection being made; and in turn the prosecuting attorney said he might reply to the argument that defendants were rogues; whereupon the defendants' counsel objected, and the judge stopped counsel, who withdrew the remark, and the argument proceeded. In the charge to the jury, the judge cautioned them not to allow such remarks of counsel to influence their verdict.

There was also evidence of a former jail-breaking, and that the defendant Bryan was cognizant of the same, and was the jailer at the time, which was received without objection. The defendants' counsel, in alluding to this, said his client had nothing to do with it, and, in reply, the opposing counsel remarked that he could as well argue that Bryan knew all about it; and, upon objection being raised to the latter's comment, the judge did not interfere, as the same was made in reply, and not in itself improper.

Verdict of guilty. Motion in arrest of judgment, upon the ground of insufficiency of the indictment; motion overruled, and the defendants appealed from the judgment pronounced.

Attorney-General, for the State.
No counsel for defendants.

MERRIMON, J. The defendants moved in arrest of judgment upon the general ground of *insufficiency of the indictment,* without specifying wherein such insufficiency appeared, and we are left to search for and find it, if, indeed, it exists at all. This is bad practice. The motion should point out with certainty and definiteness the particular ground assigned for arrest. After a careful examination of the indictment, we think it is sufficient in form and substance. There are some unnecessary words employed, but they in no way impair its efficiency; they are merely surplusage.

It is clear that an offence, under the statute, is charged. Section 93, of chapter 32, of Battle's Revisal, embraces the buildings therein specified by name, and, in addition, "the houses or buildings mentioned in section 28 of this chapter," and also any "other house or building not mentioned in the above recited section of this chapter."

Now, it is manifest that the words "other house or building," in the last recited clause, embrace a jail, a jail-house or building. The term "jail" implies a house or building used for the pur-

poses of a public prison, or where persons under arrest are kept. A jail is embraced also by another clause of the ninety-third section of said chapter. It embraces "any of the houses or buildings *mentioned* in section 28 of this chapter." The twenty-eighth section also specifies certain houses and buildings by name, and then provides further, "or any of the houses or buildings mentioned in the previous sections of this chapter." Jail is mentioned, specified, in section 11, a previous section of that chapter. Jail is not mentioned by name in the twenty-eighth section; but it is mentioned by the reference to section 11. The term *mentioned* is used in the sense of referred to or noticed. This is apparent from the comprehensive purpose manifested in the twenty-eighth section, and the general purpose of the statute to protect houses and buildings from wilful injury, damage and defacement.

The testimony mentioned in the first and third exceptions was received without objection. It was too late to object to it, even if it were not strictly competent, in the argument to the jury. It was manifestly improper for counsel to undertake to impeach the state's witness by reading to the jury a paper-writing purporting to contain what that witness had sworn to at the preliminary examination of the defendants before the justice of the peace, that paper not having been introduced as evidence. The court properly excluded it.

The exception, on account of the comments of counsel upon witnesses and the defendants cannot, be sustained. It appears that the judge carefully cautioned the jury in this respect. If he had not done so, the record develops no such comments as would entitle the defendants to a new trial. The manner of conducting the argument of counsel, the language employed, the temper and tone allowed, must be left largely to the discretion of the presiding judge. He sees what is done, and hears what is said. He is cognizant of all the surrounding circumstances, and is a better judge of the latitude that ought to be allowed to counsel in the argument in any particular case. It is only in

extreme cases of the abuse of the privilege of counsel, and when this is not checked by the court, and the jury is not properly cautioned, that this court can interfere and grant a new trial. *State* v. *Suggs*, *ante*, 527; *State* v. *Underwood*, 77 N. C., 502.

No error. Affirmed.

STATE v. GEORGE WASHINGTON.

Discharge of Jury before Verdict—Jeopardy—Motion for Discharge of Prisoner, heard in this court.

1. It is the duty of the judge, upon finding the fact that a juror fraudulently procured himself to be put on the jury, for the purpose of acquitting the prisoner in a trial for murder, to withdraw a juror and direct a mistrial to be entered, *State* v. *Bell*, 81 N. C., 591; and this, whether the prisoner be connected with or cognizant of the fraud or not. In such case, there is no jeopardy, and the order remanding the prisoner for trial before another jury was proper.

2. *Held further*, that even though no formal motion is made for the prisoner's discharge in the court below and denied, yet, this court will, on his petition for *certiorari*, consider his claim to exemption from another trial.

(*State* v. *Swepson*, 79 N. C., 632, and 81 N. C., 571; *State* v. *Pollard*, 83 N. C., 597; *State* v. *Respass*, 85 N. C., 534; *State* v. *Bell*, 81 N. C., 591; *State* v. *Garrigues*, 1 Hay., 241; *Spier's Case*, 1 Dev., 491; *State* v. *Ephraim*, 2 Dev. & Bat., 162; *State* v. *Prince*, 63 N. C., 529; *State* v. *Jefferson*, 66 N. C., 309; *State* v. *Honeycutt*, 74 N. C., 391; *State* v. *Bailey*, 65 N. C., 426; *State* v. *Wiseman*, 68 N. C., 203, cited, commented on and approved).

MOTION for *certiorari* heard at October Term, 1883, of THE SUPREME COURT.

Attorney-General, for the State.

Mr. D. G. Fowle, for the prisoner.

SMITH, C. J. The petition for the writ of *certiorari* to bring up the record of proceedings in the superior court of Craven,

with a view to the discharge of the prisoner, contains the following statement of facts:

The prisoner was put on trial under an indictment for murder, and a jury sworn and impanelled, when a short recess was taken. Upon the reassembling of the court, and before any evidence in support of the charge had been offered, the solicitor moved for the withdrawal of a juror and a mistrial, for the alleged reason that two jurors, whose names were mentioned, had fraudulently procured their admission into the panel on a false oath of indifferency, for the purpose of securing the acquittal of the accused. The court heard testimony upon the matter, found as a fact and declared the charge against the jurors to be true, and, as a conclusion of law, that the jury had been "impanelled by the fraud of the prisoner, or of some one on his behalf, with a view to the prisoner's acquittal. A juror was thereupon withdrawn, and a mistrial ordered. The prisoner did not consent to this action, but protested against it, avowing his disbelief of the charge, and, if true, any participation in it.

The cause was then, on application of the state, removed to Pamlico county for trial: and the sole inquiry for us to make is as to the legal effect of the discharge of the jury, under the circumstances, upon the rights of the accused, and whether the court shall interpose at this stage of the prosecution and discharge the prisoner without trial.

The defence, if in law effectual, may be made available by special plea on the trial of the indictment, without depriving the prisoner of his right to be tried on the plea of not guilty, if the first shall be held insufficient; and all the rulings upon conviction may be reviewed on the appeal. *State* v. *Swepson*, 79 N. C., 632; *State* v. *Swepson*, 81 N. C., 571; *State* v. *Pollard*, 83 N. C., 597; *State* v. *Respass*, 85 N. C., 534.

No injury can, therefore, result to the prisoner from our refusal to intervene and arrest the prosecution; while, if the averments made in the application of his innocence be true,

and the jury so find, an erroneous ruling as to the legal consequences of the disbanding of the jury will be rendered harmless.

It does not appear, moreover, though the order for a mistrial was strenuously resisted, that any motion was then made for the prisoner's discharge, and denied. Still, if his claim to be exempt from exposure to another trial, because it would be putting him in jeopardy a second time upon the same bill or for the same offence, be valid, he is entitled to summary relief, and should not be compelled to undergo another useless and illegal trial, with the long imprisonment and other inconveniences preceding it.

We are not prepared to concede that the course pursued by the court was in excess of the authority conferred by law to conduct the trial, so as to secure a fair and just verdict, as due alike to the public and to the accused. It would be a great defect in the administration of distributive justice if, upon discovering an attempted fraud in the organization of the jury to accomplish a conviction or acquittal of the accused, at the very inception of the trial, the presiding judge is powerless to correct the wrong and must proceed and allow the fraud to be consummated and crime to go unpunished. This would be, in the forcible language of Mr. Justice ASHE, to make "the trial by jury become a farce and the administration of justice a mere mockery." *State* v. *Bell*, 81 N. C., 591.

It is the clear duty of the presiding judge, in the language of the same opinion, "*to see that there is a fair and impartial trial, and to interpose his authority to prevent all unfair dealing and corrupt and fraudulent practices on the part of either the prosecution or the defence.*"

Admitting the right and duty of the judge to interpose and stop the trial when the fraud is contrived or known to and participated in by the prisoner, his counsel press upon us a qualification of the general proposition that the power can only be exercised when the prisoner is in privity with the attempt, and that the trial must go on to a verdict, however gross the fraud, in the absence of evidence of the prisoner's connection with it.

We should hesitate to give assent to a distinction relating to the exercise of the power, and fruitful in consequences so hurtful to the healthy administration of the law and injurious to the cause of public justice.

While the earlier decisions in this state very greatly restrict the authority of the court to discharge a disagreeing jury, impanelled to pass upon life, and deny its exercise without the prisoner's consent, except, in the language of Chief-Justice RUFFIN, "for evident, urgent, overruling necessity arising from some matter occurring during the trial, which was beyond human foresight and control" (*State* v. *Garrigues*, 1 Hay., 241; *Spier's case*, 1 Dev., 491; *State* v. *Ephraim*, 2 Dev. & Bat., 162); yet, the doctrine is modified in later cases, and it is held that a jury, after ample time for deliberation, being unable to come to an agreement, upon the fact being satisfactorily shown, may be discharged, and the prisoner be again tried upon the same bill. *State* v. *Prince*, 63 N. C., 529; *State* v. *Jefferson*, 66 N. C., 309; *State* v. *Honeycutt*, 74 N. C., 391.

But besides a physical necessity, such as is created by the sickness of the judge or a juror, which incapacitates him from going on and performing his duties, there is recognized, as equally controlling, a necessity arising "from the duty of the court to *guard the administration of justice against fraudulent practices.*" *State* v. *Bailey*, 65 N. C., 426: *State* v. *Wiseman*, 68 N. C., 203.

But a case in its facts very similar to the present is found in *State* v. *Bell*, 81 N. C., 591, to which we shall briefly refer:

After the jury were formed, and before they had heard any evidence, the solicitor asked for a mistrial, which was ordered, the court finding from the testimony that a juror had intruded himself into the jury-box, through the prisoner's procurement and over a violated oath, for the purpose of bringing about an acquittal. This ruling was upheld in this court as a proper and competent exercise of judicial power, and the prisoner was held to meet the charge.

It is true that, there, the prisoner was personally connected

with the criminal conduct of the juror, while in our case this is not proved; but we can see little difference between the cases when his agency precedes the committal of the fraud, and when he seeks afterwards to secure its results to himself, as calling for the direct and prompt interference of the court in prevention.

The necessity of maintaining the dignity and integrity of the court, and assuring the firm and impartial administration of justice, is the necessity which calls for and justifies a prompt repression of the intended fraud; and this necessity exists in either case.

Without intending in any manner to prejudice this defence of the prisoner when again put on trial, we feel constrained to refuse the summary relief which he now asks, for the reasons already given.

PER CURIAM. Motion denied.

STATE v. DANIEL PAYLOR and others.

Oath of Juror—Absence of Defendant During the Trial of Cases not Capital.

1. An oath administered to a juror in the manner prescribed by statute is sufficient; the juror need not repeat the words "so help me God."
2. The absence of a defendant from the court-room during the argument of counsel to the jury, on trial of an indictment for an offence not capital, the defendant's counsel being present, does not constitute ground for a new trial, unless it be made clearly to appear that the defendant was prejudiced thereby.
3. The law in reference to the right of the accused to be present during the trial, in capital cases and in those of a lower grade, reviewed by ASHE, J.

(*State* v. *Crayton*, 6 Ired., 164; *State* v. *Blackwelder*, Phil., 38; *State* v. *Epps*, 76 N. C., 55; *State* v. *Jenkins*, 84 N. C., 812; *State* v. *Bass*, 82 N. C., 570; *State* v. *Tilletson*, 7 Jones, 114, cited, commented on and approved).

STATE *v.* PAYLOR.

INDICTMENT tried at Spring Term, 1883, of PERSON Superior Court, before *Gilmer, J.*

The indictment contains two counts—one for burning a granary and the other for burning a stable, in violation of the act of 1874–75, ch. 228.

The defendants were found guilty, and, a motion for a new trial having been overruled, the court pronounced judgment and the defendants appealed.

Attorney-General, for the State.

Messrs. J. A. Creech and *Fuller & Snow*, for the defendants.

ASHE, J. After the verdict was rendered, the defendants moved for a new trial, on the ground:

First, that the jury who were impanelled to try the case were not legally sworn, in that, when the oath was administered to each juror, he was not required to repeat the words "so help me God," after the words "so help you God," pronounced by the clerk. The court found the fact that the jurors were sworn in the usual form.

Secondly, that during the trial, after the evidence had closed, one of the counsel for the state was permitted to make his argument to the jury in the absence of the defendants. The following are the facts found by the court: After the argument began in the forenoon, the court took a recess for dinner, and, on the reassembling of the court, the court-house being exceedingly crowded, one of the counsel for the state, continuing the argument, addressed the jury for twenty or thirty minutes, and was immediately followed by one of the counsel for the defendants, who had proceeded in his argument to the jury ten or fifteen minutes, when it was suggested to the court by the solicitor that the defendants, who had not given bail, but during the whole trial were in custody, had not been brought into court.

The argument was then suspended until the defendants were brought into court, when it proceeded without any exception or

complaint on the part of the defendants, whose counsel were present at all stages of the trial.

1. For an answer to the first exception, it is only necessary to refer to the form of the oath prescribed by law. Bat. Rev., ch. 77, §6 (20).

2. The other exception is more worthy of consideration.

In the trial of capital felonies, the rule of practice seems to be uniform in all the states that the prisoner should be present during the whole of the trial; and in favor of life, this rule is never relaxed. In this state, the principle has been maintained in several decisions, among others, *State* v. *Craton*, 6 Ired., 164; *State* v. *Blackwelder*, Phil., 38.

But in felonies of a lower grade than capital, and misdemeanors punishable with imprisonment or other corporal punishment, we find the practice of the courts to differ somewhat in different states. But both in England and the American states, it is held that in felonies less than capital, and misdemeanors where the punishment is corporal, as whipping, branding or imprisonment, the prisoner has the right to be present when the verdict is rendered, and must be when the sentence is pronounced. In misdemeanors where the punishment can only be a fine, or in cases where the court can see from the nature of the case and its circumstances that public justice requires no other punishment, the court may, in its discretion, with the consent of the prisoner, dispense with his presence during the trial. *State* v. *Epps*, 76 N. C., 55; 1 Bishop Cr. Pro., §690, and *U. S.* v. *Maye*, 1 Curtis, C. C., 432. In this latter case, Judge CURTIS has laid down, among others, the following rules regulating the discretion of the courts in such cases, to-wit:

1. That it is not an offence for which imprisonment must be inflicted.

2. The court must be satisfied that the nature of the case and its circumstances are not such that imprisonment will be inflicted.

But where the punishment is corporal, the prisoner must be present, as was held in *Rex* v. *Duke*, Holt, 399, where the pris-

oner was convicted of perjury, HOLT, C. J., saying: "Judgment cannot be given against any man in his absence for corporal punishment; he must be present when it is done." And he adds: "For if we give judgment that he should be put in the pillory, it might be demanded, *when*? and the answer would be, *when we catch him*; and there never was a writ to take a man and put him in the pillory."

In *State* v. *Jenkins*, 84 N. C., 812, this court citing *Blackwelder's case*, held "that it was not only the right of the prisoner, but it was the duty of the court to see that he was actually present at each and every step taken in the progress of the trial; and that in prosecutions for lesser felonies, the accused had exactly the same rights." All that the court meant by this was to say, that in the latter cases the prisoner had the same right as prisoners on trial for capital offences to be present at the arraignment, to plead in abatement, if proper; to be present when the jury are impanelled, that he may exercise the right of challenge; hear the evidence and be confronted with the witnesses; be present when the verdict is returned that he may have the jury polled and move for a new trial; and be present when the sentence is pronounced, that he may plead his pardon, if he have one, or move in arrest of the judgment. Further than this, there is no analogy in the rules of practice applicable to the two classes of offences. For in this very case of *State* v. *Jenkins*, the principle declared in the case of *State* v. *Bass*, 82 N. C., 570, is recognized and adopted as sound doctrine, and that case is cited with approval. There, a marked distinction was held to exist, in the power of the court to order a new trial, between capital felonies and those of a lower grade. In this respect, inferior felonies and misdemeanors are classed together, and it was held that the presiding judge had the discretion to discharge a jury before verdict in furtherance of justice, and that there was no appeal from the exercise of his discretion; but in capital cases it is well establishned he had no such discretionary power, and could only discharge a jury before verdict in cases of necessity,

and then he must find the facts constituting the necessity, and his action is reviewable.

In *State* v. *Tilletson*, 7 Jones, 114, one of the cases cited and relied upon by this court for its decision in *Bass' case*, Judge MANLY, speaking for the court, said: "The restricted range of judicial power as established in them (capital cases) has never been applied to offences of inferior grades, whether felonies or misdemeanors, and we think is not applicable." So it seems in the trial of inferior felonies, the strictness of the rules enforced on the trial of capital offences is, to some extent, relaxed, and this may account for the fact that we have been unable to find any case where it has been held that the absence of a prisoner on a trial for an inferior felony, while his case is being argued before the jury, has been held to be a ground for a new trial. It is possible that there may be cases where a prisoner might be prejudiced by his absence at such a time, but it should be made clearly to appear. Here, there was no complaint; his counsel was present all the time; it was not pretended that his cause had in any way been prejudiced; and this exception was not made until after verdict.

The motion for a new trial was properly overruled. There is no error. Let this be certified, &c.

No error. Affirmed.

STATE v. JOHN SHEETS.

Trial, preliminary statement to jury—Malicious Mischief—Evidence—Expert Witness—Polling Jury—Verdict—Comments of Counsel—Absence of Defendant during Trial of Misdemeanor.

1. A preliminary statement of what a party expects to prove may be made to the jury, in both civil and criminal cases. It is a practice which has long prevailed in this state.

2. In malicious mischief, ill-will towards the prosecutor is an essential ingredient of the crime, and as tending to establish the same, it is competent to show that the defendant whipped the prosecutor's child shortly before the offence charged was committed.
3. Where part of a certain conversation is elicited from a witness, the opposite party has the right to put the whole conversation in evidence.
4. A physician who states that he is able to give a professional opinion about a particular case (as, for instance, the effect of poison on brute animals), although he has never treated such a case in his practice, is competent to testify as an expert.
5. The proper time for polling a jury is after their announcement of the verdict.
6. In polling the jury, one of them, upon calling his name, was asked to say whether the defendant was guilty or not guilty, and his reply was, "well, I suppose I must go with the rest"; the court thereupon directed him to respond "guilty or not guilty," and he answered "guilty"; *Held*, proper to receive and record the verdict.
7. Comments of counsel, alleged to be improper, cannot be assigned as ground for a new trial, where it appears that no objection was made at the time, and that the judge, in his charge to the jury, gave them due caution not to be influenced thereby.
8. The absence of defendant from the court-room at the time the court rehearsed a part of the evidence to the jury, on trial of an indictment for a misdemeanor, the defendant being out on bail and his counsel being present and making no objection, does not constitute ground for a new trial, especially where no prejudice resulted to the defendant.

(*State* v. *Robinson*, 3 Dev. & Bat., 130; *State* v. *Jackson*, 12 Ired., 329; *State* v. *Clark*, *Ib.*, 151; *Horton* v. *Green*, 64 N. C., 64; *State* v. *John*, 8 Ired., 330; *State* v. *Swink*, 2 Dev. & Bat., 9; *Knight* v. *Houghtalling*, 85 N. C., 17; *State* v. *Godwin*, 5 Ired., 401, cited and approved).

INDICTMENT for malicious mischief tried at Fall Term, 1883, of RANDOLPH Superior Court, before *MacRae, J.*

The defendant is charged with poisoning a mare colt, the property of one Calvin Hancock.

On the trial, the counsel representing the state made an opening statement to the jury of what the state expected to prove. He said he expected to show that the defendant and Hancock lived near together, and that there was enmity between them;

that the son of the prosecutor, Hancock, a small boy about eleven years old, about eight days before the alleged offence was committed, went to defendant's spring to get water, when he was assaulted and beaten by the defendant; that defendant was afterwards tried before a justice of the peace and fined ten dollars, on the complaint of the prosecutor; that this would be for the purpose of showing malice, on the part of the defendant, towards the prosecutor.

This statement was objected to by the defendant, but the objection was overruled, and defendant excepted.

Calvin Hancock, a witness for the state, while testifying at length as to the death of his colt, and the circumstances tending to connect the defendant with it, was allowed to testify, after objection by the defendant, that he had a difficulty with defendant, shortly before the death of the colt, about the defendant's whipping the child of witness, and that he had had him before a justice of the peace, by whom he was tried, convicted and fined, and this occurred eight or nine days before the colt died. To the admission of this evidence the defendant excepted.

On cross-examination, the same witness stated that he never tried to hire any one to swear that the defendant proposed to get him to poison witness' stock; that Addison Miller came to witness' house and asked for pennyroyal, and said he came to tell witness something; that witness gave Miller no liquor, nor did he offer to give him the pennyroyal and twenty-five dollars if he would swear that defendant wanted to get him to poison witness' stock.

When the direct examination was resumed, the witness was asked by the state's counsel, "what was the conversation you had with Miller?" This question, and the answer to it, were objected to by the defendant: objection overruled and defendant excepted. Witness proceeded to answer, which was to the effect that the defendant offered to hire him (Miller) to kill the prosecutor's mules.

The same witness also stated on cross-examination that the defendant had moved away from where he was living near him,

and that the move was agreeable to the witness; that witness wanted him to move, but would not have done anything to make him move; and on direct examination resumed, he stated that he would have been willing to pay fifty dollars to get defendant away, so that witness could be at peace. Defendant objected to this statement: objection overruled and defendant excepted.

Dr. Lewis testified that he had been a practicing physician for about seven years; had attended medical lectures at Jefferson College, in Philadelphia, but had never received his diploma; that he was somewhat familiar with the effect of poison on the human and animal stomach, and had experimented some with poison on dogs and other animals; had never been called in to attend a case of poisoning, but thought himself qualified to give an opinion as to the effects of poison. Defendant objected to the examination of the witness as an expert: objection overruled, the witness proceeded to testify, and the defendant excepted.

Dr. Bulla testified that he had been a practicing physician since 1845; had experience as to the effect of poison on the human species, but very little as to its effect on brute animals; thought he was competent, to a certain extent, to give his opinion as an expert in this case, having heard the testimony of the witnesses. The testimony of this witness as an expert was also objected to: objection overruled, and defendant excepted.

In the course of the argument before the jury, the state's counsel used some very vituperative language in reference to the defendant, and the defendant's counsel retaliated by employing similar language in regard to the prosecutor. There was no objection made on either side at the time, and His Honor, in closing his charge to the jury, said: " You must not permit abusive language or epithets to influence your minds on either side. Take the case, as gentlemen entirely above feeling and prejudice; consider it well, and render your verdict upon it."

After the jury had been out some time, they returned to the box and asked that certain parts of the testimony be rehearsed to them by the court. The defendant's counsel were present,

but the defendant was not in court. The fact of his absence was not observed by the judge, and the defendant's counsel made no objection, and the judge recapitulated that part of the evidence desired.

When they came into court to return their verdict, the defendant's counsel demanded that they be polled before the verdict was announced: overruled, and the defendant excepted. The court then said: "Gentlemen of the jury, have you agreed upon your verdict?" and the jury announced a general verdict of guilty. The court then had the jury polled, and each juror was called by name, and responded. When the name of the juror, Milton Hill, was called, he answered, "well, I suppose I must go with the rest," and thereupon the court directed him to respond "guilty" or "not guilty," and he answered "guilty." The defendant excepted because the jury were not polled before the verdict was demanded, and also objected to the entry of the verdict on account of what was said by the juror, Hill.

There was a rule for a new trial for the errors set forth in the exceptions; and further, because the judge did not stop the state's counsel at the time the improper language was used; and because the defendant was not in court when part of the testimony was rehearsed. Rule discharged; judgment; appeal by defendant.

Attorney-General, for the State.
Messrs. J. T. Morehead and *Scott & Caldwell*, for defendant.

ASHE, J., after stating the facts. The first exception taken by the defendant was that the state's counsel was permitted by the court to make a preliminary statement of what the state expected to prove. So far from the practice being objectionable, we think it is to be commended; for its effect is to direct the attention of the jury to the material points in the evidence. It is a practice which has long prevailed in this state.

The second exception, to the admission of the evidence in regard to the whipping the child of the prosecutor, and the prosecution of the defendant by him for the offence, cannot be sustained. The evidence was clearly admissible. "Malicious mischief consists in the wilful destruction of personal property from actual ill will or resentment towards the owner or possessor." *State* v. *Robinson*, 3 Dev. & Bat., 130; *State* v. *Jackson*, 12 Ired., 329. The ill will towards the owner of the property destroyed is an essential ingredient of the crime, and any competent evidence that tends to establish such a state of feeling on the part of the defendant towards the prosecutor, is admissible.

The third exception, that the court allowed the witness, Hancock, to relate the whole of the conversation one Miller had had with him in regard to the poisoning the mules, was properly overruled. For, on the cross-examination of the witness by the defendant's counsel, a part of this conversation had been called out; and it is too well settled as a rule of evidence to admit of a question, where that is done, the opposite party has the right to put the whole conversation in evidence.

The fourth exception, that the court permitted the witness to state "that he would have been willing to pay fifty dollars to get the defendant away, so that the witness could be at peace," is without merit. The statement was made on the re-direct examination, and was on the same line of evidence as that elicited from the witness on his cross-examination by defendant's counsel. On that cross-examination he testified that the defendant had moved away from where he was living near witness; that the move was agreeable to him, and that he wanted him to move, but would not have done anything to make him move. Whatever object the defendant may have had in drawing out from the witness the testimony given on the cross-examination, that given by him on the re-direct examination certainly tended to the same end. We are unable to see the ground of the defendant's objection.

The fifth and sixth exceptions were to the competency of Dr. Lewis and Dr. Bulla as experts. Dr. Lewis stated that he had attended lectures at a medical college and had practiced his profession for seven years; that, although he had never been called to a case of poisoning, he had experimented some with poison on dogs and other animals, and he thought he was qualified to give an opinion as to the effects of poison. Dr. Bulla testified that he had been a practicing physician since 1845, and he had had some experience of the effect of poison on the human species, but very little in regard to brute animals, and he thought he was competent, to a certain extent, to give an opinion.

There was no error in the ruling of His Honor that both of these physicians were competent to testify as experts. When the professors of science, as physicians, for instance, swear that they are able to pronounce an opinion in any particular case, although they say at the same time that precisely such a case had not before fallen under their observation or under their notice in the course of their reading, it is competent to give in evidence their opinion. *State* v. *Clark*, 12 Ired., 151. To the same effect is *Horton* v. *Green*, 64 N. C., 64, which was an action to recover damages for deceit in the sale of a mule alleged to have glanders. One Dr. Rivers was examined, who had been practicing his profession for eleven years. When asked whether, from his general knowledge of diseases, he could tell whether the symptoms in that case indicated that the disease was of long standing or not, he answered that he had no particular acquaintance with diseases of stock, but from his books, observation and general knowledge of diseases of the human family, he could tell whether certain symptoms indicated that a disease is of recent or long standing, though he had never seen a case of glanders unless that was one. It was objected that the witness had not qualified himself to answer as an expert, but this court held that he was competent.

The seventh exception was to the refusal of His Honor to have the jury polled before their verdict was announced. There

was no error in this. It is certainly not error to poll them after the announcement that they have agreed in their verdict, and that is the approved and usual practice. In *Watts* v. *Brains*, 1 Cro. Eliz., 778, where, upon the agreement of the jury, they came to the bar and the foreman pronounced their verdict that the defendant was not guilty, "the court misliking thereof, being contrary to their direction, examined every one of them by the poll whether that was his verdict." This decision is cited by this court with approval in *State* v. *John*, 8 Ired., 330; and Mr. BISHOP says "the object of polling is merely to ascertain whether the verdict rendered by the foreman in behalf of himself and the rest is really concurred in by the others; therefore the inquiry is restricted to the question, 'is this your verdict?'" 1 Bish. Cr. Pro., §830.

The eighth exception was to the recording the verdict on account of what the juror, Hill, said when the jury were being polled. When his name was called and he was asked to say whether the defendant was guilty or not guilty, he answered, "Well, I suppose I must go with the rest." The court directed him to respond "guilty" or "not guilty," and thereupon he answered "guilty." There was no ground for refusing to receive the verdict. The last answer of the juror was an assent to the verdict of guilty. The case of *State* v. *Godwin*, 5 Ired., 401, is very like this. There, the prisoner was tried for murder, and upon the return of the jury into court, they were polled at the prisoner's request. Eleven of the jurors each answered that he found the prisoner guilty. The remaining juror answered, that when the jury first went out, he was not for finding the prisoner guilty, but that a majority of the jury were against him, and that he then agreed to the verdict, as delivered by the foreman. He was then asked, "What is your verdict now?" and he replied, "I find the prisoner guilty." And it was held that there was no objection in law to the verdict. To like effect is the case of *State* v. *Swink*, 2 Dev. & Bat., 9.

The other exceptions taken by the defendant were taken after verdict, upon a motion for a new trial. They were:

First, that the judge failed to stop the state's counsel in his abuse of the defendant. This objection came too late after verdict. *Knight* v. *Houghtalling*, 85 N. C., 17. But if it had been taken in time, the error was corrected by the court in its charge to the jury.

Secondly, to the rehearsal by the court of a part of the evidence to the jury, in the absence of the defendant. It was no ground for a new trial. The indictment is only for a misdemeanor, and the defendant, we presume, was out on bail, as the record does not show that he was in custody. If he saw proper to absent himself during the progress of the trial, it was his own fault. His counsel were present when the evidence was rehearsed, and there was no objection on their part, nor complaint made by them. and it was not pretended, when the motion for a new trial was made, that any prejudice had resulted to the defendant by the rehearsal. See *State* v. *Paylor*, *ante* 539, decided at this term.

Our conclusion is, that there is no error. Let this be certified to the superior court of Randolph county, that the case may be proceeded with according to this opinion and the law.

No error. Affirmed.

STATE v. GEORGE PIPER.

Indictment for Removing Fence—Special Verdict.

1. A landlord has no right to enter upon land leased to his tenant and remove a fence therefrom against the consent of the tenant.
2. The court below erred in not holding the defendant to be guilty upon the facts found in the special verdict.

(*State* v. *Graham*, 8 Jones, 397; *State* v. *Hovis*, 76 N. C., 117, cited and approved).

INDICTMENT tried at Spring Term, 1883, of ORANGE Superior Court, before *Gilmer, J.*

The defendant is indicted under THE CODE, §1062, for unlawfully and wilfully removing a fence surrounding a cultivated field, the property of Mary S. Nichols.

On the trial, the jury found a special verdict, in substance as follows:

The defendant and one Robert A. Nichols entered into an agreement by which Nichols leased a tract of land, in consideration, among other things, that he (Nichols) was to put a fence around the same, which he did. Subseqnently Nichols died, and his widow, the said Mary, has since continued, under the lease, to live on and cultivate the land enclosed by the said fence, which constituted a division fence between Nichols and one Whitaker, another tenant of the defendant, and was built according to contract with the defendant. Afterwards, and during the continuance of the lease, the defendant, upon notice to the prosecutrix, moved the fence and deposited the rails upon his own premises, the prosecutrix forbidding the same. Thereupon the court adjudged the defendant was not guilty, and the state solicitor appealed.

Attorney-General and *A. W. Graham*, for the State.

No counsel for the defendant.

MERRIMON, J. It appears that the prosecutrix was in the actual possession of and cultivated the field up to the fence, embracing that part removed by the defendant, and that one Whitaker was in possession of the field and cultivated the same on the opposite side of the fence, as lessee of the defendant. The fact that the fence was on the land let to Whitaker cannot alter the case, because it was built by Nichols in his life-time under his lease; he had actual possession of the land up to it, until his death, and his widow, the prosecutrix, had actual possession thereof continuously next after his death, until and at the time the fence was removed. So that, on one side of the fence the field was in the lawful possession of the prosecutrix, and on the

other it was in the lawful possession of Whitaker. The defendant, for the purpose of the statute, for the time was not the owner of the fields and the fence; he had no right to go upon the field on either side of the fence; he committed a trespass when he did so, and especially when he removed the fence; he had no right to remove it; he unlawfully removed it, and the *animus* sufficiently appears. So he was guilty, and the court ought to have so held upon the special verdict. *State* v. *Graham*, 8 Jones, 397; *State* v. *Hovis*, 76 N. C., 117.

There is error. Judgment reversed, with instructions to enter a verdict of guilty upon the special verdict, and proceed to judgment according to law. Let this be certified.

Error. Reversed.

STATE v. FRANK H. DANIEL.

Servant Leaving Employer's Service—Indictment.

An indictment under Battle's Revisal, ch. 70, will not lie against a servant for wilfully leaving the employment of one with whom he had agreed to serve. The statute has reference only to persons enticing servants to unlawfully leave the service of the employer.

INDICTMENT for a misdemeanor tried at Fall term, 1883, of PERQUIMANS Superior Court, befor *Avery, J.*

The indictment—The jurors, &c., present that the defendant, &c., unlawfully and wilfully did absent and leave the employment of John S. Hedrick, with whom the said defendant had made a contract to work during the month of June, 1883, the time of service under said contract not having then expired, against the statute, &c.

The defendant's counsel moved to quash the bill, upon the ground that no indictment would lie under the statute against

a servant for leaving the employment of the master, but only against the person enticing him to leave; and further, that the bill did not set forth the alleged contract.

His Honor sustained the motion, and the state solicitor appealed.

Attorney-General, for the State.
No counsel for defendant.

SMITH, C. J. The indictment is framed under the act of 1866, Bat. Rev., ch. 70, amended by the act of March 11, 1881, extending the offence to cases in which the contract is oral, and which, as amended, declares that, "if any person shall entice, persuade and procure any servant by indenture, or any servant who shall have contracted in writing or verbally to serve his employer, to unlawfully leave the service of his master or employer; or if any person shall knowingly and unlawfully harbor and detain in his own service, and from the service of his master or employer, any servant who shall unlawfully leave the service of such master or employer; then, in either case, such person and servant may be sued, singly or jointly, by the master, and on recovery he shall have judgment for the actual double value of the damages assessed."

The succeeding section in addition imposes a penalty, and moreover, subjects to indictment "the person and servant violating the provisions of the preceding section."

The charge contained in the bill is, that the defendant "unlawfully and wilfully did absent and leave the employment" of the person with whom he had agreed to serve during the month of June, before the expiration of the term, but does not allege that this departure from service was by reason of enticement, persuasion or procurement of another, nor that upon his voluntary leaving he entered into the service of another party.

The act imputed is the defendant's withdrawal from a service which he had stipulated to render, and violating his contract to

serve for a given time, and this is not the offence designated and provided for in the statute. The mischief which the enactment was intended to remedy was the interference of others with the servants who had thus agreed to serve, by offering them inducements to depart, or, with knowledge that they had so departed in disregard of their contract obligations, by receiving such into their service. This, in our opinion, is the purpose and import of the statute, and it does not embrace the case made in the bill. The servant himself, to be subjected to the penalties imposed, must have participated in the action under circumstances such as would subject the enticing or harboring party, in the one or other alternative, to a criminal prosecution for his offence.

We therefore concur in the opinion of the court, that no criminal offence is charged in the indictment, and in the judgment quashing the bill, which is affirmed.

No error. Affirmed.

STATE v. N. J. MCMANUS.

Concealed Weapon—Intent.

1. On trial of an indictment for carrying a concealed weapon, the statute makes the possession *prima facie* evidence of concealment, and the burden is on the defendant to rebut the presumption by proof satisfactory to the jury.
2. The law presumes the criminal intent in such case, and the defendant must likewise rebut this presumption.
3. The language of the statute is, not "concealed *on* his person," but "concealed *about* his person," and hence, if the weapon be within reach and control of the defendant, it is sufficient to bring the case within the meaning of the statute.

(*State* v. *Gilbert*, 87 N. C., 527, cited, distinguished and approved).

INDICTMENT for carrying a concealed weapon tried at Spring Term, 1883, of UNION Superior Court, before *Shipp, J.*

The defendant is charged with a violation of THE CODE, §1005, in carrying a pistol concealed about his person while off his own premises.

One Morgan, the prosecuting witness, testified that in July, 1882, he met defendant riding in a wagon on a public road about three miles from defendant's premises, and in a conversation which took place between them, the witness told the defendant that he was on his way to sow some oats on certain land in defendant's possession; that defendant thereupon turned his wagon around immediately, and the witness saw defendant draw a pistol from his hip-pocket; that he also saw a basket the defendant had with him in the wagon, but could see no pistol in it.

The defendant testified in his own behalf that, on the occasion mentioned by the state's witness, he was on his way to work upon a house he was erecting, about five miles distant, and was carrying his pistol to swap it for a watch, according to an understanding had with one Sherman Flow, whom he met at the place where he was building his house a few days before the occasion spoken of by the prosecuting witness; that he put the pistol in his dinner basket on top of the cloth which covered his dinner, and carried the basket on his lap; that he had on no coat and there was no hip-pocket in his pants; that he put the pistol in the basket because that was the most convenient place to carry it, and without intent to conceal it or the fact that he had it, his sole object being to trade the pistol with Flow, whom he expected to see that day; that when he left home he had no idea of meeting the witness Morgan, and at no time did he have the pistol in his pocket or concealed about his person; that when it was in the basket it could be seen by any one.

Another witness testified that he saw the defendant, after Morgan had passed him on the road, going towards his (defendant's) premises, following Morgan, and that the defendant had the pistol in his hand, and was then walking; that he kept it openly in his hand until he overtook Morgan, which was upon

defendant's land; that Morgan sowed the oats upon the land of the defendant, despite the efforts of the defendant, Morgan having in his own hand a double-barrelled gun during the whole time he was sowing the oats; that Morgan was indicted and convicted for forcible trespass growing out of this matter, and this defendant (McManus) prosecuted him.

Both the prosecuting witness and defendant proved a good character by a number of witnesses.

His Honor charged the jury that if the defendant was off his own premises and had in his possession a pistol, the law made the fact *prima facie* evidence of concealment, and the fact being found or admitted, the burden of proof was shifted from the state to the defendant to show to the satisfaction of the jury that there was in fact no concealment; and if the defendant, being off his own premises, had the pistol concealed in his pocket or in his dinner basket, and the basket was on his lap, he is guilty, provided he had any criminal intent in so concealing it; and in passing upon the question of intent, they could consider the fact the defendant showed a disposition to use the pistol in the difficulty between Morgan and himself. The defendant excepted to the charge of the judge.

Verdict of guilty; judgment; appeal by the defendant.

Attorney-General and *Payne & Vann*, for the State.

Messrs. Covington & Adams, and *Hinsdale & Devereux*, for defendant.

MERRIMON, J. The defendant has no ground of complaint against the charge of the court. It was as favorable to him as the law would permit.

He was off his own land, on the highway, and had with him, in his possession and about his person, a pistol. Under the statute, *prima facie*, he had it concealed about his person, and the *onus* was on him to show that he did not have it concealed.

The state offered testimony tending to prove that it was con-

cealed on his person. The defendant was examined on his own behalf, and his testimony tended to prove that he did not have it so concealed, but carried it openly, where it might be easily seen by any person, and for an innocent and proper purpose. The testimony was conflicting, and it was the province of the jury to pass upon it and find the facts of the matter. The court left the whole of it fairly to the jury, and they by their verdict found that the defendant had and carried "concealed about his person" a pistol, off his own premises, as charged in the indictment.

What the court said to the jury in respect to the intent with which the defendant carried the pistol was favorable to him. The court might have told them that if the defendant had the pistol off his premises and concealed about his person, the law *presumed* the criminal intent, and it was for the defendant to rebut this presumption by testimony sufficient to satisfy them of his innocent purpose.

The defendant relied upon *State* v. *Gilbert*, 87 N. C., 527, in regard to the question of intent. That case is not like this. There, the jury found the fact in a special verdict that there was no criminal intent. Here, the jury find there was the criminal intent, this question being fairly left to them upon the evidence.

The court told the jury that in passing upon the question of intent, they might consider the evidence that the defendant showed a disposition to use the pistol. This was relevant for this purpose, and it was left to the jury to consider it with the other testimony, for what it was worth, in enabling them to pass upon the *animus*. How a man uses or manifests a purpose to use a deadly weapon is evidence of his purpose in having it concealed about his person, more or less weighty, according to the circumstances of the case.

It is insisted that the pistol, if in the basket and concealed, was not about the person of the defendant, though upon his lap. Such is not the meaning of the statute. The language is not "concealed *on* his person," but "concealed about his person";

that is, concealed near, in close proximity to him, and within his convenient control and easy reach, so that he could promptly use it, if prompted to do so by any violent motive. If the pistol was concealed in the basket, and that was in the defendant's lap, on his arm, or fastened about his person, or if placed near his person, though not touching it, this would be sufficient. It makes no difference how it is concealed, so it is on or near to and within the reach and control of the person charged.

The purpose of the statute is a wholesome one. It is to protect individuals against sudden, unexpected, dangerous and perhaps deadly violence inflicted with weapons that the assailant has concealed in some way, on, about, or conveniently near to his person, and which he may use under sudden impulse, or deliberately and unfairly against one taken unawares; and as well to conserve the public peace and safety. It must receive such reasonable construction as will effectuate this general purpose.

There is no error, and the judgment must be affirmed. It is accordingly so ordered. Let this be certified.

No error. Affirmed.

STATE v. JOHN JONES and another.

Fornication and Adultery—Witness—Husband and Wife—Divorce.

In fornication and adultery the husband of the female defendant is not a competent witness to testify *against* her, although he may have obtained a decree for divorce *a vinculo matrimonii* before the trial of the indictment. But under THE CODE, §1353, the husband or wife of the defendant is competent to testify *for* him or her in all criminal actions or proceedings.

(*State* v. *Jolly*, 3 Dev. & Bat., 110, cited and approved).

INDICTMENT for fornication and adultery tried at Spring Term, 1883, of CALDWELL Superior Court, before *Gudger*, *J.*

The indictment was against John Jones and Sarah C. Hudson. On the trial D. M. Hudson was offered as a witness for

the state, and the defendant objected to his competency, wh the following facts were made to appear:

At the time when the alleged adulterous intercourse between the defendants was charged to have been committed, and at the time the bill of indictment was found, the witness was the husband of the female defendant, and after the finding of the bill, and before the trial in this case, he had obtained in the superior court of Caldwell county a divorce *a vinculo matrimonii* from the defendant Sarah C. Hudson, for the cause of adultery on her part.

The court held the witness to be competent and he proceeded to testify that on several occasions he had seen the defendants in bed together in a store-house near his house.

On cross-examination, the witness was asked by the defendants' counsel if he had a gun, and if he shot Jones for the adultery with his wife. In reply to this the solicitor was permitted, against the objection of the defendant, to ask the witness if he was afraid of the defendant Jones.

The defendants introduced the female defendant (Sarah C. Hudson) as a witness, who testified that no acts of adultery had occurred between her and the other defendant, Jones. She was then asked why her husband had preferred the charge of adultery against her in the divorce suit. The solicitor objected to the answer, and the objection was sustained, to which the defendants excepted.

The jury returned a verdict of guilty, and there was judgment against the defendants, from which they appealed.

Attorney-General, for the State.
Messrs. R. Z. Linney and *J. F. Morphew*, for defendants.

ASHE, J. The only question of any importance presented by the appeal for our consideration is the objection to the competency of the witness, Hudson, and we are of opinion there was error in the ruling of the court below upon this point.

In *State* v. *Jolly*, 3 Dev. & Bat., 110, which was an indictment for fornication and adultery, one who had been the husband of the female defendant, but had been divorced from her on account of her adultery, was held to be *incompetent* to testify against the defendants as to the adulterous intercourse, or any other fact which occurred while the marriage subsisted.

In this case the general rule of the exclusion of the testimony of the husband and wife for or against each other is recognized and maintained. This rule, says Judge GASTON, who spoke for the court in that case, is not only based on the identity of interest which the law creates between the married pair, "but it is a rule founded on public policy, which seeks to render the relation not only one of intimate union, but of entire confidence, and this policy makes it necessary that the disability to testify against each other should in part at least remain after the connection shall have been altogether severed."

It would seem reasonable that the adultery of the wife during the coverture was such a gross betrayal of that confidence between husband and wife, which the law declares shall be kept secret and inviolable, as to constitute an exception to the general rule, but the learned judge, in the above cited case, said: "If one exception be sanctioned because from the character of the criminal act imputed, the dissent of the witness must be presumed; others may follow where the like presumption may be entertained, although not perhaps with equal confidence, and there will be danger of our having no rule capable of general and steady application."

In that case the court speaks of the dearth of authorities on the subject, and say they "must decide the question by a proper application of the principle of the rule." But we find, upon investigation, that the principle decided in this case is strongly supported by the authorities. In *Dickerman* v. *Grans*, 6 Cush. (Mass.), 308, which was a case in which the question was involved whether in an action brought by a husband against the defendant for criminal conversation with his wife, the latter,

after a divorce from the bonds of matrimony, was a competent witness for the plaintiff to prove the charge of the criminal connection, it was held she was competent. Upon the bare announcement of the proposition, it appears to militate against the decision in *Jolly's case*, but instead of doing so, it fully sustains that decision. In the former case the distinction is made, when the testimony of the husband or wife is offered *for* or *against* the other. If *for*, it is competent; but if against, it is incompetent. There, the wife was not called to testify *against* the husband, but, on the contrary, for him, and did testify in his favor and on his behalf, so that there was, there, no violation of the confidence of the relations of husband and wife, and in that very case the principle decided in *Jolly's case* is fully sustained. FLETCHER, J., delivering the opinion of the court, said: "The proposition is no doubt fully established by the authorities that, even after the dissolution of the marriage contract, the husband and wife are not in general admissible to testify *against* each other, as to any matter which occurred during the existence of that relation; and to sustain the position, he cited *Monroe* v. *Twiston*, Peake's Add. Ca., 219; *Doker* v. *Hasler*, Ry. & Mo., 198; *Barnes* v. *Camock*, 1 Barb., 392; *State* v. *Jolly*, 3 Dev. & Bat., 110; 1 Greenl. Ev., §§337, 338; *State* v. *Philips*, 2 Tyler, 374, and 1 Phil. Ev., 83, where the reason of the rule is thus stated: "This, as LORD ELLENBOROUGH has said, is on the ground that the confidence which subsisted between them at the time shall not be violated in consequence of any future separation. Thus one great source of distrust is removed, by making the confidence, which once subsists, ever afterwards inviolable in courts of law."

The distinction made in *Dickerman* v. *Grans*, between the testimony of husband or wife, *for* or *against* the other after a divorce, has been recognized by our legislature. While it has left such testimony when it is adverse, untouched, it has declared that the "husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant." THE CODE, §1353.

Our opinion is, there was error in the ruling of His Honor in the court below, in admitting the testimony of D. M. Hudson. The judgment of that court must be reversed, and a *venire de novo* awarded. Let this be certified.

Error. *Venire de novo.*

STATE v. RICHARD STEWART.

Trial by Jury, cannot be waived in state cases.

1. A trial by jury in a criminal action cannot be waived by the accused.
2. On trial of an indictment for an assault and battery, a jury trial was waived and the court, by request, found the facts and declared the law arising thereon; *Held*, that such a procedure is not warranted by law, and the case will be remanded for trial.

(*State* v. *Moss*, 2 Jones, 66, cited and approved).

INDICTMENT for an assault and battery, tried at Spring Term, 1883, of STOKES Superior Court, before *Graves, J.*

The assault is charged to have been committed with a deadly weapon. The defendant pleaded not guilty and former conviction.

A jury trial was waived, and the court was requested to find the facts, and they were found by the court to be as follows:

The defendant, within the last two years, assaulted Alexander Golding (named in the indictment) above the left eye, inflicting two wounds a half inch long, and cutting to the bone, which wounds had the appearance of being made with the knuckles of a man's hand; and in consequence of said wounds, the eye of said Golding was greatly swollen, so that he could not see out of it for three days. It was further found that there was no deadly weapon, and that within six months after said assault, a justice of the peace took final jurisdiction of the matter, and tried and convicted the defendant.

Upon these facts it was agreed that if in law the defendant is

guilty, then there should be a verdict of guilty; but if in law he is not guilty, then there should be a verdict of not guilty.

The court, being of opinion that the defendant was guilty, and that the court had jurisdiction, and the justice of the peace had no jurisdiction because of the serious injury done, directed a verdict of guilty to be entered.

Thereupon the defendant moved in arrest of judgment for defects in the indictment, and especially that the bill did not set out that there was serious injury done, and did charge that the assault was made with a deadly weapon to the jurors unknown, and omitted any name or description of such weapon. The motion was sustained; judgment arrested; appeal by the state solicitor.

Attorney-General, for the State.
No counsel for the defendant.

ASHE, J. It is a fundamental principle of the common law, declared in "*Magna Charta*," and again in our Bill of Rights, that "no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court." Art. I, §13. The only exception to this is, where the legislature may provide other means of trial for petty misdemeanors with the the right of appeal—Proviso in same section. This is not one of the petty misdemeanors embraced in the proviso; and if it was, no such means of trial as that adopted in this case has been provided by the legislature. The court here has undertaken to serve in the double capacity of judge and jury, and try the defendant without a jury, which it had no authority to do, even with the consent of the prisoner. 1 Bish. Cr. Law, §759.

The action of the court in this respect was in violation of the constitution, and in subversion of a fundamental principle of the common law. *State* v. *Moss*, 2 Jones, 66.

There is error. The case must be remanded to the superior

court of Stokes county, that it may be proceeded with by a jury trial according to the regular practice of the court.

Error. Reversed and remanded.

STATE v. STEPHEN BAREFOOT and others.

Forcible Trespass—Judge's Charge—One cannot be deputed a special officer to execute civil process.

1. Forcible trespass is the taking personal property by force, from the possession of another, in his presence; and it is not an essential element of the offence that he should oppose the seizure, if he be overawed by the circumstances of the occasion. If the act be done against the will of the possessor, whether he expressly forbid the taking or not, the offence is consummated.
2. The charge of the judge in reference to the effect of the forbiddance by the wife of the prosecutor in his presence, is not erroneous, under the facts of this case.
3. One of the defendants was *deputed a special officer* to execute the civil process, alluded to in the opinion, but it did not justify him in making the seizure, under the ruling in *Marsh* v. *Williams*, 63 N. C., 371, and the case there cited.

(*State* v. *Sowls*, Phil., 151; *State* v. *Pearman*, *Ib.*, 371; *State* v. *Armfield*, 5 Ired., 207, cited and approved).

INDICTMENT for forcible trespass tried at Spring Term, 1883, of COLUMBUS Superior Court, before *MacRae, J.*

The indictment is against three defendants, and in substance as follows:

The jurors, &c., present that defendants unlawfully, forcibly, &c., and with a strong hand, did take and carry away, out of the actual possession of J. F. Rushing, a certain hog, against the will of said Rushing, and D. C. Rushing, wife of said J. F. Rushing, the said J. F. Rushing being then and there personally present, forbidding the said defendants so to do, to the great

damages, &c. The facts are stated in the opinion. Verdict of guilty; judgment; appeal by the defendants.

Attorney-General, for the State.
Messrs. French & Norment, for defendants.

SMITH, C. J. The bill of indictment charges the defendants with the forcible seizure and removal of a hog, in possession of the prosecutor, and against his will, he, with his wife, being personally present and forbidding the same.

The prosecutor's testimony, in conflict with that of two of the defendants, examined on their own behalf, was, in substance, that he met the three defendants in a cart going towards his premises, about one hundred yards distant therefrom, when one of them mentioned that he had a warrant to take the hog, which, at the instance of the witness, was read over to him, but in a manner that it was not understood, when the witness forbade the proposed seizure. Thereupon, another one of the defendants declared that he "would have the hog or skin the witness' d—d head"; that the prosecuting witness then returned to his house, accompanying the defendants, and when they arrived at the pen, the wife of the witness came out, and in the hearing of her husband, also forbade the taking, he remaining silent; and that the hog was then caught and carried away.

The concurring testimony of the defendants examined was, in effect, that the prosecutor, on hearing the warrant of the justice of the peace read, made no objection to its being executed, accompanied them back to his house, and upon his wife's forbidding them, told her that the defendants had a warrant, and to let them proceed and take the hog.

The warrant was produced, and it is only necessary to say that it conveyed no authority to the defendants deputized by the justice to execute it, and is not relied on as furnishing a justification for the seizure.

The defendants' counsel asked the court to give these instructions to the jury:

1. The defendants did not use such force, after the prosecutor forbade them to take the hog, as is necessary to constitute an indictable offence.

2. The forbidding by the wife in her husband's presence and without response from him, did not make a criminal act nor sustain the charge in the bill of indictment.

The instructions were refused, and the court, after recapitulating the testimony of the witnesses, charged the jury that the opposition of the prosecutor to the defendants' avowed purpose to take possession of the hog by force, made known to them where they met, was, under the circumstances, a continuous resistance to their action, and it was not necessary for him to reiterate his words of prohibition; and that when the wife again forbade the taking in her husband's presence and hearing, and without any expression from him of dissent, his acquiescence would be deemed a recognition of her assumed agency to speak for him, and equivalent to his own utterance of her words.

The sole inquiry before the jury was, whether the force used by the defendants was sufficient to make the trespass a criminal and indictable act, and under the directions the defendants were found guilty, and judgment pronounced, from which they appeal.

"Forcible trespass," says PEARSON, C. J., in *State* v. *Sowls*, Phil., 151, "is the taking by force the personal property of another," to which definition READE, J., adds the words, "in his presence." *State* v. *Pearman*, *Ib.*, 371. The offence is described with more particularity by MANLY, J., in his charge to the jury, approved on appeal in this language: "It was not a necessary constituent of such an offence that the individual whose rights are violated should oppose the seizure or taking away his property by force, provided he was overawed and prevented from doing so by a superior force, and a disinclination to engage in a breach of the peace; nor was it necessary that he should in express language forbid the trespassers, provided the jury be of

opinion that it was against his will; that whenever property is taken by a superior force from the presence of one who is in peaceable possession, and contrary to the will of the possessor, the offence is consummated." *State* v. *Armfield*, 5 Ired., 207.

Nor do we see how the charge of the court, that the act of the wife was equivalent to the act of the husband in resisting the aggression upon his rights of property and possession, could tend to mislead the jury in withdrawing their minds from the testimony of the defendants. The instructions asked and the instructions given are upon the assumed correctness of the prosecutor's testimony, should the jury accept his verson of the transaction. None seem to have been asked or given upon the hypothesis of the belief of the defendants' testimony, or, if given, no objection is made to their correctness.

The whole matter seems to have been fairly left to the jury, and the case shows no assignment of error except in such directions as were predicated upon the testimony of the prosecutor, the credit due to which was left to the jury to determine.

There was no error. Let this be certified.

No error. Affirmed.

STATE v. T. A. LYON and another.

Libel, evidence in—Official Character, proof of—Joint Trial, challenges to jury in—Witness.

1. The matter set out in the indictment in this case is libellous, and in order to the justification of the defendant, he must show that the entire charge imputed to the prosecutor is true.
2. Proof of the general bad character of an officer in other matters of which he had taken cognizance, will not be received to establish the truth of a libellous charge in reference to a particular matter.
3. The official character of one may be proved by parol in an issue between other parties. It is necessary to show the record of his appointment

only in proceedings where the officer undertakes to justify his own conduct.

4. Upon a joint trial, where each defendant had the opportunity afforded by the tender of the jurors to make his own challenges; *Held*, that the judge properly refused to allow the jurors forming the panel to be withdrawn, and again tendered to one of the defendants to enable him to use his remaining challenges.

5. A witness may be allowed to refresh his memory by reading a paper-writing or having the same read over to him.

(*Burke* v. *Elliott*, 4 Ired., 355; *Swindell* v. *Reeves*, 7 Jones, 575; *Norfleet* v. *Staton*, 73 N. C., 546, cited and approved).

INDICTMENT for libel tried at Fall Term, 1883, of GUILFORD Superior Court, before *MacRae, J.*

The alleged libellous matter is set out in the bill of indictment according to its tenor, the substance of which is as follows: A man named Dean attempted to commit rape upon a little girl; a warrant was issued for his arrest, and he was carried before Joseph A. Davis (a justice of the peace and the prosecutor); 'Squire Davis, after his style of dispensing justice, converts the case into an assault and battery and discharges the offender of all decency and law, upon payment of costs, which was thirty dollars. We presume that Mr. Davis had an eye to the costs; that if this grave offender was bound over or committed to jail, he (Davis) would lose a handsome fee, and accordingly rendered his decision to suit his own convenience.

The exceptions taken upon the trial, and the rulings of the judge thereon, are set out in the opinion. Verdict of guilty; judgment; appeal by defendants.

Attorney-General, for the State.
Messrs. Fuller & Snow and *J. N. Staples*, for defendants.

SMITH, C. J. The defendants, of whom one is editor and the other publisher of a weekly newspaper called "*The Kernersville News*," are charged with publishing therein the defamatory matter set out in the indictment, in which malversation and cor-

ruption in the administration of his office as a justice of the peace are imputed to one Joseph A. Davis, while acting as such. The matter contained in the article is clearly libellous, and tends to expose the officer thus charged to public hatred and contempt.

1. At the trial four jurors were peremptorily challenged, without saying on behalf of which defendant, when some controversy arising out of this uncertainty, the court acceded to the suggestion of their counsel that the challenges should be charged to the defendant Lyon, on whose behalf they were intended to be made, and allowed the other defendant the same number. After one other peremptory challenge, a full jury was obtained, and thereupon counsel for defendant Edwards asked that the jurors on the panel be again recalled and tendered, in order to his having an opportunity to exercise his unexhausted right of peremptory challenge. The jurors had been before separately challenged for cause, and each one examined by defendants' counsel. The court refused to allow the jurors forming the panel to be withdrawn and again tendered, and to this refusal the defendants excepted.

It certainly cannot be necessary to cite authority to show that the defendant had no right, after foregoing the opportunity afforded by the tender of each juror to make his peremptory, as well as a challenge for cause, to require the breaking up the panel to enable him to use his remaining challenges. It was a matter resting in the sound discretion of the judge, and which he properly refused to exercise in the absence of any evidence or suggestion even, that the jurors were not all of them competent and impartial.

2. A witness for the state was asked whether he did not, in June, 1882, see the libellous article in the *News*, which was at the same time read over to him. This was objected to by counsel for defendants, as also the response intended to be elicited. The objection was overruled. The issue containing the article was examined by the witness, and he, using it to refresh his memory, allowed to answer the question. Upon his cross-examination,

the witness said he had no recollection of the article apart from the paper, but he did remember that it appeared early in the month of June.

The question is not, in our opinion, leading; no more so when the article is read over to the witness, than if he had taken the paper and read it himself. Indeed, this is the ordinary practice in calling the attention of the witness to a contemporary memorandum to revive his memory of the transaction or matter. Nor was the testimony rendered incompetent by what was said upon the cross-examination. It is not necessary that the mind should be able to recall the distinct facts, when the witness has such assurance of them as enables him to testify.

Among the classes into which Mr. GREENLEAF distributes this species of evidence, is one in which the witness fails to recognize the writing, nor does it awaken his memory; yet, knowing the writing to be genuine, his mind is so convinced as to be enabled thereby to swear positively to the fact. 1 Greenl. Ev., §437.

3. The clerk of the court was permitted, after objection, to testify that Davis was an acting and recognized justice of the peace of Guilford county, the defendant insisting that the only competent proof of his official character was the record of his appointment.

It is well settled that such evidence is admissible in an issue between other parties, and the appointment itself is only required to be shown in a proceeding where the officer undertakes to justify his own conduct, and from his authority to do the act drawn in question. In reference to third persons, the official capacity of the office is *prima facie* shown, by his recognized acts as such. This rests upon abundant authority. *Buryman* v. *Wise*, 4 Term R., 366; *Burke* v. *Elliott*, 4 Ired., 355; *Swindell* v. *Reeves*, 7 Jones, 575; *Norfleet* v. *Staton*, 73 N. C., 546; 1 Whar. C. L., §653; 2 *Ib.*, §§2533, 2554.

4. Davis was himself examined for the state, and upon cross-examination, testified to other of his official acts unconnected with those mentioned in the libel.

The defendants then proposed to inquire, from a witness of their own, into other alleged official misconduct of the justice, and also into his general character as an officer, distinct from his personal moral character, all of which was excluded by the court.

There is no error in rejecting the offered evidence. The sole inquiry before the jury was as to the malicious charge contained in the libel, and its truth. It was quite immaterial whether the justice had been guilty of a corrupt use of his official authority in other transactions, or what his general reputation was in this regard. As a witness, it was competent to impeach his veracity, and this right was not denied when the question was put to a witness; but unless the *charge made in the libellous article was shown to be true*, and thus justify the publication, other misconduct would be no defence to the indictment, and proofs thereof were wholly irrelevant.

This, unlike a civil action, does not admit evidence in mitigation, except where after verdict judgment is to be pronounced. The only issue before the jury was as to the malicious character of the publication and the justification offered, and their verdict only settles those questions. Then, too, the entire charge must be justified, and not parts of it, to warrant an acquittal.

There is no error. Let this be certied that the court may proceed to judgment.

No error. Affirmed.

STATE v. JAMES C. LUMSDEN and another.

Lottery.

The defendant sold to customers small boxes of candy, of trifling value, for the chance or opportunity of designating one of certain pictures, conveniently arranged in his place of business, behind some of which were small sums of money, and behind others a card on which was the letter "C," the

purchaser getting either the money or the card, accordingly as he may select; but if he got a card, he became entitled to another box of candy; *Held,* to constitute a lottery, and to be in violation of the statute. THE CODE, §1047.

(*State* v. *Bryant,* 74 N. C., 207, cited and approved).

INDICTMENT for keeping a lottery, tried at May Special Term, 1883, of NEW HANOVER Criminal Court, before *Meares, J.*

The jury rendered a special verdict, the facts of which are sufficiently set out in the opinion of this court, and thereupon His Honor held the defendants, Lumsden and Rhodes, to be guilty; judgment; appeal by the defendants.

Attorney-General, for the State.

No counsel for the defendants.

MERRIMON, J. A *lottery,* within the meaning of the statute of this state forbidding lotteries (Bat. Rev., ch. 32, §69), is a scheme, devise or game of hazard, whereby for a smaller sum of money, or other thing of value, the person dealing therein by chance or hazard, or contingency, may or may not get money or other thing of value, of greater or less value, or in some cases no value at all, from the owners or managers of such lottery. 2 Bish. Cr. L., §§945, 946, and notes.

It appears from the facts found in the special verdict in the case before us, that the defendants carried on the business whereby they would sell to their customers small boxes of candy of trifling value. This was the consideration for the *chance* or opportunity to designate, with a cue or slender stick, one of a number of pictures of uniform size set in a line on the wall across the counter, behind some of which were small sums of money, various in amount, and behind others of them were cards on which was the letter "C." If the customer happened to designate a picture with money behind it, he got the money; if he happened to designate a picture with a card with the letter "C" on it behind it, he became entitled to recover another box

of candy similar to the one he had purchased. The customer did not know which of the pictures on the line the money was behind, nor the amount, nor did he know which of them the card with the letter "C" on it was behind, until he had exercised his right to designate one of the pictures at random. It was purely hazard; whether he got money was contingent; whether he got a larger or smaller sum was contingent; whether he got another package of candy or not was entirely left to chance.

We cannot doubt that the facts found in the verdict constitute the offence charged in the indictment. A scheme called "*a gift enterprise*," and so licensed in this state, having features in some respects strikingly like those in this case, was held to be a lottery under the statute. *State* v. *Bryant*, 74 N. C., 207.

No error. Affirmed.

STATE v. JOHN W. BRITTAIN.

Towns and Cities—Retailing.

1. Town ordinances must be subordinate to and harmonize with the general law of the state, unless special powers are conferred upon the town by its charter.
2. Therefore, in the absence of special authority over the subject, *it was held*, that an ordinance prohibiting the sale of liquor within the corporate limits of a town is void, as the general law allows retailing upon obtaining license.
3. *Quaere*, whether the legislature can authorize a town to make an offence against the state a separate offence against the town.

(*Hammond's Case*, 76 N. C., 33; *State* v. *Langston*, 88 N. C., 692, cited and approved).

CRIMINAL ACTION tried at Spring Term, 1883, of HENDERSON Superior Court, before *Avery, J.*

This was an appeal by the defendant from a judgment of the

mayor of the town of Hendersonville, imposing upon the defendant a fine of fifty dollars for the violation of a town ordinance, which is as follows:

"No. 25. That to sell spirituous, vinous or malt liquors within the corporate limits of the town of Hendersonville is declared a nuisance, and any person who may be guilty of said offence shall, upon conviction before the mayor, forfeit and pay a fine not to exceed fifty dollars, or be imprisoned in the lock-up in said town for not more than twenty days."

The defendant moved to quash the warrant issued by the mayor for his arrest, but it is unnecessary to set it out here, as the decision of this court is upon another point involved in the case. The appeal, however, is taken by the state solicitor from the ruling of the judge in granting the motion to quash.

Attorney-General, for the State.
Mr. J. C. L. Harris, for defendant.

MERRIMON, J. Municipal ordinances and by-laws must always be subordinate to and harmonize with the general laws of the state, unless in cases where special powers are conferred upon the municipality to pass ordinances inconsistent with the general law. Nor can municipalities, by ordinances, create offences known to the general laws of the state, and provide for the punishment of the same, unless they have special authority so to provide conferred either by some general or special statute. Hence, when an offence is indictable in the superior court, a city or town ordinance, making the same act, or substantially the same act, an offence punishable by fine or imprisonment, such ordinance is void. It may be that the legislature has power to authorize a town to make an offence against the state a separate offence against the town, but this could be done only by an express grant of authority. *Town of Washington* v. *Hammond*, 76 N. C., 33; *State* v. *Langston*, 88 N. C., 692.

The statutes of this state make it indictable to sell spirituous

liquors by a measure less than a quart without first having obtained a license so to do. THE CODE, §§ 1076, 3701.

These statutes embrace and apply to "the town of Hendersonville."

It appears from the record that that town has an *ordinance* that prohibits within its corporate limits the sale of "spirituous, vinous and malt liquors"; declares such a sale a *nuisance*, and that all persons offending against it shall be punished by a fine, or imprisoned in the town prison.

Now, "the town of Hendersonville" has no special power conferred upon it by law to prohibit the sale of liquors; it cannot do so, certainly as to retailing spirituous liquors by a measure less than a quart, by virtue of its general powers, because the general laws of the state have provided that persons may so retail there, first having obtained a license so to do, and made it indictable to retail without a license.

The ordinance in question, first, prohibits a business allowed and regulated by the general law of the state; secondly, it creates an offence and provides the punishment therefor, embraced by an offence punishable by the like general law. It is plainly inconsistent with and undertakes to supersede a law of the state. It is therefore void.

It may be said that if the ordinance is void as to spirituous liquors, it is not so as to vinous and malt liquors. We are not called upon to decide that question. The proof was that the defendant sold liquors, and it must be taken that he sold spirituous liquors. Most generally the term "liquors" implies spirituous liquors; and besides, if the prosecutor insisted that the defendant sold vinous and malt liquors, the *onus* was on him to show the fact.

The warrant is informal, but it is unnecessary to decide the question raised as to its validity, as the exception we have considered disposes of the case.

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

No error. Affirmed.

STATE v. ROBERT TAYLOR.

Liquor Selling—Judge's Charge.

Indictment for liquor selling: Witness testified that he applied to defendant for liquor; defendant said he could not get it unless he had a bottle; witness got a bottle and gave it to defendant, together with a small sum of money; defendant went off, and in a short while returned with a bottle of whiskey, and said he charged witness a small sum for getting it, which was paid; *Held*, error in the court to charge the jury that, if they believed the evidence, the defendant was guilty, without further telling them to consider the *bona fides* of the transaction—the purchase by defendant as agent of the witness.

APPEAL from a justice's court, heard at Fall Term, 1883, of ORANGE Superior Court, before *MacRae, J.*

This was a criminal proceeding instituted in the court of a justice of the peace, in which the defendant was charged with selling spirituous liquor within four miles of Chapel Hill, in violation of the provisions of the act of 1879, ch. 232, and the act of 1880, ch. 45.

On the trial in the superior court, John Perry, a witness for the state, testified that in the village of Chapel Hill, within the last two years, he went to the defendant and asked him if he could get him some liquor. The defendant said he could not unless witness had a bottle. Witness got a bottle and carried it to the defendant, and gave him thirty cents; and the defendant then went off, and on his return brought the witness a pint of whiskey. He was gone not more than fifteen minutes, and he said he charged the witness five cents for getting the whiskey, and the witness paid him the five cents.

The state rested its case, and the defendant introduced no testimony.

The judge instructed the jury that if they believed the evidence, the defendant was guilty. The defendant excepted.

Verdict of guilty; judgment; appeal by the defendant.

Attorney-General and *John Manning*, for the State.
Mr. James B. Mason, for defendant.

ASHE, J. The instruction given to the jury, we think, is erroneous.

The facts proved by the testimony of the witness, Perry, were susceptible of two constructions: either that the transaction of obtaining the spirits was a subterfuge, and the defendant was the real vender of the spirits, or he acted in good faith as the agent of the witness in purchasing it for the witness. If the former was the nature of the transaction, then the defendant is guilty; but if the latter, then he is not guilty. The court should have left it to the jury to say how that was.

But when His Honor instructed the jury "that if they believed the evidence, the defendant was guilty," it took away from the jury the right to consider the *bona fides* of the transaction, which, in our opinion, was, upon the evidence, a proper subject for their consideration.

There is error, and the judgment of the court below is reversed. Let this be certified to the superior court of Orange county, that further proceedings may be had according to law.

Error. *Venire de novo.*

STATE v. ISAAC WALLIN.

Costs of Prosecution, not a debt—Liability of Defendant for Costs of his own Witnesses.

1. The "costs of prosecution" are those incurred in the conduct of the prosecution, and do not include the costs incurred by defendant in resisting the prosecution.
2. Where a defendant is taxed with the costs of prosecution, a witness, though summoned by the defendant and examined in his defence, has no right to have his ticket for attendance allowed in the bill of costs. It is a personal

debt of the defendant, the payment of which the witness may enforce by suing out execution in the cause.

3. But costs of prosecution against a prosecutor (upon acquittal of the accused or *nolle prosequi* entered), or against the accused upon a verdict of guilty, or a fine imposed, does not constitute a debt within the meaning of article one, section sixteen, of the constitution, and hence the defendant may be imprisoned for non-payment of the same.

(*State* v. *Manuel*, 4 Dev. & Bat. 20; *State* v. *Cannady*, 78 N. C., 539; *Collins* v. *Jones*, 3 Hawks, 25; *Office* v. *Taylor*, 1 Dev., 99; *Office* v. *Allen*, 7 Jones, 156; *Office* v. *Huffsteller*, 67 N. C., 449; *Office* v. *Lockman*, 1 Dev., 146; *Office* v. *Wagoner*, 4 Ired., 131; *Sheppard* v. *Bland*, 87 N. C., 163, cited and approved).

APPEAL from an order made at Spring Term, 1883, of BUNCOMBE Superior Court, by *Avery, J.*

The defendant and one Myers, after being tried and convicted of an affray in the inferior court of Buncombe, were adjudged to pay the costs of the prosecution and a fine of five dollars each. The judgment was afterwards, during the term, suspended as to the fine upon payment of the costs of the prosecution.

A witness, who had been summoned by the defendant and examined in his defence, had proved and filed his ticket with the clerk, and the charge was in the bill of costs. Before the bill was approved, the defendant paid all the costs except that due this witness, and moved for his discharge from the custody of the sheriff, to whom he had been committed. The court denied the motion and ruled that the amount due the witness was part of the costs of prosecution, upon the payment of which, and not before, the defendant was entitled to his discharge.

Upon his appeal to the superior court, the ruling in the inferior court was affirmed, and from this judgment the defendant appealed to this court.

Attorney-General, for the State.

Mr. F. A. Sondley, for the defendant.

SMITH, C. J. We are clearly of opinion that the costs of the prosecution, devolving upon the accused in case of conviction, and for which he may be committed to the custody of the sheriff, are such only as were incurred in the conduct of the prosecution and making it effectual in a verdict. Those are not included which the defendant incurred in resisting the prosecution and defending himself from the criminal charge. Such costs are personal to himself, and he, when found guilty, must provide for their payment. This is the obvious sense in which the term is used in the statute when the successful party recovers costs—that is, his costs against the other. THE CODE, §§739, 740, 737, 875, 1204, 1211.

For then, when adjudged against the prosecutor when the prosecution terminates in a *nolle prosequi*, acquittal or arrest of judgment, or against the accused when it terminates in a verdict of guilty, either party may be put in the sheriff's custody until the costs are paid or he discharged according to law. THE CODE, §738; *State* v. *Manuel*, 4 Dev. & Bat., 20; *State* v. *Cannady*, 78 N. C., 539.

These charges do not constitute a *debt* within the meaning of the clause in the constitution for which imprisonment is forbidden (Art. I, §16), but are in the nature of a penal infliction, punitory in character and purpose, as is a fine imposed upon one found guilty of crime.

The liability of a person for his own costs is a mere indebtedness which may be enforced by execution sued out in the cause, but for which he cannot be imprisoned. *Collins* v. *Jones*, 3 Hawks, 25; *Officers* v. *Taylor*, 1 Dev. 99; *Clerk's Office* v. *Allen*, 7 Jones, 156; *Clerk's Office* v. *Huffsteller*, 67 N. C., 449; *Superior Court Office* v. *Lockman*, 1 Dev., 146; *The Clerk of Davidson County Court* v. *Wagoner*, 4 Ired., 131; *Sheppard* v. *Bland*, 87 N. C., 163; Rev. Code, ch. 102, §24.

The three last cases directly sustain the proposition that execution may issue against a party for his own costs, and even when he has recovered them against an adversary whose insolvency prevents the collection of the money from him.

There is error in the ruling of the superior court, and it is reversed. Let this be certified.

Error. Reversed.

STATE v. JOHN HORTON.

Prosecutor, order taxing with costs—Judgments, irregular and erroneous—Excusable Negligence.

1. It is error in the superior court of one county to tax the prosecutor in a criminal action in that court with costs of prosecution in a like action pending in another county.
2. The court cannot tax the prosecutor with costs where the grand jury ignore the bill of indictment.
3. A motion to set aside a judgment, taxing the prosecutor with costs, upon the ground of excusable negligence, must be made within twelve months after the judgment is rendered. The presence of the prosecutor is not essential to the validity of the judgment.
4. An irregular judgment may be set aside at the term ensuing its rendition, but an erroneous judgment must be corrected by appeal or *certiorari*.

(*Wolfe* v. *Davis*, 74 N. C., 597; *State* v. *Cockerham*, 1 Ired., 381; *State* v. *Owens*, 87 N. C., 565, and case cited, approved).

MOTION to set aside a judgment taxing the prosecutor with costs, heard at Spring Term, 1883, of BURKE Superior Court, before *Gudger, J.*

At spring term, 1880, an indictment was pending in the superior court of Burke county against A. W. Purley for the offence of perjury, and this defendant (Horton) was marked upon the indictment as prosecutor. At that term, the case was removed to the superior court of Watauga county for trial. At the spring term 1880 of that court there was a mistrial, because of some defect in the indictment, and the defendant was recognized to appear at fall term, 1880, of Burke superior court,

and at that term a new bill of indictment was sent to the grand jury, the defendant being marked on the bill as prosecutor. This bill the grand jury *ignored*. Thereupon, in the absence of the defendant, the court gave judgment against him as prosecutor for the costs of the prosecution in that case, and likewise, against him as prosecutor for the costs of the prosecution in the indictment then pending in Watauga county. Afterwards, a *nolle prosequi* was entered in the latter prosecution. An execution issued against the defendant for the costs. It appears that he had no actual knowledge of this execution, until afterwards, when he was served with a *capias* returnable to the spring term, 1883, of Burke superior court, and when for the first time he had actual knowledge of the judgment against him.

At the spring term, 1883, of Burke superior court, the defendant moved to set aside the judgment entered against him at the fall term, 1880, for the costs of the said prosecution. The court denied the motion, and the defendant appealed.

Attorney-General, for the State.
Mr. J. F. Morphew, for defendant.

MERRIMON, J. It was error in the superior court of Burke county to tax the prosecutor in a criminal action in that court with the costs of a like action wherein he was prosecutor pending in the superior court of Watauga county. If there was a criminal action and grounds therein in the latter court for taxing the defendant as prosecutor with the costs of prosecution, the order and judgment ought to have been made in that court, not in the superior court of Burke county.

It is settled, also, that the court cannot order the prosecutor to pay the costs of prosecution when the grand jury returns the bill of indictment "not a true bill." *State* v. *Cockerham*, 1 Ired., 381. The law, as applicable to this case, has not been changed since that decision was made.

The court, however, properly refused to grant the motion.

The judgment was entered at the fall term, 1880, and more than twelve months had elapsed before the motion was made, so that the court could not set aside the judgment because of "mistake, inadvertence, surprise or excusable neglect."

Nor could the court set it aside because it was an irregular judgment. An irregular judgment may be set aside at a term subsequent to that at which it was given (*Wolfe* v. *Davis*, 74 N. C., 597), but the judgment in this case was not irregular. The defendant was prosecutor; he was properly in court. The law presumes he was present and took cognizance of all that was done in and about the prosecution and the judgment against him. It was his fault and neglect if he were not actually present. His actual presence was not necessary to enable the court to give judgment, and his presumed presence was sufficient. *State* v. *Owens*, 87 N. C., 565; *State* v. *Spencer*, 81 N. C., 519. The court had jurisdiction and authority to grant the judgment.

As it appears in the record before us, the judgment was erroneous, and such a judgment cannot be set aside at a subsequent term of the court because of such rulings as render it simply erroneous. *Wolfe* v. *Davis*, *supra*. The defendant, if there were such errors as he suggests, ought to have appealed in due time from the judgment taxing him with the costs. As he did not, if there was sufficient excuse for his failure to do so, and he can make a proper case, his remedy is to apply for the writ of *certiorari*, to bring his case to this court, to the end that such errors as may be found to exist may be corrected.

There is no error, and the judgment must be affirmed. It is so ordered. Let this be certified.

No error. Affirmed.

STATE v. WESTERN NORTH CAROLINA RAILROAD COMPANY.

Corporations—Railroads—Process to compel appearance to answer an Indictment.

The proper mode of bringing into court a corporation charged with a criminal offence is by service of a copy of the summons upon one of its officers or agents. The acts of assembly in reference to service of process in civil and criminal cases reviewed by SMITH, C. J.

(*State* v. *Lane*, 78 N. C., 547; *State* v. *Hinson*, 82 N. C., 540; *State* v. *Pollard*, 83 N. C., 597; *State* v, *Powell*, 86 N. C., 640, cited and approved.)

INDICTMENT for obstructing a public highway, tried at Fall Term, 1883, of MADISON Superior Court, before *Gudger*, *J.*

The offence charged is that the defendant company, in constructing its line of road, used the public highway from the Tennessee line to Warm Springs, in Madison county, and thereby obstructed the same, so that the citizens of the state cannot pass along or over it with their vehicles, &c., and that the defendant did not construct another road as good and convenient, &c. The solicitor of the state appealed from the ruling of the judge upon the question which is the basis of the decision of this court, the facts in reference to which are sufficiently set out in its opinion.

Attorney-General for the State.

No counsel for the defendant.

SMITH, C. J. A copy of the bill of indictment having been delivered by the sheriff to a local agent of the defendant company, without process of any kind in his hands, and the company failing to appear and answer the charge at the next term of the court, the solicitor moved that a plea of "not guilty" be entered and the accused put on trial. The motion was refused, and the solicitor, on behalf of the state, was allowed to appeal from the ruling to this court.

It has been too often declared to need reiteration that no appeal lies from any ruling of the court in the conduct of a criminal prosecution until its determination by a final judgment, which, unreversed, puts an end to the cause, and only by the state in a few specified cases, to no one of which does this belong. *State* v. *Lane*, 78 N. C., 547; *State* v. *Hinson*, 82 N. C., 540; *State* v. *Pollard*, 83 N. C., 597; *State* v. *Powell*, 86 N. C., 640.

The ruling of the court, that the defendant had not been brought into court, left the cause to be proceeded with as if no action to that end had taken place, and the indictment was still depending. The appeal must therefore be dismissed.

But it is not improper that we should express an opinion as to the proper mode of bringing into court a corporation charged with a criminal offence—the point intended to be presented, and one of practical importance in the administration of the criminal law.

At common law this was done by the issue of a summons and its service upon the principal or head officer of the company, and if it did not appear, as it only could appear, by a duly constituted attorney, a *distringas* was awarded, under which its goods and lands were seized to compel an appearance. 1 Tidd. Pr., 116; 2 Sellon Pr., 148; Ang. & Am. Corp., §637; 1 Whar. C. L., §89.

But a method of procedure is prescribed by statute in this state, as we presume it has been in most if not all of the others, which dispenses with that furnished by the common law, if not itself obsolete, to be found in C. C. P., §82, and in THE CODE, §217.

It is there provided that the summons issued by the clerk of the superior court shall be served by delivering a copy thereof, "if the suit be against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, a director or managing or *local agent* thereof;" the italicized words, as well as the superadded definition of them, having been introduced as an amendment by the act of March 16th, 1875.

If it be a foreign corporation, service must be made upon its president, treasurer or secretary found within the state, and is sufficient when made upon the other corporate officers and agents, when it has property in the state or the cause of action arose therein, or the plaintiff resides in the state. These provisions apply to corporations generally, but there are others applicable specially to insurance companies, unnecessary in this connection to be noticed. Acts 1883, ch. 57.

The enactment from which we have recited, though primarily intended as a regulation in the institution of a civil action, is equally appropriate in a criminal action, and its terms are sufficiently comprehensive to embrace both. The former initial step was by summons and not by *capias*, as was necessary when the offender was a natural person; and this from necessity, as a corporation has no bodily existence capable of being taken into custody by the officer, and could only be reached by a mandate directed to it and served upon its principal officer.

A corporation having existence only as a legal conception, and incapable of being present in court except as represented by attorney, would seem, from its nature, to be subject to the same process in criminal and civil actions, and we see no reason why it should not be.

We find this view taken by the supreme court of New Hampshire in *Railroad* v. *State*, 32 N. H., 215, where it expressly decided, under legislation essentially similar to our own in this feature, that a summons is the only process that can issue against a corporation to compel it to appear and answer to an indictment, the common law not being there in force.

In our case no summons issued, and the delivery of a copy of the bill of indictment to its local agent could have no more effect than a delivery of a copy of a complaint in a civil action would have, without an accompanying mandate from the court, and in both, the act would be inoperative and meaningless for any legal purpose.

If the appeal could be entertained, we should have no hesitation in affirming the ruling of the judge in his refusal to proceed with the trial, until it is made to appear that the proper process has been served on the defendant.

The appeal is dismissed, and this will be certified, that the cause may proceed in the court below where it is pending.

PER CURIAM. Appeal dismissed.

STATE v. W. T. RAY and another.

Jurisdiction of Superior Court in cases of Assault.

The superior court has jurisdiction under its general power to try assaults where no deadly weapon is used or serious damage done, in all cases where it has jurisdiction of the offence *charged*. After thus gaining jurisdiction, it will proceed with the case, even though the proof should show the offence to be less in degree than that charged.

(*State* v. *Reaves*, 83 N. C., 553, cited and approved).

INDICTMENT for assault and battery tried at Fall Term, 1883, of MADISON Superior Court, before *Gudger, J.*

The indictment charged that the assault was committed upon one James Dover "with a certain deadly weapon, to-wit, a chair, knife and pistol."

The jury found a special verdict, which is substantially as follows: That the defendant struck Dover four blows with a stick; that said stick was not a deadly weapon and no serious damage was done; that on the same occasion the other defendant struck Dover one blow with his fist, no serious damage being done; that no justice of the peace, or court other than this, has attempted to exercise jurisdiction of this offence, and that this prosecution was begun less than six months since the commission of the alleged assault.

Thereupon, the judge being of opinion that the defendants

were not guilty, directed a verdict of not guilty to be entered, and from this ruling the state solicitor appealed.

Attorney-General, for the State.
No counsel for defendants.

MERRIMON, J. The indictment charges an offence of which the superior court had jurisdiction. It turned out, however, on the trial, that the proof was that the defendants were guilty of the assault, but not with a deadly weapon. The defendants are guilty of an offence inferior to that charged, and of which a justice of the peace had original jurisdiction. This inferior offence is of the same nature as that charged, and the superior court having gained jurisdiction, will continue to hold it, and proceed to judgment.

It was not the intention of THE CODE, §892, defining and establishing the jurisdiction of justices of the peace in certain cases, to arrest the jurisdiction of the superior court where it turned out on the trial that an offence of the same nature as that charged in the indictment, but of less degree, was proved. The court having gained jurisdiction, will continue to hold it in such a case, because it is a court of general jurisdiction, and has jurisdiction of such inferior offences, except as the same is abridged or suspended by the express words of the statute, or by necessary implication. This is not so as to the jurisdiction of a justice of the peace, because his jurisdiction is not general, but a limited one. This is settled. *State* v. *Reaves*, 85 N. C., 553.

Upon the special verdict, the court ought to have directed a verdict of guilty to be entered. There is error, and the judgment must be reversed, the verdict of not guilty upon the special verdict set aside, and the verdict of guilty entered, and further proceedings had according to law. Let this be certified.

Error. Reversed.

STATE v. HENRY KENNEDY.

Practice—Certiorari.

This court will not pass upon an exception to the charge of a judge, in the absence of a statement of the evidence to which it applies, and in such case a writ of *certiorari* will be granted to supply the same.

(*State* v. *Summey*, 2 Winst., 108; *State* v. *Dunlop*, 65 N. C., 288; *State* v. *Jones*, 87 N. C., 547; *State* v. *Randall*, 88 N. C., 611, cited and approved).

INDICTMENT for murder tried at Spring Term, 1883, of LENOIR Superior Court before *McKoy, J.*

The writ of *certiorari* is ordered by this court to obtain a statement of facts upon which the charge of the presiding judge was based.

The case sent up states there was no exception to the rulings upon the evidence or to the charge to the jury; that the jury, after being out some time, came into court, and, upon being asked if they had agreed upon a verdict, said they had not; and one of the jury, in presence of the prisoner and his counsel and in open court, asked "how far would a man have to run in the street before he would be pressed to the wall?" The judge replied, "that is a question of fact for your common sense, under the law as laid down to you by the court. If a man were pressing upon another in the street with a shot-gun, then the man thus pressed would be put to the wall; or, if a man were pressing upon another with a pistol, and it was as dangerous to flee as to stand, then he would be put to the wall." And, after giving other illustrations, the judge said: "But if so situated that he could escape, but he preferred to shoot rather than escape, then he would be at least guilty of manslaughter." To this last part of the charge the prisoner excepted.

The jury returned a verdict of guilty of manslaughter; judgment; appeal by prisoner.

Attorney-General, for the State.
No counsel for the prisoner.

MERRIMON, J. At the trial, the jury having retired and considered of their verdict, returned and propounded to the court this inquiry: "How far would a man have to run in the street before he would be pressed to the wall?"

The court, in reply to this inquiry, after stating, so far as the record shows, several general abstract views of law, to which no exception was taken by the prisoner, said: "But if so situated that he could escape, but he preferred to shoot rather than escape, then he would be at least guilty of manslaughter."

None of the evidence received on the trial has been sent to this court. We cannot, therefore, see how or in what respect this statement of the law was pertinent and applicable to the case; or whether it tended to favor or prejudice the prisoner; or whether it was proper in view of the facts of the case. In one view, of which we can conceive, it would seem to be favorable, certainly not prejudicial to the prisoner; in another, it may possibly have led the jury to find a verdict of guilty of manslaughter, when otherwise they might have found a verdict of acquittal. The counsel for the prisoner thought that the instruction was unwarranted by the facts of the case and prejudicial to the prisoner, and at once excepted to it. In a case like the present, this court cannot *infer* that the law, as stated, was pertinent and applicable, especially when the prisoner's exception implies that it was not, in the judgment of his counsel.

It is not the province of the court, in charging juries, to state abstract principles of law, and express speculative views of the same; indeed, it is improper to do so. The court ought to apply the law to the case and the facts in evidence. It is the great business of courts to apply settled principles of law to the cases, in all their aspects, that come before them to be heard and determined. *State* v. *Dunlop*, 65 N. C., 288: *State* v. *Jones*, 87 N. C., 547; *State* v. *Summey*, 2 Winst., 108.

In all cases coming to this court, enough of the facts should be stated to enable the court to see clearly how the law was stated and applied to and bore upon the case, in the respects embraced by the errors assigned. The law, as stated by the court to the jury, or as applied in any respect, might be well applied in one state of the facts and erroneously and improperly applied in another. It is impossible for this court to pass upon exceptions without the facts that gave rise to them

We are not, however, to be understood as suggesting that all the facts of the case should be sent up; on the contrary, it would be improper to send more than are necessary to present clearly the points raised by each exception. More than this would only tend to embarrass the case in this court and encumber the record. It is a serious practical mistake to encumber the case with unnecessary evidence. Each exception ought to be stated as briefly as practicable, tersely and as clearly as possible. Only so much and such parts of the evidence as may be involved in and pertinent to the exception should be set out. It cannot be very difficult for counsel and court to do this. Clearness of statement of the exception and the evidence connected with it helps counsel in the effective presentation of the argument here, and greatly facilitates the efforts of the court in reaching proper conclusions. Much labor is often expended in stripping the exception and the points raised by it of redundant, cumbersome and confusing matter. Good pleading and good practice cannot fail to facilitate the thorough trial and just determination of causes; and they, as well, save much labor on the part of counsel and the court.

These suggestions are deemed pertinent, in view of the great number of cases that from time to time come before us in a confused and oftentimes unintelligible and inexplicable condition.

In the case before us, it was the duty of the judge who presided at the trial in the court below to prepare the case on appeal for this court. *State* v. *Randall*, 88 N. C., 611.

We infer the court is in possession of and can supply the facts of the case, and to the end that we may properly pass upon the

prisoner's exception, the clerk of this court will issue the writ of *certiorari* to the clerk of the superior court of Lenoir county, commanding him to certify the facts of the case to this court under the direction and control of the judge who presided at the trial in that court, and he will notify that judge of this order. Let the writ of *certiorari* issue.

PER CURIAM. *Certiorari* ordered.

RULES OF PRACTICE

IN THE

SUPREME AND SUPERIOR COURTS

OF

NORTH CAROLINA,

REVISED AND AMENDED BY

THE JUSTICES OF THE SUPREME COURT,

At February Term, 1884, by Virtue of The Code, §961;

TOGETHER WITH THOSE ADOPTED BY THE JUDGES OF THE SUPERIOR COURTS OF NORTH CAROLINA ON JANUARY 4, 1884, AT GREENSBORO.

RULES OF PRACTICE

IN THE

SUPREME COURT OF NORTH CAROLINA,

REVISED AND AMENDED

AT FEBRUARY TERM, 1884.

RULE 1. *APPLICANTS FOR LICENSE.*

1. Applicants for license to practice law will be examined on Monday and Tuesday of the first week of each term of the court. Each applicant must have attained the age of twenty-one years, and is expected to have read:

The Constitutions of this state and the United States;
Blackstone's Commentaries (the second book with care);
Coke, Cruise, Washburn or Williams on real property;
Stephen and Chitty on Pleading;
Adams on Equity;
Greenleaf on Evidence (1st vol.);
Williams on Executors;
Smith on Contracts;
Addison or Bigelow on Torts;
THE CODE of North Carolina, especially *the Code of Civil Procedure.*

[NOTE.—It is not intended to confine the student to the special treatises above mentioned, other than Blackstone, but any standard author on the same subjects may be used in their place].

2. Each applicant shall deposit with the clerk a sum of money sufficient to pay the license fee before he shall be examined; and if, upon his examination, he shall fail to entitle himself to receive a license, the money shall be returned to him.

RULE 2. *APPEALS.*

1. DOCKETING.

Each appeal shall be docketed for the judicial district to which it properly belongs and in the order in which the papers are filed with the clerk.

2. WHEN HEARD.

An appeal from a court in a county in which the court shall be held during the term of this court may be filed at the next succeeding term; but if filed before the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, it shall stand continued.

3. CALL OF DISTRICTS.

1. The first district shall be called on Wednesday of the first week of each term of the court, and if need be, the call will be continued until and including Tuesday of the second week.

2. The second district shall be called on Monday of the second week, if by that time the causes from the first district shall have been disposed of, and if not, as soon thereafter as may be, not later than Wednesday of that week, and the call shall continue, if need be, through that and the week next following.

3. Causes from the third district will be called on Monday of the fourth week; from the fourth district on Monday of the fifth week; from the fifth district on Monday of the sixth week; from the sixth district on Monday of the seventh week; from the seventh district on Monday of the eighth week; from the eighth district on Monday of the ninth week; from the ninth district on Monday of the tenth week.

4. The call of causes not reached and disposed of during the several weeks designated, or put to the foot of the docket, shall begin on Monday of the eleventh week and be continued, each in its order and tried or continued.

5. At the term of the court held next preceding the end of the year, no cause will be called and tried after the expiration of the

ten weeks designated, unless by consent of parties and the assent of the court.

6. Each appeal shall be called in its proper order; if any party shall not be ready, the cause may be put to the foot of the district by common consent, or by the consent of counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time; otherwise, the first call shall be peremptory; or at the first term of the court in the year, it may, by consent of the court, be put to the foot of the docket; or it may be continued by common consent, or for cause; and if no counsel appear for either party at the first call, it will be put to the end of the district, and if none appear at the second call, it will be continued, unless the court shall otherwise direct.

4. Dismissed, if not Prosecuted.

The Code, §967, provides that, "suits and appeals pending in the supreme court may be dismissed on failure to prosecute the same, after a rule obtained for that purpose and served on the plaintiff or appellant, his agent or attorney, at least thirty days before the term next ensuing that of entering the rule; when, if the party shall fail to prosecute his suit or appeal, the court shall, at the election of the adverse party, dismiss the suit or appeal at the cost of the plaintiff or appellant, or proceed to hear and determine it."

But the cases not prosecuted for two terms shall, when reached in order after the second term, be dismissed at the costs of the appellant, unless the same for sufficient cause shall be continued, and when so dismissed, the appellant may at any time thereafter, not later than during the week allotted to the district to which it belongs, at the next succeeding term, move to have the same reinstated on notice to the appellee and showing sufficient cause.

5. Motion to Dismiss.

A motion to dismiss an appeal for non-compliance with the requirements of the statute in perfecting an appeal, must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed, unless such compliance

be shown in the record, or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appellee or his counsel, to that effect.

6. TIME OF FILING.

Each appeal from a judgment rendered before the commencement of a term of this court, must be filed within the first eight days of the term, or before entering on the call of cases from the judicial district to which the case belongs: otherwise, it will be continued. But this shall not apply to motions to docket and dismiss appeals.

7. DISMISSED BY APPELLEE.

If the appellant in a civil action shall fail to bring up and file a transcript of the record before the call of causes from the district from which it comes is concluded during the week appropriated to the district, at a term of this court in which such transcript is required to be filed, the appellee, on exhibiting the certificate of the clerk of the court from which the appeal comes, or a certified transcript of the record, showing the names of the parties thereto, the time when the judgment was taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been filed, and filing said certificate with the court, may move to have the appeal docketed and dismissed at appellant's cost, with leave to the appellant during the term and after notice to the appellee, to apply for the re-docketing of the cause.

8. WHEN APPEAL IS DISMISSED.

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for the purpose as allowed by paragraph 7 of this rule, is procured by the appellee, and the case dismissed, no order shall be made setting aside the dismissal, or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid or offered to pay, the costs of the appellee in procuring the

transcript of the record, or proper certificate, and in causing the same to be docketed.

9. UNNECESSARY PARTS OF RECORDS, COSTS OF.

The costs of copies of unnecessary and irrelevant testimony, or of irrelevant matter about the appeal not needed to explain the exceptions, or errors assigned, and not constituting a part of the record of the action of the court taken during the progress of the cause, shall in all cases be charged to the appellant, unless it appears that they were sent up by the appellee, in which case the cost shall be taxed against him.

10. TRANSCRIPT ON APPEAL.

1. *Of the Record.*—In every record of an action brought to this court, the proceedings shall be set forth in the order of time in which they occurred, and the several processes, or orders, &c., shall be arranged to follow each other in the order the same took place, when practicable.

2. *Pages Numbered.*—The pages of the record shall be numbered, and there shall be written on the margin of each, a brief statement of the subject matter contained therein.

3. *Index.*—On some paper attached to the record there shall be an index thereto, in the following or some equivalent form :

Summons, date of ..... page 1
Complaint, first cause of action ..... " 2
" second cause of action ..... " 3
Affidavit for attachment, &c ..... " 4

4. *Consequences of non-compliance.*—If any cause shall be brought on for argument, and the above regulations shall not have been complied with, the case shall be put to the foot of the district, or the foot of the docket, or continued, as may be proper; and it shall be referred to the clerk or some other person to put the record in the prescribed shape, for which an allowance of five dollars will be made to him, to be paid in each case by the appellant, and execution therefor may immediately issue.

5. *Marginal References.*—A case will not be heard until

there shall be put in the margin of the record, as required in the next preceding paragraph, brief references to such parts of the text as is necessary to be considered in a decision of the case.

6. *Printing the Record.*—At and after October term, 1884, of the court, fifteen copies of so much and such parts of the record as may be necessary to a proper understanding of the exceptions and grounds of error assigned as appear in the record in each civil action, shall be printed.

7. *Parts of, by whom designated.*—The counsel for the appellant shall designate such parts of the record as are required to be printed, and have the same copied for the printer; if he shall fail to do so, the clerk of this court shall cause the same to be done at the appellant's cost; and such printed matter shall consist of the statement of the case on appeal and of the exceptions appearing in the record, to be reviewed by the court, or, in case of a demurrer, of such demurrer and the pleadings to which it is entered. This will not preclude the parties in the argument from referring to the manuscript parts of the record whenever they may deem it needful to the argument, nor from reading the record in full when necessary to the proper understanding of the case.

8. *Costs of.*—Costs for printing the record shall be allowed to the successful party in the case, at the rate of forty cents per page, of the size of the page in the North Carolina Reports, for each page of one copy of the record printed, not exceeding 20 pages, unless otherwise specially allowed by the court, to be taxed in the bill of costs.

RULE 3. *CERTIORARI AND SUPERSEDEAS.*

1. WHEN APPLIED FOR.

Generally, the writ of *certiorari*, as a substitute for an appeal, must be applied for at the term of this court to which the appeal ought to have been taken, or, if no appeal lay, then before, or at the term of this court next after the judgment complained of was entered in the superior court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

2. How applied for.

The writs of *certiorari* and *supersedeas* shall be granted only upon petition specifying the grounds of application therefor, except when a diminution of the record shall be suggested, and it appears upon the face of the record that it is manifestly defective, in which case the writ of *certiorari* may be allowed upon motion in writing. In all other cases the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit and such other evidence as may be pertinent.

3. Notice of.

No such petition or motion in the application shall be heard, unless the petitioner shall have given the adverse party ten days' notice, in writing, of the same; but the court may, for just cause shown, shorten the time of such notice.

RULE 4. *COUNSEL.*

1. Agreement of Counsel.

The court will not recognize any agreement of counsel in any case, unless the same shall appear in the record, or in writing filed in the cause in this court.

2. Argument of Counsel.

1. The counsel for the appellant shall be entitled to open and conclude the argument.

2. The counsel for the appellant may be heard for one hour and a half, including the opening argument and reply.

3. The counsel for the appellee may be heard one hour and a half.

4. The time occupied in reading the record before the argument begins shall not be counted as part of the time allowed for the argument; but this shall not embrace such parts of the record as may be read pending the argument.

5. The time for argument may be extended by the court in a case requiring such extension; but application for such extension

must be made before the argument begins. The court, however, may direct the argument of such points as it may see fit, outside of the time limited.

6. Any number of counsel may be heard on either side within the limit of the time above specified; but if several counsel shall be heard each must confine himself to a part or parts of the subject matter involved in the exceptions, not discussed by his associate counsel, unless directed otherwise by the court, so as to avoid tedious and useless repetition.

3. BRIEFS.

The appellant shall file with the clerk a printed brief, if any, in which shall be set forth a brief statement of the case, embracing so much and such parts of the record as may be necessary to understand the case; the several grounds of exception and assignments of error relied upon by the appellant; the authorities relied upon, and if statutes are material, the same shall be cited by the book, chapter and section; but this shall not be understood to prevent the citation of other authorities in the argument.

4. COPIES OF BRIEF TO BE FURNISHED.

1. *Number*—Fifteen copies shall be delivered to the clerk of the court, one of which shall be filed with the transcript of the record, one handed to each of the justices at the time the argument shall begin, and one to the reporter, and one to the opposing counsel, when he shall call for the same.

2. *Of Appellee.*—The appellee shall file the same number of like briefs, except that he may omit the statement of the case, which shall be distributed in like manner, except that one copy shall be delivered to the appellant when he shall call for the same.

3. *Costs of.*—Costs shall be allowed to the successful party in the cause, at the rate of forty cents per page of the size of the page in the North Carolina Reports, for each page of one copy of his brief, not exceeding ten pages, to be taxed in the bill of costs.

RULE 5. *BOOKS.*

A book belonging to the supreme court library shall not be taken from the chamber of the supreme court, except into the office of the clerk of the court, unless by the justices of the court, the governor, the attorney-general or the head of some department of the executive branch of the state government, without the special permission of the marshal of the court, and then only upon the application in writing of a judge of a superior court holding court or hearing some matter in the city of Raleigh, of the president of the senate, of the speaker of the house of representatives or of the chairman of the several committees of the general assembly; and in such case the marshal shall enter in a book kept for the purpose the name of the officer requiring the same, the name and number of the volume taken, when taken and when returned.

RULE 6. *CLERKS AND COMMISSIONERS.*

1. FUNDS IN HANDS OF.

The clerk and every commissioner of this court who, by virtue or color of any order, judgment or decree of the supreme court, in any action or matter pending therein, has received, or shall receive, any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall at the term of said court held next after the first day of January in each year report to the court a statement of said fund, setting forth the title and number of the action or matter, the term of the court at which the order or orders under which the clerk or such commissioner professes to act was made; the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund, and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

2. REPORT RECORDED.

The reports required by the preceding paragraph shall be

examined by the court, or some member thereof, and with their or his approval endorsed shall be recorded in a well bound book kept for the purpose in the office of the clerk of the supreme court, entitled *Record of Funds*, and the cost of recording the same shall be allowed by the court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

RULE 7. *EXCEPTIONS.*

Every appellant, at the time of settling the case upon appeal, or if there be no case settled, then within ten days next after the term at which the judgment is rendered from which an appeal shall be taken, or in case of a ruling of the court at chambers and not in term time, within ten days after notice thereof, shall file in the clerk's office his exceptions to the proceedings, rulings or judgment of the court, briefly and clearly stated and numbered. And in civil actions, no other exceptions than those so filed and made part of the record shall be considered by this court, except exceptions to the jurisdiction, or because the complaint does not state a cause of action, and such as may be authorized under THE CODE, §412, par. 3.

RULE 8. *PLEADINGS.*

1. MEMORANDA OF.

Memoranda of pleadings will not be received or recognized in the supreme court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

2. ASSIGNING TWO OR MORE CAUSES OF ACTION.

Every pleading containing two or more causes of action shall each set out all the facts upon which it rests, and shall not by reference to others incorporate in itself any of the allegations in them, except that exhibits by marks or numbers may be referred to without reciting their contents when attached thereto.

3. WHEN SCANDALOUS.

Pleadings containing scandalous or impertinent matter will,

in a plain case, be ordered by the court to be stricken from the record or reformed, and for this purpose the court may refer it to the clerk or some member of the bar to examine and report the character of the same.

RULE 9. *ISSUES.*

If pending the consideration of an appeal, the supreme court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issues shall be made up under the direction of the court, and certified to the superior court for trial, and the case will be retained for that purpose.

RULE 10. *THE JUDGMENT DOCKET.*

The judgment docket of this court shall contain an alphabetical index of the names of the parties in favor of whom and against whom each judgment was entered. On this docket the clerk of the court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring in whole or in part the payment of money, stating the names of the parties, the term at which such judgment was entered, its number on the docket of the court; and when it shall appear from a return on an execution, or from an order for an entry of satisfaction by this court, that the judgment has been satisfied in whole or in part, the clerk, at the request of any one interested in such entry, and on payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

RULE 11. *EXECUTIONS.*

1. TESTE OF.

When an appeal shall be taken after the commencement of a term of this court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

2. Issuing and Return of.

Executions issuing from this court may be directed to the proper officers of any county in the state. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the term of this court next ensuing its teste. In the absence of such request, the clerk shall within thirty days after the expiration of the term issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the said superior court held next after the date of its issue, and thereafter successive executions will only be issued from said superior court, and when satisfied, the fact shall be certified to this court, to the end that an entry to this effect may be made here.

RULE 12. *PETITION TO REHEAR.*

1. The Code, §966.

"A petition to rehear may be filed during the vacation succeeding the term of the court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term, and upon the filing of such petition the Chief-Justice or either of the Associate Justices may, upon such terms as he sees fit, make an order restraining the issuing of an execution, or the collection and payment of the same, until the next term of said court, or until the petition to rehear shall have been determined."

2. What to Contain.

The petition must distinctly specify and assign the alleged error complained of, or the material matter overlooked; and only alleged errors in law will be reviewed upon such rehearing, or a rehearing may be had for newly discovered evidence, and it must appear that the judgment complained of has been per-

formed or sufficiently secured; and it must be accompanied with the certificate of at least two members of the bar who did not appear in the cause at the first hearing, and who have no interest in the same, that they have carefully examined the case and the law relating thereto, and the authorities cited in the opinion, and that in their opinion the judgment is erroneous, and in what respect it is erroneous.

3. NOTICE OF.

Before applying for an order restraining the issuing of an execution, or the collection and payment of the same, written notice must be given to the adverse party of the intended motion, as prescribed by law, and also of the proposed application for a rehearing of the cause, with a copy of the petition therefor; the court may, however, grant a temporary restraining order without notice.

RULE 13. ***MOTIONS.***

All motions made to the court shall be reduced to writing, and shall contain a brief statement of the facts on which they are founded and the purpose of the same. Such motion, not leading to debate, nor followed by voluminous evidence, may be made at the opening of the sessions of the court.

RULE 14. ***CASES HEARD OUT OF THEIR ORDER.***

In cases wherein the state is concerned, involving or affecting some matter of general public interest, the court may, upon motion of the attorney-general, assign an earlier place in the calendar, or fix a day for the argument thereof, which shall take precedence of other business.

RULE 15. ***CAUSES HEARD TOGETHER.***

Two or more cases involving the same question may, by leave of the court, be heard together, but they must be argued as one case, the court directing, when the counsel disagree, the course of the argument.

RULES OF PRACTICE

IN THE

SUPERIOR COURTS OF NORTH CAROLINA

REVISED AND AMENDED BY THE

JUSTICES OF THE SUPREME COURT,

At February Term, 1884, by virtue of the Code, §961.

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1. No entry shall be made on the record of the superior courts (the summons docket excepted) by any other person than the clerk, his regular deputy, or some person so directed by the presiding judge, or by the judge himself.

2. No person who is bail in any action or proceeding, either civil or criminal, or who is security for the prosecution of any suit, or upon appeal from a justice of the peace, or is security in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty of the clerks of the several superior courts to state, in the docket for the court, the names of the bail, if any, and security for the prosecution, in each case, or upon appeal from a justice of the peace.

3. That in all cases, civil and criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

4. When several counsel are employed on the same side, the examination, or cross-examination, of each witness shall be conducted by one counsel; but the counsel may change with each successive witness, or with leave of the court in a prolonged examination of a single witness. When a witness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel

so offering shall state for what purpose the witness, or the evidence to be elicited, is offered, whereupon the counsel objecting shall state his objections and be heard in support thereof, and the counsel be heard in support of the competency of the witness and of the proposed evidence in conclusion—and the argument shall proceed no further unless by special leave of the court.

5. When a party in a civil suit moves for a continuance on account of absent testimony, such party shall state in a written affidavit the nature of such testimony, and what he expects to prove by it; and the motion shall be decided without debate, unless permitted by the court.

(*The above rules substantially prescribed by the supreme court at January Term*, 1815).

6. That in any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument, except in cases mentioned in rule three, the court shall decide who is so entitled, and his decision shall be final and not reviewable.

7. Issues shall be made up as provided and directed in THE CODE, §§395 and 396.

8. Judgments shall be docketed as provided and directed in THE CODE, §433.

9. Clerks of the superior courts shall not make out transcripts of the original judgment docket to be docketed in another county, until after the expiration of the term of the court at which such judgment was rendered.

10. Judgments rendered by a justice of the peace upon a summons issued and returnable on the same day, as the cases are successively reached and passed on without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the superior court shall be furnished to applicants at the same time after such rendition of judgment, and if delivered to the clerk of such court on the same day, shall create liens on real estate and have no priority or precedence the one

over the other, if all are or shall be entered within ten days after such delivery to said clerk.

11. In every case of appeal to the supreme court, or in which a case is taken to the supreme court by means of the writ of *certiorari* as a substitute for an appeal, it shall be the duty of the clerk of the superior court, in preparing the transcripts of the record for the supreme court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes or orders, and shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered, and there shall be written on the margin of each a brief statement of the subject matter opposite to the same.

On some paper attached to the transcript of the record there shall be an index to the record in the following or some equivalent form:

Summons—date of..... page 1
Complaint—first cause of action..... " 2
" second cause of action..... " 3
Affidavit for attachment..... " 4

and so on.

12. Every clerk of a superior court and every commissioner appointed by such court who, by virtue or color of any order, judgment or decree of the court in any action or proceeding pending in it, has received, or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action, or of any other person, shall, at the term of such court, held on or next after the first day of January in each year, report to the judge a statement of said fund, setting forth the title and number of the action, and the term of the court at which the order or orders, under which the officer professes to act, were made, the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of the security. In every report after the first he shall set forth any change made in the amount or character of the investment

since the last report and every payment made to any person entitled thereto.

The reports required by the next preceding paragraph shall be made to the judge of the superior court holding the first term of the court in each and every year, who shall examine, or cause the same to be examined, and if found correct, and so certified by him, shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries.

13. The superior court shall grant the writ of *recordari* only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified, and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto, duly verified, and upon affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject to appeal as in other cases; if granted without notice, the petitioner shall first give the undertaking for costs and for the writ of *supersedeas*, if prayed for as required by THE CODE, §545. In such case the writ shall be made returnable to the term of the superior court of the county in which the judgment or proceeding complained of was granted or had, and ten days' notice in writing of the filing of the petition shall be given to the adverse party before the term of the court to which the writ shall be made returnable. The defendant in the petition, at the term of the superior court to which the said writ is returnable, may move to dismiss or answer the same, and the answer shall be verified. The court shall hear the application at the return term thereof, unless, for good cause shown, the hearing shall be continued, upon the petition, answer, affidavits and such evidence as the court may deem pertinent, and dismiss the same or order the case to be placed on the trial docket, according to law.

In proper cases the court may grant the writ of *certiorari* in like manner, except that, in case of the suggestion of a diminution of the record, it shall manifestly appear that the record is imperfect, the court may grant the writ upon motion in the cause.

14. In no case shall the court make or sign any order, decree or judgment, directing the payment of any money or securities for money belonging to any infant or to any person, until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in that respect, and such payment shall be directed only when such bonds as required by law shall have been given and accepted by competent authority.

15. In all cases when it is proposed that infants shall sue by their next friend, the court shall appoint such next friend upon the written application of a reputable disinterested person closely connected with such infant; but if such person will not apply, then upon the like application of some reputable citizen, and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

All motions for a guardian *ad litem* shall be made in writing, and the court shall appoint such guardian only after due inquiry as to the fitness of the person to be appointed, and such guardian must file an answer in every case.

RULES OF PRACTICE

ADOPTED BY THE

JUDGES OF THE SUPERIOR COURTS

OF

NORTH CAROLINA,

JANUARY 4, 1884, AT GREENSBORO.

I. All civil actions that have been at issue for two years, and that may be continued by consent at any term, will be placed at the end of the docket for the next term in their relative order upon the docket; when the continuance shall be ordered, and when a civil action shall be continued on motion of one of the parties, the court may, in its discretion, order that such action be placed at the end of the docket, as if continued by consent; but this rule will not be enforced when the opinion of the supreme court has been certified to the court below since the last term; in such case a continuance will be ordered without prejudice, unless tried by consent.

II. When a calendar of civil actions shall be made under the supervision of the court, or by a committee of attorneys under the order of the court, or by consent of the court, unless cause be shown to the contrary, all actions continued by consent and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end of the docket for the next term, as if continued by consent, if such actions have been at issue for two years.

III. Neither civil nor criminal actions will be set for trial on a day certain, and will not be called for a day certain, unless by order of the court, and if the other business of the court shall have been disposed of before the day for which a civil action is set, the court will not be kept open for the trial of such action,

except for some special reason apparent to the judge; but this rule will not apply when a calendar has been adopted by the court.

IV. The court will reserve the right to determine whether it is necessary to make a calendar, and also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set.

V. When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory orders, will be placed on the motion docket, and the judges will claim the right to call the motion docket at any time after the calendar shall be taken up.

VI. Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

VII. When civil actions shall be continued by consent of parties, the court will, upon suggestion that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

VIII. When time to file pleadings is allowed it shall be computed from the expiration of the term as fixed by law.

IX. Except for some unusual reason, connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

X. Clerks of the courts will be required, upon the criminal dockets prepared for the court and solicitor, to state and number the criminal business of the court in the following order:

First—All criminal causes at issue. Second—All warrants upon which parties have been held to answer at the term. Third—All presentments made at preceding terms, undisposed of. Fourth—All cases wherein judgments *nisi* have been entered at

the preceding term against defendants and their sureties, and against defaulting jurors or witnesses in behalf of the state.

XI. Clerks will also be required, upon both civil and criminal dockets, to bring forward and enter in different columns of sufficient space, in each case:

First—The names of the parties. Second—The nature of the action. Third—A summary history of the case, including the date of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein. Fourth—A blank space for the entries of the term.

APPENDIX.

CASES CITED.

INDEX.

2. Whatever effect the insolvency may have upon other creditors, it cannot avail the creditor in this case who has a security for the debt, for as to him the debtor is not insolvent. *Ib.*
3. The statute allowing actions to be brought *within* a year after judgment of nonsuit is intended to extend the period of limitation, not to abridge it. *Keener* v. *Goodson*, 273.
4. Where, in a suit on a guardian bond, one of the plaintiffs, a *feme* covert, arrived at full age in 1865, married in 1867, and commenced the suit in 1876; *Held*, that the statute did not bar her right to recover. The interval of two years between the termination of disability of infancy and the commencement of that of coverture, is bridged over by the act suspending the operation of the statute from May, 1865, to January, 1870. *Davis* v. *Perry*, 420.
5. The statute of limitations barring actions for relief on the ground of fraud after three years from the discovery of the facts constituting fraud, prior to the amendatory act of 1879, ch. 251, does not apply to a case where no fraud, but only a mistake, is alleged. *Mask* v. *Tiller*, 423.
6. The enforcement of an equity will never be denied, on the ground of lapse of time, where the party seeking it has been in continuous possession of the estate to which the equity is an incident. *Ib.*
7. The court will lend its aid in every such case, except where, by laches, the party has abandoned his right and acquiesced in its enjoyment by another in a manner inconsistent with his own claim. *Ib.*